

## Democratizing Common Law Constitutionalism

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The Legacy of *Roncarelli v. Duplessis*, 1959-2009  
L'héritage de l'affaire *Roncarelli c. Duplessis*, 1959-2009

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### Résumé de l'article

Le constitutionnalisme de *common law* est la théorie selon laquelle les principes juridiques tels que l'équité et l'égalité résident dans la *common law*, sont constitutifs de la légalité et guident (ou devraient guider) l'interprétation des lois lors du contrôle judiciaire. Cet article se base sur le jugement du juge Rand dans l'affaire *Roncarelli c. Duplessis* pour développer une conception démocratique et relationnelle du constitutionnalisme de *common law*. Par « démocratique », l'auteur entend une version de la théorie qui gouverne le contrôle judiciaire mais qui est mise à la disposition des principaux décideurs indépendamment de l'histoire ou de la pratique contemporaine du contrôle. Par « relationnelle », l'auteur entend une théorie qui présuppose une relation quasi-fiduciaire et significative d'un point de vue juridique entre les autorités publiques et les personnes qui sont assujetties à leur pouvoir.

Selon la théorie démocratique et relationnelle, la légalité de l'action administrative est examinée à la lumière des principes juridiques constitutifs de la relation quasi-fiduciaire et sans faire référence à la séparation des pouvoirs. Ces principes sont issus non seulement de la nature quasi-fiduciaire de la relation, mais aussi de la recherche d'une façon pour les autorités publiques de détenir un pouvoir discrétionnaire sur les individus sans toutefois les assujettir à la domination ou à l'instrumentalisation.

## DEMOCRATIZING COMMON LAW CONSTITUTIONALISM

*Evan Fox-Decent\**

Common law constitutionalism is the theory that legal principles such as fairness and equality reside within the common law, are constitutive of legality, and inform (or should inform) statutory interpretation on judicial review. This article looks to Justice Rand's judgment in *Roncarelli v. Duplessis* to develop a democratic and relational conception of common law constitutionalism. By "democratic" the author means a version of the theory that governs judicial review but which is available to front-line decision makers independently of the history and contemporary practice of review. By "relational" the author means a theory that presupposes a trust-like and legally significant relationship between public authorities and the persons subject to their power.

Under the democratic and relational theory, the legality of administrative action is assessed in light of legal principles constitutive of the trust-like relationship and without reference to the separation of powers. These principles flow from the trust-like nature of the relationship and the implications of working out how public authorities can hold discretionary power over individuals without subjecting them to domination or instrumentalization.

Le constitutionnalisme de *common law* est la théorie selon laquelle les principes juridiques tels que l'équité et l'égalité résident dans la *common law*, sont constitutifs de la légalité et guident (ou devraient guider) l'interprétation des lois lors du contrôle judiciaire. Cet article se base sur le jugement du juge Rand dans l'affaire *Roncarelli c. Duplessis* pour développer une conception démocratique et relationnelle du constitutionnalisme de *common law*. Par « démocratique », l'auteur entend une version de la théorie qui gouverne le contrôle judiciaire mais qui est mise à la disposition des principaux décideurs indépendamment de l'histoire ou de la pratique contemporaine du contrôle. Par « relationnelle », l'auteur entend une théorie qui présume une relation quasi-fiduciaire et significative d'un point de vue juridique entre les autorités publiques et les personnes qui sont assujetties à leur pouvoir.

Selon la théorie démocratique et relationnelle, la légalité de l'action administrative est examinée à la lumière des principes juridiques constitutifs de la relation quasi-fiduciaire et sans faire référence à la séparation des pouvoirs. Ces principes sont issus non seulement de la nature quasi-fiduciaire de la relation, mais aussi de la recherche d'une façon pour les autorités publiques de détenir un pouvoir discrétionnaire sur les individus sans toutefois les assujettir à la domination ou à l'instrumentalisation.

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## Introduction

Common law constitutionalism is the theory that legal principles such as fairness and equality reside within the common law, are constitutive of legality, and inform (or should inform) statutory interpretation on judicial review.<sup>1</sup> Because the principles of the common law are settled through the gradual accretion of judicial precedents, they are presumed to embody the deep-seated values of the community. Judges are thus entitled to rely on those principles when they perform their rule of law duty and read down statutes to keep the administration in check. Common law constitutionalism, in other words, is usually understood as a theory about the rule of law and the role of judges as the rule of law's guardians.

Justice Rand's judgment in *Roncarelli v. Duplessis*<sup>2</sup> has become the Canadian standard-bearer for the rule of law. His reigning in of Duplessis's abuse of discretionary power sits comfortably with the conventional understanding of common law constitutionalism, as depicted above. Yet we will see below that Justice Rand's explicit arguments fail to respond convincingly to Justice Cartwright's dissent. We will also see that common law constitutionalism is vulnerable to several objections pressed recently by Thomas Poole.<sup>3</sup> The burden of this paper is to show that Justice Rand's judgment presupposes a democratic conception of common law constitutionalism capable of answering both Justice Cartwright's dissent and Poole's objections. By "democratic" I mean a version of the theory that governs judicial review but which is available to front-line decision makers independently of the history and contemporary practice of review.

Justice Rand's common law constitutionalism, I claim, consists in more than an aversion to arbitrariness in public decision-making. Implicit in his judgment is a presumption that arbitrariness has legal significance, and that presumption relies on viewing public actors and the people subject to their powers as standing in a legally significant relationship to one another. In Canadian public law scholarship, the shape of this relationship was first noticed by Roderick Macdonald in 1987. He observed:

When viewed through the eyes of the primary decision-maker, the act of applying a statutory rule can be understood as a response to the legislative direction (which may be either explicit or tacit) to take responsibility for administering the statute by virtue of which

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<sup>1</sup> See e.g. T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) [Allan, *Constitutional Justice*].

<sup>2</sup> [1959] S.C.R. 121, 16 D.L.R. (2d) 689 [*Roncarelli* cited to S.C.R.]. I assume familiarity with the facts of the case, as presented in the introduction to this Special Issue: Geneviève Cartier, "L'héritage de l'affaire *Roncarelli v. Duplessis*, 1959–2009" (2010) 55 McGill L.J. 375.

<sup>3</sup> Thomas Poole, "Constitutional Exceptionalism and the Common Law" (2009) 7 Int'l J. Const. L. 247 [Poole, "Constitutional Exceptionalism"].

the particular power is exercised. In so responding, the statutory decision-maker acts no differently than a trustee administering a trust indenture.<sup>4</sup>

I interpret Macdonald to be saying that legislatively delegated power begets responsibility for statutory interpretation and administration, and that this responsibility is legally significant (in part at least) because statutory decision-makers are in a trust-like relationship with the public. I also interpret him to be saying that this trust-like relationship and its implications may be apprehended fully “through the eyes of the primary decision-maker,”<sup>5</sup> and so do not depend on judicial review.

In Part I, I argue that the major elements of Justice Rand’s reasoning presuppose Macdonald’s relational and democratic conception of public law. Without the relational and democratic conception in place (or a conception substantially similar to it), Justice Cartwright’s approach to discretion remains a viable alternative defensible on principled grounds. In Part II, I consider a number of Poole’s objections to common law constitutionalism. I suggest that the relational theory offers fresh replies to them, while taking on board many of Poole’s important concerns.

