The Delegation Theory of Judicial Review

Farrah Ahmed* farrah.ahmed@unimelb.edu.au

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This paper offers an interpretive theory to make sense of judicial review doctrine in light of its underlying rationale. The idea that administrators are delegates of parliament or the Crown lies at the heart of this theory. The paper argues that the best internal rationale for judicial review doctrine is that it holds administrators to their moral duties *qua* delegates of parliament or the Crown. This rationale closely fits legal doctrine, including the grounds of review and the scope of review; it reveals the underlying coherence of the law; shows how the law is supported by some moral reasons; and closely reflects judicial reasoning. The delegation theory is valuable for normative, predictive, reformatory and pedagogical reasons. It can provide guidance to judges, and may help to predict decisions, assess the law, evaluate reform proposals and enhance understanding of judicial review amongst administrators, legal practitioners and students.

INTRODUCTION

Judicial review, as a significant legal means of holding administrators to account, ought to be well understood. Each of the grounds of judicial review – including improper purposes, unreasonableness, procedural unfairness and legitimate expectations – is carefully studied, debated and explained by judges and scholars. The question of the legal basis for judicial review – legislative intent or the common law – has received enormous attention.[1] But a crucial set of foundational questions has received relatively little attention.

How can we best make sense of the legal doctrine relating to judicial review as an area of law?[2] Why is judicial review available on particular grounds, and on the exercise of particular powers? How (if at all) is the legal doctrine coherent? How (for instance) do the different grounds of review fit together? Why is there a

[1] For example C. Forsyth (ed), *Judicial Review and the Constitution* (Oxford: Hart, 2000); M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart, 2001).

[2] On the identification of areas of law: S. Smith, *Contract Theory* (Oxford: OUP, 2004) 8-11.

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widespread assumption that judicial review reflects moral values?[3] This paper offers answers to these foundational questions through an interpretive theory of judicial review. Such a theory aims to make sense of the law by revealing the intelligibility, coherence and significance of its features in light of its internal rationale,[4] that is, its rationale from the perspective of legal officials who make and apply law, including judges and lawyers.[5]

The 'delegation theory of judicial review' defended in this paper draws on the idea that those subject to judicial review ('administrators') are delegates of parliament or the Crown.[6] That is, some administrators (generally exercising statutory powers) are delegates of parliament, some administrators (generally exercising prerogative powers) are delegates of the Crown, and some administrators (generally exercising both statutory and prerogative powers) are delegates of both parliament and the Crown. The best internal rationale for judicial review doctrine, according to the delegation theory, is that judicial review doctrine holds administrators to their moral duties[7] *qua* delegates of parliament or the Crown.

The idea that administrators are delegates is pervasive in public law. It is directly expressed in some grounds of judicial review, for example *delegatus non potest delegare* (a delegate cannot delegate a power further). Judges and commentators explain other grounds of review by reference to the idea that administrators are delegates.[8] This idea underlies the appeal of ultra vires theories in debates about the legal basis of judicial review.[9] It underpins the most developed account that we have of the distinction between constitutional and administrative law.[10] It also strongly suggests – perhaps underlies – the now-prominent constitutional principle of parliamentary accountability.[11]

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[3] For an account of these values, see P. Cane, 'Theories and Values in Public Law' in P. Craig and R. Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: OUP, 2003) 14-17; C. Harlow and R. Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 3rd ed, 2009) 46-47; P. Daly, 'Administrative Law: A Values-Based Approach' in J. Bell, M. Elliott, P. Murray and J. Varuhas (eds), *Public Law Adjudication in the Common Law World: Process and Substance* (Oxford: Hart, 2016) 23-44.

[4] Smith, n 2, above, 5. The delegation theory may also be described as 'immanent' (see Cane, *ibid*, 5-6) or as a 'background theory' (C. Harlow, 'Review: Changing the Mindset: The Place of Theory in English Administrative Law' (1994) 14 *Oxford Journal of Legal Studies* 419, 422).

[5] This perspective is discussed further in the next section below.

[6] The paper does not equate parliament and the Crown to the 'state' given the complications around identifying the British state: see generally J. McLean, *Searching for the State in British Legal Thought* (Cambridge: Cambridge University Press, 2012).

[7] See the fourth section below, headed 'Aspects and Duties of Delegation'.

[8] See discussion of case law in the sections below headed 'Grounds of Review', 'Review of the crown's powers' and 'Review of de facto powers'.

[9] D. Dyzenhaus, 'Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review?' in Forsyth (ed), n 1 above, 153-154.

[10] J. Gardner, 'Can There Be a Written Constitution?' Oxford Legal Studies Research Paper no 17/2009 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401244 (last accessed 31 August 2019).

[11] *R (on the application of Miller)* v *The Prime Minister* [2019] UKSC 41 (*Miller No 2*) at [46].

Despite its foundational place in the theory and doctrine of judicial review, this idea of administrators as delegates has never germinated into a full-blown theory of judicial review. This may be because, until relatively recently, public law theory has been so focussed on the ultra vires versus common law debate that other important theoretical problems have received less attention than they deserve. It may be because judges, given their role, have offered little by way of theory in judicial review cases.[12] Or it may be that the idea of administrators as delegates is so familiar, so much a part of the furniture of everyday public law thinking,[13] that we have taken it for granted instead of investigating its implications.

In what follows, the next section introduces the nature, aims and success criteria of the kind of interpretive theory offered in this paper. The third and fourth sections offer a sketch of delegation and of three ideal-types of delegation relationships. The fifth section demonstrates how understanding the duties of administrators *qua* delegates of parliament or the Crown makes sense of the grounds of judicial review

The sixth and seventh sections show how the delegation theory makes sense of the scope of judicial review. The sixth shows that the rationale identified by the delegation theory fits with judicial review of the Crown's powers and the seventh section shows that it fits with judicial review of de facto powers. The eighth section explains how the delegation theory fits with the role of judges and the public in judicial review. The ninth section demonstrates the virtues of the delegation theory relative to other interpretative theories of judicial review.

An Interpretive Theory of Judicial Review

The delegation theory is an interpretive theory; it aims to make sense of – interpret – common law judicial review doctrine. One way to make sense of a human practice is to work out its rationale from the perspective of those intimately engaged in the practice. The delegation theory is a type of interpretive theory which aims to make sense of judicial review doctrine by identifying its rationale(s) or underpinning principle(s).[14] (While an interpretive theory may identify a set of coherent rationales or principles,[15] for simplicity's sake, what follows refers to 'rationale' and 'principle' in the singular).

The delegation theory aims to construct the *best internal rationale* for judicial review doctrine. The rationale it offers is 'internal' in the sense that it is a rationale from the internal perspective or point of view: the perspective of legal officials who make and apply law, including judges and lawyers.[16] In particular, the delegation theory aims to reflect the perspective of legal officials, *acting in their official capacity,* expressed

[12] This is understandable given the constraints under which they work: Elliott, n 1 above, 6-7.

[13] McLean finds the idea as early as 1847 in an overlooked essay by John Austin (J. Austin, 'Centralization' (1847) 85 *Edinburgh Review* 221): McLean, n 6 above.

[14] See Smith, n 2, above.

[15] *ibid*, 12-13.

[16] *ibid*, 13-15; E. Weinrib, *The Idea of Private Law* (Oxford: OUP, 1995) 11: '... not only does an internal account orient itself to the features salient in legal experience, but it also understands those (and other) features as they are understood from within the law'; R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) 14.

through public legal documents such as case reports and lawyers' arguments in court.[17] This internal perspective typically includes attitudes such as acceptance of legal norms, and beliefs that the law is intelligible, coherent and supported by moral reasons.[18] Those who do not share this perspective might reject the internal rationale identified by an interpretive theory; for example, the rule of law might be accepted by judges as a rationale for constraints on executive power, but not by legal theorists who deny its value.

If an interpretive theory aims to construct the best internal rationale for legal doctrine, a natural question is: on what criteria is the *best* internal rationale to be identified? This section will set out the criteria used in this paper, largely adopting Stephen Smith's criteria: (i) fit, (ii) coherence, (iii) morality or justification and (iv) transparency.[19]

The first criterion is the *fit* of the rationale with existing legal doctrine ie how much of the doctrine it rationalises.[20] A good rationale must fit most, if not all, of the legal doctrine. Second, and relatedly, such a rationale should also be able to reveal how (if at all) the doctrine is *coherent*.[21] It must 'convey the sense that order has been created out of apparent chaos'[22] and make the area of law intelligible *as an area of law*.[23] A theory of judicial review that proposed it to be a 'hodge-podge of entirely unconnected rules' would not reveal why 'the relevant practice merits a single label or title' – of judicial review.[24] Coherence, in a broader sense, is also important for a good rationale. All other things being equal, the better a rationale coheres with the *other* norms of the legal system – besides the particular doctrine which is the subject of the interpretive theory – the better. A rationale which shows different doctrines of public law to be coherent is superior to one that would cast them as working at cross-purposes, for instance.[25]

A further criterion relates to the *morality* or *justification* of the rationale. The delegation theory aims to reflect the internal perspective on legal doctrine, which includes the beliefs and attitudes typically expressed by judges and other legal officials – acting in their official capacity – about the law and the values it serves.[26] In systems like England and Wales, these beliefs include the belief that the law is supported by some moral

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[17] Smith, *ibid*, 14. Attempts to reflect this perspective should not therefore be confused with studies of psychological factors and motivations influencing judicial decisions; as discussed below, these studies have different aims to the interpretive theory offered here.

[18] *ibid*; Scott J. Shapiro, 'What is the Internal Point of View' (2006) *75 Fordham Law Review* 1157.

[19] Smith, *ibid*, 7.

[20] C. Michelon, 'The Inference to the Best Legal Explanation' (2019) 39 *Oxford Journal of Legal Studies* 878.

[21] Michelon describes this in terms of normative consilience; the doctrine is coherent by virtue of sharing a rationale: *ibid*, 895-900

[22] B. Wendel, 'Explanation in Legal Scholarship: the Inferential Structure of Doctrinal Legal Analysis' (2011) 96 *Cornell Law Review* 134.

[23] Smith, n 2 above 12.

[24] *ibid*, 12. On coherence generally, see for example J. Raz, *Ethics in the Public Domain* (Oxford: OUP, 1994) ch 13; E. Weinrib, *The Idea of Private Law* (Oxford: OUP, 2012) 32-44.

[25] For example, if the doctrines in a legal system generally have the protection of individual liberty as their rationale, then constraining individual liberty would not be an attractive rationale for a particular legal doctrine in that system.

[26] A. Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Oxford: Hart, 2015) 506-508; Wendel, n 22 above 133.

reasons.[27] From the internal perspective on legal doctrine – ie the perspective of legal officials – a rationale which broadly aligns with this belief about the law is more attractive than one that does not. Thus, in line with many interpretive theories, this paper takes a rationale which has some moral justification *from the internal perspective* to be superior to one that has none.[28] To satisfy the criterion relating to morality or justification, the rationale should show why the law is 'thought to be justified (even if it is not justified)'.[29]

Smith's final criterion of *transparency* refers to another belief associated with the internal perspective on legal doctrine: that legal reasoning is transparent, ie judges' purported reasons for their decisions are their true reasons (and not just window dressing to hide for example their biases or secret motives).[30] If a rationale offered by an interpretive theory is completely at odds with judges' stated reasons, then it is difficult to square that rationale with the belief that legal reasoning is transparent. As with the belief about the law's morality, a rationale which aligns with the belief about transparency is more attractive – from an internal perspective – than a rationale which does not. To satisfy the transparency criterion, a rationale need not be explicitly recognised in judicial reasons, but it must generally be in the same 'ball park' as the judicial reasons.[31]

The best internal rationale for judicial review doctrine, according to the delegation theory, is that judicial review doctrine holds administrators to their moral duties *qua* delegates of parliament, delegates of the Crown or delegates of both parliament and the Crown. This paper will argue that this rationale satisfies the criteria set out above: (i) it closely fits the legal doctrine relating to judicial review (limited to England and Wales in this paper), including the grounds of review and the scope of review; (ii) it reveals the underlying coherence of the law; (iii) it shows how the law is supported by some moral justification; and (iv) it does not require deceit or hidden motives to be imputed to judges, as it closely reflects judicial reasoning.

Comparing the delegation theory with other kinds of theories of legal doctrine may further clarify its nature. Interpretive theories are sometimes characterised as explanations or explanatory theories,[32] but interpretive theories like the one offered here do not offer genealogical, historical[33] or causal explanations.[34] They do not aim to explain the creation and development of the doctrine through empirical methods which reveal psychological or sociological factors that contribute to judicial decision-making.[35] They do not aim to explain the constitutional basis for particular legal doctrines.[36]

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[27] Amaya, *ibid*, 3-37.

[28] Smith, n 2 above, 15.

[29] *ibid*, 18.

[30] *ibid*, 24-32.

[31] *ibid*, 29.

[32] *ibid*. Scholarship notes the similarities between interpretive theory and abduction or 'inference to best explanation'. Michelon, n 20 above; Wendel, n 22 above.
Though the delegation theory is informed by, and sits well with, such accounts. See especially McLean's account which tracks the idea that public power is delegated: McLean, n 6 above, 24, 25, 36, 130.

[33] That is, they do not aim to explain the doctrine through the events, ideas or social facts that have shaped it.

[34] For example they do not aim to explain how legally-irrelevant contextual factors such as the wealth or location of the claimant influences judicial outcomes.

[35] See Forsyth (ed), n 1 above.

