

The Power of Government to Make Contracts

By David Owen Francis Heaton

St John's College, The University of Oxford

Supervised by Professor Anne Davies

**This thesis of c 30,000 words is submitted for the degree of
Master of Philosophy in Law**

Trinity Term 2015

Abstract

This thesis examines why the British central government can make contracts without statutory power. It argues that, to bear contractual rights, ‘government’ must be a legal person with legal personality extending to those rights. This constitutes a requirement for positive legal authorisation for government action with legal effect akin to that of natural persons’ actions (including contracting). Further, government contracting power is subject to judicial review, which constrains the purposes and manner of its exercise. This makes wholesale comparisons with the contracting power of natural persons inappropriate.

The thesis next examines and rejects two commonly advanced explanations of government contracting power: the ‘third source’ and ‘the Crown’ as corporation sole. The ‘third source’ theory — that government is free to act absent some prohibition — fails altogether to identify what legal person ‘government’ is and to explain the extent of its legal personality. The view that because it is a corporation sole ‘the Crown’ (here seen as a separate legal person from the Sovereign) has contracting power is also flawed: historical legal material suggests corporations sole were not separate legal persons and that the only legal effects of sole corporateness were property descending to the corporator’s successors (not heirs) and limits on dispositive power; for the Sovereign even this is doubtful in view of the prerogative.

This thesis then argues that the best explanation of government contracting power is that the Sovereign is a natural person and, for that reason, has power to contract (subject to judicial review constraints). ‘The Crown’ simply means ‘the Sovereign’; government officers act as her agents when placing contracts. This view has explicit Commonwealth and implicit English support in authority. Academic objections are unpersuasive. While further conceptual

possibilities may exist, the natural person explanation of government contracting is conceptually coherent and best represents the law.

Table of Contents

Table of Abbreviations	v
Table of Cases	vi
Table of Legislation	x
Acknowledgments	xii
I Introduction.....	1
II Conceptual Foundations.....	7
A 'Power' to Make Contracts	7
1 Legal Personality Extending to Contractual Rights and Obligations Is Required	7
2 Legal Personality as 'Positive' Legal 'Authorisation' for Government Action	11
B Judicial Review Constrains Government Contracting	20
1 Authority Establishes That Government Non-Statutory Legal Action Is Subject to Judicial Review	21
2 A 'Public Element' Requirement for Contracting Decisions Is Partial and Unjustifiable	26
C A Plea to Abandon 'Capacity'	32
III No Power Required?.....	34
A <i>Malone</i> and the 'Third Source': No Prohibition Equals 'Authority' to Act	34
B Difficulties with the 'Third Source'	37
1 'Third Source' Fails to Identify Who or What 'Government' Is and Explain Its Legal Personality	37
2 'Third Source' Ahistorically Conflates Individuals with 'Government'	39
3 'Third Source' Is Internally Incoherent When Applied to Contract.....	42
4 'Third Source' Is Inconsistent with Authoritative Decisions and Incompatible with Some Civil Actions	43
(a) Inconsistency with Authoritative Decisions Separating <i>Vires</i> and Civil Liability	43
(b) Incompatibility with the Structure of Some Civil Actions and Odd Results	44
C Conclusion on <i>Malone</i> and the 'Third Source'	46
IV 'The Crown' as Corporation Sole or Aggregate?	47
A Commentators' Suggestions That 'the Crown' Is a Corporation Sole So Has Contracting (and Natural Person) Power(s): Four Propositions	50
B Recent Judicial Decisions Are Ambivalent about the Second, Third and Fourth Propositions	51
C Older Decisions and Commentary Generally Do Not Support the Second, Third and Fourth Propositions.....	57
1 Older Judicial Decisions.....	58
2 Institutional Commentary.....	68
D Wider Historical Materials Falsify the Second, Third and Fourth Propositions and Suggest 'the Crown' Does Not Have Contracting Power as a Corporation Sole	71

1	Corporations Sole Are Probably Not Separate Legal Persons	74
2	Powers of Non-Regal Corporations Sole and Individuals Differ	77
	(a) General Differences	77
	(b) Corporations Sole Lack Contracting Power	79
3	‘The Crown’ Is a Unique Corporation Sole and Purported Corporate Legal Effects Are Difficult to Divorce from Exclusive Prerogative Power	81
E	Conclusion on Corporation Sole	85
F	Corporation Aggregate or Innominate Corporation?	86
V	Power Because the Sovereign Is an Individual	88
A	Support for the Natural Person Explanation	89
1	Commonwealth Support	91
2	British Support	94
	(a) General Statements	95
	(b) Petition of Right	96
	(c) Agency	101
	(d) Equitable Relief	102
	(e) Crown Servants	103
	(f) Commonwealth Divisibility	104
B	Objections to the Natural Person Explanation	105
1	Anachronism to Equate ‘the State’ with the Sovereign?	105
2	Odd Results?	109
3	Governmental Power Is Fundamentally Different?	110
4	Divisibility of ‘the Crown’ Is Difficult to Accommodate on the Natural Person Explanation?	112
5	An Artificial Legal Person Representing ‘the State’ Has Emerged?	113
	(a) No Evidence of an Artificial Legal Person	114
	(b) Contrast with the Australian Commonwealth	116
C	Conclusion on the Sovereign as an Individual	117
VI	Conclusion	118
	Bibliography	122
	Articles	122
	Books	123
	Chapters in Edited Books	125
	Working Papers and Speeches	126
	United Kingdom Government Publications	126
	Legal Encyclopaedia	126

Table of Abbreviations

For ease of reference, the frequently cited sources below appear only in shortened form in the body of this thesis. Secondary sources are cited in author–date style for brevity in the body of the thesis and are listed in full in the Bibliography.

Abbreviated Reference	Source
<i>Australian Constitution</i>	Commonwealth of Australia Constitution Act 1900 s 9 (which contains the Constitution)
<i>Bancoult</i>	<i>R (Bancoult) v Foreign Secretary (No 2)</i> [2008] UKHL 61, [2009] 1 AC 453
<i>Ex parte C</i> (CA)	<i>R v Secretary of State for Health, ex parte C</i> [2000] 1 FLR 627 (CA)
<i>GCHQ</i>	<i>Council of Civil Service Unions v Minister for the Civil Service</i> [1985] AC 374 (HL)
<i>Halsbury's</i> (1910)	Earl of Halsbury (ed), <i>The Laws of England Being a Complete Statement of the Whole Law of England</i> (1910)
<i>Halsbury's</i> (1996)	Lord Hailsham (ed), <i>Halsbury's Laws of England</i> (4 th edn (reissue), 1996)
<i>Hooper</i>	<i>R (Hooper) v Secretary of State for Work and Pensions</i> [2005] UKHL 29, [2005] 1 WLR 1681
<i>Malone</i>	<i>Malone v Metropolitan Police Commissioner</i> [1979] Ch 344 (Ch)
<i>New London College</i>	<i>R (New London College Ltd) v Secretary of State for the Home Department</i> [2013] UKSC 51, [2013] 1 WLR 2358
<i>Sandiford</i>	<i>R (Sandiford) v Foreign Secretary</i> [2014] UKSC 44, [2014] 1 WLR 2697
<i>Shrewsbury</i>	<i>Shrewsbury & Atcham BC v Secretary of State</i> [2008] EWCA Civ 148, [2008] 3 All ER 548
<i>Town Investments</i>	<i>Town Investments Ltd v Department of the Environment</i> [1978] AC 359 (HL)
<i>Williams (No 1)</i>	<i>Williams v Commonwealth</i> [2012] HCA 23, (2012) 248 CLR 156

Table of Cases

References to cases in the *English Reports* in the body of this thesis contain only the nominate citation for brevity. Citations to the *English Reports* are included in this table.

United Kingdom (and pre-Union England)

<i>Anns v Merton LBC</i> [1978] AC 728 (HL).....	44
<i>Arab Monetary Fund v Hashim (No 3)</i> [1991] 2 AC 114 (HL)	10
<i>Arundel's Case</i> (1615) Hob 64, 80 ER 212	77
<i>Attorney-General v Great Southern and Western Railway Co of Ireland</i> [1925] AC 754 (HL).....	102, 113
<i>Attorney-General v Köhler</i> (1861) 9 HLC 654, 11 ER 885	57, 58, 60, 61, 67, 76, 109
<i>Attorney-General v Leicester Corp</i> [1943] Ch 86 (Ch)	85
<i>Attorney-General v Manchester Corp</i> [1906] 1 Ch 643 (Ch)	85
<i>Bankers Case</i> (1690–1700) 14 How St Tr 1	97
<i>Bankers Case</i> (1700) 5 Mod 29, 87 ER 500	97
<i>Bankers Case</i> (1700) Skin 601, 90 ER 270.....	3, 88, 94, 97
<i>Barrett v Enfield LBC</i> [2001] 2 AC 550 (HL)	44
<i>Bateman v Ashton-under-Lyne Corp</i> (1858) 3 H&N 323, 157 ER 494	79
<i>BBC v Johns</i> [1965] 2 Ch 32 (CA).....	119
<i>Bumper Development Corp v Commissioner of Police of the Metropolis</i> [1991] 1 WLR 1362 (CA)	10
<i>Burmah Oil Co Ltd v Lord Advocate</i> [1965] AC 75 (HL)	16, 19, 119, 120
<i>Calvin's Case</i> (1608) 7 Co Rep 1a.....	8, 58, 82, 83
<i>Case of a Fine Levied by the King Tenant in Tail</i> (1604) 7 Co Rep 32a, 77 ER 459	58
<i>Case of Proclamations</i> (1610) 12 Co Rep 74, 77 ER 1352	108
<i>Civilian War Claimants Association Ltd v The King</i> [1932] AC 14 (HL)	101
<i>Council of Civil Service Unions v Minister for the Civil Service</i> [1985] AC 374 (HL) (GCHQ).....	12, 17, 21, 22, 26, 31
<i>Dunn v MacDonald</i> [1897] 1 QB 555 (CA).....	10
<i>Dutchy of Lancaster</i> (1561) 1 Plowd 212, 75 ER 325	57, 64, 65, 83, 84, 109
<i>Dyson v Attorney-General</i> [1911] 1 KB 410 (CA)	102, 103
<i>Earl of Devonshire's Case</i> (1606) 11 Co Rep 89a, 77 ER 1266.....	58, 83, 84
<i>Entick v Carrington</i> (1765) 2 Wils KB 275, 95 ER 807	16, 119
<i>Eshugbayi Eleko v Government of Nigeria</i> [1931] AC 662 (PC)	16
<i>Feather v The Queen</i> (1865) 6 B&S 257, 122 ER 1191	16, 100
<i>Fulmerston v Steward</i> (1555) 1 Plowd 101, 75 ER 160.....	78, 84
<i>Gillick v West Norfolk and Wisbech AHA</i> [1986] AC 112 (HL).....	16, 26
<i>Hang Wah Chong Investment Co v Attorney-General (Hong Kong)</i> [1981] 1 WLR 1141 (PC).....	25
<i>Holland and Boin's Case</i> (1586) 2 Leon 121, 74 ER 410	78
<i>Howley v Knight</i> (1849) 14 QB 240, 117 ER 95.....	77, 79, 80, 81
<i>IRC v Hambrook</i> [1956] 2 QB 641 (QB and CA).....	103
<i>Lane's Case</i> (1596) 2 Co Rep 16b, 76 ER 423	84
<i>Law Guarantee & Trust Society Ltd v Bank of England</i> (1890) 24 QBD 406 (QB).....	77, 85
<i>Lictor Anstalt v MIR Steel UK Ltd</i> [2011] EWHC 3310 (Ch), [2012] 1 All ER (Comm) 592	45

<i>Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick</i>	
[1892] AC 437 (PC).....	92
<i>Locabail (UK) Ltd v Bayfield Properties Ltd</i> [2000] QB 451 (CA)	32
<i>M v Home Office</i> [1992] QB 270 (CA)	9
<i>M v Home Office</i> [1994] 1 AC 377 (HL)	9, 51, 53, 55
<i>Macbeath v Haldimand</i> (1786) 1 TR 172, 99 ER 1036	10, 101
<i>Mackenzie-Kennedy v Air Council</i> [1927] 2 KB 517 (CA).....	16
<i>Magdalen College Case</i> (1615) 11 Co Rep 66b, 77 ER 1235	78
<i>Malone v Metropolitan Police Commissioner</i> [1979] Ch 344 (Ch).....	14, 34, 37, 46
<i>Mercury Energy Ltd v Electricity Corp of New Zealand Ltd</i> [1994] 1 WLR 521 (PC)	27
<i>Metropolitan Asylum District v Hill</i> (1881) 6 App Cas 193 (HL)	19
<i>Mulliner v Midland Railway Co</i> (1879) 11 Ch D 611 (Ch)	78
<i>Ogston v Aberdeen District Tramways Co</i> [1897] AC 111 (HL).....	19
<i>Oxnard Financing SA v Rahn</i> [1998] 1 WLR 1465 (CA).....	9, 10
<i>Pawlett v Attorney-General</i> (1668) Hardres 465, 145 ER 550	102, 103
<i>Porter v Magill</i> [2001] UKHL 67, [2002] 2 AC 357	31
<i>Power v Banks</i> [1901] 2 Ch 487 (Ch)	77
<i>R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs</i> [2002] EWCA	
Civ 1598, [2003] UKHRR 76	23
<i>R (Association of British Civilian Internees: Far East Region) v Secretary of State for</i>	
<i>Defence</i> [2003] EWCA Civ 473, [2003] QB 1397	25, 31
<i>R (Bancoult) v Foreign Secretary (No 2)</i> [2008] UKHL 61, [2009] 1 AC 453	16, 23, 33, 119, 120
<i>R (BAPIO Action Ltd) v Secretary of State for the Home Department</i> [2008] UKHL 27,	
[2008] 1 AC 1003	26
<i>R (Barclay) v Lord Chancellor (No 2)</i> [2014] UKSC 54, [2015] AC 276.....	23
<i>R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland</i>	
[2015] UKSC 9, [2015] AC 1065	16
<i>R (Cookson & Clegg) v Ministry of Defence</i> [2005] EWCA Civ 811, [2006] Eu LR 1092	3, 27, 28
<i>R (Elias) v Secretary of State for Defence</i> [2006] EWCA Civ 1293, [2006] 1 WLR 3213	25, 31
<i>R (Hooper) v Secretary of State for Work and Pensions</i> [2005] UKHL 29,	
[2005] 1 WLR 1681	3, 39, 54, 58
<i>R (Molinaro) v Kensington and Chelsea RLBC</i> [2001] EWHC Admin 896,	
[2002] BLGR 336	30, 31
<i>R (New London College Ltd) v Secretary of State for the Home Department</i>	
[2013] UKSC 51, [2013] 1 WLR 2358.....	1, 39, 46, 52, 58, 110
<i>R (Niazi) v Secretary of State</i> [2008] EWCA Civ 755.....	25
<i>R (Sandiford) v Foreign Secretary</i> [2014] UKSC 44, [2014] 1 WLR 2697	1, 3, 22, 23, 24, 26, 39
<i>R v Bow Street Magistrate, ex parte Pinochet (No 2)</i> [2000] 1 AC 119 (HL)	32
<i>R v Criminal Injuries Compensation Board, ex parte Lain</i> [1967] 2 QB 864 (CA)	25
<i>R v Criminal Injuries Compensation Board, ex parte P</i> [1995] 1 WLR 845 (CA).....	25
<i>R v Foreign Secretary, ex parte Indian Association of Alberta</i> [1982] QB 892	
(CA)	104, 105, 112, 113
<i>R v Legal Aid Board, ex parte Donn & Co</i> [1996] 3 All ER 1 (QB)	29, 32
<i>R v Lord Chancellor, ex parte Hibbit & Saunders</i> [1993] COD 326 (DC).....	27, 28, 29, 31, 32
<i>R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett</i>	
[1989] QB 811 (CA)	23
<i>R v Secretary of State for Health, ex parte C</i> [1999] 1 FLR 1073 (QB).....	53, 95

<i>R v Secretary of State for Health, ex parte C</i> [2000] 1 FLR 627 (CA)	
.....	1, 5, 14, 16, 24, 25, 31, 36, 48, 52, 53, 86, 87, 95
<i>R v Secretary of State for the Home Department, ex parte Fire Brigades Union</i>	
[1995] 2 AC 513 (HL)	39
<i>R v Secretary of State for the Home Department, ex parte Northumbria Police Authority</i>	
[1989] 1 QB 26 (CA)	119
<i>R v Smith</i> (1702) 7 Mod 78, 87 ER 1106	84
<i>R v Somerset CC, ex parte Fewings</i> [1995] 1 All ER 513 (QB)	18, 35
<i>R v Somerset CC, ex parte Fewings</i> [1995] 1 WLR 1037 (CA)	18
<i>Raleigh v Goschen</i> [1898] 1 Ch 73	16
<i>Re Mason</i> [1928] Ch 385 (Ch)	57, 60, 61, 67, 76, 81, 87
<i>Re McFarland</i> [2004] UKHL 17, [2004] 1 WLR 1289	25, 106
<i>Riordan v War Office</i> [1959] 1 WLR 1046 (QB)	103
<i>Rustomjee v The Queen</i> (1876) 1 QBD 487 (QB)	100, 101
<i>Rustomjee v The Queen</i> (1876) 2 QBD 69 (CA)	101
<i>Ryves v Duke of Wellington</i> (1846) 9 Beav 579, 50 ER 467	82
<i>Salter v Grosvenor</i> (1723) 8 Mod 303, 88 ER 216	75
<i>Shrewsbury & Atcham BC v Secretary of State</i> [2008] EWCA Civ 148,	
[2008] 3 All ER 548	1, 3, 14, 16, 24, 31, 36, 50, 52, 53, 54, 95
<i>Sir Thomas Wroth's Case</i> (1573) 2 Plowd 452, 75 ER 678	60
<i>Sutton's Hospital</i> (1612) 10 Co Rep 1a, 77 ER 937	57, 66, 67, 71, 78
<i>Thomas v The Queen</i> (1874) LR 10 QB 31	97, 98, 109
<i>Thomas v The Queen (No 2)</i> (1874) LR 10 QB 44	98
<i>Three Rivers DC v Bank of England (No 3)</i> [2003] 2 AC 1 (HL)	45
<i>Tobin v The Queen</i> (1864) 16 CBNS 310, 143 ER 1148	99
<i>Town Investments Ltd v Department of the Environment</i> [1978] AC 359 (HL)	
.....	53, 55, 56, 58, 86, 87, 95, 96
<i>Viscount Canterbury v Attorney-General</i> (1843) 1 Ph 306, 41 ER 648	60, 67, 99
<i>Von Hellfeld v Rechnitzer</i> [1914] 1 Ch 748 (CA)	9, 10
<i>Wenlock v River Dee Co</i> (1883) 36 Ch D 674 (note) (CA)	85
<i>Williams v Howarth</i> [1905] AC 551 (PC)	104, 113
<i>Willion v Berkley</i> (1559) 1 Plowd 223, 75 ER 339	40, 57, 61, 62, 63, 64, 85
<i>Windsor & Annapolis Railway Co v The Queen</i> (1886) 11 App Cas 607 (PC)	98
<i>Wood v Mayor and Commonality of London</i> (1701) 1 Salk 397, 91 ER 344	75
<i>Woolwich Equitable Building Society v IRC</i> [1993] AC 70 (HL)	45
<i>X (minors) v Bedfordshire CC</i> [1995] 2 AC 633 (HL)	43, 44