## I. The Constitution of Discretion

Discretionary power is a bugbear for liberal legalists. On its face, discretion stands in tension with the principle of formal equality according to which like cases are to receive like treatment. If a decision maker has true discretionary power, it seems she must be free to decide like cases differently. If she is not so empowered, then it seems more apt to describe her task as the application of a statutory rule rather than the exercise of discretionary power. And if she is free to decide like cases differently, then it appears that the affected individual is subject to the arbitrary will of the decision maker—to domination—rather than to stable and predictable rules consistent with the rule of law.

Yet discretionary power is a salient and arguably necessary feature of modern administrative states. To take a common example, consider the disciplinary power held by self-regulating professional organizations. When a professional organization imposes a discretionary sanction on a wayward member, it must weigh the public interest against the interest of the impeached individual, taking into account the particular circumstances of the case. No legislature can foresee the circumstances of every case, nor determine the best balance of the competing interests. Only the professional organization’s discretionary power enables it to fashion

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<sup>4</sup> Roderick A. Macdonald, “On the Administration of Statutes” (1987) 12 Queen’s L.J. 488 at 493.

<sup>5</sup> *Ibid.*

remedies appropriate to a given case and its wider context. In this sphere and others, discretion is necessary to the context-sensitive (and, plausibly, normatively best) implementation of public policy. Its existence, however, poses a challenge from the standpoint of the rule of law injunction to treat like cases in a like manner.

The judgments of Justices Cartwright and Rand in *Roncarelli* provide two distinct and credible answers to this challenge. In his article in this issue, Robert Leckey seeks “to unsettle the accepted wisdom that on that matter the majority adopted the sole credible option.”<sup>6</sup> We shall see that much can be said in favour of Justice Cartwright’s judgment, and that, read charitably, it poses several difficult challenges that Justice Rand never really confronts explicitly. Indeed, the argument that follows depends crucially on the idea that Justice Cartwright’s opinion is credible and defensible in the absence of a relational theory to ground Justice Rand’s major assumptions.

Justice Cartwright’s reasoning relied heavily on article 35 of the *Alcoholic Liquor Act*, which stated that the “[Quebec Liquor] Commission may cancel any permit at its discretion.”<sup>7</sup> The statutory discretion was not expressly qualified or limited in any way. Justice Cartwright held that the Commission enjoyed an “unfettered discretion” to grant or revoke licences.<sup>8</sup> He adopted the argument of Duplessis’s counsel, which reflects the position many judges have taken toward discretionary decision-making:

Under the Statute, no one has a pre-existing right to obtain a permit, and the permit being granted under the condition that it may be cancelled at any time, and no cause of cancellation being mentioned and no form of procedure being indicated, the cancellation is a discretionary decision of a purely administrative character.<sup>9</sup>

In other words, because there is no pre-existing right to obtain a permit, nor conditions placed on when it may be cancelled, holding a permit is a privilege that may be revoked at any time, for any reason, and without the benefit of a hearing. Justice Cartwright thus adopts a

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<sup>6</sup> Robert Leckey, “Complexifying *Roncarelli*’s Rule of Law” (2010) 55 McGill L.J. 721 at 725. Leckey focuses on Fauteux J.’s dissent, and makes a compelling case that *Roncarelli*’s overarching rule of law message cannot be properly understood without attending to the sense in which Fauteux J. sought to vindicate a particular understanding of the rule of law by taking a statutory and procedural bar to the action seriously. As my purpose here is simply to use *Roncarelli* as a vehicle to show how discretion can be brought into a democratic conception of common law constitutionalism, I prescind from making claims about what *Roncarelli* is really about, and limit discussion to the judgments of Rand and Cartwright JJ.

<sup>7</sup> R.S.Q. 1941, c. 255, s. 35, cited in *Roncarelli*, *supra* note 2 at 139.

<sup>8</sup> *Ibid.* at 167.

<sup>9</sup> *Ibid.*

“rights/privileges” distinction under which privileges are subject to the unfettered discretion of the decision maker. And the rights/privileges distinction, in his view, tracks a deeper “law/policy” distinction that distinguishes courts from administrative tribunals in terms of their institutional roles within legal order. Whereas the legislature has a monopoly on lawmaking, courts have a monopoly on the interpretation of law, and therefore a monopoly on the determination of legal rights and obligations.<sup>10</sup> Administrative bodies have a monopoly on implementing statutory policy, but the administration’s monopoly on policy is not understood to involve determinations of law (or at least it is not understood to involve determinations of law that could carry any weight on judicial review).

Justice Cartwright cited *Re Ashby*<sup>11</sup> to support the judicial/administrative and law/policy distinctions he sought to defend. Whereas judges deal in “legal rights and liabilities” established by statute or “long-settled principles” of the common law, administrative tribunals base their decisions on “policy and expediency.”<sup>12</sup> On this view, an administrative tribunal, “within its province, is a law unto itself.”<sup>13</sup> An administrative tribunal is simply politics writ small, where decisions are based on “policy and expediency”, unconstrained by legal norms and standards. So long as the administrative tribunal acts within its province, it is free to act as “a law unto itself”.

Justice Cartwright’s answer to the problem posed by discretion, then, is to deny discretion standing as a legal institution. He views discretion as a political rather than a legal feature of public administration: to think that discretion conflicts with the rule of law is to suppose errantly that exercises of unqualified discretion are susceptible to control by legal principles. Since for him discretion is not controlled by legality, and does not enjoy standing as a legal institution, it is irrelevant to the principle that like cases must receive like treatment. In short, Justice Cartwright’s reply to the problem of discretion is to say that there is no problem at all, since discretion is extralegal while the principle of formal equality is quintessentially legal.

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<sup>10</sup> The “monopoly” vocabulary is from Paul Craig’s characterization of Dicey’s vision of unitary democracy, a kind of democracy in which the legislature is the supreme and only lawmaker, and the legitimacy of the judiciary and the executive issues from their respective mandates to interpret and implement legislation. See P.P. Craig, *Administrative Law*, 5th ed. (London, U.K.: Sweet & Maxwell, 2003) at 4-7.

<sup>11</sup> [1934] O.R. 421, 3 D.L.R. 565 (C.A.) [*Re Ashby* cited to O.R.].

<sup>12</sup> D.M. Gordon, “Administrative’ Tribunals and the Courts” (1933) 49 L.Q.R. 94 at 106-107, cited in *Re Ashby*, *supra* note 11 at 428, Masten J.A., cited in *Roncarelli*, *supra* note 2 at 167.

<sup>13</sup> *Ibid.*

Justice Rand took a very different approach. He held that “there is no such thing as absolute and untrammelled ‘discretion’, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator.”<sup>14</sup> Discretion, Justice Rand said, “implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.”<sup>15</sup> He concluded that to permit without recourse the suspension of a licence critical to one’s livelihood “according to the arbitrary likes, dislikes and purposes of public officials acting beyond their public duty” would signal “the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional scheme.”<sup>16</sup>

In ascribing an unwritten constitutional status to the rule of law, Justice Rand went further than saying that in this particular case discretionary power had been used for an improper or unauthorised purpose. He insisted that “no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.”<sup>17</sup> As David Mullan suggests, this aspect of Justice Rand’s judgment points to “a common law (or common sense) perspective of what would generally be impermissible under *any* Act.”<sup>18</sup> This perspective is of a piece of common law constitutionalism because it treats the common law as a repository of principles that constitute the rule of law and control the interpretation of statutes.<sup>19</sup>

For Justice Rand, the absence of a statutory requirement limiting permit revocations to specific causes was of no consequence because, for him, the grant of any legal power carries with it an obligation to exercise the power non-arbitrarily. This prohibition against arbitrariness has a positive and a negative dimension. The positive side is that public powers must be used exclusively for the purposes for which they are conferred.