[36] Even if there were some moral justification, or at least *a* moral reason that supports that rationale, reasons can be defeated or excluded by other reasons, including competing moral considerations. For example, the doctrine

Similarly, the delegation theory is not a straightforwardly justificatory or evaluative theory. That is, the delegation theory does not set out to show that judicial review doctrine is all-things-considered justified, or to assess its justification (or lack thereof) against independent or freestanding moral criteria. Rather, the delegation theory sets out to identify a rationale for judicial review doctrine which has some moral justification *from the internal perspective*. This is not to presuppose or argue that the doctrine is truly or objectively supported by some moral justification, or that it is justified in an all-things-considered sense.[37] The rationale identified by the delegation theory merely seeks to show why the law is 'thought to be justified (even if it is not justified)'.[38] Thus the delegation theory differs subtly but significantly[39] from Dworkin-inspired interpretive theories in which interpretations of the law 'cannot conflict with the interpreters' moral convictions'.[40]

While interpretive theories like the delegation theory differ from other explanatory and justificatory theories, they are valuable for normative, predictive, reformatory and pedagogical reasons. As the conclusion will elaborate, the delegation theory can provide guidance to judges, help predict how they will decide, help assess the law, help evaluate reform proposals and enhance understanding of judicial review amongst administrators, legal practitioners and students. With this understanding of the nature of the kind of theory offered here in mind, we can proceed to sketch the theory itself, beginning with the idea of a delegate.

DELEGATION IN JUDICIAL REVIEW: A SKETCH

Who is a delegate, for the purpose of the delegation theory? The sketch below of the concept of a delegate in judicial review builds on judicial statements on delegation in judicial review.[41] But judges say little explicitly about their understanding of delegation in judicial review cases, leaving us to draw inferences based on the qualities of those who they identify as delegates. Besides such inferences, this sketch will also draw from agency law, which largely governs relationships involving delegation between private parties, to sharpen the concept of a delegate in judicial review.[42] This is fruitful because there are well-established continuities between private law and judicial review[43] and because the nature of delegation has received more attention in agency

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requiring administrators to give reasons may be justified as improving the quality of administrative decision-making; yet this doctrine may be all-things-considered unjustified because it leads to delays which greatly harm individuals.

[37] Smith, n 2 above, 18.

[38] See Wendel, n 22 above 13-24.

[39] T. Allan, 'The Moral Unity of Public Law' (2016) 67 *University of Toronto Law Journal* 1, 8. See T. Allan, 'Interpretation, Injustice, and Integrity' (2016) 36 *Oxford Journal of Legal Studies* 58; see also P. Craig 'Public Law, Political Theory and Legal Theory' [2000] *Public Law* 211; see generally M. Loughlin and S. Tschorne, 'Public Law' in M. Bevir and R. Rhodes (eds), *The Routledge Handbook of Interpretive Political Science* (Abingdon: Routledge, 2015); Dworkin, n 16 above, 285; P. Craig, 'What Should Public Lawyers Do? A Reply' (1992) 12 *Oxford Journal of Legal Studies* 564, 565-566.

[40] Discussed below in the sections headed 'Review of the Crown's powers' and 'Review of de facto powers' particularly.

[41] S. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2013) 19, 20.

[42] D. Oliver, *Common Values and the Public-Private Divide* (Cambridge: Cambridge University Press, 1999).

[43] N. Barber, 'The Significance of the Common Understanding in Legal Theory' (2015) 35 *Oxford Journal of Legal Studies* 799.

law. Further, in the absence of evidence that delegation is used purely as a term of art, ordinary understandings of the idea of delegation are also relevant to the concept of a delegate in judicial review.[44] The sections that follow will build on the sketch offered here.

A delegate in judicial review, first, holds an office, ie 'a position, devoted to a characteristic kind of action … whose grounding in [particular] purposes gives rise to particular duties and privileges that derive from the position';[45] this position is stable and endures over time.[46] Private law recognises that delegates have duties *qua* delegates by holding agents not just to their contractual duties, but to fiduciary duties which arise by virtue of their position as agents.[47] The following two sections argue that public law recognises this as well by holding administrators not only to duties explicit or implicit in their mandate, but also to duties which arise by virtue of their position as delegates of parliament or the Crown.

Consider next the maxim *qui facit per alium, facit per se* – he who acts through another, acts himself. It suggests a second mark of a delegate: in the paradigm case of delegation *in law*, delegates have the ability to exercise (at least some of) the legal powers of their delegators.[48] 'Legal power' refers to the ability to change a person's legal position by performing an act with the intention to change their legal position,[49] for example powers to contract, marry or decide legal disputes.

Delegates may be able to exercise the legal powers of their delegators in different ways. The law may *deem* some of the delegate's acts to be acts of the delegator; for example when the delegate signs a contract, the delegator might be deemed to have signed it.[50] The delegator may legally *devolve* their powers to the delegate, as government officials regularly do to other government officials or bodies, so that the delegate has the ability to exercise the delegator's powers. Alternatively, the delegate's acts may consistently *trigger* an exercise of the delegator's powers because the delegator has a legal or non-legal rule (for example a policy or social rule)[51] of exercising these powers in response to the delegate's act.[52] For example, if a doctor is found guilty of misconduct by a professional body, government officials may have a policy of legally barring them from

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[44] A. Sabl, *Ruling Passions: Political Offices and Democratic Ethics* (Princeton, NJ: Princeton University Press, 2002) 1; N. Roughan, 'The Official Point of View and the Official Claim to Authority' (2018) 38 *Oxford Journal of Legal Studies* 191, 210.

[45] As case law discussed in the sections headed 'Review of the Crown's powers' and 'Review of de facto powers' indicates, those identified as delegates for judicial review are not one-off actors, but office-holders in this sense.

[46] In what follows agency and delegation will be used interchangeably, but with agency primarily used to describe delegation in the private law context.

[47] R. Leow, 'Understanding Agency: A Proxy Power Definition' (2019) 78 *Cambridge Law Journal* 99, 107-113, argues that this is a feature of agency in private law by examining five of the most important and distinctive sets of rules in case law.

[48] A. Perry, 'The Crown's Administrative Powers' (2015) 131 *Law Quarterly Review* 652, 660-664.

[49] J. Gibbons (ed), *Language and the Law* (Abingdon: Routledge, 2014) 26-27.

[50] See for example Y. Dotan, 'Why Administrators Should Be Bound by Their Policies' (1997) 17 *Oxford Journal of Legal Studies* 23.

[51] This rule must be particular to the delegate; if the delegator would have exercised the power in response to that action regardless of who had performed it, this does not indicate a relationship of delegation.

[52] See *Miller No 2* n 11 above, where advice was unlawful.

practice on the back of the professional body's findings. Delegates may thus exercise delegators' powers directly (as in the first two examples) or indirectly (as in the last example). The section 'Review of De Facto Powers' below will appeal to indirect exercises of delegators' powers to make sense of the doctrine relating to judicial review of de facto powers.

To be clear, while the *ability* to exercise (at least some of) a delegator's legal powers is a mark of delegation, a delegate's duties *qua* delegate – discussed later – may extend beyond the exercise of the delegator's legal powers. For instance, a delegate's duties *qua* delegate may implicate whether and how she should contract, communicate, negotiate or advise the delegator[53] even when her power to do these acts does not derive from the delegator.[54]

A third feature of relationships of delegation is that they are not always *easily* visible or *readily* identifiable as such, for instance when they are not the product of an express agreement between delegator and delegate. The ordinary understanding of delegation often involves explicit agreement between the delegator and delegate (for example I ask my friend to bid on my behalf at an auction and she agrees). However, the ordinary understanding of agency or delegation also admits of cases of delegation which develop over time from implicit, rather than express, understandings between the delegator and delegate. The law of agency recognises such agency relationships if agent and principal 'have agreed to what amounts in law to such a relationship even if they do not recognise it themselves'.[55] Moreover, even though the paradigm case of delegation involves a delegate who consciously agrees to act as a delegate, the ordinary understanding of delegation also admits 'unwitting agents', as instances (even if non-paradigm instances) of agents.[56]

In the public law context, some delegates are less visible *as delegates* because the delegation relationship was created by state takeover of the delegate, usually a pre-existing institution of self-regulation, gradually over

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[53] For examples from agency law, see P.G. Watts and F.M.B. Reynolds (eds), *Bowstead and Reynolds on Agency* (London: Sweet & Maxwell, 2016) 6-046, 6-047.

[54] H. Bennett, *Principles of the Law of Agency* (Oxford: Hart, 2013) 4; D. DeMott, 'Fiduciary Principles in Agency Law' in E. Criddle, P. Miller and R. Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (Oxford: OUP, 2019) 26.

[55] See for example numerous descriptions of Donald Trump as an 'unwitting agent' of Russia: M. Morell, 'I Ran the C.I.A. Now I'm Endorsing Hillary Clinton' *New York Times* 5 August 2016 at https://www.nytimes.com/2016/08/05/opinion/campaign-stops/i-ran-the-cia-now-im-endorsing-hillary-clinton.html ; T. Porter, 'Donald Trump is Not "Unwitting Agent" to Russia, "Knows Exactly What He is Doing" Says House Intelligence Democrat' *Newsweek*, 16 January 2019 at https://www.newsweek.com/donald-trump-not-unwitting-agent-russia-knows-exactly-what-he-doing-says-1293373 (both last accessed 10 March 2021). The existence of these non-paradigm instances of delegation raises the question of whether such delegates have the same moral duties as paradigm delegates. While the question cannot be explored here, it seems unlikely that they would have precisely the same moral duties.

[56] For example British voluntary associations were absorbed by the welfare state, and assumed the role of its delegates, in the early 20th century. McLean, n 6 above, 113-127. Such delegation by takeover is perhaps because legal systems are 'open' systems such that they 'maintain and support other forms of social grouping': J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 2nd ed, 2009) 119.

a period of time.[57] Institutions of self-regulating professional communities (for example legal or medical professions) may be taken over by the state, such that their decisions receive legal imprimatur. Consider the origins of the delegation at the heart of *R* v *Panel on Take-overs and Mergers, ex p Datafin*[58] (*Datafin*), on Sir John Donaldson MR's account:

> … the City of London prided itself upon being a village community … which could regulate itself by pressure of professional opinion. As government increasingly accepted the necessity for intervention to prevent fraud, it built on City institutions and mores, supplementing and reinforcing them as appeared necessary … [T]he position has already been reached in which central *government has incorporated the Panel into its own regulatory network* built up under [statutes] …[59]

A similar relationship of delegation was at play in *R* v *Advertising Standards Authority, ex p The Insurance Service plc*.[60] The Advertising Standards Authority initially operated as a (self) regulator of the advertising community. Government regulations meant that the Director General of Fair Trading would use his or her powers under the regulations if and only if a complaint to the Authority had not been complied with. Thus the Authority, which began life without statutory or governmental authority, 'now form[ed] part of a wider legal framework'.[61] As we will see in 'Review of de facto powers', judges have identified these kinds of cases as instances of delegation.

A final feature of relationships of delegation in the administrative context is salient for a theory of judicial review: relationships of delegation form complex and overlapping networks and hierarchies. A delegate may serve different delegators, who have complex relationships with each other, just as a private agent may serve more than one principal.[62] On the delegation theory, administrators – who may exercise both statutory and prerogative powers – may serve as delegates of parliament *and* the Crown (and not just one or the other). Moreover, delegation may operate on a number of levels, with the delegator, or the primary delegate, delegating further.[63] Parliament, for example may delegate to a Minister, who in turn may delegate to other officials.

The account below of three aspects of delegation relationships, and their associated duties, will colour in this sketch of delegation.

ASPECTS AND DUTIES OF DELEGATION

If administrators are understood as delegates of parliament or the Crown, what moral duties would this generally entail? We can only identify the moral duties of delegates in general terms because their content will always depend on the context of the particular relationship of delegation. Even in general terms, identifying the moral duties of delegates is not straightforward because different *aspects* of a relationship of delegation suggest different moral duties. This paper argues that three aspects of relationships of delegation are particularly salient

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[57] *R* v *Panel on Take-overs and Mergers, ex p Datafin PLC* [1987] QB 815.

[58] *R* v *Panel on Take-overs and Mergers, ex p Datafin PLC* [1987] QB 815.

[59] [1990] 2 Admin LR 77.

[60] *ibid*, 79; Advertising Standards Authority, 'Our History' at https://www.asa.org.uk/about-asa-and-cap/our-history.html (last accessed 31 August 2019).

[61] R. Munday, *Agency: Law and Principles* (Oxford: OUP, 3rd ed, 2016) 181-182.

[62] For parallels in agency law, see Watts and Reynolds, n 54 above, ch 5.

This is sometimes required by agency law: R. Munday, *Agency: Law and Principles* (Oxford: OUP, 3rd ed, 2016) 170.

[63] For analogy with 'ministerial acts' in agency law see Watts and Reynolds, n 54 above, 5-003.

where administrators are delegates of parliament or the Crown. These three aspects, and their associated moral duties, will be illustrated through three ideal types of relationships of delegation: mandate, effectuate and expressive delegation.

Mandate delegation

Some delegates are enlisted to perform extremely well-defined actions on behalf of the delegator: signing *this* contract, purchasing *that* house at *that* price, voting in a particular way on a particular issue. Mandate delegates are meant to have, and exercise, very little discretion. If they are called upon to exercise broad discretion, something has gone wrong. Circumstances – the asking price for the house or the question being voted on – have changed, or instructions that at first appeared determinative turn out to be vague. In such circumstances, the mandate delegate should go back to the delegator and seek instructions,[64] and if she is unable to obtain further instructions, she should *not* perform the action in a delegate capacity. The mandate delegate should, as far as possible, be automaton-like, doing no more or less than instructed; they should abide by their mandate.[65]

Effectuate delegation

Some delegates are meant to effectuate – give concrete form to – the general or abstract purposes of the delegator. Such effectuate delegates are meant to have, and exercise, more discretion than mandate delegates. These delegates are generally chosen because they possess particular skills, expertise or character. Lacking financial expertise, you may ask an expert to invest on your behalf, saying 'don't take any risks and make sure I have enough to retire comfortably in 2030'. The delegator's purposes may well be moral; you may instruct the delegate not to 'promote unethical activities' through your investments, with no other guidance. The effectuate delegate should stay faithful to this instruction, but independently 'colour in' the detail, exercising independence and practical wisdom in interpreting and giving effect to the delegator's abstract preferences.

