Introduction

We live in the era of the vast administrative state. Numerous agencies, government departments and officials great and small make rules, distribute benefits, punish rule-breakers and do much else besides. Legislatures delegate power because they cannot possibly fulfil the expectations of the modern citizen through primary legislation. Instead experts are employed as agents to achieve legislators' policy goals, identified in legislation with varying degrees of specificity. Courts, by contrast, lack similar expertise, endure the shortcomings of adversarial decision-making procedures, are removed from the political process and are thus generally not delegated significant administrative powers. At the same time, most modern societies place various limits, policed by an independent judiciary, on government action. Consequently, judges retain a very important role. The difficulty for administrative law lies in the need to ascertain the proper spheres of competence of judges, who assess legality, and expert decision-makers, who choose the wisest policies. The question of the proper means of allocating decision-making authority as between reviewing courts and administrators lies at the heart of my argument.[1] I will argue that a doctrine of curial deference, pursuant to which reviewing courts should defer in appropriate circumstances and to varying degrees to administrative decision-makers, is a necessary feature of the modern legal landscape. A broad and general doctrine of curial deference will be developed by answering three questions: why should courts defer, how should courts defer, and when should courts defer?

[1] In that sense, I train my sights on legal, as opposed to political accountability. As Denis Galligan has noted pithily: 'In the context of delegated powers, accountability branches off in two directions, one towards the political process, the other towards the legal system.' *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon, 1986), p. 4.

Exclusions and assumptions

The scope of my argument is ambitious. Nevertheless, I have excluded several topics. I address only statutory powers. I do not address non-statutory powers, or executive or prerogative powers. It is, to my mind, an interesting happenstance that in England the general principles of judicial review are applied to review of statutory, non-statutory and executive or prerogative powers alike,[2] a phenomenon that is not universal. Much effort has been expended in attempting to explain and justify this curious development, much more than on the comparatively neglected question that I consider: whether the general principles of judicial review are or should be affected by statutes which do not refer expressly to the general principles.

My justification for excluding non-statutory and executive or prerogative powers rests on an important simplifying assumption: I assume that judicial review is constitutionally acceptable. I do not aim to reconcile theoretical justifications with judicial practice,[3] and hence I believe, excluding non-statutory powers and executive or prerogative powers is defensible. The assumption is justified because judicial review is generally accepted as legitimate in common law jurisdictions, where commitment to the rule of law requires that judicial review be available to prevent abuses of power and arbitrary uses of power.[4]

In respect of non-statutory powers, a particular difficulty lies in justifying judicial review of their exercise in the first place.[5] Because of the disagreement as to the justification of judicial review of non-statutory powers, it is difficult to propose that non-statutory powers should be included in a doctrine of curial deference designed for statutory powers. Some justifications will simply be incompatible with any

[2] See e.g. *R* v. *Panel on Takeovers and Mergers, ex p. Datafin* [1987] QB 815; *R (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61; [2009] AC 453.

[3] Unlike, for example, Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart, 2001).

[4] See generally Christopher Forsyth (ed.), *Judicial Review and the Constitution* (Oxford: Hart, 2000). See also Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, 6th edn (Oxford: Oxford University Press, 2007), p. 5, p. 24.

[5] Compare Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122, 124–7 with Dawn Oliver, *Common Values and the Public–Private Divide* (London: Butterworths, 1999), pp. 37–54.

doctrine designed for statutory powers; others would require significant modifications to any proposed doctrine. In short, it does not seem prudent to allow the existence of some non-statutory powers to prevent or dictate the development of a doctrine for the review of statutory powers which, in any case, are much more numerous. I appreciate that the existence and reviewability of such powers present contentious questions about the scope of the administrative state and about the judicial role in overseeing it, but I see these questions as best answered with the sort of singular focus that I am unable to apply in this book.

In respect of executive or prerogative powers, it is simply difficult to comprehend why the same principles of judicial review should apply to them as to statutory powers, for anything other than reasons of convenience or historical happenstance. Statutory powers are delegated by statute, and – assuming that judicial review is legitimate – courts may police limits on the exercise of those statutory powers. But executive or prerogative powers are not delegated by statute. Rather, they are either delegated by a constitutional instrument, as in the United States,[6] or have developed as part of the constitutional firmament, as in the United Kingdom. Applying principles of judicial review developed in the context of statutory powers to the exercise of executive or prerogative powers may simply be inapt.[7]

I also do not address procedural fairness. The distinction between process and substance is not necessarily a sustainable one,[8] and may be particularly unstable where process is prescribed by statute,[9] but common law courts generally hold fast to the view that the development of principles of procedural fairness lies within the province of the judiciary: 'The courts have, in effect, devised a code of fair administrative procedure based on doctrines which are an essential part of any system of administrative justice.'[10] Even though the requirements of procedural

[6] Art. II, § 1 of the United States Constitution provides: 'The executive power shall be vested in a President of the United States of America.'