<sup>14</sup> *Roncarelli*, *supra* note 2 at 140.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* at 142.

<sup>17</sup> *Ibid.* at 140 [emphasis added].

<sup>18</sup> David J. Mullan, “Judging the Judgment of Judges: *CUPE v. Ontario (Minister of Labour)*”, Case Comment, (2003) 10 C.L.E.L.J. 431 at 450 [Mullan, “Judging the Judgment”].

<sup>19</sup> See e.g. Allan, *Constitutional Justice*, *supra* note 1; Mark D. Walters, “The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51 U.T.L.J. 91; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) [Dyzenhaus, *Constitution*]; Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State” in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 77.



This aspect is positive in the sense that it looks to the actual legislation in play to limit administrative decision-making to action consistent with the statute's purposes. The negative dimension of the proscription against arbitrariness reflects Mullan's "common law (or common sense) perspective":<sup>20</sup> even broad grants of discretion do not authorize decision makers to use public power arbitrarily. Regardless of what the substantive aim of a particular statute happens to be, the presumption is that the aim is to be pursued through non-arbitrary exercises of public power. The justification of this presumption is that the arbitrary use of power, by definition, does not concern itself with statutory purposes. This side of the prohibition against arbitrariness is negative in that it does not depend on a particular legislative scheme or purpose, but rather imposes a default condition on the exercise of public powers. Putting the positive and negative dimensions together, the following rule of law principle emerges from Justice Rand's judgment: public powers may be used only for the purposes for which they are conferred, and the purposive exercise of public power precludes its arbitrary use.

Justice Rand's answer to the problem of discretion, then, is to insist that decision makers are under a legal obligation to use it non-arbitrarily. This answer does not imply that like cases will necessarily receive like treatment in the sense that all cases of a certain type will be decided for (or against) the individual. In a given decision-making context, there may be more than one non-arbitrary or reasonable way to exercise a particular power.<sup>21</sup> But Justice Rand's answer does imply that like cases will receive like treatment in a wider, purposive sense: every case decided under a particular statute will be evaluated in light of that statute's purpose, and no case will be decided on the basis of irrelevant considerations. As a consequence, individuals are not subject to the arbitrary will of decision makers, but to public law regimes structured by public purposes. Domination is thereby ruled out because arbitrariness is prohibited.<sup>22</sup>

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<sup>20</sup> Mullan, "Judging the Judgment", *supra* note 18 at 450.

<sup>21</sup> Legitimate expectations may arise if a public body decides a particular kind of case a certain way over a period of time, and these expectations would lead to complications I cannot address here. Put briefly, the conception of public law I attribute to Rand J. would imply that once an agency follows one among several reasonable policies for a period of time, the agency would be under an obligation to justify deviations from that policy in particular cases. If the agency does otherwise, it fails to treat the prejudiced individual with the solicitude she is due under Rand J.'s conception of public law. For discussion of the legitimate expectations doctrine in Canada, see *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281 at paras. 22-38, Binnie J.

<sup>22</sup> For the argument that Rand J.'s judgment rests on the republican principle of non-domination, see David Dyzenhaus, "Rand's Legal Republicanism" (2010) 55 McGill L.J. 491 [Dyzenhaus, "Rand's Legal Republicanism"]. Non-domination plays a central, animating role within the relational theory defended here. Roughly, non-domination sup-

Justice Cartwright, however, has a principled reply. The reply is that Justice Rand, in lionizing the rule of law, has given short shrift to another unwritten constitutional principle, the separation of powers. And in his disregard for the separation of powers, the reply goes, Justice Rand has imposed limits on public power that the legislature alone is entitled to impose. As Justice Cartwright observes, the Quebec authorities had some basis in statute for revoking Roncarelli's licence, since on its face the *Alcoholic Liquor Act* gave the Commission an unqualified discretion to cancel permits at any time. While Justice Rand attempts to defend his view in part on the basis of statutory interpretation, the statute itself is at least unclear with respect to the breadth of the discretion conferred. The legislature could have limited the grounds of revocation, just as it qualified the grounds of approval in certain cases, but had declined to do so. Thus, Justice Rand must resort to arguments related to good faith in the discharge of public duty and the common law perspective within which legislation is presumed to operate.

These arguments are unlikely to convince judges sympathetic to Justice Cartwright's position. For them, the permit is a privilege, and thus it falls on the privilege side of the rights/privileges distinction they support. Courts protect rights while administrative bodies extend privileges. The courts, therefore, have no business interfering with political and discretionary decisions concerning privileges because privileges lack underlying legal entitlements. Moreover, if courts treat Roncarelli's permit as a thing to which he had a right extinguishable only under certain conditions, they infringe the separation of powers by in effect rewriting the statute and imposing legal limits without legislative warrant.

The challenge posed by the rights/privileges distinction is to explain how an interest in an acquired liquor permit can underlie a right to hold it that is defeasible only on grounds related to the purposes of the *Alcoholic Liquor Act*. The challenge posed by the separation of powers is to explain how judges can have authority to impose on front-line decision makers a legal obligation to exercise unqualified discretion on limited grounds. The deeper and more interesting challenge, however, is to explain why we should think that decision makers are under a legal obligation *at all* to order revocations on only limited grounds.

Perhaps they are under no obligation. Assuming for the sake of argument that non-arbitrariness is a deep-seated common law value, it does not follow that decision makers are under an obligation to act in accordance with it; not everything of moral value denotes a moral (much less legal) duty. Heroic sacrifices are morally valuable, but they are heroic

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plies the content of the public law obligation to exercise discretion non-arbitrarily, while the relational theory explains why front-line decision makers are under an obligation to so exercise their discretion, and why that obligation is legal in nature.

precisely because the hero's sacrifice is supererogatory. The gap between value and duty entails that there is no inconsistency in supposing that a principle of non-arbitrariness (or non-domination) is intrinsic to the common law but that the legislature alone is authorized to give it legal effect. And even if the value-duty gap can be bridged, it remains to be seen why the duty is legal rather than simply moral in nature. As every first-year student of contract law comes to know, not every morally binding promise is also legally binding. That which is morally required is not, without some concomitant legal indicia, legally required.

In sum, a theory is needed that can close the value-duty gap while explaining the legal nature of the decision maker's purported duty. The theory must also explain the authority of judges to impose such a duty, and why a mere economic interest in a permit can ground it. To make matters more difficult still, if the theory is to be one of common law constitutionalism, it has to call on concepts developed by the courts, and yet if it is to be democratic in the sense that it is specifiable independently of judicial review, the decision maker's obligation should be explicable without reference to the historical role of judges on review. That is, the theory must explain how the obligation can be normatively independent of judicial review, while also explaining how judges can have institutional authority to impose the obligation without the prompt of statute.