Australia

<i>Chaff and Hay Acquisition Committee v JA Hemphill & Sons Pty Ltd</i> (1947) 74 CLR 375	8
<i>Clough v Leahy</i> (1904) 2 CLR 421	14
<i>Commonwealth v Bogle</i> (1953) 89 CLR 229	117
<i>Commonwealth v Mewett</i> (1997) 191 CLR 471	41, 117
<i>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and</i>	
<i>Allied Services Union of Australia v Queensland Rail</i> [2015] HCA 11, (2015) 318 ALR 1	9
<i>MBA Land Holdings Pty Ltd v Gungahlin Development Authority</i> [2000] ACTSC 89,	
(2000) 206 FLR 120	32

<i>New South Wales v Bardolph</i> (1934) 52 CLR 455.....	93, 94
<i>Williams v Commonwealth (No 2)</i> [2014] HCA 23, (2014) 252 CLR 416	117
<i>Williams v Commonwealth</i> [2012] HCA 23, (2012) 248 CLR 156 (<i>Williams (No 1)</i>)	14, 32, 41, 89, 117

Canada

<i>Attorney-General (Quebec) v Labrecque</i> [1980] 2 SCR 1057	91, 93
<i>Verreault & Fils v Attorney-General (Quebec)</i> [1977] 1 SCR 41	91, 92, 93

Table of Legislation

Act de Donis Conditionalibus 1285 (13 Edw 1 c 1).....	61, 62, 63, 64
Alienation by Bishops Act 1558 (1 Eliz 1 c 19)	78
<i>Australian Constitution</i> (being Commonwealth of Australia Constitution Act 1900 s 9)	5, 114, 116, 117
s 1	116
s 51	9, 116, 117
s 52	116
s 61	116
s 69	116
s 81	116
s 82	116
s 83	116
s 84	116
s 87	116
s 89	116
s 93(ii)	116
s 105	116
s 105A	116
s 122	116
Bodies Corporate (Joint Tenancy) Act 1899 (62 & 63 Vict c 20)	77
s 1	77
Commonwealth of Australia Constitution Act 1900	116
s 4	116
s 9	116
Crown Private Estate Act 1800 (39 & 40 Geo 3 c 88).....	51
Crown Proceedings Act 1947.....	8, 41, 55
s 1	8, 41
s 2	41, 96
s 21	42
s 25	42
s 26	42
s 40	96
Human Rights Act 1998	20
s 6	20, 54
Immigration Act 1971	52
Interpretation Act 1889 (52 & 53 Vict c 63).....	96
s 30	96
Interpretation Act 1978	96
Ministers of the Crown Act 1975	48
s 2	48
s 6	48
Sch 1	48
Public Contracts Regulations 2015, SI 2015/102.....	3, 27

Regulation of Investigatory Powers Act 2000 37

 s 1 37

Acknowledgments

I am indebted to a number of people for their assistance over the past year. I would like to thank several individuals for helpful discussions and insightful comments. They include Justice Kenneth Hayne AC, Sir Stephen Sedley, Professor Simon Evans, Professor Cheryl Saunders AO, Dr Adam Perry, Professor Andrew Burrows QC, Professor Anthony Bradley, Nick Wood and Ben Saunders. I am also very grateful to Professor Michael Crommelin, Michael Heaton, Stella Heaton, Stephen Lloyd, Rob Kelly, Max Harris, Nicholas Tiverios and Dr Benjamin Spagnolo for detailed comments on drafts and discussions at various points. Christopher Tran and Olaf Ciolek kindly organised a gathering of the Australian Association of Constitutional Law in Melbourne in January 2015 at which I was able to present work in progress. Dr Eirik Bjorge and Stephen Dimelow organised a gathering of the Oxford Public Law Discussion Group in June 2015 for the same purpose. Professor Adrienne Stone invited me to present further work at the Melbourne Law School Constitutional Law Conference in August 2015. All were experiences from which I benefitted greatly and at which I received valuable thoughts and comments.

I am also particularly grateful to Professor Bruce Harris, who kindly attended and responded to my presentation at the Public Law Discussion Group and challenged me to think further about what I meant by ‘power’ to contract. The same goes for my examiners, Professor Timothy Endicott and Professor Mark Elliott, for their insightful comments and questions.

I acknowledge and thank the Menzies Foundation for funding my participation in the MPhil and St John’s College and the Law Faculty at the University of Oxford for support towards research in Australia.

My biggest thanks go to my supervisor, Professor Anne Davies, for encouragement, suggestions, searching but always constructive criticism, support and for reading several (overly long) drafts throughout the year.

Finally, for her forbearance, love and support throughout I thank Penelope Heaton.

DOFH
London
October 2015

I INTRODUCTION

This thesis examines why the British central government can make contracts without statutory power to do so. It argues that two common explanations — the ‘third source’ and corporation sole — are unsupported by authority and conceptually flawed. Instead, the best explanation of contracting power is the Sovereign being a natural person. Whatever its basis, government contracting power is subject to judicial review, which constrains the manner, motives and purposes for which it may be exercised, making unqualified comparisons with the contracting power of natural persons (hereafter ‘individuals’) inappropriate.

The analysis presented is doctrinal. It seeks to identify first and foremost what judicial decision establishes or suggests as law. It also seeks to evaluate claims by commentators such as Professors Sir William Wade, Christopher Forsyth, Bruce Harris, Sue Arrowsmith and Peter Hogg by reference to cases on government contracts and general British constitutional law. It uses some Commonwealth comparative material, but justifies this by reference to British constitutional considerations.

Providing a conceptually persuasive explanation for, and identifying relevant authority bearing on, government contracting power is valuable and timely for several reasons.

First, multiple recent Supreme Court and Court of Appeal decisions indicate that the source of the Crown’s ‘general administrative powers ... which are not exercises of the royal prerogative and do not require statutory authority’,¹ including power to contract, remains an

¹ *New London College* [28] (Lord Sumption). See also *Sandiford* [49] (Lords Carnwath and Mance), [82] (Lord Sumption); *Ex parte C* (CA) 632 (Hale LJ); *Shrewsbury* [44] (Carnwath LJ).

open question. The source has been the subject of commentary,² which, given the relative paucity of decisions, warrants critical consideration. Contracting power is one so-called ‘general administrative power’, and the analysis in this thesis is limited to contract. However, contract is an important example due to the wide range of activities government conducts and amount of money it spends by contract.³ Further, the position as to contract may be illuminating as to other powers and a possible global explanation of ‘general administrative powers’, matters which will be considered briefly but await further academic examination.

Secondly, contracting power and the ‘general administrative powers’ are an under-theorised part of British public law. Relatively little effort has been made to identify their conceptual basis and how this fits with constitutional law more generally. Conceptual clarity and systemic coherence are inherently desirable. Further, courts and commentators often refer to ‘the Crown’ as a contracting party and to ‘Crown contracts’. By examining what ‘the Crown’ means in the contracting context, this thesis contributes to the ongoing broader debate⁴ about the meaning and conceptualisation of ‘the Crown’, ‘the State’ and the Sovereign in British constitutional law.

Thirdly — and more practically — conceptual clarity about the basis of contracting power enables understanding of *why* the law recognises such power. Understanding the rationale for government power enables identification of its limits. The conceptual basis of contracting power has implications for its scope and, perhaps, how judicial review constrains

² See, eg, Harris (1992); Harris (2007); Harris (2010); Harris (2014); Howell (2010); McManus (2010); Sales (2014); McLean (2004); Arrowsmith (1988) ch 6; Arrowsmith (1992) 6–8, 53–6; Hogg and Monahan (2000) 13–14, 219; Hogg, Monahan and Wright (2011) 12, 16–18, 313.

³ For example, in 2014–15 the Crown Commercial Service assisted £15.1 billion of public sector procurement and the Department of Defence 2014–24 Equipment Plan includes £69 billion for procurement: Crown Commercial Service (2015–16) 18; National Audit Office (2014–15) 11.

⁴ See generally Sunkin and Payne (1999).

it. Identification of the conceptual basis of the power may thus challenge the often repeated⁵ but rarely conceptually justified assertion that ‘the Crown’ has contracting power as wide — as to subject-matter — as that of the individual. Similarly, while government contracting power is subject to judicial review on any explanation considered below, the precise application of judicial review principles may vary with the explanation. For example, Sales, in reliance on the (problematic) corporation sole explanation, advocates proper purposes limits to government power by reference to the corporate *ultra vires* doctrine,⁶ whereas the Court of Appeal in *Shrewsbury* sees such limits as stemming from direct application of public law principles. Detailed consideration of this interaction is not possible, but this thesis constitutes a necessary anterior step in that analysis. The ultimate consequence of all this is the more coherent subjection of government contracting to the requirements of good administration imposed by public law.

Available space precludes examination of statutory contracting power (and statutory bodies), the interaction of statute and non-statutory power, the effect of subordinate legislation implementing EU procurement rules,⁷ and powers other than contracting power. In particular, this thesis does not consider power to spend money, which under consolidated fund legislation is likely exclusively statutory,⁸ power to own property, which likely shares its explanation

⁵ See, eg, Turpin (1972) 19 (‘the Crown possesses a general capacity to make contracts which rests upon no statutory authority. The existence of this power cannot now be realistically controverted’); Craig (2012) [5-033] (‘the Crown possesses a common law power to contract ... unconstrained by ... subject-matter or person’, citing *Bankers Case* (1700) Skin 601, which supports but does not in terms state this wide proposition: see Part V(A)(2)(b)).

⁶ See below n 358.

⁷ Public Contracts Regulations 2015, SI 2015/102. Judicial review cannot be sought for precisely the same conduct by a party who claims thereunder: *R (Cookson & Clegg) v Ministry of Defence* [2005] EWCA Civ 811, [2006] Eu LR 1092 [20] (Buxton LJ).

⁸ Treasury (1989) [2.2.6] (‘the Appropriation Act is ... the sole legal authority for voted expenditure’); *contra Sandiford* [49] (Lords Carnwath and Mance), [82] (Lord Sumption); *Hooper* [4]–[6] (Lord Nicholls), [46]–

with contracting power, and power to distribute information, to which different considerations may apply, at least where distribution does not of itself have legal consequences. Consideration of these areas and further government powers would constitute valuable future enquiry.

This thesis proceeds as follows. Part II establishes two conceptual building-blocks: the need for a legal person with legal personality that extends to contractual rights — which informs the meaning of ‘power’ to contract — and the applicability of judicial review to constrain the power. I argue that the essential steps in explaining government contracting power are identifying the government party, explaining why it is a legal person, and explaining why its legal personality extends to the rights at issue (here, why the law recognises it as a contractual right-and-duty-bearer). I further argue that contracting power ought to be subject to judicial review generally and has been so treated, at least in some circumstances, which differentiates the power from that of an individual. Part II concludes with a brief sketch of how judicial review principles constrain contracting power in practice.

Part III considers and rejects Professor Harris’s ‘third source’ explanation of when government may act as an explanation of contracting power. Harris argues that no power need be identified because, absent some prohibition, government can act as an individual can, including making contracts. I reject this view because, most fundamentally, Harris fails to explain who or what he means by ‘government’ and provides no explanation of the ‘government’s’ or ‘Crown’s’ or ‘State’s’ legal personality. His theory is generally

[47] (Lord Hoffmann), [82] (Lord Hope), [96] (Lord Scott), [103] (Lord Brown), assuming or suggesting common law power to spend public money.

unpersuasive: it is beset with logical and precedential difficulties, particularly when its consequences are unearthed.

Part IV considers and rejects the view espoused most prominently by Professors Wade, Forsyth, Hogg and Arrowsmith that ‘the Crown’ is a common law corporation (sole, aggregate or innominate) and *because of this* has all the powers of a natural person (hereafter ‘natural person powers’), so can make contracts. Decisions and authoritative commentary on common law corporations suggest that, in fact, sole corporateness did *not* create a separate legal person or confer power but simply changed the descent and constrained disposition of property. Excepting one recent dictum, no case states that *contracting power* flowed therefrom. Further, the assumptions underlying this view — that sole corporateness implies an artificial legal person with natural person powers and that any analogy exists between the Sovereign and other corporations sole — are demonstrably wrong. No authority (two unreasoned dicta excepted) supports the view that the Sovereign is a corporation aggregate, although aggregate corporateness *would* establish a separate legal person with contracting power. Assertions of some unspecified corporate existence are really normative calls for change rather than exegesis of the law. The Supreme Court should not accept the Court of Appeal’s reasoning in *Ex parte C* and should abandon the concept of corporation — sole or otherwise — as an explanation of government contracting power.

Part V advances a persuasive explanation of government contracting power: the power exists — subject to judicial review — because the Sovereign is a natural person (hereafter the ‘natural person explanation’). Many older and modern English cases on examination support this view indirectly; Commonwealth decisions provide direct support. Objections to this view are unpersuasive, and the contrast to the *Australian Constitution* — which *does* create a separate legal person — confirms that none exists in Britain. As such, the natural person

explanation is a persuasive explanation of government contracting power and may (subject to future consideration) explain other natural person powers. Part VI offers some concluding observations.

II CONCEPTUAL FOUNDATIONS

This Part argues that the existence of a legal person with legal personality of sufficient extent is a prerequisite to bearing contractual rights and situates this argument in the broader debate about what ‘government’ action requires ‘positive authorisation’. It argues that government contracting decisions are (often, on current authority) subject to judicial review and should, in principle, always be so. Judicial review therefore constrains contracting power, regardless of the explanation of government contracting power adopted.

A ‘Power’ to Make Contracts

1 *Legal Personality Extending to Contractual Rights and Obligations Is Required*

Formation of contract entails the agreement of (at least) two parties to rights and duties. The parties must (amongst other things) be *ad idem*.⁹ Contractual formation, however, presupposes parties whom the law recognises as capable of bearing contractual rights and indicating consent. As Raz says, ‘[t]he definition of rights does not itself settle the issue of who is capable of having rights’.¹⁰ Asserting that a party other than an individual may contract requires identification of *who* it is, why the law recognises it as *capable of bearing* contractual rights, and how actions of individuals — through whom such parties must act — are *attributed* to it.

⁹ Beale (2012) [2-001].

¹⁰ Raz (1986) 176. It is necessary to differentiate between ‘the right to promise which a promisor must have if his promise is to be binding’ and ‘the right conferred on the promisee by the promise’: at 173.

This is usually expressed by saying that a contracting party must *be* a ‘legal person’ — be recognised by law as a right-and-duty-bearing entity¹¹ — and that the aspects of its ‘legal personality’ — the specific rights and duties the law permits it to bear¹² — must *include* contractual rights and duties. The rights to which legal personality extends ‘come in thick and thin bundles’.¹³ The existence of any one aspect establishes that the entity holding it is a legal person — a body recognised by law for *at least that* purpose. Critically, however, the existence of one aspect does *not logically or necessarily imply* the existence of others. Bearing contractual obligations does not necessarily imply ability to be sued: ‘the Crown’, sometimes regarded as bound by contract,¹⁴ could not be sued (instead consenting to petitions of right)¹⁵ before legislative intervention.¹⁶ Even individuals did not *all* have the same aspects of legal personality: historically some aliens could not own ‘lands within this realm’.¹⁷

Several decisions apply the distinction between existence as a legal person and the aspects (or extent) of legal personality, sometimes using different terminology. They illustrate legal persons with different aspects of legal personality and demonstrate that recognition of

¹¹ See, eg, Patton (1972) 391; Cane and Conaghan (2008) 885; Fitzgerald (1966) 299; Raz (1986) 166; *Chaff and Hay Acquisition Committee v JA Hemphill & Sons Pty Ltd* (1947) 74 CLR 375, 385 (Latham CJ) ([‘a] body which, as distinct from the natural persons composing it, can have rights and be subject to duties ... must be regarded as having a legal personality’).

¹² See, eg, Cane and Conaghan (2008) 885 (‘a set of abilities or capacities to participate in legal relations’); Patton (1972) 394 (‘the differing legal personalities of entities whose recognition as legal persons is assumed’).

¹³ Cane and Conaghan (2008) 885. See also Fitzgerald (1966) 330; Howell (2010) 46 (there is ‘no necessary identity between the capacity of the Crown as a corporation and the capacity of other corporations’).

¹⁴ See below n 466. On immunity, see Part III(B)(2).

¹⁵ See Part V(A)(2)(b).

¹⁶ Crown Proceedings Act 1947 s 1.

¹⁷ *Calvin’s Case* (1608) 7 Co Rep 1a, 17a.

one aspect does not imply others. Lord Woolf, deciding (for the House of Lords) that the Crown could not be held in contempt in *M v Home Office*, stated that ‘at least for some purposes, the Crown has a legal personality’ — it could hold property and make contracts.¹⁸ However, these aspects did *not* entail that ‘the Crown’ could be held in contempt. The High Court of Australia, deciding whether an authority made by statute ‘not a body corporate’ was nonetheless a ‘trading or financial corporation’ under *Australian Constitution* s 51(xx), distinguished between ‘recognition as a right and duty bearing entity’ — a legal person — and ‘the particular capacities which [a statutory] ... body was given’ — aspects of personality.¹⁹

Private international law decisions also embrace this distinction. In *Von Hellfeld v Rechnitzer*, the Court of Appeal held that a French *société en nom collectif* — a partnership which for service of process and contracts was ‘a distinct person at law from the individuals who constitute the firm’ — could not be sued in England by its partnership name.²⁰ Phillimore LJ held that it could be sued ‘as a corporation’ by showing ‘not merely that it has a separate persona, but that it has a separate ownership of property and a separate liability from ... the persons composing the aggregation.’²¹ In *Oxnard Financing SA v Rahn*, Mummery LJ, holding that a Swiss general partnership could be sued by naming its partners (as partners), referred to the partnership as ‘enjoying a degree of legal personality which enables it to enter

¹⁸ [1994] 1 AC 377 (HL) 424. *Contra M v Home Office* [1992] QB 270 (CA) 300, 307–8 (Lord Donaldson MR), 313 (Nolan LJ), holding the Crown not to be a legal person. Part IV(F) critiques Lord Woolf’s explanation employing corporation sole *and* aggregate.

¹⁹ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11, (2015) 318 ALR 1 [36] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ).

²⁰ [1914] 1 Ch 748 (CA) 750 (Report), 753–4 (Buckley LJ), 754–5 (Phillimore LJ).

²¹ *ibid* 754–5.

into a contract in its own name’ and thought the *société* in *Von Hellfeld* had had ‘some ... characteristics of a separate entity, though not as many as a [Swiss] general partnership’.²²

These principles apply equally to ‘government’ or ‘the state’ or ‘the Crown’. The individual agent is not herself party to or liable on government contracts.²³ Who contracts? As Pollock remarked, it may be an individual or an artificial legal person:²⁴

The greatest of artificial persons, politically speaking, is the State. But it depends on the legal institutions and forms of every commonwealth whether and how far the State or its titular head is officially treated as an artificial person.

Consideration of ‘who’ is complicated by ambiguity about whether ‘the Crown’ as ‘the political entity which exercises government powers’ means simply ‘the Monarch herself’ — an individual — or ‘a corporation sole or corporation aggregate’ — an artificial legal person.²⁵ But either way — contrary to Joseph’s assertion that ‘legal personality implies the plenary powers of a natural person which the Crown, like anyone else, enjoys’²⁶ — the entity’s legal personhood and extension of its legal personality to contracting power must be explained. They cannot simply be assumed. Parts III–V consider explanations of varying persuasiveness.

²² [1998] 1 WLR 1465 (CA) 1475–6. See also *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114 (HL) 164–5 (Lord Templeman); *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (CA) 1372–3 (Purchas LJ).