[7] But see below, Ch. 7.

[8] See e.g. David Dyzenhaus and Evan Fox-Decent, 'Rethinking the Process-Substance Distinction: *Baker* v. *Canada*' (2001) 51 UTLJ 193, 212; Laurence Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 Yale LJ 1063.

[9] David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart, 1997), p. 279, pp. 286–9.

[10] William Wade and Christopher Forsyth, *Administrative Law*, 10th edn (Oxford: Oxford University Press, 2009), p. 371.

fairness may vary according to context, common law courts have the final say as to whether they have been fulfilled or not:

> [W]hat the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, *but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.*[11]

In the United States, where procedural fairness is prescribed by constitutional requirements, a strikingly similar view has been taken: 'Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.'[12] Accordingly, there is little scope for curial deference (at least as I shall define it below) and it seems prudent to exclude matters of procedural fairness from the present study.

As I have intimated, I also do not intend to develop a detailed theory of the administrative state. Accordingly, I use 'delegated decision-makers' to denote entities, legal or natural, to which power has been delegated by the legislature.[13] The term encompasses elected and non-elected members of the executive branch, executive-controlled administrators and independent administrators and their employees. Although it is cumbersome, it elides the difficult terminological and jurisprudential problem of whether delegated power should be classified as executive, administrative or something else entirely.[14] I use the term 'delegation' to refer to the legislature's granting of authority to administrative bodies, rather than to situations in which a delegate is invited to stand in the

[11] *Lloyd* v. *McMahon* [1987] AC 625 at 702–3, per Lord Bridge of Harwich. Emphasis added.

[12] *Morrissey* v. *Brewer* (1972) 408 US 471 at 481, per Burger CJ. See also *Mathews* v. *Eldridge* (1976) 424 US 319 at 334–5.

[13] See also *Canada (Citizenship and Immigration)* v. *Khosa* [2009] SCC 12; [2009] 1 SCR 339 at 386 per Rothstein J.

[14] See e.g. Peter Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 8 Colum LR 573.

shoes of the legislature, or those of an individual legislator. 'Delegation' is a more elegant term than the unwieldy 'granting of authority' and in any event captures the idea of the legislature granting to a delegate powers the delegate otherwise would not have. Occasionally, I retain the term 'agency' when quoting from the literature, to avoid square brackets interfering with the flow of text. Similarly, 'Congress' and 'Parliament' are sometimes retained in favour of 'legislature'; and I very occasionally follow the literature in using 'deference' or '*Chevron* deference' rather than 'curial deference'.

Overview of argument

In Chapter 1, I introduce different types of deference. Although this point has not been canvassed at great length in the literature, it seems to me that there are essentially two different types: epistemic deference and doctrinal deference. I provide examples of each, by reference to the three jurisdictions on which I focus. The doctrine of curial deference that I propose falls into the latter category.

In Chapters 2 and 3, I explain my reliance on legislative intent. I argue that there is a widely accepted constitutional principle, common to common law jurisdictions, that courts should give effect to legislative intent. I argue that, properly considered, this principle suggests that courts should (a) be deferential to administrative decision-makers and (b) accord administrative decision-makers a variable degree of deference. In the first instance, legislatures have delegated variable extents of power to administrators, which counsels not only judicial restraint, but variable amounts of judicial restraint. In the second instance, a proper consideration of the statutory provisions relevant to a particular case may reveal reasons for the delegation of power. I call these the 'practical justifications' for deference: expertise, complexity, democratic legitimacy and procedural legitimacy. These practical justifications are variable in nature and should be taken into account by reviewing courts, if an interpretation of the statutory language suggests that the practical justifications motivated the delegation of power. Even in situations where the statute does not seem to give much guidance to the reviewing court, judges can probe the limited statutory language to ascertain whether and to what extent a deferential approach is appropriate. The arguments based on the delegation of power and on practical justifications both suggest that reviewing courts should develop and implement a variable standard of review, in order to give effect to legislative intent.

In Chapter 4, I develop a variable standard of review. I analyse the concept of unreasonableness in the context of judicial review and elaborate on its internal reason and structure, thereby establishing its legitimacy. I am then able to formulate a conception of unreasonableness which can accommodate a variable standard of review. I argue that three standards are possible and desirable. These are: correctness, which allows a reviewing court to substitute its judgment for that of the administrative decision-maker; unreasonableness, which requires deference on the part of the reviewing court; and manifest unreasonableness, which requires a great deal of deference on the part of the reviewing court.