The theory I will call on to address these issues is Macdonald's hypothesis that primary decision-makers stand in a trust-like and legal relationship to the people affected by their decisions—i.e., to the public at large and to individuals such as Roncarelli who are touched directly by an exercise of public power. A number of scholars have developed this theory by drawing parallels between private legal relationships with a trust-like character—fiduciary relationships—and the position of public authorities vis-à-vis the people subject to them.<sup>23</sup> In the remainder of this section I

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<sup>23</sup> See e.g. Paul Finn, "Public Trust and Public Accountability" (1994) 3 Griffith L.R. 224; Paul Finn, "The Forgotten 'Trust': The People and the State" in Malcolm Cope, ed., *Equity: Issues and Trends* (Sydney: Federation Press, 1995) 131 [Finn, "Forgotten 'Trust'"]; Paul Finn, "A Sovereign People, A Public Trust" in P.D. Finn, ed., *Essays on Law and Government: Principles and Values*, vol. 1 (North Ryde, N.S.W.: Law Book Company, 1995) 1 [Finn, "Sovereign People"]; Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 L.Q.R. 238; Hon. J.J. Spigelman, "Foundations of Administrative Law: Toward General Principles of Institutional Law" (1999) 58:1 Austl. J. of Pub. Admin. 3; Lorne Sossin, "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law" (2003) 66 Sask. L. Rev. 129; Evan J. Criddle, "Fiduciary Foundations of Administrative Law" (2006) 54 UCLA L. Rev. 117. For some of my reflections on the topic, see Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31 Queen's L.J. 259 (defending the claims made in the subsequent text about the nature of trust-like or fiduciary relationships) [Fox-Decent, "Fiduciary Nature"]. See also Evan Fox-Decent, "Fashioning Legal Authority from Power: The Crown-Native Fiduciary Relationship" (2006) 4 N.Z.J.P.I.L. 91; Evan Fox-Decent, "Is the Rule of Law Really Indiffer-

show how the theory can answer the challenges raised by Justice Cartwright's dissent and thereby provide a deep structure to both Justice Rand's vision of common law constitutionalism and the place of discretion within legality.

### *A. The Rights/Privileges Distinction*

Trust-like or fiduciary relations can generate obligations protective of vulnerable interests with respect to which the beneficiary has no right apart from the entitlement arising from the fiduciary relationship. In other words, the fiduciary's obligation and the beneficiary's right are relationship-specific and may be grounded on "practical" as well as legal interests.<sup>24</sup> So corporations have a right to loyalty from their directors and officers with respect to business opportunities, but have no right to either loyalty or those opportunities against the world.<sup>25</sup> Similarly, under Justice Rand's vision of public law, Roncarelli had a right to non-arbitrary decision-making against public authorities, notwithstanding his lack of an independent right to a liquor permit. Within the relational approach, the right to security against arbitrariness is explained as the legal consequence of the trust-like relationship between Quebec authorities and Roncarelli. The relationship arises from the power delegated to administer the liquor control regime, and this relationship implies a legal obligation to administer the regime consistently with the purposes for which the power is granted. As with other fiduciary relations, the correlative right is specific to the relationship in question and can attach to Roncarelli's practical interest in the permit. That Roncarelli had no freestanding right to the permit is irrelevant because all that needs to be defended is a relationship-specific right to non-arbitrary treatment. Thus, the relational theory explains and justifies Justice Rand's assumption that the rights/privileges distinction is irrelevant.

### *B. The Separation of Powers and Judicial Activism*

The objection based on the separation of powers trades on the idea that the legislature alone is entitled to create legal rights and obligations, and so judges overstep if they impose constraints that lack a legislative anchor. Judges in the Rand camp can attempt to answer the objection by falling back on legislative intent; the legislature is said to have intended its statute to operate in accordance with the relevant limit or constraint.

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ent to Human Rights?" (2008) 27 Law & Phil. 533; Evan Fox-Decent & Evan J. Criddle, "The Fiduciary Constitution of Human Rights" (2009) 15 Legal Theory 301.

<sup>24</sup> See e.g. *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136, 42 D.L.R. (4th) 81. See also *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 276, 92 D.L.R. (4th) 449.

<sup>25</sup> See e.g. *Canaero Aero Service v. O'Malley* (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371.

Justice Rand gestures in this direction when he writes that “there is always a perspective within which a statute is intended to operate.”<sup>26</sup> One of the difficulties of this approach, however, is that it places considerable weight on the forgetfulness or oversight of the legislature. This is especially problematic with statutes such as the *Alcoholic Liquor Act* in *Roncarelli* in which some grants of discretionary power are expressly limited while others are unqualified. In these cases it appears that the legislature did turn its mind to the issue of legal limits on discretionary power within the statutory scheme.

The relational theory charts an entirely different course, explaining why the separation-of-powers worry is misguided, and indeed why the separation of powers is irrelevant to the assessment of the legality of administrative action. The separation of powers is misguided because it presupposes that judges illegitimately make law by imposing obligations on decision makers without statutory warrant. On the relational theory, judges are simply recognizing rights and duties intrinsic to and constitutive of the trust-like relationship between public authorities and the affected party. Judges who enforce such rights and duties no more infringe on the law-making authority of the legislature than judges who uphold rights and duties arising from contract or tort in private law. Even if such adjudication is in some sense judicial lawmaking, it is the kind of lawmaking that common law judges engage in on a routine basis.

The bolder claim is that the separation of powers is irrelevant to determinations of the legality of administrative action—determinations that must be made by primary decision-makers at first instance as well as judges on review. The separation of powers is irrelevant because, on the relational theory, the criteria for assessing the legality of administrative action are supplied by a limited set of legal principles constitutive of the underlying trust-like relationship. It is beyond the scope of this paper to defend the set in more than general terms, but it includes: a prohibition on fraud and corruption; procedural fairness; formal equality or evenhandedness; solicitude in the sense of taking seriously the legitimate interests and human rights of individuals subject to public power; transparency; proportionality; reason-giving where important interests are at stake; and purposiveness in the sense of Justice Rand’s principle that public powers must be used exclusively for the purposes for which they are conferred.<sup>27</sup> The violation of any of these principles would offend the

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<sup>26</sup> *Roncarelli*, *supra* note 2 at 140.

<sup>27</sup> For discussion of several of these principles and their derivation from a fiduciary theory of public authority, see Evan Criddle & Evan Fox-Decent, “A Fiduciary Theory of Jus Cogens” (2009) 34 *Yale J. Int’l L.* 331 [Criddle & Fox-Decent, “Jus Cogens”]. For discussion of these principles from the same theoretical perspective in the context of U.S. administrative law, see Evan J. Criddle, “Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking” (2010) 88 *Texas L. Rev.* 441.

central idea that public decision-makers occupy a trust-like position vis-à-vis the people they serve, where every agent subject to public power is necessarily regarded as an equal co-beneficiary of the rule of law. Each principle is justified as a necessary and constituent part of the trust-like relationship.

The trust-like relationship itself is normatively grounded on respect for the agency of persons subject to irresistible public power. In this trust-like relationship, the imperative to respect agency reflects the demands of a Kantian idea of dignity, and crystallizes in two intermediary principles that connect respect for agency to the more determinate legal principles set out above. One of these intermediary principles is the idea that persons are to be treated as ends always (the principle of non-instrumentalization), while the other is the republican idea that individuals are not to be subject to arbitrary power (the principle of non-domination). Non-domination complements non-instrumentalization in the following way. Whereas non-instrumentalization prohibits public actors from wrongfully interfering with their subjects, non-domination bars them from holding arbitrary power that ipso facto would pose a wrongful threat because it could be exercised wrongfully at any time. In other words, non-instrumentalization controls the actual exercise of power, while non-domination controls the threat implicit in the mere possession of power, and so non-domination controls the terms of its possession. Roncarelli suffered domination because Quebec authorities interpreted the *Alcoholic Liquor Act* to give themselves arbitrary power. He suffered instrumentalization because they wrongfully used that assumed power to cancel his permit. Legal principles such as fairness, purposiveness, and reason-giving provide a bulwark against the possession and use of arbitrary power, and thereby embody in a more determinate form the requirements of non-instrumentalization and non-domination.

