Judicial Review: Substance and Procedure

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Abstract. Here we distinguish two questions about judicial review. First, substance: what acts or decisions are properly subject to the grounds of review? Second, procedure: what acts or decisions are properly reviewable through the judicial review procedure? Then we settle both. Our answer to substance is that two principles determine the scope of the grounds of review, the first a principle of regularity, the second a principle of non-arbitrariness. Our answer to procedure is that acts or decisions are amenable to judicial review when two conditions are met, the first that the grounds of review apply, the second that no alternative procedure adequately enforces those grounds.

INTRODUCTION

The term 'judicial review' refers to at least two things. One is a set of substantive norms against which courts review conduct. These norms form the grounds of review, including *ultra vires*, unreasonableness, and procedural unfairness. The term also refers to a procedure, governed by the Civil Procedure Rules, under which courts review acts and decisions that relate to the exercise of public functions. These two senses of 'judicial review' correspond to two distinct questions.

1. *Substance*: what acts or decisions are properly subject to the grounds of review?
2. *Procedure*: what acts or decisions are properly reviewable through the judicial review procedure?

The answer to the first question tells us the proper scope of the grounds of review. The answer to the second question tells us the proper scope of the judicial review procedure.

It is natural to think the answers to the two questions go hand in hand. In one respect, they do. The judicial review procedure may only be used to

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bring a challenge based on the grounds of review.[1] The converse, however, is not true: the grounds of review may apply to a decision even though it cannot be challenged through the judicial review procedure. Decisions by clubs, churches, unions, sports bodies, and trustees generally cannot be challenged through the judicial review procedure. Nor can decisions by individuals and corporations exercising contractual discretionary powers. Nonetheless, as we will explain, all these decisions can be challenged on the grounds of review.

Neither of our two questions, about substance and procedure, has settled answers in the case law or academic literature. Our aim in this article is to answer both questions. We answer the substance question first. Based on that answer, we answer the procedure question. Since the grounds of review apply widely, a good answer to the substance question will deliver principles that outstrip the judicial review procedure. Conversely, a good answer to the procedure question should reflect the limits, not of the grounds of review, but a particular avenue of their enforcement. Broadly, our answers will be as follows. The scope of the grounds of review is properly determined by two principles, the first a principle of regularity, the second a principle of non-arbitrariness. The availability of the judicial review procedure properly turns on whether there is an alternative procedure by which regularity and non-arbitrariness can be upheld.

Our approach is interpretive in that we seek to identify principles that make sense of the legal materials.[2] The legal materials relevant here are mainly cases. The task is to arrive at principles showing how the cases fit together, in ways which cast the law in its best light.[3] This allows for a principled reconstruction of the law, rather than Tennyson's 'codeless myriad of precedent'.[4] The principles therefore serve a justificatory role. But the point is not to tell judges how to proceed if they were starting from a blank slate. Rather, it is to give an account of what best justifies previous decisions, and to provide guidance to judges bound by those decisions.

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[1] Courts sometimes resolve private law issues in the course of deciding a challenge based on the grounds of review. See e.g. *R (Balding) v Secretary of State for Work and Pensions* [2007] EWCA Civ 1327.

[2] For useful introductions to interpretive theory, see S Smith, *Contract Law Theory* (OUP 2004) ch 1; T Khaitan and S Steel, 'Theorizing Areas of Law: A Taxonomy of Special Jurisprudence' (2022) 28 *Legal Theory* 325, 337ff; F Ahmed and A Perry, 'Interpretive Theory in Public Law' in P Daly and J Tomlinson, *Researching Public Law in Common Law Systems* (Edward Elgar 2023).

[3] R Dworkin, *Law's Empire* (Harvard University Press 1986) 152.

[4] A Tennyson, 'Aylmer's Field'.

There are many ways to flesh out the details of the interpretive approach. We wish to be ecumenical. It is now standard to speak of 'fit' and 'justification' with respect of the legal materials. An account prioritises fit if it minimises the cases to be condemned as wrongly decided, even at the cost of justificatory power. Conversely, an account prioritises justification if it presents the law closer to what we might ideally prefer, even when it disturbs a settled understanding of the legal rules. Setting aside the foundational question of what has ultimate priority for interpretive theory, we will take these two poles of fit and justification as a useful heuristic. Through a process of reflective equilibrium, we aim to deliver an account which to some extent fits and justifies the law. Our account therefore accepts most, but not all, cases as correctly decided. Some prefer to hew closer to the cases. Others prefer greater idealisation for purposes of justification. We take a middle path, seeking to respect both impulses.

SUBSTANCE

To recall, the substance question is: when do the grounds of review properly apply? Initially, the answer might seem obvious. When we think of the bodies whose acts and decisions are liable to be reviewed on these grounds, the examples that come first to mind are ministers, local councils, parole boards, and the like. These are all *public* bodies. It is tempting to generalise and say that the grounds of review only apply to public bodies' acts and decisions.

We should resist that temptation. The acts and decisions of some *private* bodies are also subject to the grounds of review. For example, British Petroleum's decisions can sometimes be reviewed for unreasonableness. The Beefsteak Club, a gentleman's club in London, can have its actions challenged for bias and unfairness. The British Weight Lifters' Association must, on pain of unlawfulness, refrain from acting for improper purposes. A Chief Rabbi's decisions can be reviewed for *ultra vires.*[5] Other examples will come later in this section. For the moment, the point is that the grounds of review apply to decisions and acts of diverse bodies, not only to those of public bodies. Thus, a good answer to the substance question needs to explain what these apparently dissimilar bodies have in common, such that their acts and decisions are reviewable on similar grounds.

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[5] *Shergill v Khaira* [2014] UKSC 33, [47], [58], per Lords Neuberger, Sumption, and Hodge.

Our answer appeals to a principle of regularity and a principle of non-arbitrariness. We consider each principle in turn, first in terms of its justification and then in terms of its fit with the case law.

The Principle of Regularity

A putative exercise of authority is *ultra vires*, relative to a system of norms, when the putative source of authority is a norm of that system, yet no such norm in fact provides that authority. It is *intra vires* otherwise. For a court to review a decision for *ultra vires* is for the court to authoritatively determine whether the decision is *ultra vires*. English courts properly review a decision for *ultra vires* in two situations. The first situation is when there is a dispute about whether a decision is authorised under English law. This is a proper task for English courts for the simple reason that courts have a constitutional duty to settle disputes as to the meaning and applicability of legal norms. A dispute about whether a decision is made under legal authority is a dispute about whether a legal norm applies, such that it authorises the decision. Thus, courts discharge their constitutional duty by reviewing decisions to determine whether they are *ultra vires* English law.

The second situation requires more explanation. Sometimes, the law confers a power to create a non-legal norm. Take, for instance, the legal rule providing for the power to make contracts. By exercising the power to contract, the parties create norms which are not, themselves, laws.[6] Some contractual norms in turn confer authority on one of the parties to, for example, determine that a condition has been satisfied or to impose a penalty. When a decision purports to be authorised under a contractual norm, courts will review it for *ultra vires*. That is, courts will determine whether, in fact, the contract authorises the decision. In addition to contractual norms, the norms found in trusts are also created under law without being laws themselves.

This second type of *ultra vires* review might seem puzzling. On the assumption that a court's proper role is limited to upholding the law, then it should not be for courts to determine whether a decision is *ultra vires* a norm which is not a law. The assumption, however, is false. One of the functions of law is to facilitate people's attempts to arrange their own affairs.[7] The law furthers this function by giving people the power to make norms for themselves. When the law has justifiably given people norm-creating powers, it should support the norms they create. Courts

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[6] J Raz, 'Institutional Nature of Law' (1975) 38 MLR 489, 503.
[7] J Raz, 'The Identity of Legal Systems' (1971) 59 California Law Review 795, 815.

can support those norms by applying them, enforcing them, and—more to the point—settling disputes about their meaning and applicability. For instance, one reason to give people the power to contract is personal autonomy. Through contract people can make norms of their choosing, arranging their own social relationships as they desire. Courts can further personal autonomy by giving effect to people's contractual choices, including to authorise or not to authorise a decision.

These two types of *ultra vires* review can be expressed as strands of a single principle:

> *Principle of regularity*. Courts properly review a putative exercise of authority for *ultra vires* if and only if its alleged basis is either (i) a legal norm or (ii) a norm created under a power conferred by a legal norm.

We call this the principle of regularity because it concerns whether a decision conforms to a given set of norms. Review for *ultra vires* proceeds on the basis that decisions should be regular, in the sense of being in accordance with a set of prior standards.

The principle of regularity is limited to putative exercises of authority, that is, power over others.[8] Of course, courts can and do ask whether exercises of other types of power conform to sets of norms. For example, courts ask whether conveyances, which are the product of mutual agreement, conform to formal requirements. However, the exercise of power over others raises special concerns of arbitrariness, domination, and injustice, as we explain in the next section. The scope of the principle of regularity reflects these distinctive concerns.

Review for Regularity

Having explained the attractiveness of the principle of regularity, we turn now to its fit with the legal materials.