²³ Unless the individual objectively intends to be bound personally: *Dunn v MacDonald* [1897] 1 QB 555 (CA) 556 (Lord Esher MR), 557 (Lopes and Chitty LJ); *Macbeath v Haldimand* (1786) 1 TR 172, 180 (Lord Mansfield CJ), 181 (Ashurst J), 182 (Buller J).

²⁴ Pollock (1896) 113. See also Carr (1905) 163 (‘[a] *persona ficta* is not a spontaneous growth; it does not exist unless called into being by the State.’)

²⁵ Cornford (1999) 233.

²⁶ Joseph (1993) (Pt 1) 126.

It is necessary to distinguish between the ‘state’ or ‘government’ as legal system — what Hart calls ‘the sovereign above the law’,²⁷ namely, the provider of the set of norms that define and give effect to rights and duties — and the ‘state’ or ‘government’ as *participant* within that system — a legal person. Sales thus distinguishes between ‘the state ... as ... legal system’ and ‘the state ... as ... juristic person’,²⁸ and Maitland between ‘the Crown’ as ‘wielder of public power’ and “‘subject” of private rights’.²⁹ This distinction is necessary because the state as legal system *itself confers* all legal personality, including upon individuals and any internal manifestation of the state. Because this thesis seeks only to explain *how* this occurs in British law (assuming the existence of the British legal system), it need not account for the state as legal system.³⁰

2 *Legal Personality as ‘Positive’ Legal ‘Authorisation’ for Government Action*

The analysis above intersects with the general question of whether and when government action requires ‘positive’ or ‘deliberate’ legal authorisation in the sense that, if challenged, government must point to some legal norm expressly permitting (or immunising) its conduct to establish its validity. Trying to suggest an answer for *all* government action is difficult because government acts in myriad ways. However, the need to demonstrate legal personality extending to private law rights³¹ amounts to a requirement for positive legal authorisation to create and hold such rights. The following discussion places that requirement in the context

²⁷ Hart (1961) 50.

²⁸ Sales (2014) 29 n 140.

²⁹ Maitland (1901) 133.

³⁰ See generally Raz (1980).

³¹ I use ‘right(s)’ to encompass, in Hohfeldian terms, all claims, privileges, powers and immunities and their correlative duties, no-claims, liabilities and disabilities respectively: see Hohfeld (1913) 30.

of the broader debate and — using Hohfeldian analysis to identify different kinds of government action — explains what ‘power to contract’ entails. The discussion assumes no statute permits or immunises government action — this would obviously constitute legal authorisation (and may curtail non-statutory authorisation).³²

It is useful to distinguish, with Wade³³ and others,³⁴ between government ‘action’ that — if valid — has some legal effect (‘legal action’) and that which does not (‘non-legal action’).³⁵ Making a contract or transferring property exemplify legal action. Each creates or changes legal rights. Distributing information and asking questions — where not civil or criminal wrongs — exemplify non-legal action. Neither has legal effect. (Actions that might, in future, have legal significance, like representations engendering procedural legitimate expectations,³⁶ do not *of themselves* have legal effect and are thus non-legal action. If government later purportedly takes legal action, a non-legal action may constitute fact establishing the purported legal action’s invalidity.)

³² See Part II(B).

³³ Wade so distinguished to argue that judicial review of non-legal action ‘burst through ... logical boundaries’ (Wade (1986) 175–6) and define the prerogative (controversially) as ‘legal power — ... the ability to alter people’s legal rights, duties or status under the laws of this country which the courts of this country enforce’ — unique to the Crown (Wade (1989) 58–9).

³⁴ See, eg, Daintith and Page (1999) 335 (judicial review extends to ‘common law or prerogative powers’ *and* ‘decisions without direct legal consequences, such as ... advisory ... material’).

³⁵ Simply *having* a right is not ‘action’. Exercising a right *may* have legal effect: it might change existing rights (for example, exercising an option) or might not (for example, seeking an injunction to prevent an anticipated tort).

³⁶ See, eg, *GCHQ* 401–3 (Lord Fraser), 411–13 (Lord Diplock).

Hohfeldian analysis enables a more precise definition of government non-legal action as the exercise of a ‘privilege’ with a correlative ‘no-right’ in individuals.³⁷ Government (officers) may — have *no duty not to* — take non-legal action because individuals lack a ‘claim’ to *prevent* such action (that is, have a ‘no-right’ to prevent such action). Because non-legal action is the exercise of a mere privilege — not a claim — individuals have no correlative duty — to obey or accept non-legal action or otherwise. The privilege exists only to the extent that individuals have no claim against government (officers) placing it (them) under a duty not to act.³⁸ For example, government (officers) have the privilege of distributing information which, in general, nobody has a claim to prevent, but if this constitutes defamation (absent some defence) the defamed individual has a claim to prevent publication and government (officers) a duty not to publish.³⁹

While legal personality might not logically be necessary for a privilege, it *is* for a claim — a claim assumes a person recognised by law as capable of bearing it and another as bearing the correlative duty. Assertions that government may act *unless* its action constitutes a civil wrong must, to be complete, establish who ‘government’ is and that its legal personality extends to civil liability.

³⁷ See Hohfeld (1913) 32, 36–7. While subject to criticism, Hohfeld’s analysis remains useful as a description of, rather than justification for, jural relations: see Patton (1972) 291–2.

³⁸ See Hohfeld (1913) 37. Non-legal action may not require distinguishing between ‘government’ and its officers: see below n 40.

³⁹ This looks slightly like Harris’s ‘third source’ theory, but Harris applies this reasoning to *legal* action — beyond bare privilege: see Part III(B)(1). This fails in Hohfeldian terms, because legal action — exercise of a power — is not *necessarily* subject to a claim (which Harris effectively assumes).

Non-legal action may require no positive legal authorisation — a question this thesis need not resolve.⁴⁰ The explanations of contracting power below could conceivably constitute positive legal authorisation for non-legal action, if it is required.

‘Legal action’ by definition *alters existing or creates new* rights, obligations or status (or both).⁴¹ In Hohfeldian terms, ‘legal action’ is the exercise of a ‘power’: the creation of circumstances ‘under the volitional control of one or more human beings’ which ‘effect[s] the particular change of legal relations ... involved’.⁴² It includes ‘the power to create contractual obligations’ and the ‘powers of public officers’ like that ‘of a sheriff to sell property under a writ of execution’.⁴³ Exercise of a power might create, remove or alter a claim, privilege, (further) power or immunity, but the *alteration* of such rights by an individual’s action —

⁴⁰ Elliott (2001) 167–8 argues that for non-legal action ‘government ... does not, in the first place, need to demonstrate any legal authority’, which ‘follows from the fact that the Crown, as a natural person, may do all that other natural persons may do’. However, existence as a natural person is a fact indicating legal authorisation: the law attaches powers to natural persons. Hayne J’s explanation that government officers can ask questions because this is a human faculty (a Hohfeldian privilege) and acting as government officers does not *prevent* its exercise (impose a Hohfeldian duty not to ask) appears more persuasive: *Williams (No 1)* [214], explaining *Clough v Leahy* (1904) 2 CLR 421, 157 (Griffith CJ). *Malone* reflects such reasoning: see below nn 139–140. Because such actions lack legal effect, it seems meaningless to attribute them to government (except for judicial review) and to differentiate between ‘government’ and individuals through whom it acts for the purposes of explaining the power. On the other hand, in *Shrewsbury* and *Ex parte C* actions were non-legal (respectively holding consultations and maintaining a list of names), yet the Court of Appeal sought positive authorisation: *Shrewsbury* [44]–[49] (Carnwath LJ), [73] (Richards LJ); *Ex parte C* (CA) 631–2 (Hale LJ).

⁴¹ See Hohfeld (1913) 44.

⁴² *ibid.*

⁴³ *ibid* 46–7. Other examples are abandonment and transfer of property interests: at 45. Appleby and McDonald (2013) 254 and Joseph (1993) (Pt 2) 181–4 wrongly regard making contracts as the exercise of a Hohfeldian privilege (thereby eliding legal and non-legal action). Exercise of privileges, however, does not *alter* jural relations — privileges are, for example, subject to claims.

whether acting for themselves or someone else (including ‘government’) — entails a power to alter them.⁴⁴ A power carries a correlative ‘liability’ to have one’s rights altered.⁴⁵

I use the term ‘power to make contracts’ in this sense throughout this thesis. The circumstances causing a change in legal relations are the satisfaction of the legal requirements for contract formation. These are within the joint control of ‘government’ and its counterparty. Exercise of this power creates for each a claim to the other’s performance and correlative duty to perform.

Government’s legal powers generally — unlike those of an individual — are of two kinds:⁴⁶ power to alter rights by action that would as between individuals, but does not when done by government, generate civil (tortious, contractual, trust, equitable, statutory or restitutionary) or criminal liability,⁴⁷ which I term ‘coercive legal action’ or the exercise of ‘coercive legal power’, and power to alter rights as individuals can (or otherwise non-coercively), which I term ‘benign legal action’ or the exercise of ‘benign legal power’.⁴⁸ (This distinction does not map to that between exclusive prerogatives and non-prerogative non-

⁴⁴ A right might change also because of superadded fact ‘not under the volitional control of a human being (or human beings)’ (Hohfeld (1913) 44), as where a contract is frustrated. I leave this to one side as government *action* does not alter the right.

⁴⁵ *ibid* 44–6.

⁴⁶ Legislation — changing rights by paramount force — can be seen as a third kind of ‘super-coercive’ legal action. It is not action of a participant within the legal system so not considered further: see above nn 27–30.

⁴⁷ The conduct of the government *agent* would constitute a civil wrong (for example, by trespassing upon property) or contravene criminal law (for example, by assault) or both. cf Winterton (1983) 409 n 16.

⁴⁸ cf Elliott (2001) ch 5. Elliott equates legal action (which he terms ‘legal power’) with prerogative and statutory power, saying, for example, what ‘government is able to do in common with other persons it does in reliance on neither statutory nor prerogative power’ but ‘*de facto* power or residual liberty, not legal power’: at 173. He defines *de facto* power as ‘not ... legal power [but] ... factual “control or influence over individual legal persons or a section of the community”’: at 166 n 3 (citations omitted). Elliott thereby overlooks government’s benign legal power: power to act with legal effect as individuals do under neither statutory nor exclusive prerogative power.

statutory legal powers: while all non-statutory coercive legal powers are prerogatives, not all prerogatives are *coercive* legal powers or even *legal* powers.)⁴⁹ Taking property under the war prerogative — which creates new property rights and would, without that power, constitute conversion or trespass⁵⁰ — exemplifies coercive legal action. Taking a transfer of property by gift exemplifies benign legal action. So too does making contracts.

*Entick v Carrington*⁵¹ established the now uncontroversial⁵² principle that government must have positive legal authorisation to exercise *coercive* legal power. This legal authorisation must go *beyond* legal personality extending to the rights in question — it must explain not only why government may bear those rights (an explanation required for any entity that bears them) but why government may *displace* existing rights where the individual cannot.

⁴⁹ For example, the prerogative to conduct foreign relations does not necessarily entail interference with existing legal rights — treaties, which can be concluded under this prerogative, require domestic implementation: Wade (1989) 58–9. Even those prerogatives that have legal effect might not do so coercively: the grant of royal charter, for example, requires the consent of those to whom it is granted: Chitty (1820) 124.

⁵⁰ *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (HL) 98–9 (Lord Reid), 114–15 (Viscount Radcliffe), 135–7 (Lord Hodson), 143–5 (Lord Pearce), 163–6 (Lord Upjohn), holding or assuming, sometimes grudgingly, that the prerogative to wage war authorised destruction of an oil refinery.

⁵¹ (1765) 2 Wils KB 275, 291–2.

⁵² *Feather v The Queen* (1865) 6 B & S 257, 296–7 (Cockburn CJ) (‘a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown’); *Raleigh v Goschen* [1898] 1 Ch 73, 77 (Romer J); *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517 (CA) 523 (Bankes LJ), 532 (Atkin LJ); *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662 (PC) 670 (Lord Atkin); *Ex parte C* (CA) 632 (Hale LJ); *Shrewsbury* [44] (Carnwath LJ) (non-prerogative non-statutory action ‘subject ... to the competing rights of other parties’), [74] (Richards LJ) (‘such powers cannot override the rights of others’). See also *Bancoult* [44] (Lord Hoffmann), [124] (Lord Carswell), [151]–[152] (Lord Mance); *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9, [2015] AC 1065 [7] (Lord Sumption); *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 (HL) 192 (Lord Bridge) (addressees of non-statutory departmental guidance ‘are, as a matter of law, in no way bound by it’). For academic acceptance, see, eg, Harris (1992) 627–8; Elliott (2001) 170; Vincenzi (1998) 15–16; Zellick (1985) 293–4; Craig (1990) 188; Cane (2011) 56; Cohn (2005) 112–13.

If government lacks positive legal authorisation for coercive legal action, the officers who act (and now by statute also ‘the Crown’) are civilly or criminally liable (or both).⁵³

It is less well established that government must have positive legal authorisation to exercise benign legal power. Lord Roskill’s dictum in *GCHQ* that ‘the right of the executive to do a lawful act *affecting the rights of the citizen*, whether adversely or beneficially, is founded upon the giving to the executive of a power enabling it to do that act’, which may occur by common law, suggests so.⁵⁴ The term ‘common law powers’ in decisions considered below can be seen as impliedly supporting this view,⁵⁵ but the question remains open. Commentary is mixed.⁵⁶ Some implies that benign legal power requires positive authorisation on a broader basis: for example, Elliott argues that ‘the underlying principle of legality ... requires ... government to marshal legal authority whenever it seeks to commit action *which aims to produce legal effects*’⁵⁷ or ‘would otherwise be unlawful’⁵⁸ — that is, for all legal action — and Wade took a similar view.⁵⁹ Others,⁶⁰ including *De Smith*,⁶¹ argue that *all*

⁵³ See above nn 51–52.

⁵⁴ *GCHQ* 417 (emphasis added).

⁵⁵ See below nn 165–169.

⁵⁶ cf Part III(A) (summarising Harris’s views that no authorisation is required); Davies (2008) 103–4 (stating ‘[t]he British constitution does not require the government to identify specific positive authority for every action’ but hesitating to apply this to contracting); Seddon (2013) [2.1]–[2.2] (positive authorisation required in Australia).

⁵⁷ Elliott (2001) 181 (emphasis added).

⁵⁸ *ibid* 170.

⁵⁹ Wade (1988) 392–3, 399–401.

⁶⁰ See, eg, Tomkins (2006) 41; Lester and Weait (2003) 419, 422; Bevan (1980) 437 n 28. This is controversial regarding non-legal action: see above n 40.

⁶¹ Woolf (2013) [5-025].

government action — legal and non-legal — requires positive authorisation. Laws J supported this view in *R v Somerset CC, ex parte Fewings*.⁶²

For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. ... But for public bodies, the rule is the opposite, and so of another character altogether. It is that any action to be taken *must be justified by positive law*. ... [T]his is true of *every public body*.

Laws J was, however, dealing with a statutory authority and Sir Thomas Bingham MR on appeal endorsed his statement only for such bodies.⁶³ Whether *all* central government action, including non-legal action, requires legal authorisation is a large, difficult and — when so framed — inherently normative question. Cane rightly says ‘there is no identifiable general principle that determines which acts of government require positive legal authorization’.⁶⁴ Enquiring in Laws J’s monolithic manner elides non-legal action, benign legal action and coercive legal action, yet their different consequences make different legal treatment of each conceptually plausible. This thesis does not attempt to answer the monolithic question.

This thesis does, however, contribute part of the answer. The need to establish legal personality extending to the rights in question (which Part II(A)(1) explains) is a requirement for positive legal authorisation to exercise *benign* legal power. If we cannot identify the entity purportedly bearing the rights in question and explain why it may bear those rights, the rights cannot exist. Legal personality of requisite extent is *necessary*. However, the explanation of benign legal power need go no further: legal personality of requisite extent is also *sufficient*.

⁶² [1995] 1 All ER 513 (QB) 524 (emphasis added).

⁶³ *R v Somerset CC, ex parte Fewings* [1995] 1 WLR 1037 (CA) 1042 (emphasis added).

⁶⁴ Cane (2011) 56.

This thesis argues that at least all legal action requires positive authorisation, although its nature differs depending on whether action is coercive or benign.

‘Power’ is sometimes used — loosely — to indicate immunity, as where government is said to have ‘power to commit a tort’. In Hohfeldian terms, however, immunity is ‘freedom from the legal power or “control” of another’, with a correlative disability (the opposite of power) in that other to exert control.⁶⁵ Using ‘power’ to mean ‘immunity’ is liable to confuse: exercise of the war prerogative (power) to take real property alters claims. It creates government’s and removes the deprived party’s property interest and creates the deprived party’s entitlement to compensation.⁶⁶ But it also confers immunity: government officers may use reasonable force to enter and expel others,⁶⁷ an *exception* to the deprived owner’s rights, for example, her claim not to be battered. Conversely, government may have power whose exercise creates no immunity: statutes creating statutory corporations often conferred power to acquire land or the privilege of building upon it, but no immunity from neighbours’ claims for nuisance in conducting the enterprise.⁶⁸ Conceptual separation of power and immunity, and recognising that power does not *necessarily imply* immunity, assists in understanding the different legal effects of government powers.

⁶⁵ Hohfeld (1913) 55.

⁶⁶ *Burmah Oil* (n 50).

⁶⁷ Jones (2014) [30-13].

⁶⁸ See, eg, *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193 (HL) 200–1 (Lord Selborne LC), 208–9 (Lord Blackburn), 213 (Lord Watson); *Ogston v Aberdeen District Tramways Co* [1897] AC 111 (HL) 115–16 (Lord Halsbury LC), 118 (Lord Watson), 125–6 (Lord Davey).

B *Judicial Review Constrains Government Contracting*

The British government continues to state that ‘the Crown — and Ministers of the Crown as its agents — can do anything an ordinary person can do provided that there is no statute to the contrary and Parliament has voted the money’.⁶⁹ This wrongly, and dangerously, implies that such action is unconstrained by judicial review. This Section argues that binding authority establishes that all non-statutory legal power is subject to judicial review, which extends in principle to making contracts, and that cases requiring some further ‘public element’ cannot stand with authority and are unsupportable in principle. It concludes by sketching briefly how judicial review principles constrain government contracting. The explanation of contracting power adopted has implications for the scope of that power and, perhaps, the precise manner in which judicial review applies (which is not further considered here). On any view, however, the power is subject to — so exercises are potentially void⁷⁰ due to and therefore constrained by — judicial review principles.

Additional constraints on government contracting power exist. Statute may by conferring contracting power impliedly abrogate non-statutory power⁷¹ or may directly constrain *all* government action.⁷² Further, government may sometimes be incapable of

⁶⁹ See, eg, Government Communication Service (2014) 34–5; Office of Public Service (1996) Annex C4 [16]. See also Cabinet Office (2011) [3.31]–[3.32]. But see Select Committee on the Constitution (2012–13) [54], [65], accepting that judicial review constrains ‘common law powers’.

⁷⁰ Arrowsmith (1988) 253. In practice, other requirements for judicial review, like standing, must also be satisfied: see Craig (2012) chs 24–7.

⁷¹ Saunders (2013).

⁷² See, eg, Human Rights Act 1998 s 6(1). See Davies (2008) 161.

fettering its freedom to act, including by contract.⁷³ I do not examine these and other limits further, but they too constrain government contracting power.