Expressive delegation

Some delegates are charged with tasks which are primarily *expressive*. Acts may be expressive in a number of senses, and the senses relevant to expressive delegation require elaboration.

First, acts may be expressive in the sense that they intentionally reveal our character, attitudes or beliefs. You congratulate Mary on a recent promotion with the words: 'I am so pleased they are promoting more liberally these days', and you do not contribute to the office pool for her gift. Your words and actions reveal – express – your unfavourable belief about Mary's ability.

Second, our words and actions can reveal our character, attitudes or beliefs even when we do not intend them to. A furtive shoplifter may express nervousness in the way she talks to the cashier at the counter, but she certainly does not intend to.[66] A law which rejigs voting districts so as to disenfranchise black voters may express a lack of concern and respect for their rights even if lawmakers wished to keep this attitude hidden.[67]

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[64] E. Anderson and R. Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503, 1508.

[65] *ibid*, 1539.

[66] *ibid*, 1513.

[67] *ibid*, 1508.

Third, our words and our actions may be 'ersatz expressive', that is, may *appear to* reveal a character, attitudes or beliefs that we do not in fact possess. When I refuse to shake hands out of ignorance of social conventions relating to the greeting, I express disrespect in this sense.[68] A legislature which denies black people the right to vote expresses beliefs about their inferiority even if the law was motivated, not by this belief, but solely by a desire to appease white constituents.[69] What actions express in this sense is a matter of public meaning, not the true motivation of the action.[70]

So our actions or words are expressive when we reveal, intentionally or not, or appear to reveal, our character, beliefs, or attitudes. Just as we can express ourselves directly in these senses, we may also express ourselves indirectly through a delegate.[71] The character, beliefs or attitudes expressed by our delegate may be directly attributed to us, as delegators. My delegate's unjust or unfair treatment of you might express my lack of concern for you or my unjust character. The choice of delegate itself might be expressive. If I send an incompetent or inexperienced delegate to an important meeting that you chair, this might express my disdain for the meeting or your authority.

The ideal expressive delegate would express that, and only that, which the delegator wishes, or would wish, her to express. A delegate asked by a President to attend the funeral of a foreign head of state must express respect for the deceased, sympathy and concern, and must avoid expressing disrespect, unconcern or boredom.

Each of these three ideal types indicate significant moral duties associated with different aspects of relationships of delegation. The next section argues that the grounds of judicial review reflect these significant moral duties that administrators might be thought to possess *qua* delegates of parliament or the Crown.

GROUNDS OF REVIEW

[68] *ibid*, 1513.

[69] See P. Miller, 'Fiduciary Representation' in E. Criddle, E. Fox-Decent, A. Gold, S. Hui Kim and P. Miller (eds), *Fiduciary Government* (Cambridge: Cambridge University Press, 2018) 35.

Even the 'innominate ground' suggested in *R (Guinness plc)* v *Panel on Take-overs and Mergers* [1990] 1 QB 146 was based on 'familiar concepts' and 'formed of an amalgam of … [*GCHQ*] grounds with perhaps added elements, reflecting the unique nature of the Panel'. In any case, the precedential value of *Guinness* is questionable: D. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: Cambridge University Press, 2018) 207.

[70] T. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: OUP, 1994) 167-168.

[71] Even the 'innominate ground' suggested in *R (Guinness plc)* v *Panel on Take-overs and Mergers* [1990] 1 QB 146 was based on 'familiar concepts' and 'formed of an amalgam of … [*GCHQ*] grounds with perhaps added elements, reflecting the unique nature of the Panel'. In any case, the precedential value of *Guinness* is questionable: D. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: Cambridge University Press, 2018) 207.

Judicial review is available on specified grounds: that an administrative action was *ultra vires*, based on irrelevant considerations, made without hearing affected parties etc.[72] Any theory which aims to make sense of judicial review must account for this central feature of the doctrine. Courts have never offered an account of why judicial review is available on these specified grounds. Must we conclude that the grounds lack coherence or intelligibility taken as a whole? Or must we conclude, as some have, that courts are mistaken[73] or disingenuous in their insistence that judicial review must be on the specified grounds? We are not forced to accept these conclusions, as the delegation theory offers a way to make sense of the grounds of review, taken together.

According to the delegation theory, the best internal rationale for judicial review doctrine is that it holds administrators to their moral duties *qua* delegates of parliament or the Crown. We can make sense of the grounds of judicial review if we think about them in light of this rationale. The grounds of review reflect significant moral duties (though not necessarily all moral duties)[74] that administrators, from the internal perspective, might be thought to possess *qua* delegates of parliament or the Crown. For simplicity, the text that follows refers to administrators' moral duties, but it should not be forgotten that this refers to moral duties that they might be thought to possess from the internal perspective.

Some grounds of review explicitly reference administrators' moral duties as delegates.

Delegata potestas non potest delegari. The administrator, being a delegate, should not delegate this power further (without the delegator's permission).[75]

To appreciate how the other grounds of review reflect administrators' duties, return to the three ideal types of delegation relationships, and the duties of delegates of each type.

Mandate delegation

Some grounds of review follow quite directly from the idea that delegates should abide by their mandate.

Ultra vires. Administrators should not act beyond the scope of their powers.

Relevant considerations. In making a decision, administrators should consider or exclude those considerations their delegator implicitly or explicitly requires them to consider or exclude.

The basis of these grounds of review, which follow from the mandate type of delegation, is well appreciated. But the basis of the other grounds of review – natural justice, reasonableness, legitimate expectations etc. – remains mysterious. This is because other types of delegation have been overlooked.

Attending to effectuate and expressive types of delegation reveals that administrators, as delegates, have duties beyond abiding by the terms of their mandate, whether found in statute, Orders in Council or elsewhere.

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[72] For the many complications relating to this ground, including the operation of the *Carltona* principle, see: M. Elliott and J. Varuhas, *Administrative Law: Text and Materials* (Oxford: OUP, 5th ed, 2017) 160-174.

[73] Sometimes described as positional duties: A. Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979) 12.

[74] For the limited exceptions, see cases discussed in Leow, n 48 above, 106-107.

[75] See generally R. Munday, *Agency: Law and Principles* (Oxford: OUP, 2010) 10.

They have further moral duties, reflected in judicial review doctrine, by virtue of their position as delegates.[76] Judicial review thus mirrors the private law position where agents have duties to abide by the terms of their contracts, but generally[77] also have further duties, reflected in fiduciary law, by virtue of their position as agents.[78]

Effectuate delegation

Recall that the effectuate delegate is meant to give concrete form to the general or abstract purposes of the delegator. The effectuate delegate has a difficult job. First, in order to *effectuate the purposes* of the delegator,[79] she has to understand those purposes. The delegator may not state those purposes explicitly; in these cases, the effectuate delegate has to infer what they are from her mandate, or the context of delegation.

Next the delegate has to work out the means by which she will achieve the purposes. If the delegator's preferred means are sketched out, then the delegate should colour them in and fill in any blanks. In some cases, the means might be left completely to the delegate. Imagine a wealthy philanthropist who entrusts her delegate with funding for the purpose of 'improving road safety', saying nothing about how this purpose is to be served. What should the delegate do?

To decide what means to take, the delegate should identify and compare all plausible means of achieving the delegator's purpose, for example public safety messages, targeted advertising or more road crossings (or combinations of these). This process will involve identifying and weighing considerations for and against different means. *Hearing* from those affected by the decision is a good way to bring to light relevant considerations that the delegate may have otherwise overlooked.

The cost effectiveness of public safety messages is a *relevant consideration* that she should consider. The fact that advertising companies will pay her a commission if she invests in public safety messages is an *irrelevant consideration* that she should not consider. Indeed this kind of irrelevant consideration – which goes to her personal interest – constitutes a *bias*.[80]

The decision on how to best promote road safety is a difficult one and the delegate will need to gather evidence. She should ensure that the evidence she gathers and considers is sound, and avoid *errors*. The delegate should respond to considerations appropriately: she should not, for instance, treat considerations (for example high cost) which count against a particular means as if they favoured that means. Put another way, the

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[76] See D. Smith, 'What is Statutory Purpose?' in L. Crawford, P. Emerton, D. Smith (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Oxford: Hart, 2019) for the distinction between legislative intent and purpose.

[77] D. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press, 1996) 438-442.

[78] A. Perry, 'The Flexibility Rule in Administrative Law' (2017) 76 *Cambridge Law Journal* 375, 381.

[79] Judges have invoked the administrator's status as a delegate by way of explanation for this duty: *R* v *Somerset County Council, ex p Fewings* [1995] 1 All ER 513, 525 *per* Laws J.

[80] *Secretary of State for the Home Department* v *AF (No 3)* [2010] 2 AC 269, 307 *per* Lord Hoffmann; *R (West)* v *Parole Board* [2005] 1 WLR 350 at [31]; *R (Osborn)* v *Parole Board* [2014] AC 1115 at [67]. The duty presupposes that the person affected wishes to say something: see *R (Hill)* v *Institute of Chartered Accountants in England and Wales* [2014] 1 WLR 86, 99 and judgment of Beatson J.

delegate should decide *as the relevant reasons dictate, ie reasonably*. This is not a requirement that the delegate decide in a particular way, for her decision-making will often involve choosing between incommensurable options, or between options on which she has inadequate information. In all these cases, there may be more than one reasonable decision.

The requirement of reasonableness has implications for when decision-makers have to decide a series of identical or very similar cases, one after another. For instance, our delegate may have to decide how to improve road safety in the village of Eastville, and then decide how to improve road safety in the village of Westville. If she is making this kind of decision for multiple similar villages, there are advantages to making the decision afresh each time – it keeps the delegate alive to the special features of each case. At the same time, there are advantages to having a *policy* for how to improve road safety generally, and applying it to every village. The delegate saves time, and villagers know what to expect, based on how the policy was applied to the previous village. Thus there may be circumstances when the delegate *should* adopt a policy.

In all cases though, the policies she adopts should be *flexible* 'rules of thumb'[81] rather than strict rules. The delegate does not have to go through the motions of comparing the efficacy of orange traffic cones compared to yellow traffic cones in every village: it is fair to assume that her conclusion that the former were more effective holds for every village. She must, however, keep an open mind, and never ignore or overlook considerations, for there may always be an exceptional case. There may be a village where the houses on the main street are painted orange; yellow cones would be more effective there.

Reasonableness may not exhaust the delegate's duties. The delegate may also be required to give effect to the delegator's *special* concerns in making her decisions. Imagine that the delegate could improve road safety by investing the philanthropic funds in a particular kind of street lighting. But it turns out that the lighting attracts hedgehogs, ultimately causing cars to run them over. The delegate knows that the philanthropist has a particular fondness and concern for hedgehogs; he has in fact donated considerable sums of money to protect them. This does not rule out the lighting as a means of improving road safety. But the delegate ought to consider very carefully indeed whether the lighting is *necessary* to improve road safety. She ought to consider whether there are *alternatives* to the lighting which would have similar advantages for road safety. If there are not, she ought to consider whether, on *balance*, the improvement in road safety justifies the harm to hedgehogs.

This account of what an effectuate delegate ought to do bears a strong resemblance to important grounds of review.

Proper purpose. Administrators should use their powers (only) to effectuate the purposes for which they are granted.[82]

Hearing. Administrators should hear about considerations that weigh for and against a decision from those affected (bringing to light relevant considerations that administrators may have otherwise overlooked[83])

Policies and fettering. If administrators adopt policies (and they sometimes should),[84] these should take the form of 'rules of thumb' rather than strict rules, ie they should make allowances for the exceptional case.[85]

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[81] For example *R (Lumba)* v *Secretary of State for the Home Department (JUSTICE intervening)* [2012] 1 AC 245.

[82] This ground may not be available with respect to exercises of the Crown's common law powers, see *R (on the application of Sandiford)* v *The Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44.

[83] Courts will generally treat errors of law as 'jurisdictional errors' meaning that the court can substitute its view for that of the decision-maker (*R* v *Hull University Visitor, ex p Page* [1993] AC 682). Courts will only intervene under certain circumstances when the administrator has made a 'mistake of fact giving rise to unfairness': *E* v *Secretary of State for the Home Department* [2004] QB 1044, 1071.

Errors of law and fact. Administrators should not make decisions based on errors of law or fact.[86]

Relevant considerations and *bias.* Administrators should make decisions on the means to achieve the delegators' purposes based on, and only on, considerations relevant to that decision.[87] In particular, administrators should not make decisions based on which outcome would benefit them, their friends or families, or based on their personal inclinations or disinclinations towards the affected parties.[88]

Reasonableness. Administrators should decide reasonably, ie, as the relevant reasons dictate. This is not a requirement to decide in a particular way, as the reasons may be inconclusive or incommensurable.[89]

Proportionality. Where a potential decision adversely impacts a principle or interest[90] that parliament or the Crown can be presumed to consider important, administrators should carefully consider whether the decision is *necessary* and *well-suited* to further the purpose for which the administrative power was granted, and whether, on *balance*, the impact on the principle or interest is justified[91] by the furtherance of the purpose.[92]

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[84] *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223, 223, 229 *per* Lord Greene.