Courts review decisions for misdirection of law in a wide range of cases. Under the first strand of the principle of regularity, courts review putative assertions of statutory or prerogative power for *ultra vires*. In *Anisminic Ltd v Foreign Compensation Commission*[9], the House of Lords found that a tribunal's alleged denial of compensation arose under an error of law with respect of its statutory jurisdiction under the Foreign Compensation

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[8] J Raz, *Practical Reason and Norms* (Princeton University Press 1979) 101 ('A normative power is tantamount to having an authority when it is a power over others.').
[9] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

Act 1950. The decision was therefore *ultra vires*. In the *Case of Proclamations*[10], the King's Bench found that the prerogative did not confer a power to create new offences. The King's effort to supposedly use the prerogative to prohibit the construction of certain new buildings was therefore *ultra vires*.

Under its second strand, the principle applies to alleged exercises of authority under non-legal norms made using legal powers. Decisions ostensibly made using authority conferred under a trust are a good example. Procedural defects in the use of a trustee's authority will lead to voidness. For instance, the exercise of a trustee's alleged authority is void if it comes after the expiry of the authority due to a time limit.[11] Using the wrong document or failing to secure necessary consents will also result in voidness.[12] Substantive defects, too, are within the court's scope of review. For example, trustees cannot, without authorisation, delegate their discretion to others.[13] Any effort to appoint someone who falls outside the class of eligible objects of the power is *ultra vires*.[14] More generally, courts intervene on grounds of *ultra vires* 'if it can be shown that the trustees considered the wrong question'.[15]

Courts will also review putative exercises of contractual powers for *ultra vires*. Courts insist on clear words before accepting the existence of certain contractual powers, such as the power to vary the terms of a contract to the counterparty's detriment.[16] If a contractual power does exist, it must be used in accordance with the contract's express terms. In one case, an employer's discretion to assess a bonus was expressly limited to issues of individual performance.[17] The employer tried to zero-

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[10] *Case of Proclamations* 77 ER 1352, (1611) Co Rep 74 (KB).
[11] *Breadner v Granville-Grossman* [2001] Ch 523.
[12] *Pitt v Holt* [2011] EWCA Civ 197, [96], partly reversed on other grounds in *Pitt v Holt* [2013] UKSC 26.
[13] *Re Morris's ST* [1951] 2 All ER 528 (CA); *Re Hunter's WT* [1963] Ch 372; cf. *Barnard v National Dock Labour Board* [1953] 2 QB 18.
[14] *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch), [189]. Similarly, in a case arising in the Cayman Islands, the terms of a trust expressly required all appointments to be made for the sole benefit of the stipulated beneficiaries. An appointment made for the benefit of a class inclusive of more than the stipulated beneficiaries was therefore void: *Schroder Cayman Bank v Schroder Trust* [2015] 1 CILR 239 (Grand Court).
[15] *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 (HL), 905, per Lord Reid.
[16] *Amberley (UK) Ltd v West Sussex County Council* [2011] EWCA Civ 11, [132], per Aikens LJ; cf. *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL), 131, per Lord Hoffmann.
[17] *Clark v Nomura International* [2000] IRLR 766, [41].

out the bonus, partly because the employee was about to depart.[18] But the departure date did not relate to individual performance, so the court held that the employer had gone beyond its contractual powers.[19] Even assuming an asserted exercise of discretion conforms to a contract's express terms, a court may still intervene when it is otherwise based on a 'misdirection in law'.[20]

Within the category of review of contractual powers, an important type of case involves voluntary associations. Common types of associations include clubs, sports bodies, professional organisations, religious groups, and trade unions. For unincorporated associations, the rules of the association are the terms of a contract between members. For incorporated associations, the corporation's rules and articles of association are the contract's terms. Either way, the association's rules are contractually binding. Courts accordingly require associations to conform to their rules.[21] Consider *Labouchere v Earl of Wharncliffe*.[22] Labouchere was a member of the Beefsteak Club. The club's rules said that it could expel a member on a 2/3 vote of those present at a club meeting. At one meeting, 117 members attended, of whom 77 voted to expel Labouchere. The club concluded that Labouchere was expelled. However, 2/3 of 117 is 78, not 77. Jessel MR thus granted Labouchere an injunction preventing interference with his use of the club.

If someone is not a member of an association, may they still review its decisions for *ultra vires*? The answer is potentially 'yes', because even non-members can be parties to the contract. For instance, in *Davis v Carew-Pole*, Davis had trained a horse for 'point-to-point' races run by the Duchess of Newcastle.[23] The National Hunt Rules said that an unlicensed person 'training and running a horse' is a 'disqualified person'.[24] Davis did not have a license. After a disciplinary hearing, the National Hunt Committee declared him disqualified. Davis had never been a member of the National Hunt association. Yet, by attending the disciplinary hearing, he 'submitted to the jurisdiction of the committee', at which point the two parties became 'linked by contract'.[25] That

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[18] *Clark* [37]-[39].
[19] *Clark* [79].
[20] *The Vainqueur José* [1979] 1 Lloyds LR 557 (QB), 574, per Mocatta J.
[21] *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 (CA) (unincorporated association); *New Saints FC v Football Association of Wales Ltd*. [2020] EWHC 1838 (Ch) (incorporated association).
[22] *Labouchere v Earl of Wharncliffe* (1879) 13 L 251 (Ch).
[23] *Davis v Carew-Pole* [1956] 1 WLR 833 (QB).
[24] *Davis* at 838.
[25] *Davis* at 844.

contract required conformity to the National Hunt Rules. While they disqualified those who trained *and* ran a horse, Davis had not run any horse; he had only trained one. The disqualification decision was therefore *ultra vires*.

In all these contexts—statute, prerogative, trust, contract, clubs and sports bodies—we find courts reviewing decisions for *ultra vires*. Thus, the principle of regularity substantially fits the practice of English courts.

The Principle of Non-Arbitrariness

Even if the *vires* of a decision is not at issue, courts may properly review the decision for procedural unfairness or unreasonableness, as well as related grounds such as failure to take into account relevant considerations. When is such review appropriate? Our answer reflects the interplay between two objectives: prevention of arbitrary power, on the one hand, and avoidance of substitution of the primary decisionmaker's judgment, on the other. We consider these two objectives in what follows, starting with arbitrary power.

One person, A, has arbitrary power over another person, B, when three conditions are met.[26] First, there is an imbalance of power, such that A has more power over B than B does over A. Second, avoiding A's power is infeasible, meaning it is either costly or impossible for B to exit the relationship with A. Third, A can wield power over B from a position of 'deliberative isolation'.[27] A operates from a position of deliberative isolation when he or she can wield power without taking into account anyone else's views about how that power should be used or what counts as a good reason for its exercise. Each of these conditions is gradational. Power can be more or less imbalanced. Exit can be more or less costly. Isolation can be more or less extreme. As a result, there are degrees of arbitrariness. In the paradigmatic cases of arbitrary power (e.g. feudalism, slavery, traditional marriage), power is constituted by the institutional roles occupied by the powerholder and subject (e.g. lord and vassal, master and slave, husband and wife). We take our cue from these paradigms and focus on arbitrary power in institutional contexts.

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[26] Here we distill a rich literature on arbitrary power, domination, and republican freedom. See especially P Pettit, *Republicanism* (OUP 1997) and F Lovett, *A General Theory of Domination and Justice* (OUP 2010). For an overview, see C McCammon, 'Domination' in Edward N Zalta et al (eds), *Stanford Encyclopedia of Philosophy* (2018), available at <https://plato.stanford.edu/entries/domination/>, accessed 1 July 2025.

[27] C McCammon, 'Domination: A Rethinking' (2015) 125 Ethics 1028, 1046.

It is objectionable to be subjected to arbitrary power, regardless of how the power is actually used. Suppose the powerholder is kind and wise. If so, the subject will have no cause for complaint about what the powerholder *does* with his or her power. But, because the use of the power is subject only to the powerholder's 'good will and pleasure'[28], the subject is still at the powerholder's mercy. That is an unjust situation to be in. It means the subject will be unable to look others 'in the eye without reason for fear or deference'.[29] The subject cannot 'walk tall and assume the public status…of being equal in this regard with the best'.[30] Because arbitrary power is objectionable, its elimination or reduction is a legitimate objective for the law.

How can the law eliminate or reduce arbitrary power? There are two main options. One is for the law to abolish the institution or power itself. Thus the law abolished feudalism, outlawed slavery, and removed many of the powers husbands traditionally wielded over wives. Sometimes, though, we should preserve an institution and the powers embedded within it. In that case, the law must find a means of preventing or minimizing arbitrariness, short of abolition or prohibition.

This takes us to the second option: leave power intact but render it less arbitrary. One way to render power less arbitrary is to subject its exercise to the grounds of review. (This is not the *only* way to render power less arbitrary, a point we return to in the next subsection.) Applying the grounds of review reduces the powerholder's deliberative isolation, which, as we said, is a crucial element of arbitrariness. The requirement to hold a hearing, for instance, forces a decisionmaker to confront the point of view of those subject to their power prior to arriving at a decision. Or consider review for unreasonableness. Through review on this ground, courts force decisionmakers to act, not just on their own view of which considerations are relevant, but on what are in fact relevant reasons. They also force decisionmakers to act, not just on what they believe their reasons favour, but on what they actually favour. Applying these grounds may be valuable for other reasons as well (e.g. it may improve the accuracy of decisionmaking). But what unites them is the contribution they make to reducing deliberative isolation and hence arbitrariness.

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[28] Quentin Skinner, *Liberty as Independence* (CUP 2025) 13; see also Quentin Skinner, 'A Third Concept of Liberty' (2002) 117 *Proceedings of the British Academy* 237, 249-50.
[29] P Pettit, *Just Freedom* (WW Norton & Co. 2014) 73.
[30] P Pettit, *On the People's Terms* (CUP 2012) 84.