With determinate legal principles in place, we can see why the separation of powers is irrelevant to the legality of administrative action. The separation of powers is usually deployed to restrict judicial review on the grounds that the legislature alone is authorized to make law. These grounds are formal in the sense that they rely on formal distinctions made between the role of the legislature and the role of the judiciary, and between interpreting law and making law. As a result of its formalism, the separation of powers can offer no substantive guidance to the legitimate scope of judicial review,<sup>28</sup> making a contentious retreat to legislative intent almost inevitable. Now, to be sure, the legal principles set out above constitute a fairly substantial framework to assess the legality of administrative action. But the framework is limited to more or less those

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<sup>28</sup> For more discussion, see David Dyzenhaus, "Formalism's Hollow Victory" (2002) N.Z.L. Rev. 525.



very principles, all of which are derived from the trust-like relationship between public authorities and the people. Because the principles arise from this legal relationship, affirmation of them does not usurp the legislative lawmaking role. So the separation of powers is respected willy-nilly, but it no longer does any work as an analytical tool on judicial review. Instead, the legal principles arising from the trust-like relationship do the work. It follows that once we have in view the relational theory and its implications, the separation of powers is irrelevant to determinations of the legality of administrative action.

### *C. The Content and Legal Nature of the Obligation in Roncarelli*

As noted already, Justice Rand held that Quebec authorities were under an obligation to revoke liquor permits on grounds related exclusively to the purposes for which the power was conferred. The relational theory explains the content of the obligation because in all trust-like or fiduciary relationships, discretionary power is held for limited and other-regarding purposes (i.e., for purposes that further certain interests of some person or persons other than the entrusted party), and the power must be exercised exclusively for the sake of the other-regarding purposes for which it is conferred. This is precisely the content of the principle of purposiveness Justice Rand affirmed. Furthermore, the “must” here is a legal must because trust-like or fiduciary relationships are legal relationships. They are legal relationships because, in Kantian and republican terms, their structure and normative presuppositions guarantee *de jure* that the parties in them are subject to neither instrumentalization nor domination. So the relational theory explains both the content and legal nature of the basic obligation in *Roncarelli*. In so doing, the theory also provides a legal framework for discretion. This framework ensures that individuals are respected as participants in and co-beneficiaries of a regime of public purposes and legal principles; they are not left to the arbitrary choices of others. The relational theory thus explains how public law can shield individuals from domination, and it provides the resources for a remedy should they suffer an abuse of power and instrumentalization.

Readers might question whether the fiduciary idea is appropriate to the public law context because the hallmark fiduciary obligation of private law is a duty of loyalty, whereas in public law the decision maker often must weigh the interest of the affected individual against the public interest. I have argued elsewhere that in the public setting, where both the public at large and the affected individual are considered beneficiaries, the overarching fiduciary duty necessarily becomes a duty of fairness and reasonableness.<sup>29</sup> Within this framework, more concrete obligations such

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<sup>29</sup> Fox-Decent, “Fiduciary Nature”, *supra* note 23 at 264-68. This is also the overarching duty that applies at private law when fiduciaries must exercise their power over multi-

as duties of procedural fairness and reason-giving are generally owed to individuals directly touched by public power. But the decision maker must also take account of the public interest, as the public too is a beneficiary of public power.

Bearing in mind both the private duty of loyalty and the public duty of fairness and reasonableness, a more general formulation of the fundamental fiduciary obligation can be adduced: at its most general, the fiduciary's basic obligation is to exercise her other-regarding power exclusively for the purposes for which it is held. Arguably, this general fiduciary obligation tracks precisely Justice Rand's principle of purposiveness because public power is always fiduciary in nature. In practice this means that although courts on review must not advance the applicant's best interests to the exclusion of the public interest (as might seem warranted on an overly literal application of the fiduciary concept to the public realm), courts must endeavour to interpret statutory terms and purposes in a way that is solicitous of the applicant's legitimate interests. Courts must so endeavour because statutory powers, under the relational theory, are authorized on behalf of and for the benefit of every person subject to them, including the applicant who comes before the court on judicial review.

#### *D. Normative Independence from Judicial Review*

While the relational theory serves to delimit the scope of judicial review, it is specifiable independently of review. To put the point starkly, if judges in the common law world had never engaged in judicial review, the underlying relationship between public authorities and the people would still be trust-like, and the approach of judges to trust-like relationships in other domains could still be plumbed for the purpose of developing a framework for assessing the legality of administrative action. As a consequence, the relational theory provides a unified account of the legality of administrative action that is as accessible and relevant to primary decision-makers as it is to judges on review. By distinguishing legality from judicial review, the theory democratizes common law constitutionalism by showing that its favoured principles are not the result of judicial fiat. Rather, they are the constitutive norms of a shared legal order that all public bodies are responsible for maintaining on behalf of the people. The relational theory explains and justifies certain elements of judicial review, as we have seen in the case of Justice Rand's judgment, but it does so from a critical perspective internal to law that gives no weight to the hierarchical authority of judges to quash agency determinations.

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ple classes of beneficiaries with competing claims. See e.g. *Equitable Life Assurance Society v. Hyman*, [2000] 2 W.L.R. 798, [2000] 2 All E.R. 331 (C.A.), aff'd (2000), [2002] 1 A.C. 408, [2000] 3 W.L.R. 529 (H.L.); *Edge v. Pension Ombudsman* (1999), [2000] 3 W.L.R. 79, [1999] 4 All E.R. 546 (C.A.).



## II. Reframing Common Law Constitutionalism

I argue now that the relational theory can help common law constitutionalists answer their critics. One of those critics, Thomas Poole, has marshalled an impressive array of arguments against common law constitutionalism,<sup>30</sup> turning his attention more recently to David Dyzenhaus's extension of the theory to the emergency powers context.<sup>31</sup> Poole criticizes Dyzenhaus for failing to specify "with a requisite degree of detail, what those hard-edged values are which derive from the common law and give substance to the rule of law."<sup>32</sup> He acknowledges that Dyzenhaus points to equality, due process, fairness, reasonableness, and sensitivity to human rights, but objects that Dyzenhaus's catalogue "tells us nothing about where the chosen values come from, save that they are inherent in the very notion of legality, which, given that this is precisely the subject in dispute, rather begs the question."<sup>33</sup> I will refer to this criticism as the *circularity objection*.

Poole further claims that the common law values Dyzenhaus affirms are indeterminate in that they "do not offer a coherent blueprint for judicial decision making."<sup>34</sup> He objects as well that Dyzenhaus has failed to show why "common law values should outweigh (always? generally?) other, countervailing values, such as security or even national self-preservation."<sup>35</sup> I will call this the *indeterminacy objection*.

Poole also challenges Dyzenhaus and other common law constitutionalists for relying on a falsely Whiggish history of the common law. Within the Whiggish account, Lord Coke's readiness to place substantive controls

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<sup>30</sup> See e.g. Thomas Poole, "Dogmatic Liberalism?: T.R.S. Allan and the Common Law Constitution", Book Review of *Constitutional Justice: A Liberal Theory of the Rule of Law* by T.R.S. Allan, (2002) 65 Mod. L. Rev. 463; Thomas Poole, "Questioning Common Law Constitutionalism" (2005) 25 L.S. 142; Thomas Poole, "Legitimacy, Rights and Judicial Review" (2005) 25 Oxford J. Legal Stud. 697. For Canadian public lawyers, Poole's work will call to mind the provocative scholarship of Harry Arthurs and Allan Hutchinson. See e.g. H.W. Arthurs, "Protection Against Judicial Review" (1983) 43 R. du B. 277; H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1; Allan C. Hutchinson, "Judges and Politics: An Essay from Canada" (2004) 24 L.S. 275; Allan C. Hutchinson, *Evolution and the Common Law* (Cambridge: Cambridge University Press, 2005).