[85] Galligan, n 80 above, 438-442; see generally *Locabail (UK) Ltd* v *Bayfield Properties Ltd* [2000] QB 451. Where the person affected waives their right to object to a putatively biased administrator making a decision, and the waiver was 'clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not', it is unlikely that there is a real danger of bias (*Locabail (UK) Ltd* v *Bayfield Properties Ltd ibid*, 475).

[86] Courts may be more or less deferential – depending on context – in reviewing whether administrators have indeed decided reasonably: P. Daly*, A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012) 19-21.

[87] *Pham* v *Secretary of State for the Home Department* [2015] 1 WLR 1591, 1623 *per* majority; see also Lord Sumption's judgment *ibid*, 1627. Lord Mance (Neuberger and Clarke J agreeing) in *Kennedy* v *Charity Commission* [2015] AC 455, 509 suggested 'where a common law right or constitutional principle is in issue … persuasive countervailing considerations [are needed] to outweigh' them and the court reviews 'whether relevant interests had been properly balanced'.

[88] *Kennedy* v *Charity Commission ibid*, 507 *per* Lord Mance, endorsing the language of justifiability. (Neuberger and Clarke agreeing); *Pham* v *Secretary of State for the Home Department ibid*, 1628 *per* Lord Reed.

[89] While there is uncertainty about the sense in which the court uses 'proportionality', since Lord Mance's judgment that it was available as a ground of review found favour with the majority, there is strong reason to think that they use the term in the sense in which Lord Mance uses it in *Kennedy* v *Charity Commission ibid,* 508: *'[proportionality]* introduces an element of structure into the exercise [of review], by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages'; see also *Pham* v *Secretary of State for the Home Department* n 90 above, 1628 *per* Lord Reed and *R (Keyu)* v *Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, 1446 *per* Lord Kerr.

[90] See M. Harding, 'Trust and Fiduciary Law' (2013) 33 *Oxford Journal of Legal Studies* 81; Elliott and Varuhas, n 75 above, 318.

[91] This is the best way to understand many presumptions in statutory interpretation including the presumption that parliament intends that law be 'just and fair' (690), 'uphold principles of natural justice' (693), that

This does not exhaust the major grounds of judicial review. The remainder make sense in light of the expressive type of delegation.

Expressive delegation

Recall that an expressive delegate should express what the delegator would have them express. This is important because a delegate's conduct may express character traits, attitudes or beliefs that are attributed not just to the delegate, but also to the delegator.

To make sense of the remaining grounds of judicial review, consider what parliament or the Crown would want its delegates to express. Presumably, they would, as a priority, want to express traits, beliefs or attitudes that are necessary conditions for any contemporary political authority to be viewed as legitimate. They would wish to express their character as even-handed and fair, as trustworthy[93] and reliable, as solicitous and respectful of those they govern.[94] When administrators are understood as expressive delegates, charged with expressing these traits and attitudes, the other grounds of review are unsurprising.

Apprehension of Bias. The administrator should express the delegator's even-handedness, impartiality and fairness,[95] as well as solicitousness and respect.[96] In order to do this the administrator should not even *appear* to be biased.[97]

Hearing. The administrator should hear from those affected by a decision, who wish to say something relevant to the outcome, to express respect for the persons affected, on the part of the delegator.[98]

Legitimate expectations. If the administrator has invited someone to trust that she will act in a particular way by making a promise, following a practice, or creating a policy, the administrator must act to demonstrate her – and by extension the delegator's –worthiness of that trust.[99] This generally requires honouring the promise, or giving notice of forthcoming changes to policy or practice.

Some grounds of review – for example bias and hearing – appear more than once because different aspects of those grounds of review relate to different types of delegation.

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discretionary powers are exercised 'in a manner that is reasonable, fair and just' (692), 'that a person should not be penalised except under clear law' (715), and that 'the law should serve public interest' (688): D. Bailey and L. Norbury, *Bennion on Statutory Interpretation* (London: LexisNexis UK, 7th ed, 2017).

[92] Consistent with this, the rationale for the rule has been explained in terms of 'public confidence in the integrity of the administration of justice': *Locabail (UK) Ltd* v *Bayfield Properties Ltd* n 88 above, 472.

[93] Even assuming no-one ascribes the administrator's apparent bias (for example due to the administrator's personal relationship with a party) to parliament's bias; the fact that parliament appointed an apparently biased administrator expresses a lack of solicitousness or respect.

[94] *Porter* v *Magill* [2002] 2 AC 357, 494: the test is whether a 'fairminded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'. This test 'gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done …': *R* v *Gough* [1993] AC 646, 668; *Locabail (UK) Ltd* v *Bayfield Properties Ltd* n 88 above, 477-478.

[95] T. Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies* 497; *R (Osborn)* v *Parole Board* n 83 above at [68]-[69].

[96] P. Reynolds, 'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] *Public Law* 330.

[97] R. Munday, *Agency: Law and Principles* (Oxford: OUP, 3rd ed, 2016) 168; DeMott, 61 above, 33-34.

[98] Munday, *ibid*, 166; DeMott, *ibid*, 33.

[99] DeMott, *ibid*, 33.

The three ideal types of relationships of delegation – mandate, effectuate and expressive – represent three *aspects* of relationships of delegation. These three aspects were teased apart so that their particular features, and links to grounds of review, could be highlighted through the ideal types. But it is important to appreciate that all three types often co-exist as aspects of the same delegation relationship. Imagine that I ask my friend to act for me in buying a house. When he bids for me at the auction, he would have asked for and received detailed instructions, and will not stray from these, abiding by his mandate. But if in asking him to negotiate the contract for sale I said only that I wanted 'a good deal', he should effectuate my more abstract purpose. In the way he conducts himself during the bidding and negotiation, he expresses my integrity and good faith in business dealings.

Within an administration, all three types practically always co-exist as aspects of delegation relationships. Administrators must always abide by the terms of their empowering rules. No matter how detailed and directive empowering rules are, there will practically always be areas where administrators must effectuate more abstract purposes; and in all their actions administrators cannot help expressing the character, attitudes and beliefs of parliament and the Crown. Thus, the grounds of review make sense if they are understood as reflecting the moral duties associated with the three aspects of delegation.

These duties bear a similarity to private law duties on agents not to exceed the authority conferred by the principal,[100] to carry out the principal's instructions,[101] to act consistently with the express and implied terms of any contract with the principal,[102] to exercise powers for the purpose for which they were conferred,[103] to exercise discretion 'in a manner that is not capricious, arbitrary or so outrageous in defiance of reason that it can be properly categorised as perverse'[104] and not to delegate power further (without the principal's permission[105]). It is a strength of the delegation theory that it makes sense of such similarities of the duties of delegates across public and private law. For if delegates have moral duties *qua* delegates, we would expect that these duties are found across the public-private divide, even if the precise content of these duties depends on the particular delegator and terms and context of delegation. There is also reason to expect that non-delegates exercising conferred powers (like delegates),[106] or who are fiduciaries (like delegates),[107] would share some of the duties of delegates, and be held to these duties, in other fields of law. The delegation theory is thus consistent with the continuities that scholars have established across the public-private divide.[108]

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[100] Bennett, n 55 above, 88-89.

[101] *ibid*.

[102] Munday, n 100 above, 196.

[103] J. Varuhas, 'Judicial Review beyond Administrative Law: *Braganza* v *BP Shipping Ltd* and Review of Contractual Discretions' UK Constitutional Law Association Blog, 31 May 2017 at https://ukconstitutionallaw.org/2017/05/31/jason-varuhas-judicial-review-beyond-administrative-law-braganza-v-bp-shipping-ltd-and-review-of-contractual-discretions/ (last accessed 31 August 2019); S. Boyes, 'Sport in Court: Assessing Judicial Scrutiny of Sports Governing Bodies' [2017] *Public Law* 363.

[104] D. Oliver, 'Review of Non-Statutory Discretions' in Forsyth (ed), n 1 above, 309 on similarities between trustees and administrators.

[105] Oliver, n 43 above.

[106] Elaborated on in the conclusion.

[107] See Perry, n 49 above.

[108] *R (Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs (No 2*) [2009] AC 453, 482-483 *per* Lord Hoffmann; Elliott, n 1 above, 8.

This section argued that the grounds of judicial review reflect significant moral duties that administrators might be thought to possess *qua* delegates of parliament or the Crown. The grounds of review make sense in light of the proposed internal rationale for judicial review: to hold administrators to such moral duties. But it emphatically does not follow that judicial review doctrine *is* all-things-considered-justified. It may be that the moral duties are defeated by other considerations (for example the public interest in a more efficient administration unhindered by legal challenges). Or it may be that judicial review *should not* concern itself with delegation at all, and focus instead the more morally weight task of protecting basic human rights, the rule of law and/or other values. The paper takes no position on these possibilities or on whether judicial review doctrine is all-things-considered justified. Rather it is hoped that by revealing the internal rationale and the intelligible order in the grounds of review, the delegation theory offers the normative, predictive, reformatory and pedagogical pay-offs associated with interpretive theories.[109]

REVIEW OF THE CROWN'S POWERS

The delegation theory needs to make sense of the scope, in addition to the grounds, of review. Judicial review is available over not just statutory powers, but also exercises of the Crown's prerogative and general administrative powers, as well as *de facto* powers.

Judicial review of the Crown's non-statutory powers is a settled feature of public law. However, courts have not said exactly why they can and should exercise judicial review over the Crown's prerogative or general administrative powers.[110] Like Lord Hoffmann in *R (Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs (No 2)* ((*Bancoult No 2*)) they simply 'see no reason' why these powers should not be subject to review, given that statutory powers are reviewable.[111] A better rationale is needed, particularly if prerogative powers are understood as a kind of 'reason of state'.[112]

The delegation theory makes sense of judicial review of the Crown's powers and shows how it relates to the rest of judicial review. Put simply, the internal rationale for judicial review of such powers is to hold administrators to their duties *qua* delegates of the Crown (just as judicial review of statutory powers holds administrators to their duties *qua* delegates of parliament). This account accords with legal doctrine: it is a textbook proposition that (some) administrators are delegates of the Crown.[113] In *Council of Civil Service Unions* v *Minister for the Civil Service* (*GCHQ*), Lord Fraser explicitly based judicial review of statutory and prerogative powers on their delegation from parliament and the Crown respectively.[114] In *R* v *Criminal Injuries*

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[109] See generally T. Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge: Cambridge University Press, 2015).

[110] A. Tomkins and C. Turpin, *British Government and the Constitution: Text and Materials* (Cambridge: Cambridge University Press, 6th ed, 2007) 366. See also reference in Crown Proceedings Act 1947, s 2(1)(a) to servants and agents of the Crown.

[111] *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, 399.

[112] In comments that have been cited with approval, for example *R* v *The Disciplinary Committee of the Jockey Club Jockey Club, ex p Aga Khan* [1993] 1 WLR 909 (*Aga Khan*) *per* Sir Thomas Bingham MR.

[113] *R* v *Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, 882 *per* Lord Parker CJ.

[114] *ibid*, 888 *per* Lord Diplock; see also *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, 409.

Compensation Board, ex p Lain, Parker LJ[115] endorsed the view that the decision of the Criminal Injuries Compensation Board was subject to review because it is 'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown.'[116] Diplock LJ described the Board members as 'agents of the Crown'.[117]

It is relatively easy to see how the rationale identified by the delegation theory makes sense of cases like *GCHQ* where courts review *indirect* exercises of prerogative powers, for example the actions of an administrator empowered by an Order in Council which was made as a direct exercise of prerogative power. Here courts review the administrator's exercise of power delegated *by* the Crown, not the Crown's exercise of the prerogative power as such. Such cases can be understood in light of the rationale that delegates of the Crown, no less than delegates of parliament, ought to be held to the delegates' duties discussed earlier: not to exceed their powers, to give effect to the purposes of the Crown, and to express qualities, such as trustworthiness, of the Crown.

But it is less easy to make sense of judicial review of *direct* exercises of the prerogative. Such review remains puzzling because of its apparent misfit with 'elementary constitutional principles'[118] that the Crown has immunity from judicial review and the Queen can do no wrong.[119] In *R (on the application of Miller)* v *The Prime Minister* (*Miller No 2*), an Order in Council proroguing Parliament was declared unlawful.[120] Earlier, in *Bancoult No 2*, the court asserted that even direct exercises of the prerogative, including Orders in Council in the Queen's name, were reviewable.[121] The 2004 Order in Council under review read: 'Her Majesty, by virtue and in exercise of all the powers in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order …'[122] In such cases, the involvement of the flesh-and-blood monarch in the exercise of the prerogative is impossible to ignore. How are such Orders in Council amenable to judicial review in the face of 'elementary constitutional principles'?

The puzzle is resolved once the delegation theory is understood alongside a key characteristic of the Crown in judicial review: *idealisation*.[123] Blackstone describes the legal nature of 'our sovereign lord, thus all-perfect and immortal in his kingly capacity'[124]:

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[115] W. Wade, 'The Crown, Ministers and Officials: Legal Status and Liability' in M. Sunkin and S. Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Clarendon Press, 1999) 26.

[116] *ibid*.

[117] *Miller No 2* n 11 above at [69].

[118] *Bancoult No 2* n 111 above.

[119] British Indian Ocean Territory Constitution Order 2004; UK Parliament, 'Orders in Council' at https://www.parliament.uk/site-information/glossary/orders-in-council/ (last accessed 31 August 2019)

[120] These are 'attributes with which the Crown has been invested by legal theory': W. Anson, *The Law and Custom of the Constitution* (Oxford: Clarendon Press, 1907) 4-5.

[121] W. Blackstone, *Commentaries on the Laws of England in Four Books, vol 1* (Philadelphia, PA: J.B. Lippincott Co, 1893) 250.

[122] W. Blackstone, *Commentaries on the Laws of England in Four Books, vol 1* (Philadelphia: J.B. Lippincott Co, 1893) 246. Legislation has preserved this feature of the idealisation of the Crown: McLean, n 6 above, 220.