Contract law helps illustrate the choice between these two options. The starting point is that 'parties are free to contract as they may think fit'.[31] As a result of their agreement, however, one contracting party may hold arbitrary power over the other. Take *Dallman v King*.[32] The case concerned a lease agreement. The tenant agreed to do work on the property amounting to a value of no less than £200. The contract conferred on the landlord the power to certify that the work met that conditions. In exchange the tenant was to receive a discount of £200 on the first year's rent. After the work was completed, the landlord withheld the discount on the basis that the work was not satisfactory.

Was the landlord free to withhold the discount specified by the contractual clause? The answer turns on whether the discount was conditional on the landlord's certification. The judges held it was not. Bosanquet J said the contract could not be read as conditioning the discount on certification, given the overall purpose of the contract. Vaughan and Coltman JJ, by contrast, were more straightforward: the second clause could not be a condition since, if it were, the landlord would possess a capricious—that is, arbitrary—power.

Put this way, the issue turns on whether the parties could confer such a limitless power on the landlord. The inability to do so would amount to a serious intrusion on freedom of contract. 'A basic principle of the common law of contract…is that parties to a contract are free to determine for themselves what primary obligations they will accept.'[33] If the power in *Dallman* were simply read out of the contract, the court would need to decide whether the tenant's work had, in fact, been substantial amounting to a minimum value of £200. The contract, however, had given the right to make this determination to the landlord, not the court.

Later cases reconciled this tension. They understood *Dallman* to support, not a hard *exclusion* on what powers the parties can confer upon each other, but rather the *inclusion* of legal controls on how the power is exercised. This approach keeps the aspect of the contract conferring power. Freedom of contract is therefore respected. Since the power's use is supervised, the risk of arbitrariness is also reduced. In short, later cases have adopted the second of the two options we outlined (i.e. leaving a power intact and supervising its use rather than abolishing or prohibiting

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[31] *Suisse Atlantique Societe d'Armament v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL), 399.
[32] *Dallman v King* (1837) 4 Bing NC 105, 132 ER 729 (Court of Common Pleas).
[33] *Eurico SpA v Philipp Brothers* [1987] 2 Lloyd's Rep 215 (CA), 218.

the power). In the next subsection, we will show that courts have adopted a similar approach in many other legal areas.

Judicial review on the grounds of review *reduces* deliberative isolation and thus arbitrariness; it does not *eliminate* these things. That is because supervision on the grounds of review is compatible with substantial discretion. For instance, when there is more than one reasonable exercise of power, it is up to the powerholder to choose how to use the power. As between these alternatives, the powerholder has a free hand: they need not consider anyone else's view. Why should courts not go further and eliminate even this residual arbitrariness? Courts certainly could do this, at least in some contexts. All they would have to do is review every decision on its merits and set aside the decisions they do not agree with.

But there is a good reason for courts *not* to go further and try to eliminate all arbitrariness. Taking this step would mean substituting the court's judgment for the initial decisionmaker's. This would be exactly the 'forbidden substitutionary approach'[34] reviewing courts seek to avoid. What is so bad about substituting judgment? The general answer is that it is a 'usurpation of power by the judiciary to substitute its…view'[35] for the initial decisionmaker's. The precise nature of that usurpation depends on the context. For instance, when it comes to statutory powers, courts must respect Parliament's intention to confer a power on an administrative body rather than a court. In the contractual context, the same reasons that count against a court reading out a power entirely, such as the contractual power in *Dallman*, also disfavour substitution of judgment. Thus, if freedom of contract is a reason to uphold the choice to confer a power on one of the parties, it is also a reason for the court not to seize that power for itself.

In summary, judges should reduce arbitrariness but not to the extent of substituting their judgment for the initial decisionmaker's. More fully:

> *Principle of non-arbitrariness*. Courts properly review a putative exercise of institutional authority for reasonableness and fairness if and only if the exercise would otherwise be arbitrary.

This principle does not refer to the importance of avoiding substitution of judgment. That is because applying standards of reasonableness and

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[34] *British Telecommunications Plc v Competition Commission* [2012] CAT 11, [280]. See also M Fordham, *Judicial Review Handbook* (Hart 2021) §15.1.
[35] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL), 757, per Lord Ackner.

fairness does not, without more, amount to a substitution of judgment, as we have explained.

Review for Non-Arbitrariness

The principle of non-arbitrariness explains when courts do, and do not, review decisions for unreasonableness and unfairness. By 'unreasonableness' we mean both *Wednesbury* unreasonableness and its allied grounds of taking into account irrelevant considerations, failing to take into account relevant ones, and impropriety of purpose.

Let us begin with when courts do *not* review decisions on these grounds. As we said, a power is arbitrary under three joint conditions: imbalance, infeasibility (of exit), and isolation. These conditions correspond to three kinds of situations when we would expect to not see review.

First, when the parties hold roughly equal power. Since equality of power is presumed in commercial transactions, it is unsurprising that the grounds of review are usually absent from that context.

Second, when exit is feasible. The officers of a tennis club might exercise power over its members. Because it is probably easy for a member to join another club, or find another hobby, the power is not arbitrary. So the grounds of review do not typically apply.

Third, when deliberative isolation is addressed by means other than supervision on the grounds of review. Political controls could force a decisionmaker to consider the views of others before making up their mind. Alternatively, a body of law distinct from judicial review, such as competition law, could adequately prevent deliberative isolation. For example, section 2 of the Competition Act 1998 imposes limits on those acting as an 'undertaking'. An undertaking is normally understood to exclude core public activities.[36] Air traffic control and tax collection, for instance, are therefore not subject to competition law.[37] But when it comes to abuse of market power, competition law may render unnecessary the grounds of review under the principle of non-arbitrariness.

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[36] *Höfner and Elsner v Macrotron GmbH* (1991) Case C-41/90; *Diego Cali & Figli SrL v Servizi Ecological Porto di Genova Spa* (1997) Case C-343/95.
[37] *SELEX Sistemi Integrati SpA v Commission* (2009) Case C-113/07; *Altair Chimica SpA v ENEL Distribuzione SpA* (2003) Case C-207/01.

Outside these scenarios, we would expect to see review under the principle of non-arbitrariness. This corresponds to practice. Perhaps the paradigm case is a public actor invoking a statutory or prerogative power. These powers are almost always asymmetrical. Ministers, local councils, parole boards, and so on hold powers over people who lack a comparable power over them. It is usually impossible to opt out of schemes of government regulation. And while it may be possible to challenge public decisions, the relevant mechanisms (such as an appeal, an ombudsman complaint, or political pressure) are often absent or inadequate. When this is the case, the principle of non-arbitrariness says that supervision on the grounds of review should be available—as, indeed, it almost always is.

The grounds of reasonableness and fairness are widely invoked beyond public law. In what follows we survey how these grounds apply in other contexts. Our focus on ordinary contracts, non-sport associations, sports bodies, and trusts. The discussion is meant to be illustrative, not exhaustive. Still, the deep structure of the law reveals that the grounds of review tend to extend to where it is needed to combat arbitrary power, in accordance with the principle of non-arbitrariness.

Relevant and irrelevant considerations

The exercise of contractual powers must take into account relevant considerations and exclude irrelevant considerations. *The Product Star* provides a helpful illustration.[38] The contract permits a shipowner not to load at ports determined to be dangerous. What counts as dangerous, the court reasoned, must reflect the background conditions characteristic of the region. The key question was whether the 'risks were different from those which existed at the date of the charter'. This meant 'the previous history of hostilities in the Gulf' was a relevant consideration. And risks which predate the charter were irrelevant. Yet the shipowner determined the port to be dangerous 'almost entirely ignorant' of the relevant history. And the shipowner erroneously relied on the risk of mines, which had remained unchanged within the relevant region. More seriously, there was evidence that the owner refused to load at the port partly motivated by a commercial dispute between the parties, separate from any perceived increase in danger. The court therefore found the owner's determination of dangerousness unlawful.

[38] *Abu Dhabi National Tanker v Product Star Shipping (The Product Star) (No 2)* [1993] 1 Lloyds LR 397 (CA).