<sup>31</sup> Poole, "Constitutional Exceptionalism", *supra* note 3; Dyzenhaus, *Constitution*, *supra* note 19; David Dyzenhaus, "*Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?" (2006) 27 Cardozo L. Rev. 2005; David Dyzenhaus, "The Puzzle of Martial Law" (2009) 59 U.T.L.J. 1.

<sup>32</sup> Poole, "Constitutional Exceptionalism", *supra* note 3 at 264 [footnote omitted].

<sup>33</sup> *Ibid.* [footnote omitted].

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* at 265.

on Parliament in *Dr. Bonham's Case*<sup>36</sup> is cast as the timeless emblem of the common law's rule of reason, whereas, Poole claims, it "should be seen ... as an outlier within this tradition."<sup>37</sup> In other words, when common law constitutionalists are pressed to provide a source for the values they esteem, they frequently resort to cherry-picking cases that ill-represent the broader history of the tradition. Moreover, Poole alleges that common law constitutionalists mischaracterize the common law as mainly a tradition of legal principles, when in fact its history has been much more dominated by rules, procedures, maxims, professional practices, and questions of jurisdiction, writs and remedies. I will call this the *historical objection*.

Underlying all of these objections is scepticism of judicial review, or at least scepticism of the idea that judges occupy a position of "first among equals" when it comes to determining and policing the limits of legality.<sup>38</sup>

The three objections may be thought to combine in the following way. To avoid the circularity objection, common law constitutionalists look to the history of judicial review to show that common law values are deeply embedded in the tradition and therefore deserve the privileged attention of judges on review. But if the historical objection is sound (and here, I assume that it is), common law constitutionalists are relying on a skewed vision of the values that historically animated the common law. Without an historical argument to underpin the theory, common law constitutionalists face a dilemma. On the one hand, they can resort to a Dworkinian approach according to which law aspires to embody the avowed principles of liberal political morality, such as equality and autonomy. But then the rule of law collapses into a restatement of liberal political morality and loses its distinctiveness as an autonomous and guiding ideal of the common law legal order. On the other hand, common law constitutionalists can insist that their preferred values are somehow intrinsic to the common law, but then the circularity objection resurfaces. And it is precisely this circularity that gives the indeterminacy objection its punch: without a non-question-begging account of the source and priority of common law values, it is unclear how they are supposed to guide judges who must weigh other considerations against them on review.

The relational theory goes to the heart of this critique by explicitly specifying the source and basis of the principles relevant to assessing the legality of administrative action. The guiding principles do not arise from

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<sup>36</sup> (1610), 8 Co. Rep. 113b, 77 E.R. 638 (Common Pleas) [*Dr. Bonham's Case*]. According to Lord Coke, "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void" (*ibid.* at 652).

<sup>37</sup> Poole, "Constitutional Exceptionalism", *supra* note 3 at 268-69 [footnote omitted].

<sup>38</sup> *Ibid.* at 263, 269-70.

a common law ether as “an exercise in wish fulfillment.”<sup>39</sup> Instead, they constitute the normative dimension of a legally significant trust-like relationship that exists between public authorities and the people. The principles therefore have an intelligible source and a normative framework capable of explaining how they can give rise to concrete duties in public law. Put slightly differently, the story of “where the chosen values come from”<sup>40</sup> is not a bootstrapping insistence that they are inherent to legality, but a separate relational account in which the idea that principles are intrinsic to the common law is presented as the conclusion of the argument rather than as its major premise or an article of faith.

The guiding principles are intrinsic to the common law because they play a constitutive role in the underlying common law and trust-like relationship. Just as the duty of non-interference is a constitutive aspect of tort relationships, duties such as fairness and solicitude are constitutive elements of trust-like relationships in which the entrusted party must on act behalf of multiple parties, as is the case in the public sphere where the public interest is always at stake. The relational theory thus avoids the circularity objection by explaining how its guiding principles are intrinsic to legality; they are intrinsic to legality because they constitute the normative dimension of the trust-like relationship that makes legal order possible.

With respect to the historical objection, the relational theory can grant it because, as discussed already, the theory is specifiable without reference to the historical practice of judicial review. That is, the theory’s framework and principles do not rely on the salience of similar principles within either the celebrated cases from the early seventeenth century, such as *Dr. Bonham’s Case*<sup>41</sup> and *Bagg’s Case*,<sup>42</sup> or more contemporary judgments prized by common law constitutionalists, such as Lord Shaw’s dissent in *R. v. Halliday*,<sup>43</sup> Lord Atkin’s dissent in *Liversidge v. Anderson*,<sup>44</sup> and Lord Hoffman’s opinion in *R. v. Secretary of State for the Home Department*.<sup>45</sup>

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<sup>39</sup> *Ibid.* at 266.

<sup>40</sup> *Ibid.* at 264 [footnote omitted].

<sup>41</sup> *Supra* note 36.

<sup>42</sup> (1615), 11 Co. Rep. 93b, 77 E.R. 1271.

<sup>43</sup> [1917] A.C. 260 (holding that the general regulation-making power under the Defence of the *Realm Consolidation Act, 1914* did not authorize the government to make regulations empowering the Secretary of State to detain individuals without trial). For discussion, see Dyzenhaus, *Constitution*, *supra* note 19 at 157-60.

<sup>44</sup> (1941), [1942] A.C. 206, [1941] 3 All E.R. 338 (finding that a wartime detention regulation permitting detention without trial must be read objectively rather than subjectively). For discussion, see Dyzenhaus, *Constitution*, *supra* note 19 at 23-26.

<sup>45</sup> (1999), [2000] 2 A.C. 115 at 131, [1999] 3 W.L.R. 328 (Lord Hoffman affirming that “[f]undamental rights cannot be overridden by general or ambiguous words”).

The relational theory does, of course, derive some inspiration from the evolution of fiduciary and trust concepts that date back to at least the *fi-deicommissum* of Roman Law.<sup>46</sup> These concepts developed through the doctrines of *utilitas ecclesia* (“for the advantage of the church”) and uses in the Middle Ages. The use was a form of land trust that “entailed the transfer of legal title (*enfeoffment*) to a person who was to hold the property (the *feoffee to uses*) for the benefit of another (the *cestui que use*).”<sup>47</sup> Fiduciary concepts were subsequently developed and extended by courts of equity that supervised trust and “quasi-trust” relationships.<sup>48</sup> While still an academic, Paul Finn pointed out that through the eighteenth and early part of the nineteenth century, English judges viewed the position of public office holders through a trust-like prism.<sup>49</sup> Lord Mansfield characterized public offices in 1783 as offices of “great public trust and confidence.”<sup>50</sup> Taking as its point of departure the trusteeship of public office holders, a body of criminal, civil, and equitable law developed to supervise the use of public power. But by the latter half of the nineteenth century, the work of this “law of offices” was being done by the prerogative writs, and Dicey’s principles of parliamentary sovereignty and the rule of law came to dominate the commonwealth constitutional landscape. The “law of offices” passed into disuse and obscurity.