1 Authority Establishes That Government Non-Statutory Legal Action Is Subject to Judicial Review

GCHQ arguably establishes that *all* government non-statutory legal action — not just that based on the exclusive prerogative — is subject to judicial review. All members of the Appellate Committee held that the Minister’s decision, under a prerogative Order in Council, to prevent staff at Government Communications Headquarters from being trade union members was subject to judicial review. Lords Fraser and Brightman did so on the narrow basis that the decision was taken under power delegated by exercise of the prerogative to regulate the civil service.⁷⁴ However, Lords Diplock, Scarman and Roskill all held that the *source* of power being prerogative, not statute, did not preclude judicial review: the subject-matter — justiciability — of the power was instead determinative.⁷⁵

Lord Diplock went furthest, explicitly stating that it was unnecessary for judicial review to establish that the decision was made in exercise of the prerogative and declining to determine whether it was:⁷⁶

⁷³ See Mitchell (1954).

⁷⁴ See *GCHQ* 398–400 (Lord Fraser), 424 (Lord Brightman).

⁷⁵ *ibid* 407 (Lord Scarman) (‘the controlling factor in ... whether ... prerogative power is subject to judicial review is not its source but its subject matter’), 410 (Lord Diplock) (there is ‘no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should ... be immune from judicial review’), 417–18 (Lord Roskill) (there is no ‘logical reason why ... the source of the power [being] the prerogative and not statute should ... deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory’, depending on ‘the subject matter of the prerogative power’).

⁷⁶ *ibid* 409; cf 407 (Lord Scarman), 415, 418–19 (Lord Roskill), whose reasoning is directed to ‘the prerogative’.

It does not ... matter whether today the right of the executive government ... to dismiss ... any member of the home civil service ... should be ascribed to ‘the prerogative’ or merely to ... a rule of constitutional law whose origin is ... found in the theory that those by whom the administration of the realm is carried on do so as personal servants of the monarch who can dismiss them at will ...

More generally, a decision whose ‘ultimate source of power ... is not a statute but the common law (*whether or not the common law is for this purpose given the label of “the prerogative”*) may be the subject of judicial review on the ground of illegality’.⁷⁷ A decision, ‘[t]o qualify ... for judicial review’, must (relevantly) ‘have consequences which affect some person ... other than the decision-maker, although it may affect him too ... by altering rights or obligations of that person which are enforceable by or against him in private law’, and ‘the decision-maker must be empowered by public law ... to make decisions that, if validly made, will lead to administrative action ... by an authority endowed by law with executive powers, which have ... the consequences mentioned’.⁷⁸

Lords Roskill and Scarman said nothing inconsistent with this part of Lord Diplock’s speech, which arguably forms part of the *ratio* of *GCHQ*. If, as appears uncontroversial, the common law (on any of the explanations below) confers government contracting power,⁷⁹ it satisfies these requirements: public law empowers the action, which affects the counterparty’s rights. As such — as Neill LJ⁸⁰ and Lord Sumption have implied⁸¹ — *GCHQ* extends judicial review to *all* non-statutory legal power.

⁷⁷ *ibid* 411 (emphasis added).

⁷⁸ *ibid* 408–9.

⁷⁹ Parts III–V each provide an explanation of the common law ‘conferring’ contracting power.

⁸⁰ See below n 99.

⁸¹ *Sandiford* [82].

Subsequent authority eradicates any doubt that the exclusive prerogative is subject to judicial review and strongly supports the view that all legal action is so subject. All Law Lords in *Bancoult* held that a prerogative Order in Council legislating for a ceded territory was reviewable,⁸² the House dividing about whether any ground of review was established. The Supreme Court, reaffirming that aspect of *Bancoult* in *R (Barclay) v Lord Chancellor (No 2)*,⁸³ unanimously approved Lord Mance's view in *Bancoult* that 'no good reason [existed] why [legislative Orders in Council] should not be reviewable *in the same way as other steps, administrative or legislative, by the executive*'.⁸⁴ This draws no distinction between different non-statutory actions.

Sandiford similarly supports assimilation of review of exclusive prerogative and other non-statutory legal powers. In upholding the Foreign Secretary's decision not to instruct or fund lawyers for Ms Sandiford, a Briton on death row in Indonesia who could not afford to pursue local appeals, Lords Carnwath and Mance (Lords Clarke and Toulson agreeing) held that whether the power in question was 'properly described as a common law or prerogative power' was 'immaterial'⁸⁵ but its exercise was in principle subject to judicial review.⁸⁶ Lord Sumption, concurring, referred *only* to 'common law power', not distinguishing between

⁸² *Bancoult* [35] (Lord Hoffmann), [71] (Lord Bingham), [105] (Lord Roger), [122] (Lord Carswell), [141] (Lord Mance).

⁸³ [2014] UKSC 54, [2015] AC 276 [45], [52]–[58] (Baroness Hale).

⁸⁴ *Bancoult* [141] (emphasis added).

⁸⁵ *Sandiford* [49].

⁸⁶ *ibid* [50]–[53], approving review of exclusive prerogative powers in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76 (conduct of foreign relations) and *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811 (CA) (refusal of passport).

prerogative and other non-statutory legal powers.⁸⁷ All agreed that the rule against fettering discretion did not apply so as to invalidate the Secretary's decision based on a blanket policy because — unlike statutory discretions — common law powers carry 'no necessary implication, from their mere existence, that the state ... must keep open the possibility of their exercise in more than one sense.'⁸⁸ They also agreed that 'there is no reason why action or inaction in the exercise of such a power should not be reviewable on the grounds of irrationality or breach of other judicial review principles.'⁸⁹

Court of Appeal decisions also establish that government non-statutory legal and non-legal action is subject to judicial review. In *Shrewsbury*, Carnwath LJ (Waller LJ agreeing) said that the Crown's powers 'extend, *subject to any relevant statutory or public law constraints*, ... to anything which could be done by a natural person'⁹⁰ and that, 'as an organ of government, it can only exercise [its] powers for the public benefit, and for identifiably "governmental" purposes'.⁹¹ Richards LJ accepted 'that such powers ..., when exercised by government, are subject to judicial review on ordinary public law grounds', but dissented from a requirement of 'governmental purposes'.⁹² *Shrewsbury* concerned a non-statutory consultation process, but Carnwath LJ explicitly contemplated contracting as government action subject to review.⁹³ Hale LJ in *Ex parte C* similarly held that a Department could not

⁸⁷ See *Sandiford* [78], [82]–[83].

⁸⁸ *ibid* [62] (Lords Carnwath and Mance); see also [81]–[83] (Lord Sumption).

⁸⁹ *ibid* [65] (Lords Carnwath and Mance); see also [83] (Lord Sumption) ('common law powers' must be exercised under 'ordinary public law principles, ie fairly, rationally and on a correct appreciation of the law').

⁹⁰ *Shrewsbury* [44] (Carnwath LJ) (emphasis added).

⁹¹ *ibid* [48].

⁹² *ibid* [74].

⁹³ *ibid* [45], describing contracting and owning property as 'ancillary powers'.

maintain a list of persons thought undesirable to work with children ‘in whatever way it likes’ because ‘[i]ts status as a public authority brings consequences which would not apply to a private citizen.’⁹⁴ While not there unlawful, operation of the list ‘could be unlawful and unreasonable’, for example, if it were made public or procedural fairness denied to persons listed.⁹⁵ The House of Lords⁹⁶ and Court of Appeal have judicially reviewed, and the latter has invalidated, refusals to make non-statutory⁹⁷ payments without characterising the power to (decide to) pay as prerogative⁹⁸ or even explicitly characterising the power as (perhaps) *non-prerogative* non-statutory power.⁹⁹

⁹⁴ *Ex parte C* (CA) 632–3. *Contra Hang Wah Chong Investment Co v Attorney-General (Hong Kong)* [1981] 1 WLR 1141 (PC) 1145–6 (Lord Edmund-Davies).

⁹⁵ *Ex parte C* (CA) 633–4 (Hale LJ).

⁹⁶ *Re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289 [1], [11], [15], [19] (Lord Bingham) (holding, without examining basis of power, that because claimant fell outside ministerial statement refusal to pay was lawful), [22]–[24] (Lord Steyn) (holding, without examining basis of power, that whether claimant fell within statement was question ‘of law’); but see [40]–[41] (Lord Scott) (making *ex gratia* payments not exercise of ‘statutory power’ but ‘a Crown prerogative’).

⁹⁷ Even if that characterisation is wrong (see above n 8), the courts judicially reviewed (what they thought were) exercises of non-statutory legal power.

⁹⁸ *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (CA) 881–3 (Lord Parker CJ), 887–9 (Diplock LJ), 891–2 (Ashworth J) (decision of Board established under prerogative by executive ‘Scheme’ that applicant not entitled to payment subject to review but no error); see also 886–7 (Diplock LJ) (referring to ‘power of the executive government to confer benefits upon subjects by way of money payments’ and the ‘administrative function ... to make payments’).

⁹⁹ *R v Criminal Injuries Compensation Board, ex parte P* [1995] 1 WLR 845 (CA) 856–7 (Neill LJ) (emphasis added) (decision not justiciable but court may in principle play role ‘even where ... executive power springs from the prerogative or some analogous source’), 861–2 (Evans LJ) (‘decisions to introduce and continue a scheme’ were ‘an executive or administrative decision ... amenable to review’ and justiciable), 862–3 (Peter Gibson LJ) (‘the court has jurisdiction to consider the legality of the scheme ... set up ... under the prerogative, or, perhaps more correctly, by executive action without statutory authority’); *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397 [39]–[40], [45], [54], [67] (Dyson LJ) (government ‘exercise[ed] ... common law powers’ setting up ‘non-statutory scheme’ — refusal to make payment subject to review but not unlawful); *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 [173], [182], [193] (Secretary did not unlawfully fetter ‘an existing relevant ordinary common law power (or prerogative power)’ to make *ex gratia* payments but refusal based on indirectly discriminatory so unlawful criteria quashed). See also *R (Niazi) v Secretary of State* [2008] EWCA Civ 755 [1], [53]–[63] (Laws LJ).

Additionally, non-legal action best seen as the exercise of non-prerogative power has been judicially reviewed, some judges expressly accepting that it was non-statutory non-legal action.¹⁰⁰ Commentators almost universally advocate assimilating review of prerogative and other non-statutory legal power,¹⁰¹ because the thrust of *GCHQ* and subsequent cases is that the nature, not source, of power determines reviewability and any distinction creates anomalous gaps. In principle, all government exercises of justiciable legal power are — perhaps all non-statutory action is — subject to judicial review, the power's source being relevant only where, as in *Sandiford*, a ground of review inherently flows from the statutory nature of the power.

2 A 'Public Element' Requirement for Contracting Decisions Is Partial and Unjustifiable

The principled statements of general reviewability above admit no exceptions. Surprisingly — and contrary to those authorities — some decisions nonetheless hold that, when central government (or statutory bodies) contract, a superadded 'public element' must exist to allow judicial review. This Section briefly examines the central cases dealing with judicial review of contracting, arguing that they apply judicial review to contracting decisions in some — perhaps many — cases. It examines the 'public element' requirement and adopts Bailey's and Davies' trenchant criticisms thereof. It suggests that the general principle of reviewability has

¹⁰⁰ See, eg, *Gillick* (n 52) 192–3 (Lord Bridge) (departmental guidance 'not ... issued in the exercise of any statutory power' subject to judicial review for error of law), 206 (Lord Templeman); but see 179–81 (Lord Scarman) (guidance issued under statute); *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27, [2008] 1 AC 1003 [25] (Lord Scott) (statutory guidance to NHS employers had 'no legal effect'), [52], [54], [59]–[60] (Lord Mance) ('informal guidance' did not 'effect any alteration in law to ... immigration status' but defeated legitimate expectations about employment so was invalid); but see [2], [15] (Lord Bingham) (statutory power).

¹⁰¹ See, eg, Cohn (2005) 111; Harris (2007) 245; Elliott (2001) ch 5; Craig (1990) 190–1; Craig (2012) [19-005]; Wade and Forsyth (2014) 181, 290.

overtaken such decisions and, finally, briefly outlines the ways in which judicial review constrains government contracting in practice.

The courts have held that judicial review applies to central government (and statutory bodies') contracts where several grounds of review are invoked: fraud, corruption (including bribery), bad faith, implementation of *ultra vires* policy and, perhaps, irrationality and unfairness. In *R (Cookson & Clegg) v Ministry of Defence*, Buxton LJ held that prior decisions do 'not and should not exclude public law entirely from the contract-awarding process, even if there were no statutory breaches involved: for instance, if there were bribery, corruption or the implementation of a policy unlawful in itself'.¹⁰² He suggested also that review was available for 'irrationality or unfairness' where these were not also the subject of the same claimant's Public Contracts Regulations claim.¹⁰³

*Mercury Energy Ltd v Electricity Corp of New Zealand Ltd*¹⁰⁴ suggests that contracting decisions are subject to judicial review on *all* grounds. Lord Templeman held that the Corporation's decisions, including 'exercising a discretion to terminate a contract' (there, to supply electricity to Mercury), were amenable to judicial review, the Corporation being 'empowered [by statute] to operate the business of generating and distributing bulk electricity and ... enter into and determine contracts with customers'.¹⁰⁵ While it 'does not *seem likely* that a decision by a state enterprise to enter into ... a commercial contract to supply goods or

¹⁰² (n 7) [18]. See also *R v Lord Chancellor, ex parte Hibbit & Saunders* [1993] COD 326 (DC) 328 (Rose LJ and Waller J).

¹⁰³ See above n 7.

¹⁰⁴ [1994] 1 WLR 521 (PC).

¹⁰⁵ *ibid* 526–8.

services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith',¹⁰⁶ the possibility exists on his earlier reasoning.

Other decisions suggest that, if the grounds mentioned in *Cookson* are not alleged, there must be a 'public element' to make contracting subject to judicial review. Rose LJ and Waller J in *R v Lord Chancellor, ex parte Hibbit & Saunders* — the only case apart from *Cookson* to deal with central government — held that a decision to award a contract for court reporting services was 'not amenable to judicial review' because it 'lacked a sufficient public law element', even though the applicant established departure from a procedural legitimate expectation in the tendering process.¹⁰⁷ It was 'not sufficient ... to create a public law obligation simply to say that the Lord Chancellor's Department was a governmental body carrying out governmental functions and appointing persons to public office.'¹⁰⁸ It seems that, if the required 'public element' exists, judicial review on all grounds is available.¹⁰⁹

Davies and Bailey compellingly criticise the 'public element' requirement. First, it 'rests on the assumption that the government has a private life', yet '[t]he government does not cease to be the government simply because it is placing a contract'.¹¹⁰ This has particular force for statutory bodies, because their power for *any* (legal) action must ultimately be a statutory

¹⁰⁶ *ibid* 529 (emphasis added).

¹⁰⁷ (n 102) 327.

¹⁰⁸ *ibid* 328.

¹⁰⁹ *cf* Davies (2008) 161.

¹¹⁰ *ibid* 63, 162. See also Seddon (2013) [8.10]; Alder (1993) 191.

provision¹¹¹ and a *government* body exercising statutory power is usually amenable to judicial review,¹¹² but it applies also to central government. Secondly, the requirement is a ‘truism’.¹¹³

If the claim relates to a body which ... is not public, judicial review will not be available. If the claim relates solely to a breach of contract ... judicial review will not be an appropriate procedure. Judicial review is only a possibility if the body in question is public and if the claimant is seeking to invoke one or more of the grounds of judicial review.

Thirdly, the lack of any cogent rationale makes this rule ‘inherently unclear’, generating ‘arbitrary and unconvincing’¹¹⁴ distinctions and outcomes that are impossible to reconcile.¹¹⁵ It is, for example, difficult to see how contracts to conduct litigation about Gulf War syndrome for veterans (which satisfy this requirement)¹¹⁶ and for court shorthand writing (which do not)¹¹⁷ involve different levels of ‘publicness’. Fourthly, it is illogical to allow judicial review only on some grounds: ‘in most situations, judicial review is available on an all-or-nothing basis’,¹¹⁸ although the content of particular principles of course varies with context. Craig suggests, in defence of *Hibbit*, that judicial review is ‘not appropriate when a public body makes an ordinary commercial contract for furniture’ as ‘[i]t is not self-evident that a private contractor ... should have greater substantive and procedural rights than any other contracting

¹¹¹ Woolf (2013) [3-037].

¹¹² Bailey (2007) 451.

¹¹³ Davies (2008) 158.

¹¹⁴ Bailey (2007) 462.

¹¹⁵ Davies (2008) 158.

¹¹⁶ *R v Legal Aid Board, ex parte Donn & Co* [1996] 3 All ER 1 (QB) 11 (Ognall J).

¹¹⁷ *Hibbit* (n 102) 328 (Rose LJ and Waller J).

¹¹⁸ Davies (2008) 162.

party.’¹¹⁹ This, however, misses the point by ignoring judicial review’s role in giving public rights to parties *other than* the successful contractor¹²⁰ and constraining government action.

Wade rightly expresses the general principles that *all* public powers, including non-statutory legal powers,¹²¹ exist and must be exercised for public benefit and that judicial review ensures discretions are *never* absolute:¹²²

The powers of public authorities are ... essentially different from those of private persons. ... [A] private person has an absolute power to allow whom he likes to use his land, to release a debt ... regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. ... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. ... [This] applies no less to ministers of the Crown. ... The question ... is what is the scope of judicial review, and in a few special cases [including ‘some ... prerogative powers’¹²³] the scope ... may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere.

There is, for judicial review, no principled difference between making payments, making contracts and other legal action. As Elias J said in *R (Molinaro) v Kensington and Chelsea RLBC*, which concerned the Council’s refusal to vary a lease, the Council’s powers like those of other public bodies are ‘to be exercised in the public interest’ and there is ‘no reason in logic or principle why the power to contract should be treated differently to any other power.’¹²⁴ Excepting contracting from judicial review is patently anomalous. Further, if *non-legal* action may be subject to judicial review, any *legal* action — which immediately impacts

¹¹⁹ Craig (2012) [27-022].

¹²⁰ Bailey (2007) 451.

¹²¹ Wade (1988) 392–3 (‘prerogative power is as capable of abuse as is any other power’).

¹²² *ibid* 399–401 (citations omitted).

¹²³ *ibid* 401 n 69.

¹²⁴ [2001] EWHC Admin 896, [2002] BLGR 336 [67].

rights — ought to be so. Like *Wade*, *GCHQ*, *Shrewsbury* and *Ex parte C* make no distinction between different kinds of non-statutory action. As such, the decision in *Hibbit* cannot stand with and them and has been overtaken by a general principle of reviewability. The ‘the greater caution that the courts have traditionally shown towards reviewing the common law powers of the Crown’ apparently influencing *Hibbit*¹²⁵ has fallen away, as *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* and *R (Elias) v Secretary of State for Defence* demonstrate.¹²⁶

The courts’ acceptance that judicial review applies to sufficiently public government contracting decisions and *whenever* bad faith, corruption or malice is alleged establishes that government’s contracting power is constrained by public law (especially if *Hibbit* is discarded). It does so, practically, in several ways. A private individual can act for personal spite or dislike; this is in public law malice.¹²⁷ An individual can contract with a friend or relative *because* she is a friend or relative, but this is in public law likely bad faith or corruption.¹²⁸ Review for improper purposes, where available, prevents awarding contracts for ‘naked political advantage’ (although not ‘for a legitimate purpose ... seen to carry ... significant political advantage’).¹²⁹ In addition, contracting power may have to be exercised for ‘identifiably “governmental” purposes’.¹³⁰ Where procedural fairness applies — and it generally would, as contracting decisions affect contractors’ rights and unsuccessful bidders’

¹²⁵ *ibid* [75] (Elias J).

¹²⁶ See above n 99.

¹²⁷ Woolf (2013) [5-090]; Arrowsmith (1988) 178.

¹²⁸ Woolf (2013) [5-087]–[5-089]; Arrowsmith (1988) 178, 186.