The same ground applies to trust powers through the rule in *Hastings-Bass*.[39] Trustees must 'inform themselves, before making a decision, of matters which are relevant to the decision'.[40] They must give 'proper consideration to the matters which are relevant' and exclude 'matters which are irrelevant'.[41] Crucially, the intensity of this ground varies. This is true for both public law and trusts. For instance, given concerns of administrative efficiency, courts must now refuse relief under the judicial review procedure when it is 'highly likely' the error did not make a substantial difference to the decision's outcome.[42] Similarly, in the trusts context, the Supreme Court in *Pitt v Holt* has clarified that a court can only disturb a trustee's decision for a decision making error if it amounts to a breach of fiduciary duty.[43] Since decision making errors by trustees will only breach a fiduciary duty when they are 'sufficiently serious', courts only intervene on this ground when the failure is sufficiently grave.[44] 'It would set the bar too high', Lord Walker reasoned in *Pitt*, 'to apply the *Hastings-Bass* rule whenever trustees fall short of the highest standards of mature deliberation and judgment'.[45] This is because trustees must rely on professional advice to structure their deliberations. They are therefore entitled to rely on expert advice to assess whether a consideration is relevant or irrelevant.[46]

Improper purposes

The proper purposes ground applies to contractual powers. Consider *Equitable Life v Hyman*.[47] A life insurance company had some policyholders with a guaranteed annuity rate and others with a variable rate. The present variable rate fell below the fixed guaranteed rate. In response the insurer sought to give a lower bonus to the guaranteed rate policyholders. Lord Steyn held that, in light of the commercial object of the guaranteed rates and the purpose of the final bonuses, this decision was impermissible.[48] There was, Lord Steyn considered, an implied term that gave effect to the 'reasonable expectations of the parties'.[49] In the same case, however, Lord Cooke endorsed a more general limit on

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[39] *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).
[40] *Scott v National Trust* [1998] 2 All ER 705 (Ch), 717, per Robert Walker LJ.
[41] *Edge v Pensions Ombudsman* [2000] Ch 602, 627, per Chadwick LJ.
[42] Senior Courts Act 1981, s 31(2A).
[43] *Pitt v Holt* [2013] UKSC 26, [73].
[44] *Pitt* [39]
[45] *Pitt* [68].
[46] *Pitt* [41].
[47] *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL).
[48] *Equitable Life* at 459.
[49] *Equitable Life* at 459.

contractual discretion. Referring to *Padfield*[50], the leading public law case on proper purposes, he described the insurer's discretion as limited by a principle 'common to administrative law', namely, that a power cannot be exercised 'for a purpose subverting the basis of the policies, fairly interpreted'.[51]

Association decisions are also reviewable for proper purposes. In *Baker v Jones*[52], the British Amateur Weightlifting Association tried to use its funds to pay for legal costs incurred by its members. But the Association's objects were restricted to promoting weightlifting as a sport and means of physical improvement. Since the payments were not taken for that object, they were unlawful.

Turning to trusts, the starting point is that, like public authorities[53], trustees must act honestly and in good faith.[54] But the proper purposes ground is distinct from this core aspect of trusteeship. It concerns, instead, the principle that a 'trustee shall not be permitted to use the powers which the trust may confer upon him at law, except for the purposes of the trust.'[55] Acting outside the purpose of the overall trust amounts to 'abuse of power'.[56] Some considerations will be entirely irrelevant, which has the effect of making impermissible any decision that takes the consideration into account. In the fiduciary context, self-interest is one such irrelevant consideration. When it comes to improper purpose, however, the law permits a decisionmaker to have mixed purposes. The exercise of power is permissible, despite the mixture of an improper purpose alongside a proper purpose, so long as the improper purpose is not 'primary or dominant'.[57]

That final point leads Lord Sumption to suggest the proper purposes ground operates differently across trusts and public law. The suggestion is mistaken, however. The source of the error is the correct observation that, in public law, a decision taking into account an irrelevant consideration is not automatically permissible solely because 'legally

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[50] *Padfield v Minister of Agriculture* [1968] AC 997 (HL).
[51] [2002] 1 AC 408 at 460-61. See also P Sales, 'Use of Powers for Proper Purposes in Private Law' (2020) 136 LQR 384, 396-97.
[52] *Baker v Jones* [1953] 1 WLR 1005 (QB).
[53] *R v Inner London Education Authority Ex p Westminster City Council* [1986] 1 WLR 28, [1986] 1 All ER 19 (CA).
[54] *Armitage v Nurse* [1998] Ch 241, 253-54.
[55] *Balls v Strutt* (1841) 1 Hare 146; *Vatcher v Paull* [1915] AC 372, 378 (PC).
[56] *Eclairs Group v JKX Oil & Gas* [2015] UKSC 71, [15].
[57] *Eclairs Group* [17].

relevant considerations were more significant'[58] to the decision.[59] So if *Eclairs Group* were about the irrelevant considerations ground, then there would be a significant disanalogy between trusts and public law. This is because a trustee's decision, even one pursuing an improper purpose, is permissible so long as the pursuit of proper purposes was more significant to the decision. Crucially, though, this point concerns *proper purposes*, not irrelevant considerations. And when it comes to proper purposes, its treatment is, at least in this respect, consistent across trusts and public law.[60] This is because, in public law, a decision with mixed purposes is permissible so long as the proper purpose is its 'primary object'.[61] The flip side of this is that a bad purpose exerting a 'substantial influence' renders the decision impermissible.[62]

Unreasonableness

Even when a trust instrument describes a power as 'absolute', courts review the exercise of discretion for irrationality.[63] Some cases expressly draw the link between this standard and *Wednesbury*, formulating the test in terms of whether the decision is one in which 'no reasonable body of trustees could arrive'.[64] It follows that trustees who follow professional advice, at least if the source appears reliable enough for a reasonable trustee to act on it, will satisfy this standard. This allows the court to both prevent the perverse exercise of power while declining to 'substitute its own judgment for that of the trustees'.[65]

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[58] *Eclairs Group* [17].
[59] See *R (FDA) v Secretary of State for Work and Pensions* [2012] EWCA Civ 332, [67]-[69], per Neuberger MR; cf. Senior Courts Act 1981, s 31(2A).
[60] A possible point of divergence concerns the consequences of a breach of the proper purposes ground. In trusts, the traditional approach corresponds to the public law position, namely voidness. But whether this should continue has come into doubt: *Pitt v Holt* [2013] 2 AC 108, [62], per Lord Walker; *Abacus Trust (Isle of Man) v Barr* [2003] Ch 409, [31], per Lightman J; Guy Newey, 'Constraints on the Exercise of Trustee's Powers' in PG Turner (ed), *Equity and Administration* (CUP 2016) 40-41.
[61] *Westminster Corp v London and North-Western Railway* [1905] AC 426 (HL), 433, per Lord Macnaghten.
[62] *R v Lewisham LBC ex p Shell* [1998] 1 All ER 938 (QB), [65].
[63] *Mallone v BPB* [2002] EWCA Civ 126, [12], [40].
[64] See e.g. *Harris v Lord Shuttleworth* [1994] ICR 991, [1994] IRLR 547 (CA), 999, per Glidewell LJ; *Department for Education v Molyneux* [2012] EWCA 193, [21]-[26], per Arden LJ. Cf *Pilkington v IRC* [1964] AC 612 (HL), 641, per Viscount Radcliffe; *Re Manisty's Settlement* [1974] Ch 17, 26, per Templeman J.
[65] *Trustees of the Saffil Pension Scheme v John Mark Curzon* [2005] EWHC 293 (Ch).

Courts also review decisions by sports bodies and other associations for unreasonableness. *Nagle v Feilden*[66] is an early forerunner of this approach. The case concerned the stewards of the Jockey Club, who make rules governing horseracing. Only trainers with a license from the club could train horses eligible to compete at their races. The club, as a matter of policy, refused to grant licenses to women. Florence Nagle, a horse trainer, sought to challenge this policy. The prospects of an association depriving someone of their 'livelihood', thereby implicating the right to work, meant the court must control the power to ensure it is not exercised 'arbitrarily or capriciously'.[67]

In modern times, the leading case is *Bradley v Jockey Club*.[68] Bradley, a jockey, gave confidential information to a professional gambler in exchange for bribes. The Jockey Club imposed a 10-year disqualification, reduced by the club's Appeal Board to 5 years. Bradley argued even the 5-year period was disproportionate and hence unlawful. Richards J held that, whether based on contractual principles or the doctrine of restraint of trade, the applicable grounds were 'very similar to that of the court on judicial review'.[69] Indeed, it would be 'surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body' required a 'materially different approach from a judicial review claim in relation to the decision of a public body '.[70] Regarding the 5-year disqualification, the issue was whether the decision 'falls outside the range of reasonable responses'.[71] Given that Bradley's misconduct had stretched over a decade, and the careful consideration of the relevant factors by the Appeal Board, Richards J held that the disqualification was proportionate. In later cases, courts have taken a similar approach and reviewed sanctions for reasonableness and proportionality while affording associations a 'margin of appreciation' as to the appropriate penalty.[72]

Bradley suggested a contractual basis for unreasonableness review. And indeed courts have long held that the exercise of an ordinary, i.e. not

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[66] *Nagle v Feilden* [1966] 2 QB 633.
[67] *Nagle* at 646-47, per Lord Denning MR. For modern applications, see S Gardiner, R Welch, S Boyes, and U Naidoo, *Sports Law* (Taylor & Francis 2012) 120-123.
[68] *Bradley v Jockey Club* [2004] EWHC 2164 (QB), affirmed at [2005] EWCA Civ 1056.
[69] *Bradley* [2004] EWHC 2164 at [37].
[70] *Bradley* [37].
[71] *Bradley* [43].
[72] *Colgan v Kennel Club* [2001] All ER 403 (QB); *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 (QB); *Dymoke v Association for Dance Movement Psychotherapy Ltd* [2019] EWHC 94 (QB).

association-based, contractual power will be set aside if shown to be 'arbitrary and capricious'.[73] Thus, the party with a contractual power to determine what amounts to a 'blockade' was required to make a 'full or sufficient inquiry' into the question.[74] In another case, the court insisted that a contractual power be used following 'proper consideration of the matter after making any necessary inquiries'.[75] This line of cases culminated in *Braganza v BP Shipping Ltd*.[76] The issue was the lawfulness of an employer's exercise of a contractual power to determine whether death benefits were payable to a widow of a former employee. Having noted the 'significant imbalance of power'[77] between the parties in an employment context, and the clear 'signs' in the case law 'that the contractual implied term is drawing closer and closer to the principles in judicial review'[78], the Court held that the employer's act was reviewable for *Wednesbury* unreasonableness.