[123] McLean, *ibid*, 27, 209.

[124] *ibid*, 210.

> The law … ascribes to the king, in his high political character … certain attributes of a great and transcendent nature … [T]he law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong … The king, moreover, is not only incapable of doing wrong, but ever of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness.[125]

Janet McLean argues that the common law has long conceived of the Crown as a 'moral exemplar'[126] and as the personification of the common weal.[127] Martin Loughlin elaborates: 'justice is said to emanate from her Majesty' and she is 'the fountain of honour'.[128] The idealisation of the Crown, perhaps underemphasised in contemporary British jurisprudence, is notable in settler colonies. The Supreme Court of Canada's jurisprudence assumes the Crown's 'honour' and 'integrity' in dealings with aboriginal peoples.[129] The Court's guide to evaluating government conduct notes: 'It is always assumed that the Crown intends to fulfil its promises. No appearance of 'sharp dealing' [on the part of the government] will be sanctioned.'[130]

To be clear though, it does not follow from the idealisation of the Crown that the Queen ought, in all circumstances, *to try to act as Crown,* ie ought to fit the idealised vision of a ruler. Constitutional conventions – particularly those obligating her to follow Ministerial advice – may sometimes mean that she ought to act as an idealised ruler would not.[131] It follows that the Queen is not necessarily blameworthy when she fails to live up to the ideal of the Crown.

Two implications of the idealised nature of the Crown are vital to understanding judicial review of the Crown's powers. The first relates to the relationship between the Queen and the Crown: the Queen only (truly) acts *as* the Crown *insofar* as she embodies the ideal ruler. The 'Queen *as Crown*' (to use Loughlin's phrase) has 'the Monarch's ideal character'.[132] While the flesh-and-blood Queen may fall short of the ideal ruler and may act unjustly, unfairly or dishonourably, when her actions deviate from that ideal they are not truly those of the Crown.[133] As Hearn says, '[s]ince no unlawful act is the act of the Crown, no command to do any such act can be the command of the Crown'.[134]

The second implication of the idealisation of the Crown is that, since the Crown is an ideal ruler, anything 'exceptionable in the conduct of public affairs is not to be imputed to the King [as Crown].'[135] Instead, the law holds his servants and advisors blameworthy, as the King's actions must have been due to 'the advice of

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[125] M. Loughlin, 'The State, the Crown and the Law' in Sunkin and Payne (eds), n 118 above, 58.

[126] *R* v *Badger* [1996] 1 SCR 771 at [41] *per* Cory J; *R* v *Marshall* [1999] 3 SCR 456.

[127] *R* v *Badger ibid* at [41] *per* Cory J.

[128] The Court in *Miller No 2* acknowledges the possibility of this kind of situation: n 11 above at [30].

[129] M. Loughlin, 'The State, the Crown and the Law' in Sunkin and Payne (eds), n 118 above, 58.

[130] For philosophical insight on when acts may be described as not truly or authentically those of the person concerned, see: H Frankfurt, *The Importance of What We Care About* (Cambridge: Cambridge University Press, 2006) 164-165.

[131] W. Hearn, *The Government of England* (Melbourne: George Robertson & Co, 2nd ed, 1886) 20.

[132] W. Blackstone, *Commentaries on the Laws of England in Four Books, vol 1* (Philadelphia, PA: J.B. Lippincott Co, 1893) 246.

[133] *ibid*, 244.

[134] *Tobin* v *R* (1864) 16 CB NS 310, 353-354; *M* v *Home Office* [1994] 1 AC 377, 407-408; Anson, n 123 above, 5.

[135] See *Miller No 2* n 11 above at [30] on the constitutional responsibility of the Prime Minister especially given conventions which constrain the Queen.

evil counselors, and the assistance of wicked ministers'.[136] Thus courts have held that where it *appears* that the Crown has acted unlawfully, 'the servant is responsible for the unlawful act, the same as if there had been no command'.[137] Another way of stating this position is to say that the law will hold servants (or delegates) of the Crown to the standard of behaviour that we would expect from the idealised Crown.[138]

Thus in *Bancoult No 2*, even though Orders in Council are approved *in person* by the Queen and made by her directly,[139] Lord Carswell characterises the Order in Council as 'wholly the act of the Ministry'.[140] This characterisation leads him to maintain that the proceedings 'are directed against the Minister responsible for the making of the order' rather than the sovereign.[141] In *Miller No 2,* the challenge is framed around the lawfulness of the Prime Minister's advice to the Queen to prorogue Parliament.[142]

This characterisation and framing makes perfect sense if we think of the Queen signing the Order in Council as not truly an act of the Crown, and an act for which the Crown's delegate is held responsible. Even if Queen Elizabeth II personally approved the order, the idealised ruler – the font of fairness, justice and honour – could not have. The idealised Crown would never intend to act beyond the scope of her powers,[143] nor would ever claim a prerogative that did not exist, or act contrary to the law. The idealised Crown would never authorise unfair, untrustworthy, unlawful or unreasonable conduct. This understanding of the Crown makes sense of Lord Hoffmann's statement that he could not accept that the executive could legitimate torture or other conduct 'touching the honour of the United Kingdom'.[144] If the Queen appeared to endorse such conduct, the idealised Crown never could.

On the delegation theory, the rationale for judicial review of the Crown's powers is that Ministers or other delegates of the Crown should be held to their moral duties qua delegates *of the idealised Crown*. These duties are reflected in the grounds of judicial review, as the previous section argued.

But consider an objection. Parliament is a democratically-elected representative institution; it is relatively easy to see why courts would hold parliament's delegates to their moral duties *qua* delegates. The Crown, on the other hand, is an ideal partially personified by the Queen, who is not democratically elected. Why would courts

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[136] UK Parliament, 'Orders in Council' at https://www.parliament.uk/site-information/glossary/orders-in-council/ (last accessed 31 August 2019)

[137] *Bancoult No 2* n 111 above, 515-516.

[138] *ibid*.

[139] *Miller No 2* n 11 above at [27]

[140]Though the precise scope of these powers might be 'less straightforward' than statutory powers: *Miller No 2* n 11 above at [38].

[141] *ibid*, 482-483.

[142] Smith, n 2 above, 18.

[143] D. Bassuk, *Incarnation in Hinduism and Christianity: The Myth of the God-Man* (Basingstoke: Palgrave Macmillan, 1987).

[144] BBC News, 'What would Jesus do?: The rise of a slogan' 8 December 2011 at https://www.bbc.com/news/magazine-16068178 (last accessed 31 August 2019).

hold administrators to their moral duties *qua* delegates of the Crown? Or to put it differently: how does this rationale show why the law is 'thought to be justified (even if it is not justified)'?[145]

There is a long tradition in religious and ethical thought of identifying moral duties by reference to conduct that a partly-personified ideal would endorse.[146] To take a contemporary example, the slogan 'what would Jesus do?' was popularised as a means of identifying ethical practice.[147] Similarly, it might be thought that a good way to identify the moral duties of administrators is to identify the standard of conduct that the ideal ruler would endorse from their delegate. This parallel between judicial review and religious and ethical thought is unsurprising, given the influential historical understandings of the Crown as representing or imitating Christ.[148]

The aim of the delegation theory is to make sense of the law of judicial review by revealing the intelligibility, coherence and significance of its features, in light of its underlying rationale. Making sense of a human practice by identifying its underlying rationale may be harder or easier depending on the practice. Someone attempting a theory of pre-match sports superstition may be impeded by athletes' general unwillingness and inability to articulate the nature of their superstitious behaviour.[149] In such cases, theorists must be particularly attentive to the clues they do have: athletes' patterns of behaviour and any rationales that they do offer for that behaviour. The interpretive theorist here is attempting to assemble a jigsaw puzzle though some pieces are missing from the box; despite the missing pieces, the picture on the puzzle may still be discernible.

Interpreting the doctrine relating to judicial review of the Crown's power raises similar challenges, in part due to judges' uncommunicativeness on the basis for such review. Given these challenges, a theorist might have to conclude that there is *no* internal rationale which makes sense of judicial review of the Crown's powers and/or that it does not fit with the rest of judicial review (just as someone working on the jigsaw puzzle might conclude that the picture is not discernible). This section has argued against this conclusion. If we attend to, and put together, the significant clues that we do have – clear judicial statements in landmark cases identifying administrators as delegates ('servants') of the Crown, common law case law and scholarship (including historical scholarship) understanding the Crown as idealised, legal doctrine that holds servants to account for apparently unlawful acts of the Crown – we see that judicial review of the Crown's powers shares the same internal rationale, same intelligible logic, of judicial review of statutory powers. In each case, the law holds administrators to significant moral duties they might be thought to possess qua delegates (of the Crown or parliament).

The delegation theory suggests that while we *can* make sense of judicial review of the Crown's powers, we can only do so with a conception of the Crown, and its relationship with Ministers, which may be described as 'artificial'[150] and mythical, in line with long-standing legal understandings of the Crown as 'transcendent'[151]

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[145] E. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, NJ: Princeton University Press, 2016) 87. See W. Bagehot, *The English Constitution* (Boston, MA: Little, Brown and Company, 2nd ed, 1873) 69, 109.

[146] G.I. Neil, 'Demystifying Sport Superstition' 17 (1982) *International Review of Sport Sociology*, 99, 100-103.

[147] Anson, n 123 above, 5.

[148] W. Bagehot, *The English Constitution* (Boston: Little, Brown and Company, 2nd ed, 1873) 109.

[149] *ibid*, 69.

[150] For example. G.I. Neil, 'Demystifying Sport Superstition' 17 (1982) *International Review of Sport Sociology*, 99.

and inspiring 'mystic reverence [and] religious allegiance'.[152] This is not a problem for the delegation theory, any less than it is a problem for the interpreter of pre-match sports practices – such as wearing old socks or walking only on certain parts of the field – who finds that the internal rationale for practices is a superstitious attempt to avoid bad luck.[153] We may regard a sport superstition as silly, unfounded, false, problematic or dangerous, and still accept it as the best internal rationale of the relevant practices. Similarly, someone might regard the conception of the Crown in judicial review outlined in this section as artificial or mythical and still accept it as the basis for the best internal rationale of the legal doctrine – the best way of making sense of the legal doctrine from an internal perspective.

The common law's treatment of the idealised Crown may appear familiar to those acquainted with its treatment of actual idols. The common law has long treated Hindu idols as legal persons with the capacity to own property, sue and be sued, and receive gifts.[154] Privy Council judges characterised the law as giving effect to the 'will of idol',[155] expressed through his or her guardian. As Lord Shaw wrote: 'the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant.'[156] These judges acknowledged this characterisation as 'artifice'.[157] But the best way they could make sense of the law – the best internal rationale for the law – was that it gave effect to the will of the idol.

The best internal rationale for judicial review of the Crown's powers is, like the best internal rationale for particular pre-match practices and the legal treatment of idols, not necessarily objectively or all-things-considered justified. By revealing the best internal rationale for judicial review doctrine, the delegation theory makes the doctrine a clearer target for criticism (and evaluation more generally), though it offers no conclusion on its all-things-considered justifiability. Some may be satisfied that the law is objectively justified, for example for reasons of tradition, or because the duties of delegates of the idealised Crown serve as good proxies for good administrative behavior (just as the 'What Would Jesus Do?' slogan may help identify ethical practice more

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[151] P.W. Duff, 'The Personality of an Idol' (1927) 3 *Cambridge Law Journal* 42; G. Patel, 'Idols in Law' (2010) 45 *Economic and Political Weekly* 47, 49.

[152] *Pramatha Nath Mullick* v *Pradyumna Kumar Mullick* (1925) LR 52 IA 245 at [35]; Duff, *ibid*, 43.

[153] *Pramatha Nath Mullick* v *Pradyumna Kumar Mullick ibid* at [9].

[154] Patel, n 154 above, 49.

[155] Perhaps because the artificial nature of the Crown leaves judges with too much power. Equally, reform might be sought by those who would like to see a stronger judicial role. Thus far, courts have reviewed the Crown's powers, particularly prerogative powers, with 'reluctance' (A. Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005) 133) and 'caution' (T. Poole, 'Judicial Review at the Margins: Law, Power, and Prerogative' (2010) 60 *The University of Toronto Law Journal* 81, 103). The judicial attitude to judicial review of the prerogative has seen it described as 'constitutionally abnormal' (*ibid,* 89). *Miller No 2* may change all this, but this is by no means certain. As the Court says, the circumstances of the case are a 'one off' (*Miller No 2* n 11 above at [1].)

[156] *Datafin* n 58 above, 852.

[157] *R (Beer (trading as Hammer Trout Farm))* v *Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, 239 (*Beer* v *Hampshire Farmers' Markets*); A judge in a leading High Court case complains about 'the court's approach … following *Datafin*' (*R* v *Servite Houses ex p Goldsmith* [2001] LGR 55, 72 (*Servite*)).

generally). For others, the mythical and artificial internal rationale of this kind of judicial review indicates a need for reform,[158] for example by giving prerogative powers a statutory basis.

In the next section, the paper demonstrates how the delegation theory also makes sense of judicial review of exercises of de facto (governmental) powers of non-state bodies.