The relational theory deploys this history to make a very modest point: a trust-like conception of public authority is not inimical to public law in a common law legal order, since public law was once based largely on this very conception. In other words, the relevant history confirms the plausibility of the trust-like conception, and supplies pointers to its normative framework and principles, but does not pretend to be an account of

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<sup>46</sup> See e.g. Ernest Vinter, *A Treatise on the History and Law of Fiduciary Relationship and Resulting Trusts*, 3d ed. (Cambridge: W. Heffer & Sons, 1955) at 2-9 (setting out the Roman influence on the development of modern fiduciary law).

<sup>47</sup> Avisheh Avini, “The Origins of the Modern English Trust Revisited” (1996) 70 Tul. L. Rev. 1139 at 1143 [footnotes omitted].

<sup>48</sup> For historical accounts, see Thomas O. Main, “Traditional Equity and Contemporary Procedure” (2003) 78 Wash. L. Rev. 429; Timothy S. Haskett, “The Medieval English Court of Chancery” (1996) 14 Law & Hist. Rev. 245; Mary Szto, “Limited Liability Company Morality: Fiduciary Duties in Historical Context” (2004) 23 Quinnipiac L. Rev. 61; Sir Frederick Pollock & Frederic William Maitland, *The History of English Law*, 2d ed., vols. 1, 2 (Cambridge: Cambridge University Press, 1968). In this paper I use “common law” in an expansive sense to refer generally to the law developed by judicial authorities, and not in the more technical and precise historical sense in which courts of common law were separate from courts of equity, and exercised a separate jurisdiction. For present purposes, a “common law fiduciary relationship” is meant to refer to a relationship that has its origins in equity, but which is recognized by common law judges today, who exercise concurrent common law and equitable jurisdictions.

<sup>49</sup> Finn, “Forgotten “Trust”, *supra* note 23 at 132-53; Finn, “Sovereign People”, *supra* note 23 at 9-14.

<sup>50</sup> *R. v. Bembridge* (1783), 3 Doug. 679 at 679, 99 E.R. 679.

an ancient constitution that is venerable because it is ancient or a matter of settled judicial custom.

It bears emphasizing that the history relied upon is not a line of select cases, but an entire class of legal relations that govern the myriad circumstances in which one party is empowered to act on behalf of another, leaving the latter vulnerable to the former's discretionary power. The focus on a capacious class of legal relations rather than select (liberal) cases takes the sting out of the cherry-picking complaint. It also bears emphasizing that the lack of normative reliance on the history of judicial review lets the relational theory specify a conception of legality that is independent of review. Common law constitutionalism can therefore be seen in a democratic and ecumenical light because the relational theory sets out a framework of principles whose content does not rely on the threat or practice of review.

The indeterminacy objection is thornier and cannot be addressed adequately here. But to the extent that the principles of common law constitutionalism are held to be indeterminate and incapable of providing guidance because they arise from cherry-picked cases or rely on circular reasoning, we have seen that the relational theory offers a way forward. By specifying a normative framework based on a trust-like relationship, the theory invites inquiry into the sorts of principles that must be upheld to maintain the integrity of that relationship. Relatively few principles would enjoy peremptory or absolute status, but public international law suggests that the set of such principles is far from empty. Here too a fiduciary conception of public authority can explain the peremptory norms of *jus cogens* governing genocide, arbitrary killing, torture, slavery, systemic racial discrimination, prolonged arbitrary detention, corruption, minimal due process, military aggression, and self-determination.<sup>51</sup> Legislation or administration supportive of such policies would deny from the outset the idea that public authorities were acting as public servants and trustees of their people; trustees cannot act as such through policies of deliberate victimization.

In the more ordinary course of events, where important interests are in play but non-derogable human rights are not at stake, principles of procedural fairness and solicitude combine to ensure that the affected in-

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<sup>51</sup> See Criddle & Fox-Decent, "Jus Cogens", *supra* note 27. An anonymous reviewer observes that *jus cogens* in international law is a muddle in its own right, and largely arbitrary with no decent explanatory theory other than that something is *jus cogens* because people keep saying it is and it eventually sticks as such. In the article cited in this note (*ibid.*), Evan Criddle and I attempt to address this concern by showing how the relational and fiduciary theory can yield formal and substantive criteria capable of distinguishing genuine *jus cogens* norms from counterfeits. We have since elaborated on the theory's implications for human rights more generally: see Evan Fox-Decent & Evan J. Criddle, "The Fiduciary Constitution of Human Rights" (2009) 15 *Legal Theory* 301.

dividual has a fair opportunity to participate in the decision-making process, and that her interests are weighed seriously against contending public concerns. Some indeterminacy with regard to outcome is inevitable, especially in hard cases, but indeterminacy is not the same thing as arbitrariness. In so far as the legal principles of the relational theory oust arbitrariness by ousting instrumentalization and domination, it is no discredit to the theory that it cannot predetermine outcomes. Individuals are entitled to a regime of public law in which they do not suffer domination, and to fair procedures and reasonable decisions that do not instrumentalize them. They are not entitled a priori to decisions that favour them, and about which reasonable decision-makers may disagree.

Before closing I wish to respond to two questions raised by participants at this commemorative symposium. The first concerns the practical implications of the relational theory. If the Supreme Court of Canada adopted the theory, what difference in practice might it make to judicial review? Consider first *Canada (A.G.) v. Mossop*,<sup>52</sup> a case in which the majority of the Supreme Court of Canada quashed a decision of the Canadian Human Rights Tribunal on the basis that “family status”, a prohibited ground of discrimination under the *Canadian Human Rights Act*,<sup>53</sup> could not be interpreted to protect the partner of a same-sex couple from discriminatory treatment. According to the majority of the Court, the legislature did not intend to extend protection to same-sex couples because sexual orientation had been left out of the prohibited grounds of the legislation, and because the “usual and ordinary sense” of “family” in Canada, Justice La Forest stated, is the “traditional family”.<sup>54</sup>

Justice L’Heureux-Dubé, dissenting, insisted that the point of human rights statutes is to ensure equality, and that there are statute-independent “fundamental principles” that must be at the forefront of the interpretation of human rights codes.<sup>55</sup> In other words, she subscribes to a common law constitution that contains fundamental values expressive of human rights, such as equality, and these values are to guide statutory interpretation. With this framework in place, it may appear that the work the relational theory intends to do has already been done. Yet cases such as *Mossop* demonstrate that many judges are reluctant to depart from their favoured interpretation of the original intent of the legislature, and others still are reluctant to move beyond their understanding of the “usual and ordinary” meaning of statutory words.<sup>56</sup> Of course, it would be

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<sup>52</sup> [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 [*Mossop* cited to S.C.R.].

<sup>53</sup> R.S.C. 1985, c. H-6.

<sup>54</sup> *Mossop*, *supra* note 52 at 580-82, Lamer C.J.C., Sopinka and Iacobucci JJ. concurring; at 585-86, La Forest and Iacobucci JJ. concurring.

<sup>55</sup> *Ibid.* at 621.

<sup>56</sup> See *supra* note 54 and accompanying text.



naïve to think that any theory of common law constitutionalism might convert a committed originalist, but the fiduciary idea both strengthens Justice L'Heureux-Dubé's argument and exposes the majority's error. As public fiduciaries, tribunals and judges are legally required to endeavour to interpret statutes in a manner solicitous of the well-being of the people subject to them. This requirement is especially demanding when there are no significant competing interests, as was the case in *Mossop*.