Introducing *Wednesbury* to contract law has been controversial.[79] One worry is that it undermines the 'consensual character of private contract law'.[80] Crucially, though, the *Wednesbury* standard is of 'variable intensity'[81], making the degree of scrutiny 'context sensitive'[82] in ways which 'always depend on fact and context'.[83] And there will often be contexts, particularly in the commercial setting, favouring a lower intensity of review. This is consistent with the general approach to substantive review.[84]

Others question whether the public context from which *Wednesbury* emerged is truly analogous to the contractual context. The key difference, Lord Sales says, is that in public law the relevant standards arise from a source external to the will of the actor, while in contract the requirements

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[73] *Weinberger v Inglis* [1919] AC 606 (HL), 626, per Lord Atkinson.
[74] *Government of The Republic of Spain v North of England SS* (1938) 61 Lloyd's Rep 44 (KB), 58.
[75] *The Product Star* [1993] 1 Lloyds LR 397 (CA), 404, per Leggatt LJ.
[76] *Braganza v BP Shipping Ltd* [2015] UKSC 17.
[77] *Braganza* [18].
[78] *Braganza* [28].
[79] J Morgan, 'Against Judicial Review of Discretionary Contractual Powers' [2008] LMCLQ 230; M Bridge, 'The Exercise of Contractual Discretion' (2019) 135 LQR 227; P Sales, 'Use of Powers for Proper Purposes in Private Law' (2020) 136 LQR 384, 386.
[80] M Bridge, 'The Exercise of Contractual Discretion' (2019) 135 LQR 227, 248.
[81] *Pham v SSHD* [2015] UKSC 19, [114].
[82] *R (Justice for Health) v Health Secretary* [2016] EWHC 2338, [186].
[83] *R (Packham) v Transport Secretary* [2020] EWCA Civ 1004, [51].
[84] J Varuhas, 'Three Issues in the Law of Contractual Discretion' (2022) 42 OJLS 787, 793-803.

are generated from the will of the parties.[85] But we must be careful. It is true that, when Parliament confers a power on a decisionmaker, the statutory limits on that power come from Parliament. These limits therefore arise from a source external to the decisionmaker's will. At the same time, a power-conferring term of a contract is understood, *not* as the product of either party's subjective will, but in terms of the 'objective meaning of the language which the parties have chosen to express their agreement'.[86] Only one of the contracting parties, however, can exercise a contractual power over the other. In this respect contract law similarly provides for a separation between the source of the power's express limits and the subjective will of the decisionmaker.

There may still be a worry that the contractual context is inevitably more subjective. This is because contracting parties are entitled to act on their self-interest. Since the pursuit of self-interest is therefore rational in contract, Lord Sales argues it is 'much more difficult to identify legal constraints based on the idea of rationality'.[87] But this goes to whether self-interest may be a relevant consideration. The possibility of it being irrelevant is not unique to public law; consideration of self-interest is impermissible for fiduciaries just as much as it is for public authorities. The *Wednesbury* standard of rationality, understood in the narrow sense, asks a further question: given the relevant considerations (which for contractual powers will often include self-interest), is the outcome one a reasonable decisionmaker could have reached? The answer depends on whether the decision reflects a reasonable evaluation of the strength of the various considerations. This is distinct from the first-order question of whether self-interest is part of the set of relevant considerations.

Procedural unfairness

Unincorporated associations must conduct disciplinary proceedings in a fair manner. So they must provide an opportunity to be heard.[88] They must also provide notice of accusations.[89] In one case, a member of the Foresters' Friendly Society was summoned before a committee for one breach of its rules. They were then expelled for a different breach. This 'slipshod and irregular' process made the decision unlawful.[90] Proceedings will also be unfair if the decisionmakers are biased or appear

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[85] Sales, 'Use of Powers for Proper Purposes' 386.
[86] *Wood v Capita* [2017] UKSC 24, [10].
[87] Sales, 'Use of Powers for Proper Purposes' 386.
[88] *Wood v Woad* (1874) LR 190 (Ex), 196.
[89] *Lapointe v L'Association de Bienfaisance et de Retraite de la Police de Montreal* [1906] AC 535 (PC), 538-39.
[90] *Andrews v Mitchell* [1905] AC 78 (HL), 80, per Earl of Halsbury LC.

to be biased. For instance, when the council of the Chartered Institute of Patent Agents first laid charges against one of its members and then judged the merits of those chargers, the clear impression was that the council was not 'unbiassed and impartial'.[91] Its decision was set aside.

Sports bodies must also impose discipline in a procedurally fair way. The landmark case is *Russell v Duke of Norfolk*.[92] The Jockey Club accused Russell, a trainer, of 'doping' a horse and, following a hearing, disqualified him. Russell argued that the hearing was unfair. A majority of the Court of Appeal rejected that argument. Since the Jockey Club's rules did not require a hearing prior to disqualification, any hearing that was held did not have to be fair. However, Denning LJ considered that there must be a fair 'opportunity of being heard', at least when they are involved in 'an important field of human activity'.[93] Lord Denning's view eventually prevailed. It is now widely accepted that, whether or not a contract exists between the parties, discipline may only follow a fair hearing.[94] As Michael Beloff says, 'where a livelihood is at stake in professional sport, the content of the right to fairness is now seen as coterminous with the right to fair treatment in the context of public law'.[95]

We see a similar requirement in ordinary contractual contexts. While contract law disfavours the implication of procedural protections, matters are different if a contractual power concerns the termination of 'tenure or enjoyment by another of an employment or an office or a post or a privilege'.[96] In these circumstances the 'other party ought in fairness to be heard or be allowed to give his explanation'.[97] The approach is similar in public law, where procedural protections are a function of a claimant's possession of a special right, interest, or legitimate expectation.[98]

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[91] *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276, 289, per Eve J.
[92] *Russell v Duke of Norfolk* [1949] 1 All ER 109 (KB).
[93] *Russell* at 119-20, per Denning LJ.
[94] See e.g. *McInnes v Onslow Fane* [1978] 1 WLR 1520 (Ch), 1528 (boxing board required to act impartially, though not required to grant an oral hearing); Modahl *v British Athletic Federation Ltd* [2001] EWCA Civ 1447. For other examples, see M Beloff, 'Pitch, Pool, Rink, … Court? Judicial Review in the Sporting World' [1989] PL 95, 101-02.
[95] M Beloff, T Kerr, M Demetriou, *Sports Law* (Hart 2012) 224.
[96] *Stephenson v Road Transport Union* [1977] ICR 893 (CA), 902, per Buckley LJ.
[97] *Stephenson* at 902.
[98] *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149. See *Taylor v National Union of Seaman* [1967] 1 WLR 532 (Ch) (liberty right); *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 (HL) (sufficient interest); *McInnes v Onslow-Fane* [1978] 1 WLR 1520 (Ch), per Megarry VC (legitimate expectation).

Moving to the trusts context, trustees are subject to the conflict and profit rules for fiduciaries.[99] The conflict rule requires trustees to avoid conflicts between their interests and their duties. The profit rule requires trustees to account for any profits incurred from their position. These rules derive from a key feature of the trust, namely that trustees are charged with making decisions for others, not themselves.[100] It follows that companies—whose directors, like trustees, are fiduciaries—are 'entitled to the unbiased judgment of every one of its directors'.[101] This corresponds to the *nemo iudex* principle. Familiar to public lawyers, it prohibits judging one's own cause.[102] This reduces the deliberative isolation of decisionmakers. For instance, it stops decisionmakers from imposing their 'strongly held social or political views' on beneficiaries.[103]

There are, however, important respects in which procedural fairness works differently for trusts. This is perhaps most apparent in the judicial reluctance to enforce a freestanding duty to consult beneficiaries.[104] Several factors disfavour trustees being subject to such a duty. First, trustees may need to make a swift decision. Second, the trust may be based on scepticism regarding beneficiaries' judgment of their own interests. This contrasts with the typical situation in public administration, where a similar suspicion may well evince impermissible disrespect. Third, trustees must often allocate a fixed pot of money

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[99] *Rukhadze v Recovery Partners* [2025] UKSC 10, [16]; *Bristol and West Building Society v Mothew* [1998] Ch 1, 18, per Millett LJ.
[100] See L Smith, *The Law of Loyalty* (OUP 2023) 3-6.
[101] *Movitex v Bulfield* [1988] BCLC 104 (Ch), 118-19, per Vinelott J.
[102] Cf. M Conaglen, 'Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias' [2008] PL 58; R Valsan, 'The No-Conflict Fiduciary Rule and the Rule Against Bias in Judicial Review: A Comparison' (2019) 6 *European Journal of Comparative Law and Governance* 233.
[103] *Cowan v Scargill* [1985] Ch 270, 277-78, per Megarry VC. The situation is different when the trustees act on what they take, in good faith, to be the beneficiaries' social or political views: see *R (Palestine Solidarity Campaign) v Secretary of State for Housing* [2020] UKSC 16, [43], per Lord Carnwath.
[104] *X v A* [2000] 1 All ER 490 (Ch), 496, per Arden J. Another issue concerns the giving of reasons. The orthodox position is that public bodies are not under a general duty to explain their decisions, although there is often a duty under the circumstances: *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531 (HL); *Dover DC v CPRE Kent* [2017] UKSC 79, [54]-[58], per Lord Carnwath. By contrast, the traditional rule for trusts is a presumptive denial of a duty on trustees to explain themselves: *Re Londonberry's Settlement* [1965] Ch 918. But this rule has softened in ways which better accord with the position for public bodies: *Schmidt v Rosewood Trust* [2003] 2 AC 709 (PC), [66]; L Tucker, N Le Poidevin, and J Brightwell, *Lewin on Trusts* (20th edn, Sweet and Maxwell 2020), [29-105].

among a potential class of beneficiaries. In such zero-sum distributive situations, consultation may be inappropriate. The typical situation in public administration, by contrast, concerns decisions that take place according to a statutory scheme which previously settled the distributive question of how to allocate public funds. The decisionmaker is then left with the restricted question of whether an individual satisfies eligibility criteria, for which an individual entitlement to be heard may be more appropriate.