REVIEW OF DE FACTO POWERS

In a time when the state provides services like housing, welfare and medical care through non-state bodies, questions about the scope of judicial review are pressing. The question of the amenability of non-state bodies – exercising de facto powers – to judicial review was brought to the fore by *Datafin*.[159] But why de facto powers are subject to judicial review, and how such review fits with the rest of judicial review doctrine remain mysterious. Without good answers to these foundational questions, it has proven hard to formulate a good legal test of when actions of non-state bodies are subject to judicial review. 'The relevant principles tend to be stated in rather elusive terms'[160] and the key test is 'expressed in very general terms, and of itself provides no real guidance.'[161]

This section argues that the internal rationale identified by the delegation theory can make sense of judicial review of de facto powers. This argument unfolds in three steps. First, judges conceive of, and characterise, non-state bodies subject to review as delegates of parliament or the Crown. Second, the case law indicates that non-state bodies are subject to judicial review insofar as they act as such delegates. Third, the delegation theory clarifies and makes sense of the legal test for amenability of de facto powers to review.

Judges, like scholars,[162] have consistently characterised non-state bodies subject to judicial review as delegates of parliament or the Crown. The very use of the term *de facto [governmental] powers*, in common currency, is suggestive of this view. In *R* v *Disciplinary Committee of the Jockey Club, ex p Aga Khan* (*Aga Khan*), Lord Hoffmann suggested that whether 'the Club might de facto be a surrogate organ of the government'[163] was relevant to amenability on the grounds that 'governmental power may be exercised de facto as well as de jure'.[164] Judgments in *Datafin* characterise the Takeover Panel as akin to a delegate in a delegation

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[158] *Beer* v *Hampshire Farmers' Markets ibid*, 240. Judges are concerned because of the recognised need for courts to 'adopt a careful and principled approach' to 'the imposition of public law standards upon a private body …' *Servite ibid*, 70.

[159] See generally, C. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (Oxford: OUP, 2007); McLean, n 6 above, 260 argues that contracting out arrangements were based on a theory of the firm which treated "the Minister as the principal and the chief executive as her contractual agent".

[160] *Aga Khan* n 115 above, 932.

[161] *ibid*, 931. The emphasis in both Hoffmann LJ and Sir Thomas Bingham MR's judgements on the *governmental* nature of the Panel in *Datafin* is also suggestive of the characterisation of the Panel as government delegate.

[162] As discussed in 'Delegation in judicial review: a sketch' above.

[163] *Datafin* n 58 above, 849.

[164] *ibid*, 852.

relationship created by implicit, rather than express, understandings[165] to explain its amenability to review. Lloyd LJ characterised the set-up as 'an implied devolution of power'[166] and Nicholls LJ as 'indistinguishable in its effect from a delegation by the council of the Stock Exchange to the Panel … of its public law task'.[167] Sir John Donaldson MR was influenced by the 'willingness of the Secretary of State … to use the Panel as the centrepiece of his regulation of that market.'[168]

Later cases also implicitly and explicitly characterise non-state bodies subject to judicial review as delegates of parliament or the Crown. In *R* v *Servite Houses ex p Goldsmith* (*Servite*), Moses J[169] found that Servite was *not* amenable to judicial review because it 'was not acting as agent of Wandsworth (Council)' which 'had no power to delegate its obligations'.[170] Burton J of the High Court in *R (Heather)* v *Leonard Cheshire Foundation* (*Leonard Cheshire*) followed *Servite* in using 'true delegation' as part of the test of amenability.[171] The Court of Appeal in *Beer* v *Hampshire Farmers' Markets* also used language strongly suggestive of implicit delegation as the test of amenability: the body in question had 'stepped into the shoes' of the Council[172] and was 'taking the place of central government or local authorities'.[173]

Turn next to the second step of the argument: case law shows that non-state bodies are subject to judicial review insofar as they act as delegates of parliament or the Crown. Recall that a feature of legal delegation is that delegates have the ability to exercise (at least some of) the legal powers of their delegators. The case law indicates that, when deciding on amenability to judicial review, courts test for delegation with particular attention to this feature. In *Leonard Cheshire*, the High Court held that privately-run prisons were amenable to judicial review because they could exercise statutory powers (ie powers from parliament), in contrast with charitable care homes which lacked such powers.[174] In *Partnerships for Care*, the High Court identified the 'crucial' factor in assessing a private hospital's amenability to review as 'the *assimilation* by the housing

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[165] *ibid*, 838. It was significant for the judges that the Department of Trade and Industry relied on the Takeover panel to perform some of its functions; Sir John Donaldson MR quoted extensively from the Department's statement that rather than making its own provisions, it 'considers it better to *rely on* the effectiveness and flexibility of the City Code … [administered and enforced by the Panel]', *ibid*, 835.

[166] In a judgment Lord Mance called 'illuminating and persuasive': *YL* v *Birmingham City Council* [2008] AC 95, 139-140.

[167] *Servite* n 160 above, 69.

[168] *R (Heather)* v *Leonard Cheshire Foundation* [2001] EWHC Admin 429 (*Leonard Cheshire*). While the Court of Appeal offered different reasons for its decision, its focus was on the Human Rights Act 1998, so these comments on amenability to judicial review from the High Court (examined with 'obvious care and skill' *R (Heather)* v *Leonard Cheshire Foundation* [2002] 2 All ER 936, 939) remain valuable.

[169] *Beer* v *Hampshire Farmers' Markets* n 160 above, 248. For similar language in agency law, see *Imageview Management Ltd* v *Kelvin Jack* [2009] EWCA Civ 63 *per* Jacob LJ.

[170] *ibid*.

[171] *Leonard Cheshire* n 171 above at [51].

[172] *R (A)* v *Partnerships in Care Ltd* [2002] 1 WLR 2610, 2618.

[173] *Datafin* n 58 above, 837 quoting from *R* v *Criminal Injuries Compensation Board, ex p Lain* n 116 above.

[174] *Datafin ibid*, 826, 834 *per* Donaldson MR.

association of the *powers* of the local housing authority.'[175] In these cases the delegate-administrator had the ability to exercise the powers of Parliament or the Crown *directly*.

But courts also test for the kind of delegation, sketched above in 'Delegation in judicial review: a sketch', in which the delegate has the ability to exercise the power of parliament or the Crown *indirectly* by triggering an exercise of their legal powers. Sir John Donaldson in *Datafin* affirms that bodies are amenable to review even if their determination 'is merely *one step in a process* which may have the result of *altering … legal rights or liability*' (ie when they can indirectly exercise a legal power).[176] Judges in *Datafin* were swayed by 'the unspoken assumption' that the Panel could trigger statutory powers,[177] by the fact that bodies with statutory powers treated breach of the Takeover Code administered by the Panel as *ipso facto* constituting misconduct under their own rules,[178] and the fact that the Panel was '*supported and sustained* by a periphery of statutory powers and penalties'.[179] In other words, the court was swayed by these indicators that the Panel was a delegate of parliament.

In a similar case, *R* v *Advertising Standards Authority ex p The Insurance Service plc*,[180] the Advertising Standards Authority was a company whose objects included the promotion and enforcement of advertising standards. Government regulations charged the Director General of Fair Trading to consider certain complaints about advertising. But the regulations authorised the Director General to demand that the complainant demonstrate that 'established means of dealing with such complaints' had been invoked.[181] The upshot was that the Director General would use his powers under the regulations if and only if a complaint to the Authority had not 'produced a satisfactory result',[182] ie, had not been complied with. Thus, failure to follow the Advertising Standards Authority's decision would lead to the Director General of Fair Trading using her or his powers under Regulations. This was a key factor that pointed to the Authority's susceptibility to judicial review. In other words, the Authority's actions were amenable to judicial review in part because it possessed the ability to *trigger* an exercise of the powers of bodies performing statutory functions; the court was testing for delegation.

In these cases, courts found that actions of bodies – delegates with the ability to exercise, directly or indirectly, the powers of parliament or the Crown – were amenable to judicial review. But if the delegation theory is sound, it should also be able to make sense of negative results, where actions of bodies were found *not* amenable to judicial review. *R (Holmcroft Properties Ltd)* v *KPMG LLP*[183] offers a good example. Here a financial regulator, the FCA, received an undertaking from Barclays Bank that they would set up a scheme to provide redress to customers who had been wrongly sold certain products. This scheme involved Barclays contracting with KPMG (as an independent party) to approve offers of compensation from Barclays. The terms

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[175] *ibid*, 834-835.

[176] *ibid*, 835. Sir John Donaldson MR emphasises the abundant 'invisible or indirect [legal] support' that the Department of Trade and Industry and bodies exercising statutory functions such as the Stock Exchange and the Bank of England offer the Panel.

[177] [1990] 2 Admin LR 77, 77-93.

[178] *ibid*, 80-81.

[179] *ibid*, 81.

[180] [2017] Bus LR 932.

[181] *ibid*, 937.

[182] *ibid*, 944.

[183] *ibid*, 944-945.

of the engagement emphasised that KPMG was undertaking to act only for Barclays, although the FCA had some third-party rights.[184] The question was whether KPMG's actions were subject to judicial review.

There was a connection, the court found, between KPMG's functions and the regulatory duties of the FCA.[185] But while the FCA 'had a number of … draconian powers it could have exercised', it chose instead to 'adopt an essentially voluntary scheme of redress' … 'KPMG's role … as vital as it was, could not have been imposed upon Barclays by the FCA in the exercise of its regulatory powers'.[186] In short, KPMG did not possess the power to exercise the FCA's powers; it was not a delegate.[187]

The third step of the argument in this section is that the delegation theory fits and makes sense of the tests that courts have used for amenability to judicial review.[188] Take the 'statutory underpinning' test. Post-*Datafin*, courts have usually required bodies subject to review to show some 'sign of underpinning directly or indirectly by any organ or agency of the State'.[189] A closely related requirement is that the body has been 'woven into [a] system of governmental control'.[190] An example of how this plays out is in the leading High Court case of *Servite*,[191] where the body was found *not* amenable to judicial review because it did not possess 'power … derived from statute'.[192] Through the statutory underpinning test, the court tested whether the school had the ability to exercise any of the powers of parliament, ie whether the school was a delegate of parliament. Here, as in other cases where the 'statutory underpinning' test is used, it functions as an imprecise but effective indicator of whether the body is a delegate, de facto or de jure, of parliament or the Crown.

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[184] Despite 'powerful pointers' in favour of amenability: *ibid*, 944.

[185] Given the aims of this interpretive theory, it will not consider factors, such as whether a body was exercising monopolistic powers, which have now been rejected in case law *Aga Khan* n 115 above; *R* v *Football Association Ltd, ex p Football League Ltd* [1993] 2 All ER 833) though this factor enjoyed some judicial and scholarly support in the past (C. Campbell, 'Monopoly Power as Public Power for the Purposes of Judicial Review' (2009) 125 *Law Quarterly Review* 491; H. Woolf, 'Public Law – Private Law: Why the Divide? A Personal View' [1986] *Public Law* 220; *R* v *Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] All ER 207, 221; Elliott and Varuhas, n 75 above, 138).

[186] *R* v *Football Association Ltd, ex p Football League Ltd ibid*, 848

[187] *Aga Khan* n 115 above, 923 *per* Sir Thomas Bingham MR.

[188] *Servite* n 160 above.

[189] *ibid*, 77.

[190] *R* v *Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1992] 1 WLR 1036, 1041, cited with approval in *R* v *Football Association Ltd, ex p Football League Ltd* n 188 above.

[191] The basis for this test has been questioned: D. Pannick, 'Who is Subject to Judicial Review and in Respect of What?' [1992] *Public Law* 1. It was criticised as requiring courts to make political predictions in *Leonard Cheshire* n 171 above at [48].

[192] *Servite* n 160 above. In *Aga Khan* n 115 above, Sir Thomas Bingham MR thought the Jockey Club passed the 'but for' test, but was not amenable to review.

The delegation theory also makes sense of the *but for* test. In testing for amenability, courts have asked whether the body's activities involved potential government interests[193] such that the state would have stepped in, *but for* the body.[194] Generally, delegates are appointed to perform functions that the delegator has an interest in seeing performed. If a putative delegator has no interest in the function that a putative delegate is performing, the two are in fact unlikely to *be* delegate and delegator. The 'but for' test is best understood as only an indicator of a relationship of delegation; and indeed, courts treat passing the test as neither a necessary nor sufficient condition for amenability.[195]

Finally, the delegation theory also makes sense of why judicial review is often[196] excluded where the challenged action is based on a contract between the claimant and defendant.[197] When there is a contract between a non-state body and a non-state person empowering the body to act, the body is not exercising the power of parliament or Crown. It is exercising its own contractual power based on the contract *with the claimant.*[198] The exercise of this contractual power suggests that the main relationship in play is not that of the non-state body and parliament or Crown as delegator. Thus, Lord Diplock says that such bodies are not amenable to judicial review because they are not 'empowered by public law'.[199] We can say now, more precisely, that they were not empowered (directly or indirectly) by parliament or the Crown.

The legal tests just discussed are helpful heuristics. The delegation theory, as developed in this section, tells judges what the heuristics are *for*: to identify the existence of relationships of delegation between the non-state body and parliament or the Crown. This offers judges a coherent account of the tests, as indicators of delegation, and a way to assess the relative weight that they should place on each test.

The delegation theory also has the potential to guide the development of the law on *de facto* powers. For instance, there is uncertainty about whether the existence of a contract between the government and a non-state body is relevant for amenability of the body to review.[200] The delegation theory reveals that the better view is that the existence of such a contract is neither here nor there, as far as amenability to judicial review is concerned; this view better fits the doctrine.[201] For such a contract does not preclude a relationship of delegation of the kind of that the delegation theory argues is at the heart of judicial review.

In sum, understanding bodies exercising de facto powers as delegates of parliament or the Crown makes sense of judicial review doctrine. These delegates may exercise their delegators' powers indirectly rather than

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[193] For exceptions, see *R (Weaver)* v *London and Quadrant Housing Trust* [2009] 1 All ER 17 and *R (McIntyre)* v *Gentoo Group Ltd* [2010] EWHC 5 (Admin).