In Chapter 5, I contrast the conception of unreasonableness developed in Chapter 4 with the 'proportionality' test which has found judicial favour in many jurisdictions in recent decades. I sharply distinguish constitutional review from administrative review and argue that where fundamental rights have allegedly been infringed by state action, a standard of review of correctness should be applied by courts. However, I also note that deference does not slip entirely out of the picture: both doctrinal deference and, in particular, epistemic deference, can legitimately be accorded by courts in constitutional review.

In Chapters 6 and 7, I argue that the doctrine of curial deference developed in the previous chapters should have a wide scope. I suggest that the employment of complex concepts such as 'jurisdiction', 'error of law' and 'justiciability' as organising principles in judicial review may frustrate legislative intent. I urge instead that reviewing courts should undertake a general inquiry into unreasonableness or manifest unreasonableness whenever an exercise of delegated powers is impugned, except where a proper consideration of the relevant statutory provisions suggests that a standard of review of correctness is appropriate.

1

Defining deference

1.1 The meaning of deference

This chapter will serve as an introduction both to the concept of deference and the particular conception that I will be advancing over the course of this book. I will begin with a conceptual and linguistic analysis. I will then proceed to give examples of what I term epistemic deference and doctrinal deference. Finally, I will lay out and respond to what appear to me to be the major objections to doctrinal deference.

To forestall confusion, it is worth noting at this early point that my focus in this book will be on deference being paid by courts to other actors. I will not be addressing, for example, interesting questions about individuals' obligations to obey the law, which might be characterised as deference being paid by citizens to officials.[1]

1.1.1 Epistemic deference and doctrinal deference

Perhaps the most popular means of characterising deference is to associate it with the giving of weight. Brian Foley's approach is a good example: 'Reduced to its most basic form, the deference question concerns the *weight* which courts should attribute to the decisions of non-judicial institutions.'[2] The notion here is that deference involves the paying of respect to the decisions of others by means of according weight to those decisions.[3] I attach the label of *epistemic deference* to this notion.[4]

[1] See e.g. Philip Soper, *The Ethics of Deference: Learning from Law's Morals* (Cambridge: Cambridge University Press, 2002).

[2] Brian Foley, *Deference and the Presumption of Constitutionality* (Dublin: Institute of Public Administration, 2008), p. 256. Emphasis added.

[3] One could say that deference is given to the views of others. For present purposes, however, views will be equated with decisions, as it is through their decisions that delegated decision-makers express their views in legally relevant ways.

[4] See similarly T. R. S. Allan, 'Judicial Deference: Doctrine and Theory' (2011) 127 LQR 96, 102; Adrian Vermeule, 'Holmes on Emergencies' (2008) 61 Stan LR 163, 164. For

Focusing on epistemic deference, however, may cause one to overlook an equally important notion. Deference may also refer to the allocation of authority. Rather than simply paying respect to the decisions of another, one might allocate authority to another to make binding decisions. Such authority need not be absolute: its exercise might be subject to limitations of, to take a pertinent example, reasonableness. Decisions are binding, as long as they are, say, reasonable. I attach the label of *doctrinal deference* to this notion. The main focus of this book will be on doctrinal deference. Specifically, I aim to develop what I term a doctrine of curial deference which, I will argue, ought to be applied by reviewing courts whenever decisions of delegated decision-makers are challenged.

An example should shed some light on the distinction between epistemic deference and doctrinal deference. *Morse* v. *Frederick*[5] is a decision of the Supreme Court of the United States. In Juneau, Alaska, a group of high school students were allowed out during their school day to observe the Olympic Torch Relay en route to the Winter Games in Salt Lake City in 2002. During the Relay, one of the students unfurled a 14-foot banner, which declared: 'Bong Hits 4 Jesus'. On the basis that the reference to a bong – a device designed to facilitate the consumption of marijuana – violated the school's policy prohibiting public expression advocating the use of illegal drugs, the offending student was suspended from school for ten days. Subsequently, the student sued the school's principal for damages, on the basis that the former's right to freedom of expression – guaranteed by the First Amendment to the United States Constitution – had been violated.

In holding that the student's rights had not been violated, Roberts CJ relied on doctrinal deference and epistemic deference respectively. First, Roberts CJ affirmed that a school principal was entitled, consistent with the First Amendment, to punish speech which could be '*reasonably viewed* as promoting illegal drug use'.[6] This is an example of doctrinal deference: authority was allocated to the school principal to take punitive measures. However, that authority was not unbounded: any decision of the principal that speech could be construed as advocating illegal drug use would have to be reasonable. Assuming the reasonableness of the principal's view of this question, a court could not quash the measures

different uses of the term, see e.g. Scott Brewer, 'Scientific Expert Testimony and Intellectual Due Process' (1998) 107 Yale LJ 1535; Paul Horwitz, 'Four Facts of Deference' (2008) 83 Notre Dame LR 1061, 1086; Michael Moore, 'Four Reflections on Law and Morality' (2007) 48 William and Mary *LR* 1523, 1542.