These differences, however, are consistent with an axiom of procedural fairness, namely, that the 'so-called rules' of procedural fairness are 'not engraved on tablets of stone'.[105] The requirements of procedural fairness 'are not cut and dried'.[106] 'They vary indefinitely.'[107] What counts as unfairness is context-sensitive, turning on 'the circumstances of the case'.[108] That an enforceable duty of consultation is inappropriate for many trusts is therefore not a reason to rule it out across the board. In line with this, there are suggestions that trustees may, in some contexts, be under a duty to consult beneficiaries:

> [Trustees] are not under any general duty to give a hearing to both sides … Nevertheless, if (for instance) trustees (whether of a charity, or a pension fund, or a private family trust) have for the last ten years paid £1,000 per quarter to an elderly impoverished beneficiary of the trust it seems at least arguable that no reasonable body of trustees would discontinue the payment, without warning, and without giving the beneficiary the opportunity of trying to persuade the trustees to continue the payment, at least temporarily.[109]

We should also observe that this ground can be difficult to distinguish from the requirements that trustees act in good faith and take into account relevant considerations.[110]

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[105] *Lloyd v McMahon* [1987] 1 All ER 1118 (HL), 1161, per Lord Bridge.
[106] *R v Secretary of State for the Home Department ex p Santillo (No 2)* [1981] QB 778, 795, per Lord Denning MR.
[107] *Santillo* at 795.
[108] *R (Edwards) v Environment Agency (No 2)* [2006] EWCA Civ 877, [91].
[109] *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 718, per Robert Walker J. See also *McPhail v Doulton* [1971] AC 424 (HL), 449, per Lord Wilberforce ('Any trustee would surely make it his duty to…consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.').
[110] Cf. *Telstra Super v Flegeltaub* [2000] VSCA 180, [30] (Australia); J Campbell, 'Exercise by Superannuation Trustees of Discretionary Powers' (2009) 83 *Australian Law Journal* 159, 175.

Summary

We began this section by describing the diverse bodies, public and private, whose acts and decisions are subject to the grounds of review. We asked: given that diversity, what is the best understanding of the scope of these grounds? That question, in turn, led us to a principle of regularity and a principle of non-arbitrariness. Each is supported by reason and enjoys broad fit with legal practice. Thus, our answer to the substance question is that putative exercises of authority are subject to the full suite of grounds of review if and only if (i) the alleged source of that authority is a legal norm or a norm created under a power conferred by law, and (ii) the exercise would otherwise be arbitrary.

We should be clear about what this answer presupposes. There are limits on the applicability of the grounds of review in the form of ouster clauses[111], non-justiciability doctrines, and the like.[112] These limits are upstream of the principles of regularity and non-arbitrariness. More precisely, then, our conclusion is that courts should apply the grounds of review when regularity and non-arbitrariness favour doing so, provided relevant background conditions are satisfied.

PROCEDURE

With our answer to the substance question in hand, we now take up the procedure question. To recall, that question is: what acts and decisions are properly subject to the judicial review procedure? Often this question is put in terms of whether the act or decision is 'amenable' to the judicial procedure. Yet another way to put the issue, given the terms of its governing rules, is what acts or decisions relate to the 'exercise of a public function'.[113]

It is common ground that the judicial review procedure extends to governmental acts and decisions. The difficult issue is what other acts and decisions, if any, are properly within the procedure's scope.

Traditionally, amenability to judicial review followed the source of a power.[114] Exercises of statutory powers and, later, prerogative powers

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[111] E.g. Judicial Review and Courts Act 2022, s 2.
[112] E.g. *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), 418, per Lord Roskill.
[113] Civil Procedure Rules, Part 54.1.
[114] For a modern defence, see A Williams, 'Judicial Review and Monopoly Power: Some Sceptical Thoughts' (2017) 133 LQR 656.

were amenable to judicial review; exercises of other powers were not.[115] Since abandoning that approach in the 1980s, courts have generally despaired of giving a 'precise definition'[116] or 'universal test'[117] of amenability to judicial review. Instead, they have appealed to a long list of factors to decide whether a body's acts and decisions are reviewable: whether the body is 'woven into the fabric' of government[118]; whether the government would regulate the area in question 'but for'[119] the body's presence; whether the body wields 'governmental' powers[120]; whether the body is profit-seeking[121]; and so on.

The difficulties with this multi-factorial and context-sensitive approach are considerable. For one thing, these factors are not all suitable for judicial determination. Which activities are 'governmental'? What would government regulate 'but for' a given body's activities? These are deep questions of politics and ideology, requiring a theory of the state to answer. Further, some factors may pull one way while the rest pull in the other. A court will need to decide what they favour on balance. But the case law provides little guidance as to the relative weights of the various factors. The result has been a confusing and at times contradictory jurisprudence, with uncertainty as to how specific acts and decisions will be classified.[122]

We propose a simpler and clearer approach. Our starting point is that the answer to the procedure question depends on the answer to the substance question. That is because only acts and decisions to which the grounds of review apply are potentially subject to the judicial review procedure. In other words, the procedure is only available for decisions to which the grounds of review apply. The applicability of the grounds is not, however, sufficient. This is because the judicial review procedure is supposed

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[115] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) expanded judicial review to prerogative powers. *Datafin*, discussed below, expanded it further.
[116] *R (Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 57, [13]
[117] *R (Ames) v Lord Chancellor* [2018] EWHC 2250 (Admin), [55]
[118] *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909 (CA), 923, per Bingham MR.
[119] *R v Chief Rabbi, ex p Wachmann* [1991] 1 WLR 1036 (QB), 1041.
[120] *R v Panel of Takeovers and Mergers, ex p Datafin* [1987] 1 QB 815 (CA), 849.
[121] *R (Liberal Democrats) v ITV Broadcasting Ltd* [2019] EWHC 3282 (Admin), [72].
[122] For a trenchant critique along these lines, see C Campbell, 'The Nature of Power as Public in English Judicial Review' (2009) 68 CLJ 90, 92-99.

to be a remedy of 'last resort'.[123] If there are other adequate means to challenge a decision based on the grounds of review, then the judicial review is unavailable. We propose that these two conditions—what we might call 'the grounds of review condition' and 'the last resort condition'—together suffice for the availability of the judicial review procedure. As with our answer to the substance question, we presuppose that relevant background conditions (e.g. standing and ripeness) are satisfied. To defend our proposal, we first show it is consistent with legal practice.

Procedure and practice

The judicial review procedure tends to be available when there is no other way to challenge a decision. Consider the well-known case of *R v Panel of Takeovers and Mergers, ex p Datafin plc*.[124] Datafin complained to the Panel about a competitor's alleged breach of the City Code on Take-overs and Mergers. The Panel dismissed the claim and Datafin applied for judicial review of its decision. The main issue was whether the Panel's decision was amenable to judicial review. The Court of Appeal began by observing the Panel's 'immense' and inescapable power over Datafin and similar businesses.[125] The court had no doubt that the Panel was competent and well-intentioned. Even so, the possibility of abuse remained. '[W]hat', Donaldson MR asked, 'is to happen if the panel goes off the rails?'[126] There were no agreements between companies like Datafin and the Panel, so contract law would be of no help. The notion that other areas of private law might fill the gap was 'wholly unconvincing'.[127] Non-legal forms of redress, such as commercial pressure, would be too slow.[128] This lack of alternatives had two implications. First, the Panel's decisions would go unchecked unless they were subject to the grounds of review. Second, the only way to raise those grounds would be through the judicial review procedure.

It follows, on our way of thinking, that the Panel's decisions should be reviewable through that procedure. And that is precisely what the court held in *Datafin*.