[194] For example *R* v *Insurance Ombudsman Bureau, ex p Aegon Life Assurance Ltd* [1994] CLC 88; Elliott and Varuhas, n 75 above, 139-140. Judges have suggested that where the claimants have access to other remedies in private law, there is no need for judicial review: Sir Thomas Bingham MR in *Aga Khan* n 115 above, 924.

[195] Bingham MR in *Aga Khan ibid*, 924.

[196] *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, 409.

[197] It is sometimes suggested that the existence of this kind of contract counts against judicial review as in *Servite* n 160 above.

[198] For support see *Leonard Cheshire* n 171 above at [53]; P. Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 *Law Quarterly Review* 551.

[199] *Datafin* n 58 above, 839 *per* Sir John Donaldson MR.

[200] See works cited in note 188 above.

[201] *Kennedy* v *Charity Commission* n 90 above, 525 *per* Lord Toulson.

directly. They may be delegates through implicit understandings, rather than express grants of legal powers. Courts have implicitly or explicitly acknowledged this kind of delegated power and the 'subtlety and sometimes complexity of the way in which it can be exerted.'[202] This enhanced understanding of the doctrine relating to judicial review of non-state bodies should enable better informed debate about the justifiability of such review, as well as the justifiability of any expansion of review to monopolies or other powerful non-state actors.[203]

THE ROLE OF JUDGES AND THE PUBLIC

This paper has argued that the internal rationale for judicial review doctrine proposed by the delegation theory makes sense of the grounds and scope of judicial review. This section argues that this internal rationale also fits with the roles of judges and the public in judicial review, once the nature of the delegation relationship is understood. The role of judges and the public in judicial review makes sense when we take into account that from the internal perspective, administrators are delegates of parliament or the Crown, *where the purpose of the delegation is to benefit the public*.

Courts have described the powers of administrators as being for the 'service',[204] 'good', 'benefit', 'purposes', 'protection' and 'interest' of the public.[205] Instruments empowering administrators – whether statutory or prerogative – are similarly regarded as benefitting the public, not administrators, parliament or the Crown.[206] Principles of statutory interpretation conceive of arliament as 'serv[ing] public interest'[207] and, as discussed in 'Review of the crown's powers' below, the Crown is understood in judicial review as the personification of the common weal.[208] Thus for a closer (but not necessarily perfect) analogy with the private law of agency, we must specify that the principal's purpose (and the agency contract)[209] is to benefit the public,[210] meaning that the agent must act for this purpose.[211]

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[202] J. Varuhas, 'The Reformation of English Administrative Law? "Rights", Rhetoric and Reality' [2013] *Cambridge Law Journal* 369, 410.

[203] D. Bailey and L. Norbury, *Bennion on Statutory Interpretation* (London: LexisNexis UK, 7th ed, 2017) 688;

[204] *ibid*.

[205] As McLean argues, judicial review understands '[t]he Crown, as representative of the public … [and thus] harmed, for example, when an official acts fraudulently or in abuse of office – regardless of whether that official was appointed by the Crown': McLean, n 6 above, 210.

[206] Putting aside the particular complications raised by the privity rule in the context of agency contracts; R. Merkin (ed), *Privity of Contract* (London: Routledge 2013) 32-38.

[207] The contract would be 'largely and primarily' for the benefit of 'third party' members of the public (*Maumee Valley Elec Co* v *Toledo* 13 F.2d 98, 104 (6th Cir. 1926)). See also Contracts (Rights of Third Parties) Act 1999, s 1.

[208] R.C. Nolan, 'Controlling Fiduciary Power' [2009] *Cambridge Law Journal* 293, 297-304.

[209] While the paper is focussed on common law doctrine, see Cane, n 3 above, 6 on the judicial responsibility for coherence and consistency across judicial interpretation of legislation and common law.

[210] P. Cane, *Administrative Law* (Oxford: OUP, 2011) 286.

[211] McLean, n 6 above, 210; H. Wade, *Administrative Law* (Oxford: Clarendon Press, 2nd ed, 1967) 116.

When it is appreciated that, from the internal perspective, delegation to administrators is for the benefit of the public, the delegation theory fits standing doctrine in judicial review. The judicially-developed doctrine[212] relating to the 'sufficient interest' test recognises public interest standing[213] as an alternative to standing based on a personal interest. Both types of claimants – whether claiming personal or public interest – might be expected to have the motivation to effectively hold administrators to account for breach of their duties, ultimately vindicating the public interest. This view of standing doctrine fits with Wade's explanation of the form of judicial review ('R v …'): the Crown 'lends its prerogative' to claimants to bring actions for judicial review 'to ensure good and lawful government'.[214]

Further, if delegation to administrators were for the benefit of the public, we would expect remedies in judicial review to track public interest. Again, this is what we find. Even when administrators breach their duties, a remedy will not be granted when this conflicts with the public interest in finality or decisiveness, for instance.[215]

At this point, someone might wonder: if administrators are best understood as delegates, where delegation is for the benefit for the public, how does judicial involvement fit with the delegation theory? Why do courts not leave the delegators (parliament or the Crown) or the beneficiaries (the public) to hold administrators to their duties? At least part of the internal rationale lies in the value of access to courts, articulated in *R (on the application of UNISON)* v *Lord Chancellor*,[216] which is applicable to cases involving delegation in both public and private law.

In a dispute, even where mediation or negotiation are options, 'the party in the stronger bargaining position will always prevail' unless there is 'knowledge on both sides that a fair and just system of adjudication will be available if they fail'.[217] Given the usual power differential between a member of the public and the administrator, it is easy to see why courts would not be deterred from judicial review by the possibility of members of the public holding administrators to account themselves.

Parliament's potential role in holding administrators to account would not prevent judicial involvement either. This may be in part rationalised by reference to the costs associated with a principal managing their agent. Imagine that you have an agent who has failed in their duties: they acted outside the scope of their mandate and lost your money as a result. This is just one of many potential costs associated with using an agent.[218] You could admonish the agent for this failure and seek to mitigate the resulting harms. Your agent might accept that they acted wrongly and make amends. But instead, the agent might dispute this, claiming that your mandate, correctly understood, extended to their actions; that you are biased in your own cause; and that

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[212] *R* v *Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 1 WLR 763; J. Varuhas, 'Taxonomy and Public Law' in M. Elliott, J. Varuhas and S. Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart Publishing, 2018) 67.

[213] *R (on the application of UNISON)* v *Lord Chancellor* [2017] UKSC 51.

[214] *ibid* at [72]

[215] D. Rave, 'Two Problems of Fiduciary Governance' in Criddle, Fox-Decent, Gold, Hui Kim and Miller (eds), n 71 above, 52; S. Isacharoff and D. Ortiz, 'Governing Through Intermediaries' (1999) 85 *Virginia Law Review* 1627, 1638, 1641-1645.

[216] R. Flannigan, 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* 285, 288-290.

[217] Text to n 100-108 above.

[218] A. Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 *University of Toronto Law Journal* 1, 3.

your loss was due to your unwise instructions. As you want to treat the agent fairly, you spend time and resources considering their response to your admonishment. These are further costs of using an agent. If you have a leadership role in a large organisation with multiple agents and sub-agents, your potential costs are even steeper.

Through agency law, courts respond to the potential costs, and the potential mischief, associated with the use of agents who are trusted by principals.[219] An impartial adjudicator, with specialised expertise on dispute resolution and the power to enforce their decisions, addresses at least some of the costs, inefficiencies and unfairness associated with unresolved or badly-resolved agent-principal disputes. This is why no-one thinks that there is anything wrong with judges deciding whether there has been a breach of an agency duty.

Similar costs and mischief accompany delegation to administrators; judicial involvement might therefore be rationalised in a similar way, particularly given that the duties of agents in private law are similar to the duties of administrators.[220] These rationales might be thought to hold despite the possibility of parliament checking its own delegates. After all, even 'avowed political constitutionalists'[221] accept that some decisions – for example on weighing evidence, appropriate process and the requirements of procedural fairness – are best left to judges rather than parliament.[222] Finally, the fact that delegation to administrators (in contrast to most agents in private law) is for the public benefit might provide further support for judges' role in judicial review.

An interpretive theory of legal doctrine cannot completely rationalise the exact degree of judicial involvement because judicial practices of restraint, such as non-justiciability[223] and deference, are strongly influenced by contextual and pragmatic considerations such as cost and relative institutional capacity. But principles deducible from such judicial practices broadly align with the delegation theory, as demonstrated by Paul Daly's account of deference; this account is based on the considerations underlying legislative delegation to administrators of powers varying in degree and scope.[224]

More generally, thinking about judicial review in terms of delegation also partially makes sense of why there is so much heat in the debates between legal and political constitutionalists,[225] though it cannot settle these debates. Return to the example of your many agents. Is it more efficient for you or a court to try to enforce the agents' duties? Assuming that going to court would result in a fairer, but less efficient, outcome, should greater fairness be sacrificed for greater efficiency? These are difficult questions to answer in a private principal-agency relationship. We should not be surprised that they are much more difficult to answer in, say, a parliament-administrator relationship, where parliament's ability to check administrators is heavily disputed.[226] The difficulty of determining when administrators are best checked by courts, rather than (say) parliament, may also

[219] *ibid*, 6-7.

[220] B.V. Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 *Cambridge Law Journal* 631, for a model of justiciability in judicial review.

[221] These considerations include relative expertise, democratic legitimacy and complexity. Daly, n 89 above, 36-136.

[222] P. Craig, 'Political Constitutionalism and Judicial Review' in C. Forsyth, M. Elliott, S. Jhaveri, A. Scully-Hill and M. Ramsden (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (New York, NY: OUP, 2010).

[223] Elliott, n 1 above, 1-2.

[224] Varuhas, n 215 above 67.

[225] Elliott and Varuhas, n 75 above, 455.

[226] For example Allan, n 73 above, 223.

suggest why courts have wide discretion when it comes to remedies in judicial review[227] and why they so often use declarations, rather than coercive remedies.[228]

So the delegation theory fits with – is able to rationalise – the legal doctrine on the role of judges and the public in judicial review. We can see how from the internal perspective, the law is coherent and might be thought to be justified. (As emphasised earlier, this claim is consistent with the law being unjustified because for example other considerations weigh in favour of stronger or weaker judicial power or involvement by the public).

THE RELATIVE VIRTUES OF THE DELEGATION THEORY

The delegation theory aims to construct the *best* internal rationale for judicial review doctrine. Defending this theory therefore requires a comparison with other interpretive theories of the type sought to be developed in this paper. While it is impossible to do justice to these in the available space, three categories of interpretive theory will be considered to highlight the relative virtues of the delegation theory.

Consider first, Trevor Allan's influential theory justifying judicial review by reference to individual rights and interests.[229] It would be impossible to fully expound or evaluate Allan's complex theory in the space available,[230] so the focus will be Allan's exhortation to understand public law 'primarily as protecting individual rights'.[231] The delegation theory compares well to Allan's theory on perhaps the most vital criterion for the success of an interpretive theory – *fit*.[232]

Judicial review clearly protects individual rights, for example through requirements relating to procedural fairness as well as the principle of legality which requires administrators to show that they have acted proportionately when they interfere with fundamental rights in exercising their statutory powers.[233] Human

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[227] For example his argument that we can understand 'the purposes and operation' of judicial review in terms of justice, fairness and equality, understood in a particular way: Allan, *ibid*, 172-173. For a discussion, see D. Dyzenhaus, 'Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism by T.R.S. Allan (1995) 45 *University of Toronto Law Journal* 205.

[228] Allan, n 73 above, 214.

[229] We have already noted Allan's reluctance to think of judicial review in terms of specified grounds in section V.

[230] *R* v *Secretary of State for the Home Department, ex parte Leech* [1994] QB 198; *Pham* v *Secretary of State for the Home Department* n 90 above, 1629-1630; *R (Daly)* v *Secretary of State for the Home Department* [2001] 2 AC 532; *Ex p Simms* [2000] 2 AC 115 at [131] *per* Lord Hoffmann.

[231] Daly, n 89 above, 19-21.

[232] J. Varuhas, 'The Reformation of English Administrative Law? "Rights", Rhetoric and Reality' [2013] *Cambridge Law Journal* 369, 379. See McLean, n 6 above, 235 for how ultra vires review only protects individual rights (if at all) by happenstance.

[233] T. Poole, 'Questioning Common Law Constitutionalism' (2005) 25 *Legal Studies* 142, 161; see McLean, *ibid*, 200 for examples of the prevalence of these disputes in the early 20th century.

rights discourse has had a profound effect on the evolution of the *Wednesbury* test and review for proportionality.[234] But as Jason Varuhas argues,

> it remains difficult to imagine how significant and traditional doctrines of review such as improper purpose, delegation, relevant considerations, bias, review for factual error, and 'bog-standard' *vires* review, which forms the central plank of many review challenges … could be recalibrated around a right-centred approach.[235]

Intra-governmental disputes, particularly, the availability of judicial review *to* government actors, sits uneasily with a rights-focussed theory of judicial review.[236] Allan's theory does not fit with judicial review doctrine on standing which allows public-spirited individuals and groups to bring cases even when their individual rights are not affected,[237] or with judicial review remedies, particularly the limited availability of damages.[238] Allan's right-centric account sits uneasily with the common conception of duties in judicial review as 'owed to the public at large rather than to individuals'.[239] Allan's account of judges exercising 'independent', even 'personal', moral judgement[240] does not accord with their self-description.[241] Overall, Allan's theory – despite its appeal – contrasts with the 'traditional British understanding of the practice'.[242]

In the second category of interpretive theories are theories of fiduciary government, including judicial review,[243] according to which 'public officials enjoy a position of power and owe obligations comparable to those of agents, trustees and other fiduciaries'.[244] The delegation theory has strong resonance with such fiduciary theories, but it differs significantly, if subtly. These differences allow the delegation theory to evade

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[234] See Varuhas, n 235 above, 381-382, 410-411.