Another case that brings to the surface the practical implications of the relational theory is *Dunsmuir v. New Brunswick*.<sup>57</sup> In this case the Supreme Court of Canada reversed its prior holding in *Indian Head School Division No. 19 v. Knight*<sup>58</sup> that "at pleasure" office holders are entitled to procedural safeguards prior to termination. The Court in *Dunsmuir* held that contract law rather than the public law duty of procedural fairness governs the parties upon dismissal. The majority writers, Justices Bastarache and LeBel, found that the Crown as an employer is in much the same position as a private employer, and so the private law of contract applies. They insisted that termination with reasonable notice "cannot be qualified as arbitrary."<sup>59</sup> But here the Court confuses the terms of notice accompanying dismissal with the grounds for dismissal. If a person is dismissed for capricious or irrelevant reasons, then the dismissal is arbitrary in the conventional sense that it is based on irrelevant considerations. No amount of notice can undo this arbitrariness.

Under the relational theory, the Crown is a special kind of employer because it is a public employer, and as such it stands in a trust-like relationship to both the employee and the public at large. Procedural safeguards are owed to public employees given the importance and vulnerability of the employment interest, and the trust-like obligation of public bodies to take seriously the legitimate interests of individuals directly affected by public power. The Crown retains authority to dismiss for policy as well as performance reasons, but under the fiduciary theory it cannot terminate employment arbitrarily; if it could, the Crown's relationship to the employee would be one of domination.<sup>60</sup> Procedural safeguards provide a measure of security against arbitrary dismissal by exposing the grounds of termination and giving the individual an opportunity to be heard. The Crown's countervailing (and equally trust-like) duty to provide efficient administration is given its due under the relational theory because par-

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<sup>57</sup> 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1 [*Dunsmuir*].

<sup>58</sup> [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489 [*Knight* cited to S.C.R.].

<sup>59</sup> *Dunsmuir*, *supra* note 57 at para. 104.

<sup>60</sup> It is no accident that (non-unionized) employment figures prominently as an exemplar of domination in Philip Pettit's major work on non-domination: Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997) at 48-49.

ticipatory rights are restricted to those necessary to let the individual know and reply to the considerations that may be weighed against her.<sup>61</sup> If the individual's credibility is a determining factor, an oral hearing may be required, but in most cases disclosure of the Crown's case and an opportunity to make written submissions will suffice.<sup>62</sup>

The second question raised at the symposium goes to the relational theory's normative underpinnings, and the explanation it offers of the legal nature of public law duties. The discussant noted that judges sympathetic to common law constitutionalism impose common law duties because ultimately they think these duties are just or fair. They view their role in legal order as one that both entitles and requires them to impose public law duties that track justice and fairness. But, he continued, if Poole's circularity and historical objections are sound, then these judges are really just legislating their convictions from the bench. He acknowledged that the relational theory aims to avoid this complaint and explain public law duties by drawing an analogy to the private law of fiduciaries. Yet why should we suppose that when judges impose fiduciary duties of private law they are doing anything more than insisting on what they think is just and fair? And why should sensibilities of justice and fairness at private law enjoy some special privilege over like sensibilities of public law?

To clarify a preliminary issue: the relational theory does not claim that there is simply an analogy to be drawn between the circumstances in which public authorities confront legal subjects and private fiduciary relationships. The claim, rather, is that public institutions actually stand in a trust-like or fiduciary relationship to the people subject to their power. Private fiduciary relations help to reveal the constitutive features of fiduciary relationships, but it is the possession of those actual features—and not an analogy to private law—that makes the relationship between public institutions and the people fiduciary.

The constitutive features of fiduciary relationships may be apprehended by a brief recital of the conditions that give rise to them. Fiduciary relationships arise when one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary). This administrative power is other-regarding, purposive, and institutional; it is held so as to be used on behalf others, for limited purposes, and within the framework of a legal institution such as a family or a corporation. The beneficiary is peculiarly

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<sup>61</sup> The theory thus reflects L'Heureux-Dubé J.'s view that "every administrative body is the master of its own procedure and need not assume the trappings of a court": *Knight*, *supra* note 58 at 685.

<sup>62</sup> See e.g. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at paras. 121-27, 208 D.L.R. (4th) 1.



vulnerable to the fiduciary's power in that she is unable, either as a matter of fact or law, to exercise the entrusted power. The relationship between public institutions and the people subject to them possesses these characteristics. Public institutions hold administrative power that is other-regarding, purposive, and institutional. Moreover, legal subjects, as private parties, are not entitled to exercise it. The relationship between public institutions and legal subjects is therefore fiduciary because it possesses the constitutive features of fiduciary relations.

A relationship in which the fiduciary has unilateral administrative power over the beneficiary's interests can be understood as a relationship mediated by law, however, only if the fiduciary is precluded from exploiting her position to set unilaterally the terms of her relationship with the beneficiary. The fiduciary principle authorizes the fiduciary to exercise power on the beneficiary's behalf, but subject to strict limitations arising from the beneficiary's vulnerability to the fiduciary's power and her intrinsic worth as a person.<sup>63</sup> This Kantian construal of fiduciary relations trades on the idea that legal order consists in the ongoing construction of a regime of secure and equal freedom, a regime marked by an absence of domination and instrumentalization.<sup>64</sup> Because beneficiaries in fiduciary relations cannot exercise or control the power to which they are subject, the law controls it, protecting them from unilateralism, and ensuring their secure and equal freedom. In short, fiduciary duties are legal duties because they safeguard the individual against domination and instrumentalization. Within the relational theory defended here, this is the normative basis of legality and the explanation of why fiduciary duties are distinctively legal duties.

## Conclusion

Admittedly, the relational theory is an ideal theory that does not cohere especially well with the way most judges and commentators today think about the theoretical underpinnings of judicial review. The legislative-intent (or *ultra vires*) theory and mainstream understandings of common law constitutionalism score better on that front. But all three theories share roughly the same methodology—inference to the best explanation—as they attempt to explain common law duties of public law

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<sup>63</sup> When Pettit initially sets out what it would mean for someone to interfere with someone else in a way that does not dominate them, the example he uses (cited by Dyzenhaus, "Rand's Legal Republicanism", *supra* note 22) is a paradigmatic fiduciary relationship: an agent who possesses a power of attorney over another's affairs. See Pettit, *supra* note 60 at 23.

<sup>64</sup> For extended discussion of Kant's theory of right (part of which includes fiduciary relations), and how Kant's theory informs his politics, see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009).

and the appropriate approach to statutory interpretation. I have suggested that the legislative-intent theory is unconvincing, and that common law constitutionalism, as generally conceived, is hard-pressed to explain how common law values translate into legal duties. The conventional understanding of common law constitutionalism is also vulnerable to the objections Poole raises. The relational theory, by contrast, offers principled replies to Poole's circularity and indeterminacy objections, and can grant his historical argument. It can do so by explaining common law duties and principles governing statutory interpretation as constitutive features of a trust-like relationship between public authorities and the people. The relational theory also explains the irrelevance of the separation of powers to assessing the legality of administrative action, while providing a legal framework for discretion respectful of agency because consistent with non-instrumentalization and non-domination. The theory thus supplies a framework for Justice Rand's judgment that reconciles discretion with the rule of law and answers the separation-of-powers argument that supports Justice Cartwright's dissent.

Just as significantly, however, the relational theory democratizes common law constitutionalism by taking seriously, and ecumenically, the actual features of the actual relationship that exists between public authorities and the people. Because this relationship would exist with the same basic features with or without the possibility of judicial review, it can underlie a theory of legality that would remain intact if Canada, through constitutional reform, abolished altogether judicial review of administrative action. By revealing the democratic promise of common law constitutionalism, the relational theory thus reveals the democratic promise of the rule of law.

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