¹²⁹ *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 [144] (Lord Scott); see also [21] (Lord Bingham). *Contra* Arrowsmith (1988) 199–203.

¹³⁰ See above n 91.

interests¹³¹ — the hearing rule requires that ‘bidders ... be given ... a fair and equal chance to explain their proposals’ and equality of treatment generally.¹³² Further, if a decision-maker (or close relative) had a non-*de minimis* financial interest but were unaware of this — so did not act in bad faith — the presumed bias rule would invalidate her decision.¹³³ An individual is unconstrained by these principles. Judicial review means government cannot do ‘anything an ordinary person can do’.

C *A Plea to Abandon ‘Capacity’*

The word ‘capacity’ is used in at least five senses in relation to government non-statutory action, often without the intended sense being explained. ‘Capacity’ often indicates what I term ‘legal power’: ability to cause a change in legal rights. ‘Capacity to contract’ in this sense — often attributed to corporations — means that a legal person’s personality extends to contracting power. (Where contrasted with prerogative power, ‘capacity’ usually means what I term ‘benign legal power’.)¹³⁴ The next three senses being directly relevant to contracting causes intense confusion. ‘Capacity’ is, secondly, used to mean ‘the ability of legal persons to enter into legal relations without the assistance of a third party’: ‘legal competence’.¹³⁵

¹³¹ Craig (2012) [12-013]–[12-018].

¹³² Davies (2008) 124. See also Seddon (2013) [8.14]. Examples of procedural unfairness include *Hibbit* (n 102) 327 (some bidders allowed to lower prices but tender terms reserved only right ‘to clarify the submitted bid’); *Donn* (n 116) 4–6, 13–15 (Ognall J) (decision-makers by administrative error given incomplete copy of tender and provided bidder with insufficient opportunity to answer question); *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* [2000] ACTSC 89, (2000) 206 FLR 120 [44]–[45], [181]–[182], [220]–[221], [237] (Higgins J) (one bidder allowed to increase offer for land after tenders closed).

¹³³ See *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA) [4]–[11] (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C); *R v Bow Street Magistrate, ex parte Pinochet (No 2)* [2000] 1 AC 119 (HL) 132–3 (Lord Browne-Wilkinson), 137–8 (Lord Goff), 140–1 (Lord Hope), 145 (Lord Hutton); Arrowsmith (1988) 173.

¹³⁴ See, eg, *Williams (No 1)* [23] (French CJ); Davies (2008) 86–7.

¹³⁵ Cane and Conaghan (2008) 885. See, eg, Beale (2012) pt 3 (‘Capacity of Parties’).

Children and the intellectually disabled are legal persons who can bear contractual rights but are sometimes incompetent to *create* those rights (or unqualified rights) themselves.¹³⁶

‘Capacity’ is, thirdly, used to mean ‘role’: a trustee acts ‘in her capacity as trustee’ or personally; the Queen acting ‘in right of the United Kingdom’ rather than another territory expresses the same idea.¹³⁷ A fourth sense occurs when ‘capacity’ meaning ‘role’ is applied to an agent to indicate technical (actual or apparent) ‘authority’,¹³⁸ as where A acts ‘in her capacity as agent’. A fifth, general sense is practical ability to bring matters about.

Often in decisions or literature any of the four contract-related meanings is plausible, which makes it particularly difficult to know what is meant. Identifying the five common meanings assists to some extent. But the term is best avoided — as it is in this thesis — for its ambiguity.

¹³⁶ Beale (2012) [8-001]–[8-005], [8-069]–[8-074]. cf Patton (1972) 393; Raz (1986) 173.

¹³⁷ cf *Bancoult* [76] (Lord Roger).

¹³⁸ Watts and Reynolds (2014) [1-001].

III NO POWER REQUIRED?

This Part considers and rejects Professor Harris's 'third source' theory and *Malone* as an explanation of government contracting power. It first explains that theory. It then points out general problems and specific difficulties in applying it to contracting.

A *Malone and the 'Third Source': No Prohibition Equals 'Authority' to Act*

Malone is sometimes treated as establishing that government can act as an individual can. In deciding *Malone*'s claim for a declaration that intercepting, monitoring or recording conversations on his telephone line without his consent (or disclosing them to others) was unlawful, even pursuant to the Home Secretary's warrant, Sir Robert Megarry V-C said:¹³⁹

England is not a country where everything is forbidden except what is expressly permitted. ... If the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, *it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful.*

He held that the tapping was neither criminal, nor tortious (there being no trespass or tort of invasion of privacy), nor a breach of confidence, so not unlawful; however, he also suggested the tapping was required, or at least permitted, by statute.¹⁴⁰

Professor Harris has extrapolated the reasoning in *Malone* into a theory that 'government is free to do anything that is not prohibited by law' and which 'it is physically capable of doing'.¹⁴¹ Harris characterises this as 'the freedom the government has to act independently of deliberate authority in positive law' and a 'residuary freedom'.¹⁴² Such action is 'not

¹³⁹ *Malone* 366–7 (emphasis added).

¹⁴⁰ *ibid* 369, 372, 375–6, 381.

¹⁴¹ Harris (1992) 633, 650; see also 626–8. See generally Harris (2007); Harris (2010); Harris (2014).

¹⁴² Harris (2007) 225–6. See also Daintith (1979) 43.

authorised by positive law',¹⁴³ namely, 'statutory and common law'.¹⁴⁴ Harris thus resists the idea that any legal authorisation — a source of power — is needed where government action is not prohibited (rejecting Laws J's view in *Fewings* beyond its application to statutory authorities).¹⁴⁵ He contrasts this 'third source' of 'authority' for government action with prerogatives, exercise of which *is* authorised by common law, and statute, these being the other two sources.¹⁴⁶

Actions are prohibited by law when the common law or statute forbids them.¹⁴⁷ 'government will be constrained by positive law protection of justifiable competing interests'.¹⁴⁸ As such, 'positive law, often in the form of torts, criminal law, common law recognition of fundamental rights in the course of judicial review or statutory human rights law' may prohibit conduct and thereby limit government 'third source' action.¹⁴⁹ In particular, actions generating 'civil and criminal liability of the Government' are prohibited,¹⁵⁰ so for example 'government action will only be recognised as valid if it does not constitute a tort.'¹⁵¹ Actions that could successfully be subjected to 'judicial review' are also prohibited.¹⁵² As

¹⁴³ Harris (2007) 233.

¹⁴⁴ *ibid* 225. See also Harris (1992) 630; Harris (2010) 373.

¹⁴⁵ Harris (2007) 232–5.

¹⁴⁶ Harris (1992) 626 n 6.

¹⁴⁷ *ibid* 626–7.

¹⁴⁸ Harris (2007) 228.

¹⁴⁹ *ibid* 232.

¹⁵⁰ Harris (2010) 378. 'Civil liability' presumably includes equitable wrongs, breach of trust and liability in restitution.

¹⁵¹ Harris (1992) 647.

¹⁵² Harris (2010) 378.

such, ‘third source’ action does ‘not override common law rights in the event of conflict’, whereas exclusive prerogative and statutory powers may. ‘Third source’ action is not the exercise of ‘power’ in the ‘narrow sense’ of ‘the capability of interfering with, or modifying, the operation of pre-existing legal rights’.¹⁵³ Conversely, government may ‘interfer[e] with the liberties or activities of individuals where those interests are not protected by legal rights.’¹⁵⁴

The ‘third source’ is said to authorise activities such as ‘the distribution of written information, the establishment of bodies to carry out functions on behalf of the government and the entering into of contracts’.¹⁵⁵ Harris is clear that it gives government ‘general authority to enter into contracts’.¹⁵⁶ As Davies says, Harris’s theory means that ‘new capacities can be discovered whenever the government seeks to do something that no one has thought to prohibit or regulate’.¹⁵⁷

Harris initially eschewed¹⁵⁸ arguments based on corporation sole or legal personality and resisted Winterton’s suggestion¹⁵⁹ that ‘the executive has power to do whatever a private individual may do ... only when their actions would be ... as identical as possible’ given inherent differences between private and government action. Later — seemingly to accommodate *Ex parte C* and *Shrewsbury* — he reframed his contention as government being

¹⁵³ Harris (1992) 627–9. See also *ibid.*

¹⁵⁴ Harris (1992) 633.

¹⁵⁵ *ibid* 627 (citations omitted).

¹⁵⁶ *ibid* 645. See also Harris (2007) 226.

¹⁵⁷ Davies (2008) 103.

¹⁵⁸ Harris (1992) 635.

¹⁵⁹ Winterton (1983) 410.

able to do anything a ‘natural legal person’ may do.¹⁶⁰ Government acts through individuals, so this makes little practical difference.

B *Difficulties with the ‘Third Source’*

‘Third source’ reasoning is beset with internal inconsistency, cannot stand with authoritative decisions, and — most basically — fails to explain *who* ‘government’ is, *why* it is a legal person and *what aspects* its legal personality has. This Section explains these and other difficulties, arguing that the ‘third source’ theory should not be accepted as explaining government contracting or generally.

1 *‘Third Source’ Fails to Identify Who or What ‘Government’ Is and Explain Its Legal Personality*

Harris’s starting-point is that government has a ‘freedom’ to do anything not prohibited by law, including making contracts. He effectively *assumes* that this is so, praying *Malone* in aid. However, *Malone* concerned *non-legal action* — the exercise by Post Office employees, who were not trespassing, of a bare privilege to intercept calls (in the absence of any duty, in tort or equity, under statute or otherwise, not to do so).¹⁶¹ As such, *Malone* offers Harris no support on *legal* action: his theory extends beyond anything *Malone* establishes. Harris, however, ignores this distinction altogether and, in so doing, conflates legal and non-legal action.

¹⁶⁰ Harris (2010) 373.

¹⁶¹ Statute now regulates telecommunications interception — by imposing a duty not to intercept without authorisation it has curtailed the privilege: Regulation of Investigatory Powers Act 2000 s 1(1).

Central to Harris's theory is the assertion that 'government' can bear criminal and civil liability: its actions are 'invalid' where it incurs such liability. Harris states that he 'use[s] the term "government" rather than "Crown" or "state" for reasons of convenience.'¹⁶² In so doing he fails to identify *who* or *what* 'government' is — a person or people, a separate entity or something else. As Maitland said, 'the Government' is an 'extra-legal organization ... [the law] does not recognise it — knows nothing about it.'¹⁶³ Yet Harris's assertion that 'government' has criminal and civil liability — and can contract — is an assertion that government has not only privileges but has and is subject to *legal powers (and correlative liabilities) and claims (and correlative duties)*. As Part II(A)(1) explains, this entails: (1) some person or body ('government') recognised by law as a legal person (a right-and-duty-bearing entity); (2) legal personality extending to the legal consequences in question (criminal and civil rights); and (3) some means by which individuals' actions are attributed to 'government'. To this extent, 'government' action *does* require positive legal authorisation — the norm in step (2). Harris, however, provides no explanation of any of these matters.

In asserting that government has the same 'freedoms' as an individual, Harris effectively assumes that the law recognises 'government' in the same way and to the same extent as an individual. As argued above in Part II(A)(1), however, this is illogical: the existence of one legal person and its personality say nothing about another's existence or personality. Equivalence to the individual may or may not be correct,¹⁶⁴ but to assume it is insufficient. Yet Harris does exactly this.

¹⁶² Harris (2007) 225 n 1.

¹⁶³ Maitland (1908) 387.

¹⁶⁴ See Part V.

In consequence, the ‘third source’ fails as a complete explanation of government contracting. More significantly, Harris’s reasoning is insufficient to establish his main claim — that ‘government’ cannot validly act where it would attract criminal or civil liability — because he does not explain *what* ‘government’ is or *why* it can incur such liability. Further, the requirement to establish legal personality shows that, insofar as *legal action* is concerned, Harris’s assertion that government does not need ‘deliberate’ or ‘positive’ authorisation is incorrect. *Dicta* in House of Lords and Supreme Court decisions referring to ‘common law power’,¹⁶⁵ ‘commonplace power’,¹⁶⁶ ‘general administrative powers’,¹⁶⁷ ‘a possible “third source” of powers’,¹⁶⁸ and ‘non-statutory governmental powers’¹⁶⁹ also cast doubt on Harris’s claim, suggesting the need for positive authorisation — power — rather than mere absence of prohibition, even outside the exclusive prerogative.

2 ‘Third Source’ Ahistorically Conflates Individuals with ‘Government’

Two related flaws in the ‘third source’ are its assumption that ‘government’ (which Harris equates with ‘the Crown’ or ‘the state’)¹⁷⁰ has always been subject to civil and criminal law and conflation of individuals with the ‘government’. Harris cannot accommodate the Crown’s historical immunity.

¹⁶⁵ *Sandiford* [82] (Lord Sumption); *Hooper* [6] (Lord Nicholls), [75] (Lord Hope), [84] (Lord Scott), [103] (Lord Brown); *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL) 559–60 (Lord Mustill), 573 (Lord Nicholls).

¹⁶⁶ *Hooper* [46] (Lord Hoffmann).

¹⁶⁷ *New London College* [28] (Lord Sumption).

¹⁶⁸ *ibid* [34] (Lord Carnwath) (emphasis added).

¹⁶⁹ *Sandiford* [58] (Lords Carnwath and Mance).

¹⁷⁰ See above n 162.

‘The Crown’ — Harris’s ‘government’ — was and, at common law, remains immune from civil¹⁷¹ and criminal¹⁷² process. Wade argues that the maxim that ‘the king can do no wrong’ did not mean that the Sovereign was not subject to law but merely that, the courts being ‘the king’s courts[,] ... like other feudal lords the king could not be sued in his court. No form of writ or execution would issue against him, for there was no way of compelling his submission’.¹⁷³ To say, however, that the immunity was from *process*, not law, puts matters too highly. Although remedies against the Sovereign developed¹⁷⁴ — particularly the petition of right — the maxim was deployed to hold that no remedy was available for what between subjects would be wrongs, including most torts.¹⁷⁵ As Arrowsmith says: ‘the substantive law ... [was] held not to apply at all to the Crown.’¹⁷⁶ Even where available — broadly for debt, contract and recovery of property¹⁷⁷ — petitions of right were not *as of right*. The Sovereign could give or refuse their fiat, which referred the petition to the courts for decision *as if* a case between subjects, in its unfettered discretion.¹⁷⁸ Practically, ‘no claim ... [could] be enforced, if the Crown [did] not choose to recognise it.’¹⁷⁹ Thus McLean describes the government as

¹⁷¹ Wade and Forsyth (2014) 693–4.

¹⁷² *Halsbury’s* (1910) vol 6, [549], [631]; *Willion v Berkley* (1559) 1 Plowd 223, 247 (Anthony Brown J).

¹⁷³ Wade (1988) 809.

¹⁷⁴ Hogg and Monahan (2000) 4–9.

¹⁷⁵ See Part V(A)(2)(b); Cornford (1999) 235–8.

¹⁷⁶ Arrowsmith (1992) 11.

¹⁷⁷ See Robertson (1908) 330–62.

¹⁷⁸ *Halsbury’s* (1910) vol 8, [690], vol 9, [65] n (n). Mandamus lay to compel consideration, but the discretion was generally considered ‘unqualified’: Street (1953) 5.

¹⁷⁹ Jenks (1897) 313.

‘immune from contract claims’ at common law.¹⁸⁰ (The Crown by the Attorney-General *was* subject to the courts’ equitable jurisdiction, though relief was largely declaratory.)¹⁸¹ This is hardly the general subjection to civil law Harris assumes. Further, as it (mostly) did not apply to ‘the Crown’ — and ‘has been fashioned primarily to deal with the interests of private parties’¹⁸² — the civil and criminal common law does not speak to *validity* of government action. The Crown Proceedings Act 1947 removes civil (but not criminal) immunity.¹⁸³ But it says nothing about validity (and Harris does not rely on the Act).

Individuals, by contrast to the Sovereign, were never immune. As Wade states:¹⁸⁴

Public authorities, including Ministers of the Crown, enjoy no dispensation from the ordinary law of tort and contract, except in so far as statute gives it to them. Unless acting within their powers, they are liable like any other person for trespass, nuisance, negligence, and so forth.

Individual criminal and civil liability is doubtless a *practical* limit on government action. In relying on civil and criminal liability as limiting ‘government’ power and privileges, however, Harris conflates individual government officers with the ‘government’ (whether a natural or artificial legal person). Yet as Wade also said:¹⁸⁵

Elementary constitutional principles ... demand that the legal personalities of the Crown and of ministers should be kept distinct. Otherwise, the immunity of the Crown could not co-exist with the non-immunity of ministers.

¹⁸⁰ McLean (2004) 130.

¹⁸¹ *Commonwealth v Mewett* (1997) 191 CLR 471, 542 (Gummow and Kirby JJ).

¹⁸² *Williams (No 1)* [151] (Gummow and Bell JJ).

¹⁸³ ss 1 (a ‘claim’ previously enforced by obtaining His Majesty’s fiat ‘may be enforced as of right, and without the fiat ... , by proceedings taken against the Crown for that purpose’), 2 (‘the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject’).

¹⁸⁴ Wade (1988) 751–2.

¹⁸⁵ Wade (1999) 26.

3 'Third Source' Is Internally Incoherent When Applied to Contract

Harris's failure to distinguish between legal and non-legal action leads to internal incoherence when his theory is applied to government contracting, which he expressly purports to explain. Harris states that '[c]itizens are always free to ignore without legal consequence that which the government attempts to do under the third source.'¹⁸⁶ This is true of *non-legal action*, but not of *legal action* — benign or coercive. A binding contract cannot be ignored. A court will order its performance or require damages be paid for breach.¹⁸⁷ Similarly, Harris asserts that 'government action authorised by the third source cannot affect rights created by law'.¹⁸⁸ Plainly, contracts can affect legal rights: a right of action (Hohfeldian claim) can be released by contract. It is incoherent to define the 'third source' in these terms yet assert that it explains government contracting.

Harris attempts to accommodate this difficulty by arguing that the binding nature of a government contract does not flow from contracting power:¹⁸⁹

Although the freedom to contract can be explained as an aspect of the third source of authority for government action, it does give the government an avenue to legal enforceability of that which it has agreed in the contract. The enforceability derives *not from the third source*, but can be traced to the consent of the other contracting party and the provision private law makes for enforceability of contracts.

Problematically, this *assumes* — rather than demonstrates — that 'government' can contract. True, enforceability derives from contractual rights, but whether 'government' can create and

¹⁸⁶ Harris (2007) 232.

¹⁸⁷ Specific performance is unavailable and enforcement differs against 'the Crown': Crown Proceedings Act 1947 ss 21, 25. An *individual*, however, cannot 'ignore' her contract, which 'the Crown' enforces like a subject: s 26.

¹⁸⁸ Harris (1992) 651.

¹⁸⁹ Harris (2007) 227 (emphasis added) (citations omitted).

hold legal rights is a *separate and anterior question* to whether contract law recognises the parties' actions as creating a contract to which, as explained, Harris provides no answer. As Arrowsmith says, '[w]ith all contracts it is necessary to ensure (i) that the entity that is party to the contract has the legal capacity [scil — Hohfeldian power] to make the contract and (ii) that the human agent(s) who purport to conclude the contract have ... authority' to do so.¹⁹⁰ Harris skips both steps.

4 *'Third Source' Is Inconsistent with Authoritative Decisions and Incompatible with Some Civil Actions*

Harris's most fundamental claim is that civil or criminal liability makes government action 'invalid'. This is, however, problematic in two further ways: it is inconsistent with decisions establishing that *vires* and liability are different enquiries and is incompatible with the structure of some civil actions. It also produces odd results.