[235] *ibid*, 383-384.

[236] McLean, n 6 above, 205.

[237] Allan, n 79 above, 185, 199.

[238] T. Poole, 'Dogmatic Liberalism? T. R. S. Allan and the Common Law Constitution' (2002) 65 *Modern Law Review* 463, 476.

[239] T. Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 *Oxford Journal of Legal Studies* 435.

[240] L. Sossin, 'Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law' (2003) 66 *Saskatchewan Law Review* 129; E. Criddle, 'Fiduciary Foundations of Administrative Law' 2006 54 *UCLA Law Review* 117; E. Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: OUP, 2011).

[241] E. Criddle, E. Fox-Decent, A. Gold, S. Hui Kim and P. Miller, 'Fiduciary Government: Provenance, Promise, and Pitfalls' in Criddle, Fox-Decent, Gold, Hui Kim and Miller (eds), n 71 above, 1; Miller, n 78 above.

[242] Criddle, Fox-Decent, Gold, Kim and Miller, *ibid*, 7; T. Endicott, 'Equity and Administrative Behaviour: A Commentary' in P. Turner (ed), *Equity and Administration* (Cambridge: Cambridge University Press, 2016) 367-379; R. Nolan, 'Controlling Fiduciary Power' (2009) 68 *Cambridge Law Journal* 293, 302; Miller, n 78 above, 22-23.

[243] For example note language of 'beneficiary' in E. Leib, D. Ponet and M. Serota, 'Mapping Public Fiduciary Relationships' in A. Gold and P. Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford: OUP, 2014) 397 and 'trust' and 'beneficiary' in T. Endicott, 'The Public Trust' in Criddle, Fox-Decent, Gold, Hui Kim and Miller (eds), n 71 above.

[244] The difference this makes is noticed in Criddle, Fox-Decent, Gold, Kim and Miller, n 244 above, 6.

much of the criticism directed at fiduciary theories. Unlike fiduciary theories, which are criticised for lack of fit with legal doctrine,[245] the delegation theory is highly attentive to doctrine. Further, criticisms of fiduciary theories aimed at the parallels they draw between officials and *trustee-type* fiduciaries[246] do not implicate parallels the delegation theory draws between administrators and *delegates or agents*.[247] Finally, the delegation theory is unaffected by controversies over 'whether and … how conventional fiduciary duties can be extended from bilateral relationships to public administration for diverse constituencies'.[248] Unlike fiduciary theories which centre on the relationship between the state or state officials (as fiduciaries) and 'the people' as beneficiaries,[249] the delegation theory centers on the relationship between parliament and the Crown (as principals) and administrators (as agents). The delegation theory thus evades many objections raised against the indeterminacy,[250] imprecision[251] and challenges[252] associated with the diverse beneficiaries at the heart of fiduciary theories.

The third and final category of theory features the rule of law. On first blush, the rule of law – broadly understood as an ideal that condemns arbitrariness, unconstrained discretion and government unrestrained by law – seems a good candidate rationale for judicial review doctrine. The rule of law may appear to be a promising fit for a body of law which holds administrators to account for unlawful action and unreasonable exercise of discretion, in addition to breach of other duties. Legislative acknowledgement[253] of the rule of law as a constitutional principle and judicial acknowledgement of its significance in judicial review[254] enhance its attractiveness as a rationale.

[245] *ibid*, 7; Endicott, n 246 above.

[246] Leib, Ponet and Serota, n 246 above, 396. However, sometimes voters are characterised as fiduciaries: Rave, n 218 above, 51, fn 17.

[247] Criddle, Fox-Decent, Gold, Kim and Miller, n 244 above, 6.

[248] Leib, Ponet and Serota, n 246 above, 397.

[249] Criddle, Fox-Decent, Gold, Kim and Miller, n 244 above, 7.

[250] Constitutional Reform Act 2005, s 1.

[251] *R* v *Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 (HL); see Turpin and Tomkins, n 113 above, 119-125.

[252] Dyzenhaus, n 9 above.

[253] T. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: OUP, 2003) 125.

[254] Elliott, n 1 above, 109-110.

Unsurprisingly then, the rule of law features heavily in theories justifying[255] or evaluating[256] judicial review or arguing for its constitutional basis.[257] However, there has been no detailed systematic *interpretive* account of how a coherent defined understanding of the rule of law rationalises the particular features of judicial review doctrine, such as the grounds of review.[258] This may be because the ideal of the rule of law has grown to require not just Fullerian principles relating to certainty, stability and consistency, but natural justice, access to courts, moral and political rights, socio-economic rights, legal literacy and even more.[259] It is perhaps challenging to offer an interpretive theory based on such a protean and imprecise concept[260] – as opposed to common social phenomena, like promises[261] or delegation – whose basic features and normative force are well-understood.

Overall, the delegation theory has attractions even over its most sophisticated competitors, particularly those based on individual rights, fiduciary relationships and the rule of law. It is on this basis that it is defended here as the best internal rationale for judicial review doctrine.

However, it would be a mistake to view the ideas and ideals underpinning other theories merely as potential bases for competitors to the delegation theory. The delegation theory also reflects the importance of many of these ideas and ideals,[262] including the rule of law and the protection of fundamental rights. According to the delegation theory, administrators' moral duties *qua* delegates of parliament or the Crown include duties to further and protect the purposes and special concerns of their delegator; and to take into account the considerations, and keep within the limits, that their delegator implicitly or explicitly dictates. But against what background are the delegator's purposes, concerns, considerations and limits to be understood?[263]

The rule of law and the protection of fundamental rights, courts tell us, are a prominent part of that background. Courts interpret the intentions and purposes of parliament and the Crown, and thus the duties of their delegates, against a social, political and legal background which respects these and other constitutional

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[255] See D. Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 *Oxford Journal of Legal Studies* 257, 265 for similar criticism. See D. Dyzenhaus, 'Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review?' in Forsyth (ed), n 1 above, 172 for how such an account might be developed. Mark Elliott is clear that his focus is not on the grounds of judicial review (Elliott, n 1 above, 12, 105, 106.)

[256] See P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' in R. Bellamy (ed), *The Rule of Law and the Separation of Powers* (London: Routledge, 2005); N. Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' (2004) 17 *Ratio Juris* 474.

[257] Turpin and Tomkins, n 113 above, 97; S. Nason, *Reconstructing Judicial Review* (Oxford: Hart, 2016) 56; Tomkins, n 228 above, 7; Elliott, n 1 above, 100.

[258] C. Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 2009).

[259] As already mentioned, there are strong resonances between the delegation theory and fiduciary theories of government.

[260] To put it differently: 'against what background of values and principles is power to be read?' Galligan, n 258 above, 273.

[261] *R* v *Secretary of State for the Home Department, ex p Pierson* n 254 above, 587 *per* Lord Steyn.

[262] *ibid*.

[263] T. Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 69 also ties enforcement of rule of law to statutory interpretation.

principles. 'Parliament does not legislate in a vacuum',[264] and 'unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law'[265] as well as other constitutional principles.[266] Similarly, as the section headed 'Review of the crown's powers' argued, the idealised Crown (as delegator) would never intend to act beyond the scope of her powers, which are limited by the common law, understood as including constitutional principles[267] such as the rule of law and respect for fundamental rights. Thus the delegation theory anticipates the prominence of these ideals in judicial review doctrine and shows how judicial review is both capacious – accommodating plural values and principles – and coherent at the same time.

CONCLUSION

The idea that administrators are delegates of parliament and the Crown is deeply embedded in public law. It turns out that unpacking this idea yields a simple theory which makes sense of judicial review. This paper argued that the best internal rationale for judicial review doctrine is that it holds administrators to their moral duties *qua* delegates of parliament or the Crown. The paper sketched the features of delegation and the significant moral duties of administrators by elaborating on three aspects – mandate, effectuate and expressive – of these relationships of delegation. The paper showed how the grounds of judicial review reflect these moral duties that administrators might be thought to possess *qua* delegates of either parliament or the Crown. The paper then sought to make sense of judicial review of the Crown's powers by exploring the implications of the idea that administrators are delegates, set alongside a key characteristic of the Crown in judicial review: idealisation. It argued that the internal rationale identified by the delegation theory can also make sense of judicial review of de facto powers. The paper also argued that the role of judges and the public in judicial review makes sense when we take into account that, from the internal perspective, the purpose of delegation to administrators is to benefit the public. Finally, the paper sought to show that the delegation theory has significant virtues compared to its competitors.

No theory will fit every aspect of legal doctrine, especially not in a field where the law is dynamic and sometimes uncertain. But the delegation theory fits 'most of the core elements'[268] of judicial review doctrine. It fits practically all major grounds of review, the doctrine relating to the scope of judicial review and the role of judges and the public. The delegation theory also makes sense of similarities between the duties of delegates across public and private law. The internal rationale identified by the delegation theory reveals the coherence of judicial review doctrine and why judicial review 'merits a single label or title'.[269] By showing how grounds of judicial review reflect administrators' significant moral duties (from the internal perspective) as delegates of parliament or the Crown, the delegation theory shows why judicial review might be thought to be justified by legal actors. Since the delegation theory closely reflects judicial reasoning, it does not need to impute deceit or

[264] *Miller No 2* n 11 above at [40]-[49].

[265] Smith, n 2 above, 13.

[266] *ibid*, 12.

[267] See generally, Michelon, n 20 above.

[268] For an argument for how this duty should be 'translated' into public law in a different jurisdiction, see D.T. Rave, 'Politicians as Fiduciaries' (2013) 126 *Harvard Law Review* 671; E.J. Leib, David Ponet, and Michael Serota, 'Translating Fiduciary Principles into Public Law' (2013) 126 *Harvard Law Review Forum* 91. Given the increasing recognition of the continuities between private and public law, one can imagine agency duties further influencing grounds of review.

[269] Sometimes described as normative consilience, see Michelon, n 20 above.

hidden motives to judges. The delegation theory thus satisfies the criteria identified in the second section of this paper relating to fit, coherence, morality or justification and transparency.

Interpretive theories like the delegation theory are valuable for predictive, normative, reformatory and pedagogical reasons. Judges (not just scholars) offer interpretive theories when they identify abstract rationales for past cases, and they may base their decisions on those rationales.[270] This paper develops the same rationale for judicial review offered by judges who, over a number of cases, identified administrators as delegates of parliament or the Crown. By elucidating the rationale, and how it is reflected in case law, the delegation theory might help predict the future course of the law. For instance, judges in future cases, the delegation theory suggests, would be unlikely to roll back the proper purpose doctrine in a way that undermined the logic of administrators as delegates; at the same time, it would be in line with that logic for judges to recognise further duties of administrators qua delegates, for example by creating further public law parallels of duties on agents in private law, such as the duty of loyalty.[271]

Interpretive theories like the delegation theory are also normative, offering guidance to judges. The rationale for a legal doctrine is typically what gives it coherence.[272] If judges have a reason to develop the common law so that it remains coherent, then an interpretive theory (at the very least) is a constraint on how judges may develop the doctrine. Judges should not develop the law in ways that undermine the identified rationale so that the doctrine becomes incoherent. They should not for instance develop the law such that bodies which do not qualify as delegates of parliament or Crown (for example private corporations with no connection to either) were amenable to judicial review; such a development would create incoherence.

Interpretive theories are normative in a stronger sense as well. When interpretive theories identify a rationale for existing law, chances are that rationale is potentially applicable to cases that the law does not yet cover. If the rationale for judicial review doctrine is to hold administrators to their moral duties *qua* delegates of parliament or the Crown, then where further (but as yet unrecognised) moral duties of this kind are convincingly demonstrated, judges have a reason (from the internal perspective) to extend the common law to recognise them. This is not to say that judges ought *all-things-considered* to extend the common law in this way, for countervailing considerations may apply. Considerations of fairness, limits of judicial legitimacy and capacity, and constitutional circumscription of the role of judges may count against judges developing the common law in

[270] As it did in the text to 200-201 above.

[271] As it did in the text to 200-201 above.

[272] As it did in the text to 200-201 above.

a particular case. But the rationale identified by the delegation theory is (at the very least) a reason (from the internal perspective) to extend the law to include hitherto legally unrecognised moral duties of administrators *qua* delegates of parliament or Crown. Thus the delegation theory can contribute to the accuracy of assessments of the legitimacy and justifiability of exercises of judicial power by making it easier to understand whether a judge has overstepped, or merely extended the rationale for judicial review doctrine to a new set of facts.

The delegation theory, by identifying and elaborating on the internal rationale for legal doctrine, also has the potential to contribute to the quality of legal reform. Reform which overlooks this rationale overlooks a key consideration for whether and how the law should be reformed, and may misfire because it fails to apprehend how legal officials understand the law. To effect coherent reform, a reformer also needs to understand whether and how judicial review makes sense as an area of law and how (if at all) the different part of the law fit together. Imagine a proposal to develop the law such that judicial review were available on grounds unrelated to delegates' duties, for example the unpopularity of the administrative action amongst judges. The delegation theory offers a touchstone which allows us to conclude when such proposals would adversely impact the coherence of judicial review. Finally, the enhanced understanding of legal doctrine offered by the theory should be valuable, for practical reasons, to administrators, lawyers, judges and law students. The delegation theory, by making sense of judicial review doctrine, can help guide administrative behaviour; law is more effective where it makes sense to those it addresses. Where there is uncertainty about what the law is, the delegation theory can help us see which contested position fits better with the rest of the doctrine;[273] this should be valuable to lawyers and judges. And though the pedagogical benefits of interpretive theories are often overlooked, the delegation theory might well offer a powerfully intuitive way for law students to learn about judicial review doctrine.

[273] As it did in the text to 200-201 above.