Conversely, when there is an alternative way to bring a challenge to a decision, the judicial review procedure is usually *not* available. This is

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[123] *R (Glencore Energy) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716, [55].
[124] *R v Panel of Takeovers and Mergers, ex p Datafin* [1987] 1 QB 815 (CA).
[125] *Datafin* [1987] 1 QB 815 at 836-37.
[126] *Datafin* [1987] 1 QB 815 at 827.
[127] *Datafin* [1987] 1 QB 815 at 839.
[128] *Datafin* [1987] 1 QB 815 at 827.

consistent with the last resort condition. In *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*[129], the Jockey Club's Disciplinary Committee disqualified a horse from a race after a banned substance was found in its urine. The horse's owner, the Aga Khan, applied for judicial review on grounds of procedural unfairness. The Court of Appeal rejected that application, holding that the Club's decision was not amenable for judicial review. Although earlier cases had suggested that judicial review might lie against the Club's decisions, in those cases there was no contract between the applicant and the Club. Here, by contrast, there was a contractual relationship between the Aga Khan and the Club. That contract included 'an implied obligation…to conduct [the] disciplinary proceedings fairly'.[130] If the Aga Khan were able to show that this obligation was breached, he would receive 'entirely adequate'[131] private law remedies.[132] The unavailability of judicial review would therefore not cause any 'injustice'.[133] For there is 'no hardship to the applicant in his being denied judicial review'.[134]

Later cases have also relied on the availability of contractual[135] and equitable[136] remedies to deny judicial review. A good illustration is *R v Association of British Travel Agents, ex p Sunspell Ltd.*[137] The Association imposed a large fine on Sunspell. Sunspell asked the court to consider the Association amenable to judicial review so that it could argue the fine was disproportionate. But the court rejected the request as confused. Sunspell was in a contractual relationship with the Association. It was perfectly possible for the company to argue in private law proceedings that there was an implied term that any fine would not be 'unreasonable or excessive'.[138] For that reason, among others, the court concluded ABTA was not amenable to judicial review.

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[129] *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853 (CA).
[130] *Aga Khan* at 933, per Hoffmann LJ.
[131] *Aga Khan* at 933, per Hoffmann LJ.
[132] *Aga Khan* at 924, per Bingham MR.
[133] *Aga Khan* at 933, per Hoffmann LJ.
[134] *Aga Khan* at 930, per Farquharson LJ.
[135] See e.g. *R v Lloyd's of London ex p Briggs* [1993] 1 Lloyd's Rep 176 (DC); *R (Mullins) v Jockey Club (Appeal Board)* [2005] EWHC 2197 (Admin); *R (Holmcroft Properties) v KPMG* [2018] EWCA Civ 2093.
[136] *R v Imam of Bury Park Mosque, Luton ex p Ali (Sulaiman)* [1994] COD 142, [1995] CLY 47 (CA).
[137] *R v British Association of Travel Agents, ex p Sunspell Ltd* [2001] ACD 15 (QB).
[138] *Sunspell* [22].

We should acknowledge that courts in some cases have warned against concluding that a decision is subject to judicial review simply because there is no other procedure available to a claimant.[139] A careful look at those cases, though, uncovers nothing that challenges our proposal. Take *TH v Worcester Cathedral*.[140] The Cathedral revoked permission for the claimant, TH, to ring the Cathedral bells. TH wished to apply for judicial review of that decision. Was the decision amenable to judicial review? The court observed that, if judicial review were unavailable, TH might lack any redress. But it declined to attach significance to that fact. For 'the administrative court is not there to simply fill in the gaps left by statute or the common law'.[141]

If the court in *TH* means that unavailability of alternative recourse does not *on its own* establish amenability to judicial review, then we agree.[142] We also agree that the decision in *TH* was unreviewable. Our explanation, though, is that the decision would not have been arbitrary even if there was no way to challenge it. So it fails the grounds of review condition. Recall that authority is arbitrary only if there is no feasible way for the subject to avoid being subject to it. Here the authority concerns who is permitted to ring the cathedral's bells. Bell ringing was, for the claimant, a mere hobby. He could ring bells somewhere else. He could take up another hobby. Either way, he had other easy options. Since only potentially arbitrary power is properly governed by the grounds of review, the Cathedral's decision fell outside the scope of the judicial review procedure.[143]

Let's take a step back. What *TH* helps illustrate is the significance of the grounds of review condition. When assessing a decision's amenability to the judicial review procedure, it is crucial to check whether the grounds

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[139] See e.g. *Aga Khan*, 876, per Hoffmann LJ; *R (Cole-Njie) v Methodist Church* [2018] EWHC 2622 (Admin), [29]; *R (Ames) v Lord Chancellor* [2018] EWHC 2250 Admin, [55].

[140] *TH v Worcester Cathedral* [2016] EWHC 1117 (Admin).

[141] *TH* [76]

[142] If, alternatively, the court in *TH* means to suggest that the unavailability of alternative procedures is *irrelevant* to amenability, then we disagree. But we know of no clear statement putting forward this extreme view.

[143] Cf. *R v Insurance Ombudsman Bureau ex p Aegon Life Assurance* [1994] CLC 88, 94 (finding an ombudsman scheme established by three insurance companies not amenable to judicial review because 'the public do not have to use the ombudsman. They can instead sue insurers in the courts'); *R (Holmcroft Properties) v KPMG* [2018] EWCA Civ 2093, [55] (finding KPMG not amenable to judicial review when it made offers of redress on behalf of Barclays Bank to its customers, because the Barclays customers were 'free to reject' the offer, leaving unaffected their 'legal remedies against the bank').

are applicable. This includes, among other things, ensuring the following two conditions are met.

First, the body must actually exercise *power* over others. Consider, for instance, pubwatch schemes whereby pubs share information amongst themselves about which of their customers caused trouble, so that they can coordinate to ban the troublemakers from their premises. Such schemes are not amenable to the procedure since 'the exchange of information' is not, in itself, an exercise of power.[144]

Second, the power must be over those who seek to access the judicial review procedure. This issue came up in *Mooyer*, which concerned an ombudsman set up for consumers of investment firms.[145] The court held that the body, although it exercised power over the firms, lacked power over customers.[146] For a useful illustration, take the *Tortoise Media* case.[147] Tortoise Media sought to challenge the Conservative Party's refusal to divulge information about its 2022 leadership election, which Liv Truss won. Following the result of that election, Boris Johnson, the outgoing Prime Minister, advised the Queen to appoint Truss on the basis that she was best positioned to command the Conservative majority in Parliament. So the election result led Johnson to advise the Queen to appoint Truss. The Queen obliged. Did this mean the party, in holding its leadership election, performed a public function? The court said it did not. This is the correct result, but the court failed to clearly articulate the best explanation as to why.[148] Neither the refusal to disclose information

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[144] *R (Proud) v Buckingham Pubwatch Scheme* [2008] EWHC 2224 (Admin), [8]; see also *R (Boyle) v Haverhill Pub Watch* [2009] EWHC 2441 (Admin).

[145] *R (Mooyer) v Personal Investment Authority Ombudsman Bureau* [2001] EWHC Admin 247.

[146] *R (Mooyer) v Personal Investment Authority Ombudsman Bureau* [2001] EWHC Admin 247, [12], per Newman J.

[147] *R (Tortoise Media) v Conservative Party* [2025] EWCA Civ 673. Strictly speaking, the case concerned whether the Conservative Party was a 'public authority' for purposes of section 6 of the Human Rights Act 1998. Although the court acknowledged that this is 'not necessarily the same question as…amenability of a body to judicial review', the court proceeded on the basis that substantially the same analysis applied to both issues: *Tortoise Media* [25].

[148] The court's reasoning is difficult, in part, because it largely rests on the Conservative Party being a 'voluntary association' that does not exercise 'any statutory or other public law powers': *Tortoise Media* [39]. But this, alone, does not explain why the party's election, to the extent it is situated as an 'integral part of a governmental framework' for the appointment of the Prime Minister, is not a public function: *Datafin* [1987] QB 815 at 836; Leah Trueblood, 'Public Functions of Political Parties in the United Kingdom' MLR, forthcoming . On this analysis, 'the more closely the acts that could be of a private nature are enmeshed in the activities

about the election, nor the election itself, amounted to an exercise of power to Tortoise Media. While the party's electoral process involved an exercise of power over its *leadership candidates* (and perhaps its members more generally), it did not exercise power over the *claimant*. And so, with respect of the claimant, the situation is analogous to the pubwatch scheme. The election led to the communication of information to Johnson, who, having taken the information into account, gave advice to the Queen.

Monopoly power

We observed at the start of this section that courts have struggled to articulate a precise test for amenability to judicial review. There have been a small number of academic attempts to fill the gap. Of those, ours is most similar to Colin Campbell's.[149]

He proposes that the 'sole test for determining the availability of judicial review' should be whether an act or decision relates to the exercise of 'monopoly power'.[150] By monopoly power he means 'that only one person or body in fact performs the function pursuant to which the power is exercised'.[151] Like us, Campbell claims his theory fits the bulk of legal practice. For example, the Panel of Take-overs and Mergers had a monopoly over many aspects of financial regulation. Campbell's theory says that its decisions should therefore have been subject to judicial review—as, indeed, they were.

Campbell also thinks the monopoly power test is normatively justified. It is important, he says, for decisions to be made in accordance with the 'principles of good administration'[152], such as reasonableness and fairness. Since it is impossible to subject *every* decision to review on these principles, a selection criterion is needed. Monopoly power is said to be the right criterion. If a body misuses non-monopolistic power over someone, then that person can always choose to deal with another body instead, which may treat them better. By contrast, if a body abuses monopolistic power, then dealing with another body is not an option. It

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of a public body, the more likely they are to be public': *Poplar Housing v Donoghue* [2001 EWCA Civ 595, [65]; cf. *R v Servite Homes, Ex p Goldsmith* [2001] LGR 55. The court needed to either reject this line of reasoning or explain why the leadership election was insufficiently enmeshed with Johnson's advice.

[149] C Campbell, 'Monopoly Power as Public Power for the Purposes of Judicial Review' (2009) 125 LQR 491.

[150] Campbell, 'Monopoly Power' 491.

[151] Campbell, 'Monopoly Power' 493.