[5] (2007) 551 US 393. [6] *Ibid.*, p. 403. Emphasis added.

imposed. Secondly, Roberts CJ accorded weight to the principal's decision as to whether the banner actually could be construed as advocating illegal drug use. He quoted approvingly from affidavits of the principal and, noting that the banner could be read either as an imperative command to take drugs or as a celebration of drug taking, concluded that 'it *was* reasonably viewed as promoting illegal drug use'.[7] Roberts CJ was able to reach this conclusion by according epistemic deference to the decision of the school's principal. In other words, the court's conclusion was not entirely independent; it depended in part on having given weight to the decision of another body.

1.1.2 'Curial deference'

On a point of nomenclature, I employ the term 'curial deference' in preference to 'judicial deference' and 'deference'. Although Lord Steyn has professed himself 'reluctant to enter into an argument about labels', fearing that it might 'fetter our substantive thinking',[8] and 'labels are less important than the underlying approach or philosophy and its consequences',[9] the point is worth pursuing because, I will suggest, the use of 'curial deference' actually clarifies the terms of the discussion.

The root of 'curial' is the Latin word *curia*, which is not, descriptively speaking, limited to courts of law. One might be misled by the development of the Court of the King's Bench, which evolved from the *Curia Regis*. However, the *Curia Regis*, although it acted as an appellate court in complex matters, was primarily a body of wise counsellors.[10] *Curia*, then, does not denote a court of law, but a court of expert advisors. Accordingly, 'curial deference' denotes the paying of respect on the basis of another's competence.

The term 'curial deference' is preferable to both 'deference' and 'judicial deference'. Standing alone, 'deference' arguably has inappropriate 'overtones of servility, or perhaps gracious concession'.[11] Employing the alternative 'curial deference', by adding an extra word, means that

[7] *Ibid.*, p. 409. Emphasis added.
[8] Lord Steyn, 'Deference: A Tangled Story' [2005] PL 346, 350.
[9] Hugh Corder, 'Without Deference, with Respect: A Response to Justice O'Regan' (2004) 121 SALJ 438, 441.
[10] See Max Radin, *Handbook of Anglo-American Legal History* (St Paul: West, 1936), pp. 46–7.
[11] *R (ProLife Alliance)* v. *British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 AC 185 at 240, per Lord Hoffman.

'deference' is less likely to be understood as having connotations of subservience. Moreover, to rule the word 'deference' out completely would be to overlook a distinction between 'submissive deference' and 'deference as respect':[12]

> Deference as submission occurs when the court treats a decision or an aspect of it as nonjusticiable, and refuses to enter on a review of it because it considers it beyond its competence. Deference as respect occurs when the court gives some weight to a decision of a primary decision-maker for an articulated reason, as part of its overall review of the justifications for the decision.[13]

I employ 'curial deference' to denote something closer to the latter (though evidently also including doctrinal deference) than to the former. By contrast, the use of 'judicial deference' is apt to be doubly misleading. First, the term has connotations of individuals, be they judges or members of the legal profession, humbly doffing the cap to others, whereas the deferring where appropriate to the considered views of others seems to capture more accurately the notion of deference as respect. Secondly, employing the term 'judicial deference' might lead its users to place judicial competence at the centre of the discussion, a point to be proved, not merely asserted. For these reasons, I prefer the term curial deference, which encompasses both epistemic deference and doctrinal deference.

1.1.3 Spheres of authority

Murray Hunt has argued powerfully that the notion of spheres of authority, some of which are assigned to the political branches of government and others of which are assigned to the judicial branch, has exerted a malign influence on Commonwealth public law theory.[14] Although my preferred approach is not entirely immune from criticism on the ground that it might tend to create spheres of authority,[15] I agree with the thrust of Hunt's argument.[16]

[12] David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart, 1997), p. 279, p. 286.

[13] Murray Hunt, 'Sovereignty's Blight' in Nicholas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003), p. 337, pp. 346–7.

[14] *Ibid.* [15] I identify and rebut this criticism below 3.7.

[16] But see Sir John Laws' approving view of 'territoriality' in 'Concluding Comments: Judicial Review's Constitutional Home' in Christopher Forsyth *et al.* (eds.), *Effective*