(a) *Inconsistency with Authoritative Decisions Separating Vires and Civil Liability*

Wade and Forsyth correctly point out that, for an individual to sue for damages, the government action in question need 'not necessarily [be] ultra vires'.¹⁹¹ Although decisions establishing this are mostly from statutory contexts, the same analysis applies in principle to non-statutory action. As Part II(A)(2) explains, any power *might* conceptually carry immunity — this depends on its nature. Thus Lord Browne-Wilkinson in *X (minors) v Bedfordshire CC* criticised previous statements that 'liability cannot exist unless the act complained of lies

¹⁹⁰ Arrowsmith (2005) [2.28].

¹⁹¹ Wade and Forsyth (2014) 669 n 287.

outside the ambit of the power’,¹⁹² holding instead that ‘it is [not] either helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence’.¹⁹³ Lord Slynn in *Barrett v Enfield LBC* similarly separated questions of *vires* and civil liability:¹⁹⁴

it does not in my view follow that, having [exercised a power], an authority cannot be liable for what it or its employees do ... without it being shown that they have acted in excess of power. It may amount to an excess of power, but that is not in my opinion the test to be adopted ...

Contrary to these conceptually coherent and authoritative statements — the converse and logical corollary of the principle that invalidity does not *necessarily* lead to government liability¹⁹⁵ — Harris conflates the conceptually distinct concepts of power to act (called ‘authority’) and liability.

(b) Incompatibility with the Structure of Some Civil Actions and Odd Results

Harris’s theory is structurally incompatible with some civil causes — so logically flawed — and produces strange results when applied to causes beyond his examples of trespass, assault and battery¹⁹⁶ — a reason to hesitate before accepting it.

Where an element of a civil action is absence of power (or knowledge thereof), application of that civil action to *determine whether power exists* is circular. Validity hangs from liability, yet liability hangs from validity. This concern is not theoretical: an element of

¹⁹² *Anns v Merton LBC* [1978] AC 728 (HL) 758 (Lord Wilberforce).

¹⁹³ [1995] 2 AC 633 (HL) 736.

¹⁹⁴ [2001] 2 AC 550 (HL) 572.

¹⁹⁵ Craig (2012) [30-001].

¹⁹⁶ Harris (2007) 227, 244.

misfeasance in public office can be that ‘a public officer acts knowing that he has no power to do the act complained of’¹⁹⁷ and a restitutionary claim lies for payments that government ‘exacted unlawfully’.¹⁹⁸ Both assume, inconsistently with Harris’s theory, a rule of validity *external* to the civil action.

Harris’s theory also generates odd results. On his view, government’s ability to act turns on whether it owes a duty of care in negligence (an uncertain enquiry)¹⁹⁹ and whether a tortious defence exists — government, apparently, may ‘validly’ batter one who consents. Where torts — including negligence, nuisance, misfeasance in public office and slander²⁰⁰ — are actionable only on damage occurring, on Harris’s theory *validity* turns on damage. Thus government’s negligently engaging an ill-qualified contractor becomes ‘invalid’ only when that contractor harms an individual. Additionally, the tort of inducing breach of contract would constrain government contracting power, so whether government can validly contract would turn on whether it has sufficiently detailed knowledge that the proposed contract precipitates breach of an existing contract.²⁰¹ These are extremely — arguably inappropriately — fragile, complicated and uncertain criteria for validity of government action, particularly contracting. Harris criticises Carnwath LJ’s view that government power must be exercised for governmental purposes as ‘a compromise which would be difficult for the courts to

¹⁹⁷ *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 (HL) 191 (Lord Steyn).

¹⁹⁸ *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL) 173 (Lord Goff); see also 198 (Lord Browne-Wilkinson), 204 (Lord Slynn).

¹⁹⁹ Booth and Squires (2006) [1.02].

²⁰⁰ Jones (2014) [1-51].

²⁰¹ See *Lictor Anstalt v MIR Steel UK Ltd* [2011] EWHC 3310 (Ch), [2012] 1 All ER (Comm) 592 [29] (David Richards J).

supervise, given the vagueness of the respective concepts'.²⁰² Yet once its consequences are appreciated, the same is true of Harris's theory.

C *Conclusion on Malone and the 'Third Source'*

The difficulties explained mean that Harris's 'third source' view is unpersuasive as an explanation of government contracting power and generally. *Malone* says nothing about *legal* action. The 'third source' has not been²⁰³ and should not be accepted as law.

²⁰² Harris (2010) 376.

²⁰³ *New London College* [28] (Lord Sumption), citing — without adopting — Harris (2007).

IV ‘THE CROWN’ AS CORPORATION SOLE OR AGGREGATE?

‘The Crown’ is often said to have contracting power — even all natural person powers — *because it is* a corporation sole or aggregate. This raises two distinct issues: Is ‘the Crown’ a corporation sole or aggregate? If so, what legal consequences does this have? In particular, does sole or aggregate corporateness entail the existence of a legal person — distinct from the Sovereign — with contracting power (or all natural person powers)? If there is no separate person, no question of power arises: ‘the Crown’ simply means ‘the Sovereign’ from time to time.²⁰⁴ If there is a separate legal person (‘the Crown’ in addition to the Sovereign), its powers must be identified and, as Part II(A)(1) explains, may or may not include contracting or wider powers. But sole or aggregate corporateness conceivably explains a governmental legal person and the extent of its legal personality.

Recent commentary and decisions have attempted to answer these questions by reasoning in one of two sets of steps. Both start with the proposition that the Crown is a corporation sole (hereafter the ‘First Proposition’). The first variant continues: corporations sole other than the Crown (hereafter ‘non-regal corporations sole’) can be assumed to be separate legal persons which have all natural person powers (hereafter the ‘Second Proposition’) and the Crown is analogous to them (hereafter the ‘Third Proposition’). The second variant simply asserts that, *regardless* of the powers of non-regal corporations sole, the Crown can be assumed to be a separate legal person with all natural person powers (hereafter the ‘Fourth Proposition’). Thus the First, Second and Third or the First and Fourth Propositions establish that ‘the Crown’ is a separate legal person with natural person powers, including contracting power.

²⁰⁴ As Part V argues.

The First Proposition is almost certainly correct,²⁰⁵ although it is more accurate to say that *the Sovereign* is a corporation sole, and decisions so hold only *obiter*. The Second, Third and Fourth Propositions, however, are conceptually illegitimate as assumptions and demonstrably wrong. As Part II(A)(1) explains, recognition as a legal person does *not* imply a particular extent of legal personality analogous to an individual or artificial legal person. As this Part explains, legal-historical material about corporations sole suggests that the Second, Third and Fourth Propositions are incorrect.

Section A surveys commentary embracing (various of) the four Propositions identified above, arguing that it does not extend beyond assumption. Section B examines recent judicial decisions, arguing that they are less certain about whether 'the Crown' *is* a corporation sole (*Ex parte C* holding that 'the Crown' is an innominate 'corporation') and that, while some partially support the Second and Third propositions, others undermine them. Section C examines the authorities that recent commentators cite, arguing they do not in fact support the Second, Third or Fourth Propositions, which remain unsustainable assumptions.

Section D then examines legal-historical material suggesting that corporations sole — as opposed to *aggregate* — were not artificial legal persons (falsifying the Second and Fourth Propositions).²⁰⁶ As Gray said:²⁰⁷

²⁰⁵ Kyd (1793) vol 1, 19–20, 39–40; Chitty (1820) 121–2; Grant (1850) 627–9; Maitland (1901) 135–6; Carr (1905) 13; Adler (1903) 22; *Halsbury's* (1910) vol 8, [690], vol 6, [745], [773].

²⁰⁶ This Part considers common law, not statutory, corporations sole. Where a statute creates a corporation sole, it generally *as a matter of construction* impliedly creates a separate legal person with defined powers: see, eg, Ministers of the Crown Act 1975 s 6 and Sch 1 para 5 (making certain Ministers 'for all purposes a corporation sole'), s 2(1)(b) (referring to 'the transfer of any property, rights or liabilities to or from a Secretary of State', thereby implying power to hold and transfer property, rights and liabilities). cf Davies (2008) 93.

²⁰⁷ Gray (1927) 58.

A corporation sole does not seem to be a fictitious or juristic person; it is simply a series of natural persons some of whose rights are different and devolve in a different way from those of natural persons in general.

This implies that the term ‘corporation’ is inapt and that ‘corporation sole’ really denotes something in the nature of a status,²⁰⁸ ‘an office’²⁰⁹ or ‘trusteeship’²¹⁰ — as Maitland said, ‘no “juristic person”’ but ‘juristic abortion’.²¹¹ (For convenience, ‘corporation sole’, ‘the Sovereign’ and ‘the Crown’ are used in this Section without prejudice to the question of separate legal personhood.)

Section D also makes the following arguments, regardless of separate legal personhood. Powers of non-regal corporations sole *differed* from those of individuals (for example, non-regal corporations sole could not generally ‘hold’ personal property), falsifying the Second Proposition. There is no analogy between the Sovereign and non-regal corporations sole (for example, the Sovereign could not take a joint property interest, but non-regal corporations sole ‘took’ as tenants in common), falsifying the Third Proposition. The only established legal effect of non-regal sole corporateness was on descent and disposition of property — official property passed to successors, not heirs, and dispositive power was limited — falsifying the Second Proposition. For the Sovereign, that sole corporateness had even this effect is doubtful in light of exclusive prerogative powers, falsifying the Third and Fourth Propositions.

²⁰⁸ cf Graveson (1953).

²⁰⁹ McLean (2012) 70.

²¹⁰ Carr (1905) 17.

²¹¹ Maitland (1900) 354. Maitland spoke of non-regal corporations sole but was equally scathing of ‘the Crown’ as corporation sole: see below n 334.

Section F rejects fleeting suggestions that 'the Crown' is a corporation aggregate, which *would*, if correct, imply a separate legal person with contracting power, albeit more constrained than an individual's power.

What follows requires inherently uncertain historical analysis; space precludes exhaustive examination. Lester and Weait, with Carnwath LJ's support,²¹² think it 'inappropriate ... to base ... ministers' and civil servants' powers without parliamentary authority on medieval concepts of the Crown as a corporation sole' because they are 'wholly outmoded' in a democratic, rule-of-law-based parliamentary system.²¹³ As Part V(B)(1) argues, anachronism as an objection proves too much. However, uncertainty — about legal effects of sole corporateness and, for the Sovereign, difficulties separating corporate powers (if any) from prerogative powers — is a powerful practical objection to continued reliance on sole corporateness.

A *Commentators' Suggestions That 'the Crown' Is a Corporation Sole So Has Contracting (and Natural Person) Power(s): Four Propositions*

Several recent commentators adopt the Propositions identified as premises without detailed analysis of corporations sole. Forsyth adopts the Fourth Proposition, saying: 'the Crown *as a corporation sole* has *all* the powers of a natural person and may enter into contracts and own and convey land and do all the many other things its subjects may do'.²¹⁴ Wade adopts the Second and Third Propositions, asserting that all corporations sole (Sales here substitutes 'all

²¹² *Shrewsbury* [48].

²¹³ Lester and Weait (2003) 420.

²¹⁴ Wade and Forsyth (2014) 180 (emphasis added) (citations omitted). See also Bailey (2007) 452; HL Deb 25 February 2003, vol 645, col WA12 (government view that 'common law powers ... derive from the Crown's status as a corporation sole').

legal persons’)²¹⁵ have equivalent powers, as is implicit in his comparison of the Queen with ecclesiastical and statutory corporations sole:²¹⁶

In truth, ‘the Crown’ means simply the Queen, though the term is usually confined to her in her political or constitutional capacity. She has plenty of legal personality, both as a natural person and, according to a long line of authority, as a corporation sole. In the latter capacity, she resembles a bishop or a parson, and indeed sundry of her ministers under Acts of Parliament, who are given corporate capacity in order that assets vested in them as such may pass to their successors in office automatically.

Nobody presents deeper analysis of what sole corporateness entails. As will be seen, *none* of the decisions in the ‘long line of authority’ — other than a dictum in *M* — suggests that sole corporateness carries contracting power (or natural person powers), and many on analysis undermine this assertion, as does Wade’s acknowledgment that the Crown ‘could not dispose of Crown lands by will’ until Parliament passed the Crown Private Estate Act 1800.²¹⁷

B *Recent Judicial Decisions Are Ambivalent about the Second, Third and Fourth Propositions*

Some recent judicial decisions also adopt some of the four Propositions. However, all recent statements about the Crown as corporation *sole* and its consequences are *obiter*, and decisions conflict about whether the Crown is a corporation *sole* or *aggregate* or some innominate corporation. Further, some decisions undercut the Second and Fourth Propositions by suggesting limits to the Crown’s sole corporate legal personality that do not exist for individuals. Detailed historical analysis is remarkably absent. This Section surveys those decisions.

²¹⁵ Sales (2014) 1, 6, 13–14.

²¹⁶ Wade (1999) 24 (citations omitted).

²¹⁷ *ibid.*

Lord Sumption (for the majority) in *New London College* expressly reserved the correctness of the Second and Third or Fourth Propositions. He recognised *Ex parte C* and *Shrewsbury* as holding ‘that the basis of the power [in question] was the Crown’s status as a common law corporation sole, with all the capacities and powers of a natural person subject only to such particular limitations as were imposed by law’, but thought the ‘extent of these powers and their exact juridical basis ... controversial’.²¹⁸ This needed no resolution in *New London College* because the Immigration Act 1971 impliedly conferred power ‘to administer the system of immigration control’, extending to ‘the vetting of sponsors’ there at issue.²¹⁹

Ex parte C adopts a variant on the Second and Third Propositions by relying on corporation but not corporation *sole*. The Department maintained a list of people suspected to be inappropriate to work with children; on request, it told an employer that it had ‘no observations’ about a prospective employee who was not on the list or, if they were, suggested requesting a reference from a specified person.²²⁰ *C*, who was on the list, argued that, without statutory power, the Secretary could not lawfully maintain the list because:²²¹

public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law (including the royal prerogative) or statute, and in particular may not interfere with the liberties of individuals without statutory authority.

Hale LJ accepted that exclusive prerogative power did not support maintaining the list, but adopted *Halsbury’s* statement that:²²²

²¹⁸ *New London College* [28].

²¹⁹ *ibid*; see also [37] (Lord Carnwath).

²²⁰ *Ex parte C* (CA) 628–9 (Hale LJ).

²²¹ *ibid* 631, quoting *Halsbury’s* (1996) vol 8(2), [101] (citations omitted).

²²² *Ex parte C* (CA) 632, quoting *Halsbury’s* (1996) vol 8(2), [101] n 6.

At common law the Crown, as a corporation possessing legal personality, has the capacities of a natural person and thus the same liberties as the individual ...

Because ‘private citizens are free to maintain services such as this ... maintaining the list [was] not, in itself, unlawful.’²²³ Hale LJ thus assumed (unpersuasively: see Part II(A)(1)) that being a legal person implies natural person powers. What kind of corporation the Crown is — and why — were not explained. As Sir Stephen Sedley points out, *Halsbury’s* itself provided no authority supporting this variation on the Second Proposition.²²⁴

Carnwath LJ, in *Shrewsbury*, treated *Ex parte C* as establishing that the Secretary’s powers ‘are not confined to those conferred by statute or prerogative, but extend ... to anything which could be done by a natural person’²²⁵ but did not regard the corporation-based reasoning as essential, saying: ‘Reference to the status of a Minister as “corporation sole”, or to analogies with the powers of natural persons, seem ... unhelpful.’²²⁶ Richards LJ by contrast thought *Ex parte C* ‘not only determinative ... but ... correct’ and that much government business required:²²⁷

powers that have not been conferred by statute and are not prerogative powers in the narrow sense but are the normal powers (or capacities and freedoms) of a corporation with legal personality.

Richards LJ thereby also unpersuasively assumes that ‘legal personality’ implies some universal, predefined set of powers. *Shrewsbury* and *Atcham Borough Council* argued that

²²³ *Ex parte C* (CA) 632.

²²⁴ Sedley (2014) 11–12. *Halsbury’s* (1996) cross-refers back to [6], which cites *M* (n 18) 424 and *Town Investments* for the proposition that (emphasis added): ‘The Crown is a corporation sole or aggregate *and so has general legal capacity*, including ... capacity to enter ... contracts and ... own and dispose of property.’ As explained in this Section, neither case supports ‘general legal capacity’.

²²⁵ *Shrewsbury* [44]. Waller LJ did not consider the power’s legal basis: see [78]–[81].

²²⁶ *ibid* [48].

²²⁷ *ibid* [72]–[73]. Richards LJ was the judge at first instance upheld in *Ex parte C*: [1999] 1 FLR 1073 (QB).

the Secretary lacked power to hold an extra-statutory consultation process, and all Lords Justice agreed that a subsequent Act had validated that process,²²⁸ so reasoning about non-statutory power was in any case unnecessary.

Three House of Lords decisions also suggest — *obiter* and without detailed consideration — that *because* the Crown is a corporation sole it has certain powers. One tentatively supports the Fourth Proposition but the other two on analysis undermine it.

Lord Hoffmann in *Hooper*, in deciding which limb of s 6(2) of the Human Rights Act 1998 prevented a claim for damages based on the Secretary's sexually discriminatory non-payment of certain benefits to widows,²²⁹ saw 'a good deal of force'²³⁰ in submissions that, '[a]s a corporation sole, the Crown has the same right to deal with its property as any other legal person', and '[t]he right to spend money is not a power which the Crown enjoys as executive but simply by virtue of being a legal person like any other.'²³¹ He and Lord Nicholls did 'not express a concluded opinion'²³² (and no other Law Lord considered the nature of the power), because all held that either s 6(2)(a) or (b) precluded the claim. As argued above, because it implies that *all* legal persons have the *same* legal personality, the submission was fatally flawed.

²²⁸ *Shrewsbury* [1]–[2], [4]–[8], [11], [13], [70] (Carnwath LJ), [76] (Richards LJ), [82] (Waller LJ).

²²⁹ *Hooper* [41]–[44].

²³⁰ *ibid* [47].

²³¹ *ibid* [46].

²³² *ibid* [47]; see also [4]–[6] (Lord Nicholls); cf [79] (Lord Hope), [95] (Lord Scott), [124] (Lord Brown).

Lord Woolf in *M*, where *M* sought to have ‘the Crown’ and the Home Secretary held in contempt, accepted that the Crown is not, but Ministers and departments are, amenable to contempt, reasoning (for the House):²³³

Lord Donaldson ... [below] considered that a problem was created in making a finding of contempt because the Crown lacked a legal personality. However, at least for some purposes, the Crown has a legal personality. It can be appropriately described as a corporation sole or a corporation aggregate ... The Crown can hold property and enter into contracts. On the other hand, even after the [Crown Proceedings] Act of 1947, it cannot conduct litigation except in the name of an authorised government department or, in ... judicial review, ... a minister.

Lord Woolf was uncertain whether the Crown was corporation sole or aggregate. While suggesting property ownership and making contracts as aspects of its legal personality (*obiter*, as these were not at issue), he identified differences from individuals’ legal personalities regarding contempt and bringing actions. *M* establishes the Crown’s non-amenability to contempt and thereby avoids a flawed assumption of universal legal personality, undermining the Second and Fourth Propositions.

Finally, Lord Diplock (for the majority) in *Town Investments* stated that ‘the Crown’ is a corporation sole but gave this no real content. A Minister took leases over premises used by civil servants from other departments, and statutory Orders prevented rent increases where premises were ‘occupied by the tenant ...for the purposes of a business’ it carried on.²³⁴ Lord Diplock held that the tenant was ‘the Crown’, to which ‘[e]xecutive acts of government ... done by’ Ministers and civil servants were attributable, and that civil servants using the building were ‘servants of the Crown’, their presence constituting Crown occupation, so the

²³³ (n 18) 424.