[152] Campbell, 'Monopoly Power' 507.

follows, says Campbell, that judicial review is the only recourse for someone who wishes to correct abuses of power by monopolistic bodies.[153]

We find much to admire in Campbell's account. In particular, we agree that the key to understanding the scope of judicial review is its status as a recourse of last resort. For both Campbell and us, the judicial review procedure should be available when, and only when, there is no adequate alternative.

The way that Campbell develops this basic insight leads to several serious problems, however. First, his account is overinclusive, meaning it predicts that decisions will be amenable to judicial review which are clearly not. For example, because the Jockey Club has a monopoly over horseracing, Campbell's test implies that the Jockey Club's acts will be amenable to judicial review. In fact, they are not reviewable. The monopoly power test therefore cannot explain cases like *Aga Khan*. Our account, by contrast, correctly says the Jockey Club's decisions are unamenable. This is because, as we explained earlier in this section, private law proceedings can adequately supervise the Jockey Club's decisions.

Second, Campbell's account is underinclusive. Take a government department operating a system of food stamps. Now suppose a local council separately runs a food bank. The same function—giving free food to those in need—is performed by the department and the council.[154] Since the bodies perform the same function, neither has monopoly power, at least in this area. The monopoly power test would therefore conclude that both the department and council are unamenable to judicial review. This is incorrect, however. Both are subject to the procedure. Our account explains why. The two bodies both wield power over the poor and hungry. These people likely need all the help they can get, making it unrealistic to expect them to simply exit the relationship with either body. As a result, each body wields power that is potentially arbitrary. Such power is properly subject to judicial review.

More fundamentally, Campbell seems to assume there are only two ways to avoid an initial abuse of power: deal with another body or seek judicial review. This is not true, however. There are other forms of recourse. One

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[153] Campbell, 'Monopoly Power' 511.

[154] We do not think there is a significant difference between food stamps and a food bank. If we are wrong about that, it is easy enough to change the example to eliminate the difference.

speculative possibility is that Campbell supposes these alternatives do not provide protection on a par with the judicial review procedure. Dispelling this impression is the main aim of our detailed survey of the grounds of review in the previous section.

'Public function'

The Civil Procedure Rules govern the judicial review procedure. As set out in Part 54.1(2), the procedure is for challenges to acts or decisions 'in relation to the exercise of a public function'.

It is easy to construe this as a test for when an issue is amenable to the procedure. The problem is that CPR 54.1(2) leaves 'public function' unspecified. No criteria are provided for when a function is public. This leads courts and commentators to provide their own criteria for publicness.

On one view, these criteria identify public duties as opposed to private duties.[155] The thought is that 'if the duty is a public duty, then the body in question is subject to public law'.[156] But this conflates two questions: (i) the applicability of a substantive body of legal norms, such as those of 'public law'; (ii) whether the body is amenable to a specific procedure by which those norms are enforced. The immediate issue is that the grounds of review apply outside the procedure.[157]

On another view, the criteria identify public bodies as opposed to private bodies.[158] The description of a body as 'public', however, carries many possible 'shades of meaning'.[159] In *Mullins*, Stanley Burnton J considered

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[155] *R v Criminal Injuries Compensation Board ex p Lain* [1967] 2 QB 846 at 882, per Lord Parker CJ; *R v Panel on Take-overs and Mergers ex p Datafin* [1987] 1 QB 815 at 851, per Nicholls LJ; *R (Beer (t/a Hammer Trout Farm)) v Hampshire Farmers Market* [2003] EWCA Civ 1056, [26], per Dyson LJ. See also *Law v National Greyhound Racing Club* [1983] 1 WLR 1302 at 1309, per Fox LJ ('I see nothing that suggest that the defendants have right or duties relating to members of the public as such.').

[156] *Datafin* [1987] 1 QB 815 at 848, per Lloyd LJ.

[157] E.g. *O'Reilly v Mackman* [1983] 2 AC 237 (HL); *Boddington v British Transport Police* [1999] 2 AC 143 (HL); *Lumba v Secretary of State for the Home Department* [2011] UKSC 12.

[158] See e.g. *R v Disciplinary Committee of the Jockey Club ex p Aga Khan* [1993] 1 WLR 909, 923, per Bingham MR; *R (Jenkins) v Marsh Farm Community Development Trust* [2011] EWHC 1097 (Admin), [55], per Ockelton J.

[159] *Aston Cantlow v Wallbank* [2004] 1 AC 546, [6], per Lord Nicholls.

two senses.[160] First, public could refer to the general population, as in 'a decision affecting the public'. Second, it could refer to governmental bodies, as in 'the Secretary of State is a governmental official'. It is the second sense, Stanley Burnton J reasoned, that is relevant to amenability.

But our answer to the procedure question is silent on what makes a body 'governmental'.[161] This leads to the objection that it fails to explain how judicial review pertains to acts or decisions 'in relation to a public function'. The source of the issue is the assumption that CPR 54.1(2), in describing the procedure as being about the exercise of a public function, sets out a test for when that procedure applies. There is another way to understand CPR 54.1(2), however. Its point could be, not to lay out a test only to leave it conspicuously undefined, but to specify something about the nature of the procedure itself. The procedure exists to review acts or decisions that come from exercises of a public function. What, though, makes a function 'public'?

Our answer is that a body exercises a public function when a public response to its misuse is appropriate. This is a response-dependent account of a public function. What makes the exercise of a function 'public', on this construal, is the kind of response it calls for.[162] The relevant public response, in this context, is the application of a special procedure to enforce the grounds of review. We should therefore understand CPR 54.1(2) as specifying that claims under the judicial review procedure, which come in the name of the Sovereign, constitute a public response.[163]

CONCLUSION

Substance and procedure are importantly distinct. Whether the grounds of review apply is one question, how to enforce those grounds another.

Sometimes the judicial review procedure is the only way to enforce the

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[160] *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin), [15].
[161] *Aga Khan* at 923, per Bingham MR.
[162] This is analogous to the approach some theorists take to explain why crimes are public wrongs. They say crimes are public wrongs, not in virtue of wronging the public, but because they warrant a public response (which, in the context of criminal law, is punishment): G Lamond, 'What is a Crime?' (2007) 27 OJLS 609, 621.
[163] This means judicial review is 'public' in virtue of the *procedure* being a matter of public interest, as compared to the public interest in the substance of a challenged decision being correct: cf. *R (Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365, [49], per Pill LJ.

grounds. On those occasions, since the procedure is uniquely situated to deliver the substance, it is easy to conflate the two questions. But this is often not the case. We must therefore keep the two questions apart to arrive at correct answers to both.

Our answer to the substance question is that the grounds of review apply to a putative exercise of power if and only if (i) the alleged authority for that exercise is either a legal norm or a norm created under a power conferred by law, and (ii) the exercise would otherwise be arbitrary. Our answer to the procedure question builds on this. The judicial review procedure applies to a putative exercise of power if and only if (i) the grounds of review apply, and (ii) there are no adequate alternative procedures by which to enforce those grounds.

These answers do not always neatly line up with the reasoning of courts. It follows that, on our account, a number of cases were wrongly reasoned, even if, by and large, they arrived at the correct result.

With respect of substance, the Supreme Court has described the grounds on which trustees decisions are reviewable as only bearing 'superficial similarities' to public law.[164] This prompts the court to warn of pressing the public law 'analogy…too far'.[165] Our account presses it regardless.[166]

And with respect of procedure, courts sometimes construe 'public' solely in terms of 'governmental'.[167] This suggests a body is only amenable to the judicial review procedure if it exercises a 'governmental function'.[168] It is then natural to ask, for non-governmental decisions, whether there exists a 'sufficient connection' between the government and powerholder.[169] And whether, but for the powerholder's existence, the government would step in to do the job themselves.[170] None of this is necessary

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[164] *Pitt v Holt* [2013] UKSC 26, [11], per Lord Walker.
[165] *Pitt* [11].
[166] The Supreme Court's warning in *Pitt v Holt* partly rested on differences in the applicable time limit between the ordinary civil procedure and the judicial review procedure: cf *Abacus Trust (Isle of Man) v Barr* [2003] Ch 409 at [29], per Lightman J. This elides the substance and procedure questions.
[167] *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin), [15], per Stanley Burnton.
[168] *R (Moreton) v Medical Defence Union* [2006] EWHC 1948, [21], per Newman J.
[169] *Moreton* [23].
[170] *R v Football Association ex p Football League* [1993] 2 All ER 833 (QB), 848, per Rose J; R *v Advertising Standards Authority ex p Insurance Services* (1990) 2 Admin LR 77 (DC), 86, per Glidewell LJ; cf. *R v Chief Rabbi of the United Hebrew Congregations ex p Wachmann* [1992] 1 WLR 1036 (QB), 1041, per Simon Brown J.

on our account, since we do not rely on analogies to government to extend amenability to non-governmental bodies.

These are instances in which our account diverges from the reasoning of certain cases. There is some cost to this as a matter of fit. But it comes with justificatory power. Our account links the grounds of review to the perennial need to curtail arbitrary power. And it justifies the contours of the procedure with just two criteria: whether the grounds apply, and whether an alternative procedure exists. So we need not settle which issues are inherently a matter for government. Unsurprisingly, this thorny issue of political philosophy resists reduction to legal rules. The prospect of having to address it nonetheless may have led courts to treat amenability to judicial review as being 'a matter of feel'.[171] We can, and should, do better.

[171] *R (Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 2, [13], per Scott LJ.