²³⁴ *Town Investments* 378.

Order applied.²³⁵ He did not rely on corporation sole (the subject of no argument).²³⁶ Yet if corporation sole implies a separate legal person, this was a simple solution: if Ministers acted as agents of a corporation sole, and civil servants were its embodiment, the tenant was obviously the occupier. Lord Simon so reasoned but (despite agreeing with Lord Diplock) characterised the Crown as a 'corporation *aggregate* headed by the Queen', with Ministers as 'aspects or members of the Crown, incorporated and ... holding ... property required by other Crown servants, who are also aspects or members of the Crown.'²³⁷ Thus '[a] demise to the Minister ... [was] a demise to the Crown', and 'the Crown as tenant occupied' the premises.²³⁸

Lord Diplock also held, construing the Order purposively, that occupation for carrying on government was 'for the purposes of a business'.²³⁹ He expressly eschewed reliance on definitional provisions extending the meaning of 'business' to 'any activity carried on by a *body of persons*, whether corporate or unincorporate', which created 'anomalies' by embracing activities of 'a corporation aggregate' but 'not those of the Crown which is in law a corporation sole'.²⁴⁰ Lord Diplock thus saw the Crown as a corporation sole — albeit *obiter*, reliance on the definition being unnecessary²⁴¹ — but his suggestion that it did not fall within the definition and failure to deploy the concept earlier arguably suggest that he did not see it

²³⁵ See *ibid* 381, 383; see also 402 (Lord Kilbrandon).

²³⁶ See *ibid* 363–78.

²³⁷ *ibid* 400 (emphasis added); but see 401.

²³⁸ *ibid* 400.

²³⁹ *ibid* 383–4.

²⁴⁰ *ibid* 384 (emphasis added).

²⁴¹ See also *ibid* 402 (Lord Kilbrandon).

as an artificial legal person distinct from the Sovereign, contrary to the Second and Fourth Propositions.

C Older Decisions and Commentary Generally Do Not Support the Second, Third and Fourth Propositions

Detailed examination of older cases and authoritative texts that Wade and others cite indicates — contrary to their assertions — that the Second, Third and Fourth Propositions are incorrect. They suggest that corporations sole are *not* legal persons separate from their corporators and (if this is wrong) that they nevertheless do not have contracting power, let alone all natural person powers. It is demonstrably wrong that the legal effects of sole corporateness were identical for *all* corporations sole: non-regal corporations sole and the Sovereign. Most strikingly, no older case or commentator states that *because* ‘the Crown’ is a corporation sole it has general contracting power.

Wade’s ‘long line of authority’ consists of *Attorney-General v Köhler*,²⁴² *Re Mason*,²⁴³ Hargrave’s note to *Coke upon Littleton*²⁴⁴ and Blackstone’s *Commentaries*.²⁴⁵ (Sales cites the first two.) Forsyth²⁴⁶ adds *Willion v Berkley*,²⁴⁷ *Dutchy of Lancaster*,²⁴⁸ *Sutton’s Hospital*,²⁴⁹

²⁴² (1861) 9 HLC 654, 670.

²⁴³ [1928] Ch 385 (Ch) 401.

²⁴⁴ Co Litt 15b (Hargrave’s note 87).

²⁴⁵ 1 Bl Comm 469.

²⁴⁶ Wade and Forsyth (2014) 180–1, 689.

²⁴⁷ (n 172) 242, 250.

²⁴⁸ (1561) 1 Plowd 212, 213. The report and this thesis use ‘Dutchy’ although modern spelling is ‘Duchy’.

²⁴⁹ (1612) 10 Co Rep 1a, 29b.

Hale's *Prerogatives of the King*²⁵⁰ and Holdsworth's *A History of English Law*.²⁵¹ Forsyth also relies on *New London College, Hooper and Town Investments* but, as explained, the first two are inconclusive and the third undermines the Second and Fourth Propositions. This Section shows that none of Wade's or Forsyth's authorities establishes the Propositions ascribed to them. (Further, nothing in other cases commonly cited in this connection supports those Propositions.)²⁵²

1 Older Judicial Decisions

Older judicial pronouncements touching corporations sole are universally *obiter* and, with some exceptions, their reasoning denies that corporations sole are separate legal persons with natural person powers. Several cases Forsyth cites do not even *mention* corporations sole.

Köhler supports the First, but undermines the Second and Fourth Propositions. Next-of-kin claimed in 1820 against the then Treasury Solicitor (Reynolds) an amount a previous Treasury Solicitor (Mitford) had paid to the King (George III) in 1813 mistakenly believing there was no next-of-kin.²⁵³ The next-of-kin established their 'pedigree' and breach of trust only in 1859, in Queen Victoria's reign. Successive Treasury Solicitors had contested only pedigree and interest, but the Attorney-General before the House of Lords contested the

²⁵⁰ Hale (1976) 84.

²⁵¹ Holdsworth (1944–45) vol 4, 203.

²⁵² See, eg, *WIJ* (1928) 411; Carr (1905) 30, citing *Earl of Devonshire's Case* (1606) 11 Co Rep 89a, 92a (grant of treasure void for false statement in record — no mention of corporation); *Case of a Fine Levied by the King Tenant in Tail* (1604) 7 Co Rep 32a, 32a–32b (King could bar inherited fee tail under statute because claiming 'in respect of his natural capacity, as heir of the body' not 'in respect of his Royal and politic capacity' — no mention of corporation); *Calvin's Case* (n 17) 10a, 12a–12b (King has a 'body natural' and 'politick body' but 'ligeance' owed to *natural* body — no mention of corporation sole).

²⁵³ *Köhler* (n 242) 656 (Report), 670–1 (Lord Cranworth).

Solicitor's and the Crown's liability. The appeal was dismissed because no error about pedigree or interest was shown; further arguments were no longer open.²⁵⁴ As such — and as Reynolds, not the Crown, was defendant²⁵⁵ — discussion of the Crown was *obiter*.²⁵⁶

Only Lord Cranworth, considering a hypothetical claim against the Crown, referred to corporations sole.²⁵⁷

It is very difficult to say on what ground her Majesty ... can be considered as under any obligation to refund, or rather pay, the money. It never came to her Majesty's hands. The Crown is a Corporation sole, and has perpetual continuance. Can a succeeding Sovereign, upon the principle that the King never dies, be held responsible for money paid over in error to and spent by a predecessor, which that predecessor might lawfully have disposed of for his own use, supposing it to have rightfully come to his hands? Does the successor for such a purpose represent his predecessor?

Lord Cranworth thought not: 'reasoning by analogy ... between subject and subject, the right of the [next-of-kin] would be ... against the executors either of King George III ... certainly not ... Queen Victoria'.²⁵⁸ Lord Chelmsford, without mentioning corporation sole, similarly suggested George III 'would not have been liable to refund [the money] as King' and thought it 'most unreasonable that his successors should be required to pay what never came to their hands'.²⁵⁹ Detailed analysis of corporation sole was absent. If a corporation sole is a separate legal person with 'perpetual continuance', its liabilities ought to remain even where the

²⁵⁴ *ibid* 679–80 (Lord Cranworth), 683 (Lord Wensleydale), 689–90 (Lord Chelmsford).

²⁵⁵ *ibid* 673 (Lord Cranworth), 689 (Lord Chelmsford).

²⁵⁶ Williams (1948) 112.

²⁵⁷ Köhler (n 242) 671.

²⁵⁸ *ibid* 672–3.

²⁵⁹ *ibid* 687–8.

corporator changes, yet *Köhler*²⁶⁰ says the opposite. Where the liability went is 'one of the unsolved mysteries of the law.'²⁶¹

Mason is ambivalent about what *kind* of corporation the Crown is but provides *obiter* support for the view that the Crown as corporation sole is a separate legal person. However, it expressly rejects the Third Proposition. A deceased 'lunatic' was at death entitled to funds in court, which were paid to and granted by the Crown in 1801 assuming no next-of-kin existed; next-of-kin claimed in 1926 by petition of right the value of the estate (or part retained) and interest.²⁶² Romer J held that the claim — for money had and received — was time-barred, which was 'sufficient to dispose of the petition'.²⁶³

Romer J accepted the suppliants' submission that 'all ... property received by the Crown was received ... as a corporation sole in its corporate capacity', so obligations could be 'enforced against ... successors of the Crown',²⁶⁴ reasoning:²⁶⁵

It must ... be taken as established law that the Crown is a corporation, *whether it be a corporation sole, as ... is generally thought ..., or whether, as Professor Maitland supposed, it be a ... corporation aggregate of which the King is the head ...* If Professor Maitland's view be ... true ... the [deceased] estate ... was received by a corporation aggregate, and the reasoning of Lord Cranworth [in *Köhler*], based upon the analogy of certain corporations sole, would not apply. The corporation aggregate that received the money would be the same corporation aggregate ... now asked to

²⁶⁰ And *Viscount Canterbury v Attorney-General* (1843) 1 Ph 306: see below n 470. But see *Sir Thomas Wroth's Case* (1573) 2 Plowd 452, 457 (annuity by letters patent payable by subsequent Sovereign 'because he granted the annuity as King, and the body politic of the King is charged, which body politic ... has perpetual existence' — corporation sole not mentioned nor invoked as basis of power to grant); Co Litt 144b (Hargrave's note 237). Later cases allowing petitions of right in contract and equitable relief against 'the Crown' did not rely on corporateness: see below Parts V(A)(2)(b)–(c).

²⁶¹ Williams (1948) 112.

²⁶² *Mason* (n 243) 386–8.

²⁶³ *ibid* 391, 395.

²⁶⁴ *ibid* 388 (Topham KC and AC Nesbitt).

²⁶⁵ *ibid* 401 (emphasis added) (citations omitted).

refund it, and ... that such corporation is now under a different headship would not appear to be material. But, assuming the Crown to be a corporation sole, why should not the same result follow? The estate was received in the time of King George III by the corporation sole, and the same corporation sole is now asked to refund it.

Romer J criticised *Köhler* because argument on Crown liability was not full²⁶⁶ and Lord Cranworth's view 'was based upon the analogy of other corporations sole', such as a bishop (the Third Proposition), but that 'this [is] a false analogy': for example, the Sovereign has for 'property ... but one capacity' not the 'two capacities ... personal and ... corporate' of other sole corporators.²⁶⁷ *Mason* thus supports *obiter* the Crown being a separate legal person but without deciding what *kind* of corporation and rightly eschews analogies between corporations sole.

Willion does not mention corporation sole and raises no question of the Sovereign's *power* to take or alienate property, which was assumed. As such, it provides only weak support for the Fourth (or Second) Proposition. Willion sued Berkley in trespass for ejecting him from land, the critical question being whether the Act de Donis Conditionalibus caught a grant *to* the Sovereign 'and to the heirs males of his body begotten'.²⁶⁸ General statutes presumptively did not. If the Act, which created the indefeasible fee tail,²⁶⁹ applied, the land had reverted to Berkley on Edward VI's death and there was no trespass. If not, the common law meant Edward VI's grant to Willion's predecessor barred the remainder, so Willion had good title

²⁶⁶ *ibid* 400.

²⁶⁷ *ibid* 402.

²⁶⁸ *Willion* (n 172) 242 (Weston J).

²⁶⁹ *ibid* 242 (Weston J), 245–6 (Anthony Brown J), 250 (Dyer CJ).

and Berkley had trespassed. Anthony Brown J²⁷⁰ and Dyer CJ²⁷¹ held the statute applicable, so Willion failed. Weston J dissented.²⁷²

Counsel agreed the Sovereign had 'a double capacity' and could take estates in either capacity.²⁷³ Berkley argued that the Act applied more easily if the Sovereign took in his 'body natural', which was 'more distant from the prerogative'.²⁷⁴ The only reference to corporation was during argument: the King had 'two bodies, ... a body natural ... [and] a body politic', whereby 'he and his subjects together compose the corporation, ... and he is the head, and they are the members, and he has the sole government of them'.²⁷⁵ Given counsel's agreement that two 'capacities' or 'bodies' existed, the Court did not need to determine the matter. The corporation suggested — having as its members all subjects — was patently not a corporation sole.

In a passage Forsyth cites, Weston J responded to these submissions:²⁷⁶

the King has two capacities, and he comes to some things meerly [sic] as King, as ... treasure-trove, ... lands escheated for treason, and the like; and to ... other things ... not as King, as if lands descend to him from any of his ancestors. ... For there are distinctions of bodies politic, ... between those which are made by the King's letters-patent, and those which exist at common law. For those ... made by the King's letters-patent, as dean and chapter, ... cannot purchase in succession by the name of heirs, but only by the name of successors. But the ... King is a body politic by the common law, which may take in the politic capacity, by the name of King, to him and to his

²⁷⁰ *ibid* 248–50.

²⁷¹ *ibid* 252.

²⁷² *ibid* 241.

²⁷³ *ibid* 234, 238.

²⁷⁴ See *ibid* 238.

²⁷⁵ *ibid* 234.

²⁷⁶ *ibid* 242.

heirs, or by the name of King, to him and to his successors; and notwithstanding this ... his capacity to take in the body natural is not confounded by the body politic ...

Weston J held that the grant to Henry VII and the heirs *of his body begotten* vested the estate ‘in his body natural’.²⁷⁷ Nonetheless, ‘the body natural and the body politic are *not distinct, but united, and as one body*’ so even in the ‘body natural’ the King has ‘prerogatives’,²⁷⁸ including that the general Act did not bind him (so Willion succeeded).²⁷⁹ Weston J’s dissenting reasoning exemplifies Loughlin’s comment that ‘[t]hough often “bodified” ... the Crown was rarely “personified”’ and remained ‘a body politic ... not separated from ... its royal constituent as the head’.²⁸⁰ The assertion of two ‘capacities’ being ‘bodies politic’ suggests a separate legal person, yet these bodies are ‘not distinct, but united’; ‘capacity’ appears to mean ‘role’.

The same is true of Anthony Brown J’s reasoning. He conceived ‘the nature of the King’s person’ as comprising two bodies: ‘the body politic’ and ‘the natural body’.²⁸¹ The estate ‘vested in his body natural, and ... in that capacity he took it’.²⁸² Yet he did not distinguish the ‘bodies’, concluding simply that ‘*the King* shall be bound by the Act ... as well as another person.’²⁸³

²⁷⁷ *ibid.*

²⁷⁸ *ibid* (emphasis added).

²⁷⁹ *ibid* 244.

²⁸⁰ Loughlin (1999) 54.

²⁸¹ See *Willion* (n 172) 245.

²⁸² *ibid.*

²⁸³ *ibid* 249 (emphasis added).

Dyer CJ, in the other passage Forsyth cites, says:²⁸⁴

the King has two bodies, viz a body natural and a body politic, and he has capacity both in the one and in the other. And the name (King) contains them both, and heirs implies both heirs and successors ... And ... here the gift itself distinguishes in what capacity the King shall take it, for the remainder is to him and to his heirs males of his body begotten, and such heirs must come from, the natural body, for the body politic cannot beget issue. ... [T]he remainder here vested in the body natural of King Henry 7. ... So that if he had resigned the Crown to King Henry 8 yet he should have held the land ... as land distinct from, and no part of the Crown.

Dyer CJ conceives a 'body politic', being 'the Crown', distinct from the 'natural body', and 'capacity' — apparently power — in both to take property.²⁸⁵ This can be read, as Forsyth does, as suggesting a separate legal person, though not contracting power. Dyer CJ reasoned by analogy to a bishop — another corporation sole — which also takes in two 'capacit[ies]'.²⁸⁶ As explained, however, at issue was *not* the nature of 'body' but whether the Act applied. Dyer CJ held that, while sometimes 'the King shall not be restrained by general words' here he was 'bound',²⁸⁷ also not differentiating between the 'bodies' in applying the Act.²⁸⁸

Forsyth cites *Dutchy of Lancaster* to show that '[i]n law the sovereign has two personalities, one natural and the other corporate'.²⁸⁹ On analysis, the case suggests these 'personalities' are indistinct, with intermingled powers. It decided that the Sovereign's power to deal with official property in nonage applied also to property held personally (the Dutchy) and that the Sovereign must deal with personal property in 'the same circumstance and order'

²⁸⁴ *ibid* 250.

²⁸⁵ Although Dyer CJ also says that 'the Crown was entailed to King Henry 8' (*ibid*), using 'Crown' to mean 'Kingship'.

²⁸⁶ *ibid*.

²⁸⁷ *ibid* 251.

²⁸⁸ See *ibid* 251–2.

²⁸⁹ Wade and Forsyth (2014) 689.

as official property, namely, by ‘letters-patent under the Great Seal ..., without any livery of seizin or attornment’.²⁹⁰ Edward VI, in nonage, granted leases over the Dutchy, which Queen Elizabeth sought to escape.²⁹¹ While ‘no act which the King does *as King*, shall be defeated by ... nonage’,²⁹² Edward VI (by statutory twists and turns) had held the Dutchy ‘in his body natural’.²⁹³ The judges nonetheless held nonage did not void the grant: the King’s ‘body politic, ... annexed to his body natural, takes away the imbecility of his body natural, and draws the body natural, which is the lesser, and all the effects thereof to itself, which is the greater’.²⁹⁴

In this context the almost biblical passage that Maitland labels ‘so marvellous a display of metaphysical — or ... metaphysiological — nonsense’²⁹⁵ appears:²⁹⁶

For although [the King] has or takes the land in his natural body, yet to this natural body is conjoined his body politic, which contains his royal estate and dignity, and the body politic includes the body natural, but the body natural is the lesser, and with this the body politic is consolidated. So that he has a body natural, adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person, and make one body and not divers, that is the body corporate in the body natural, *et e contra* the body natural in the body corporate. So that the body natural, by the conjunction of the body politic to it, (which body politic contains the office, government, and majesty royal) is magnified, and by the said consolidation hath in it the body politic ...

²⁹⁰ *Dutchy of Lancaster* (n 248) 214. ‘Livery of seizin’ was the ancient ceremony by which subjects conveyed land and ‘attornment’ was a tenant’s agreement to hold land as tenant of a new lord: Garner (2009) 148, 1018.

²⁹¹ *Dutchy of Lancaster* (n 248) 212–13.

²⁹² *ibid* 213 (emphasis added).

²⁹³ *ibid* 222; see also 220–1.

²⁹⁴ *ibid* 213–14.

²⁹⁵ Maitland (1901) 134.

²⁹⁶ *Dutchy of Lancaster* (n 248) 213.

The passage is highly ambiguous and, given that the case decided that nonage did not affect a *personal* grant, difficult to read with Forsyth as recognising separate legal persons.

Sutton's Hospital, without mentioning corporation sole, does suggest *obiter* that the Crown is a corporation consisting of the Sovereign. It thus supports the First Proposition but says nothing about the Second, Third or Fourth. An Act empowered the King by letters patent to incorporate Sutton and others as hospital governors.²⁹⁷ Sutton purchased land; the King issued letters patent; Sutton transferred the land to the body corporate and died.²⁹⁸ Sutton's next-of-kin took possession but the governors ejected him; he sued in trespass.²⁹⁹ The Court had to decide whether the incorporation and transfer were valid: if so, there was no trespass. The nature of the Crown did not arise and was not argued.³⁰⁰ The incorporation and transfer were valid; the plaintiff failed.³⁰¹

In considering incorporation, the judges reasoned that 'every corporation or incorporation, or body politic or incorporate, ... either stands upon one ... sole person, as the King, bishop, ... or [is] aggregate of many, as mayor, ... dean and chapter'.³⁰² Five things were 'of the essence of a corporation': '[l]awful authority of incorporation: and that may be by ... four means, *sc* by the common law, as the King himself, ... by authority of Parliament: by the King's charter (as in this case); and by prescription'; 'persons to be incorporated'; a

²⁹⁷ *Sutton's Hospital* (n 249) 2b.

²⁹⁸ *ibid* 5b–8b, 19a.

²⁹⁹ *ibid* 21a.

³⁰⁰ See *ibid* 22a.

³⁰¹ *ibid* 24b, 34a.

³⁰² *ibid* 29b.

‘name by which they are incorporated’; ‘a place’; and ‘words sufficient in law’.³⁰³ The requirements of place, name and sufficient words, however, indicate that the Court was considering corporations by Act, charter and prescription, *not* common law. Similarly, the report states that ‘when a corporation is duly created, all other incidents are *tacite* annexed’ and lists incidents including ‘authority, ability, and capacity to purchase’ and ‘[t]o sue and be sued’, but other incidents are ‘[t]o be visited by the governors’, that ‘the survivors shall be the corporation’ and ‘[t]he licence to purchase in mortmain’,³⁰⁴ which again indicates that the reasoning applies not to *all* corporations but corporations *aggregate* — which could conceivably have survivors — created by Act (like that in issue), charter or prescription and *not* the Sovereign.

None of these authorities holds other than *obiter* that the Sovereign is a corporation sole; the Second, Third and Fourth Propositions attract very little support. That liability does not attach to royal successors (on *Köhler* and *Viscount Canterbury v Attorney-General*,³⁰⁵ although not *Mason*) suggests no separate legal person exists. Further, the effect attributed to the Sovereign’s ‘incorporation’ — descent of property to successors, not heirs, immediately upon demise — does not *necessitate* a separate legal person: for example, a trust also achieves this result.

³⁰³ *ibid* (citations omitted).

³⁰⁴ *ibid* 30b–31a.

³⁰⁵ (n 260). See below n 470.

2 *Institutional Commentary*

Institutional commentary that Wade and Forsyth cite mostly supports the First but undermines the Second, Third and Fourth Propositions.

Holdsworth suggests that sole corporateness lacks legal meaning altogether. He says, in the very passage Forsyth cites:³⁰⁶

speculation as to the separation of the natural and politic capacity of the king ... naturally suggested to the lawyers the distinction, with which they were becoming familiar, between corporate and natural personality; and led them to talk of the king as a corporation sole, and to compare him to a bishop ... As Bacon pointed out, the analogy was not exact, for the king was both natural man and the head of the body politic. ... [I]t is possible that, if the English king had ever become identified with the state, something might have been made of the idea that the king was a corporation sole. But in England in the sixteenth century no statesman or lawyer ever thought of suggesting this identification — he and his subjects together were the 'great corporation of body politick of the kingdom.'

Holdsworth elsewhere describes the King as corporation sole as a Tudor lawyer invention from 'hints ... in their medieval books ... of a distinction between the natural and ... politic capacity',³⁰⁷ 'complimentary mystifications ... not ... legal doctrines from which any real deductions were drawn',³⁰⁸ and something 'never properly applied' leading to 'the failure of the theory of the corporation sole, and ... resulting confusion.'³⁰⁹ He concludes that '[t]he law recognizes, not the state, but only the king'.³¹⁰

³⁰⁶ Holdsworth (1944–45) vol 4, 203 (citations omitted).

³⁰⁷ *ibid* vol 4, 202.

³⁰⁸ *ibid* vol 9, 5–6.

³⁰⁹ *ibid* vol 9, 7 n 2.

³¹⁰ *ibid* vol 9, 6.

Hargrave's note to *Coke upon Littleton* supports the view that the Sovereign is a corporation without mentioning corporation *sole*. Coke explains that Crown estates descend to successors, not heirs, because 'the quality of the [King's] person doth ... alter the descent'³¹¹ — corporateness is absent. Hargrave's note states:³¹²

by the common law the king is a corporation, and purchases made by him after assumption of the crown rest in a politic capacity. ... But ... purchases ... before accession of the crown, or descents from collateral ancestors after accession ..., vest in a natural capacity ...

This comment follows closely what Coke reported in *Sutton's Hospital* and partially supports the First Proposition. Elsewhere, Coke implies that the Sovereign as corporation sole is a separate legal person, if one combines his defining corporations as 'persons incorporate or politique created by the policy of man ... either sole, or aggregate of many'³¹³ with the statement that 'a chattell cannot goe in the succession of a sole corporation, *unless it be in the case of the king*.'³¹⁴ Generally, however, he gives sole corporateness little content, not using it to explain descent of the Sovereign's chattels (which he instead attributes to 'a law, parcell of the lawes of *England*, called *jus coronæ*, [which] differeth in many things from the generall law concerning the subject')³¹⁵ nor descent of Crown jewels.³¹⁶

Sir Matthew Hale supports the First Proposition, saying that the Sovereign had a 'double capacity, a natural and a politic capacity', the latter by virtue of 'a legal constitution whereby

³¹¹ Co Litt 15b.

³¹² *ibid* (Hargrave's note 87).

³¹³ *ibid* 2a.

³¹⁴ *ibid* 90a (emphasis added).

³¹⁵ *ibid* 15b (original emphasis).

³¹⁶ *ibid* 18b.

he is a ... sole corporation having a perpetual succession.'³¹⁷ However, he emphasises the 'conjunction' of the 'capacities',³¹⁸ states that the King has 'all the prerogatives' in lands held in his natural capacity 'as [are] ... in the king ... in his politic capacity'³¹⁹ and relates a case where the King's holding 'warranty and assets ... in his natural capacity barred him to demand his reverter in his politic capacity'.³²⁰ This intermingling of powers between the 'natural' and 'politic' capacities suggests *one* legal person acting in two *roles*. Hale also observes differences between the Sovereign and other corporations sole in taking land, undermining the Third Proposition.³²¹

Finally, Blackstone sees the Sovereign as a corporation sole:³²²

Corporations sole consist of one person only and his successors, ... incorporated by law, ... to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation:³²³ so is a bishop ...

However, Blackstone gives somewhat incoherent support to the Second, Third and Fourth Propositions. He says specifically that the Sovereign is a corporation 'to prevent ... an *interregnum* ... and ... preserve the possessions of the crown entire; for immediately upon the demise of one king, his successor is ... in full possession of the regal rights and dignity'.³²⁴ He limits his list of powers 'necessarily and inseparably incident to every corporation' —

³¹⁷ Hale (1976) 84.

³¹⁸ *ibid* 85.

³¹⁹ *ibid* 91.

³²⁰ *ibid* 92.

³²¹ *ibid* 86.

³²² 1 Bl Comm 457.

³²³ Co Litt 43.

³²⁴ 1 Bl Comm 458 (original emphasis).

including '[t]o purchase lands, and hold them' and '[t]o sue or be sued, implead or be impleaded, grant or receive, by it's [sic] corporate name, and *do all other acts as natural persons may*',³²⁵ a sweeping statement which *would* support the Second or Fourth Propositions — 'to every corporation *aggregate*'.³²⁶ Powers 'unnecessary to a corporation *sole*' were using a corporate seal and making by-laws, which might imply that the sweeping statement *does* apply to corporations sole, yet Blackstone acknowledges further qualifications to sole corporate powers, like inability to 'take goods and chattels'.³²⁷ The sweeping statement thus cannot be taken literally.

With the exception of Holdsworth, institutional commentary cited by Wade and others supports the First Proposition. But none supports the Second and Fourth Propositions and much undermines the Third.

D *Wider Historical Materials Falsify the Second, Third and Fourth Propositions and Suggest 'the Crown' Does Not Have Contracting Power as a Corporation Sole*

Chitty contrasts the two main³²⁸ types of common law corporation, aggregate and sole:³²⁹

A corporation [aggregate³³⁰] may be defined to be a collection of many individuals, united into one body, under a special denomination, having perpetual succession under an artificial form, and *vested by the policy of the law, with the capacity of acting*

³²⁵ *ibid* 463 (emphasis added), citing *Sutton's Hospital*, which as explained does not go that far: see above nn 302–304.

³²⁶ 1 Bl Comm 464 (original emphasis). Even this is too wide because corporations aggregate cannot do *all* acts individuals may: Kyd (1793) vol 1, 69–71.

³²⁷ 1 Bl Comm 464–5 (original emphasis).

³²⁸ The law recognises quasi-corporations, including individuals such as the Lord Chancellor, 'who, for certain purposes, are in the nature of corporations sole': Grant (1850) 661. See also Kyd (1793) vol 1, 9.

³²⁹ Chitty (1820) 121–2 (emphasis added) (citations omitted).

³³⁰ Apparent from reference to 'collection ... of individuals' and the later contrast to '[s]ingle persons'.

in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence.

Single persons cannot partake of many of the properties of a corporation, but as they may partake of a few, as for instance, the capacity of having perpetual succession; our law has divided corporations into two classes, corporations aggregate and corporations sole. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are the mayor of a commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and its successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the King is a sole corporation; so is a bishop; so are some deans and prebendaries, distinct from their several chapters; and so is every parson and vicar.

The first edition of *Halsbury's Laws of England* defines corporation aggregate in Chitty's terms then (adopting almost verbatim Grant's definition) says:³³¹

A corporation sole is a body politic having perpetual succession, constituted in a single person, who, in right of some office or function, has a *capacity to take, purchase, hold, and demise* (and in some particular instances, under qualifications and restrictions introduced by statute, power to alien) *lands, tenements and hereditaments*, to him and his successors in such office for ever, *the succession being perpetual*, but not always uninterruptedly continuous; that is, there may be, and mostly are, periods in which there is a vacancy, or no one in existence in whom the corporation resides and is visibly represented.

The difference in powers is striking. Corporations aggregate could, in general, be compared with individuals. Sole corporateness had significantly more limited legal effects: power to obtain and demise — not alienate — only real — not personal — property. Its sole purpose was descent of property to successors. The definitions make clear that corporations sole lacked many corporate properties.

³³¹ *Halsbury's* (1910) vol 8, [683]–[684] (emphasis added) (citations omitted). cf Grant (1850) 626.

On Chitty's definition, a corporation sole could not have contracting power *by virtue of corporateness* because this carries only powers (called 'capacities') that the corporator as a 'natural person ... could not have had'. Natural persons — including the Sovereign — have contracting power, and 'incorporation, in right of the crown, does not deprive the person wearing it of all the rights and powers of the natural person'.³³²

This Section argues that these definitions are correct, and the Second, Third and Fourth Propositions flawed, by reference to historical decisions and commentary on common law corporations and the Sovereign. Their consideration is notably absent from the commentary in Part IV(A). Yet these materials — particularly the three foremost commentaries of Kyd, Chitty and Grant — demonstrate that the powers of non-regal corporations sole were *different from* those of individuals — contrary to the Second Proposition — and that those of the Sovereign, a corporation sole *sui generis*, different again and did not include contracting power — contrary to the Third and Fourth Propositions. They strongly suggest that corporations sole were not legal persons distinct from their corporators and 'sole corporateness' was akin to a status, office or trust; if correct, this also falsifies the Second and Fourth Propositions. Strikingly, *no case or commentator* reasons as Wade and others do.

Once the Second Proposition (non-regal corporations sole have natural person powers) is rejected, some discrimen is needed to explain what legal effects sole corporateness *does* have. The commentary and decisions examined below support Chitty's suggestion of legal effects *additional* to natural person powers necessary to achieve their rationale: succession of official property. On that view, non-regal sole corporateness affected descent of and

³³² Grant (1850) 628.

dispositive power over part of the corporator's property, but that is all. The underlying powers came from elsewhere.³³³

For the Sovereign, even descent is arguably a consequence of the prerogative, not corporate status. No historical decision or commentary suggests that royal sole corporateness carried contracting power, undermining the Fourth Proposition. It seems Maitland was right to say that the royal corporation sole 'stubbornly refuses to do any real work in the cause of jurisprudence'.³³⁴ In particular, it does not explain government contracting power.

1 Corporations Sole Are Probably Not Separate Legal Persons

Commentators considering corporations sole in depth — including Maitland, Gray, Salmond,³³⁵ Carr, Grant and Kyd — suggest the concept implies no distinct legal person but merely connotes rules affecting descent of and dispositive power over official property. Grant thought that 'in the case of a sole corporation ... the natural body cannot so easily be distinguished from the politic body'.³³⁶ Carr concludes that a corporation sole's personality is 'not distinct from that of its sole corporator',³³⁷ nor 'sufficiently independent and vigorous ... to discharge by itself the duties and responsibilities incumbent upon successive officials';³³⁸ sole corporateness was '[i]n effect ... official trusteeship'.³³⁹ Kyd similarly states that sole

³³³ Part V argues that they came from the corporator's natural personality.

³³⁴ Maitland (1901) 135.

³³⁵ See above nn 207, 334, below n 404.

³³⁶ Grant (1850) 637.

³³⁷ Carr (1905) 29.

³³⁸ *ibid* 15 (emphasis added).

³³⁹ *ibid* 17.

corporateness entailed only perpetual succession ‘*resembling* that of corporations’ and corporators suing and being sued ‘*in right of the office they hold*, distinct from their capacity ... *as private individuals*’; corporations sole were instances of ‘appropriation of particular revenues to the maintenance of a single person, filling some particular station’ which ‘belong *to the person*, not in his natural capacity, but in his public character’ so descend to successors and ‘have, *without much propriety*, been, uniformly, in the books of English law, called corporations’.³⁴⁰

Several settled principles and their underlying reasoning are very difficult to explain if non-regal corporations sole are separate legal persons, so further undermine the Second Proposition. *Salter v Grosvenor* held that ‘[a] sole corporation, as a bishop ..., cannot make a lease to himself, because *he cannot be both lessor and lessee*’.³⁴¹ Maitland could find no instance where the sole corporator sued the corporation,³⁴² and I have found none since, which suggests she could not. Further, a corporation sole did not *subsist* independently of its corporator: on her death, the fee simple in corporate land went into *abeyance*³⁴³ — ‘in flagrant violation of [the law’s] own real property principles’³⁴⁴ — and the corporation could not maintain an action³⁴⁵ until a successor’s appointment.

³⁴⁰ Kyd (1793) vol 1, 19–20 (emphasis added).

³⁴¹ (1723) 8 Mod 303, 304 (emphasis added) (citations omitted). To identical effect is *Wood v Mayor and Commonality of London* (1701) 1 Salk 397, 398.

³⁴² Maitland (1900) 353.

³⁴³ Co Litt 343a; Grant (1850) 636; *ibid* 352 (the corporation sole ‘refuses to perform just the first service that we should require at the hands of any reasonably useful *persona ficta*’). By contrast, the Sovereign’s property descended immediately: see Part IV(D)(3).

³⁴⁴ Carr (1905) 28.

³⁴⁵ Grant (1850) 632, 637. Inability to *sue* might be explained by inability to act in the absence of the corporation’s head, but inability to *maintain* an action cannot.

Rules touching the Sovereign suggest that here, too, sole corporateness implied no separate legal person, undermining the Fourth Proposition. These include the intermingling of powers mentioned (prerogatives affecting personal dispositions of property and personal rights preventing acquisition of official rights in the same property),³⁴⁶ the requirement that the Sovereign dispose of personal property with official formality,³⁴⁷ and 'ligeance' being owed to the *natural* 'body'.³⁴⁸ An 'essential element in the legal conception of ... corporation is that ... a liability ... once binding on a corporation, ... sole or aggregate, ... will bind ... successors',³⁴⁹ so *Köhler's* (and *Viscount Canterbury's*) holdings that regal successors were not responsible for predecessors' liabilities (although doubted in *Mason*) similarly suggest sole corporateness implied no separate legal person.

Pollock takes a contrary view. Without accounting for the matters just mentioned, he describes corporations sole as 'artificial persons' with 'rights and duties ... wholly distinct from the rights and duties of the particular persons immediately concerned in the transactions.'³⁵⁰ The better view may be that no separate legal person exists, but in any case the rules surveyed here and in the next two Sections equally show that the Second, Third and Fourth Propositions are unsustainable.

³⁴⁶ See above nn 319–320.

³⁴⁷ See below n 376.

³⁴⁸ See above n 252.

³⁴⁹ *Halsbury's* (1910) vol 8, [685].

³⁵⁰ Pollock (1894) 107.

2 *Powers of Non-Regal Corporations Sole and Individuals Differ*

This Section explains that, assuming non-regal corporations sole are separate legal persons, their powers differ markedly from those of individuals, falsifying the Second Proposition. Contracting power is impossible to reconcile with non-regal sole corporations' inability to 'take' and 'hold' personal property — contractual rights being choses in action — and academic suggestions of contracting power, while in any case limited in scope, are contrary to authority.

(a) General Differences

Commentators who studied corporations sole universally eschew equating sole corporations' and individuals' powers. Grant, for example, states that '[t]he correctness ... ought not to be lightly presumed' of the view that 'a sole corporation ... is capable of the same acts as all natural persons are'.³⁵¹ Established rules about non-regal corporations sole bear this out.

Critically, while individuals (and the Sovereign) may hold personal property, '[a]part from statute or special custom, personal property cannot be vested in a corporation sole. It will pass to ... executors ... not ... successors'.³⁵² Corporations sole thus cannot take leases — chattels real.³⁵³ Unlike an individual, a corporation sole could not, at common law, take real property as joint tenant.³⁵⁴ Further, authority suggests that before the nineteenth century

³⁵¹ Grant (1850) 634. So too do Maitland, Carr and Kyd: above nn 335–340.

³⁵² *Power v Banks* [1901] 2 Ch 487 (Ch) 495 (Cozens-Hardy J). See also *Arundel's Case* (1615) Hob 64, 64 ('bishops, deans, parsons, vicars, and the like cannot take obligation to them and their successors, but they will go to the executors'); *Howley v Knight* (1849) 14 QB 240, 255 (Coleridge J).

³⁵³ Co Litt 46b; *Halsbury's* (1910) vol 8, [821].

³⁵⁴ *Law Guarantee & Trust Society Ltd v Bank of England* (1890) 24 QBD 406 (QB) 411 (Mathew J), adopting *inter alia* Co Litt 190a. Bodies Corporate (Joint Tenancy) Act 1899 s 1(1) enabled a 'body corporate' to hold property as joint tenant.

corporations sole could not 'take an estate to the use of another',³⁵⁵ that is, act as trustees. Ancient statutory interventions prevented corporations (sole) from acquiring real property, initially for more than 21 years or three lives, without Crown licence.³⁵⁶ Plainly, individuals can be joint tenants, be trustees and acquire real property.

Additional differences exist in the *exercise* of powers. Initially, corporations sole required certain consents to dispose of land or otherwise diminish their permanent revenues (a bishop, for example, required dean and chapter's consent).³⁵⁷ The *Magdalen College Case* established a substantive *ultra vires* doctrine that, at common law, bishops, parsons and vicars as corporations sole 'have power to dispose of their possessions during their incumbency, *but not to prejudice their successors*'.³⁵⁸ Sir George Jessel MR regarded limited *statutory* corporate powers as 'no new doctrine' because 'the ecclesiastical corporations, sole or aggregate', had 'limited powers of enjoyment, limited powers of alienation, and limited rights of control over their property', broadly equivalent to 'tenants for life'.³⁵⁹ The purposes for which the corporation existed limited its actions, particularly disposition. The Court of

³⁵⁵ *Holland and Boin's Case* (1586) 2 Leon 121, 122. To identical effect are: *Fulmerston v Steward* (1555) 1 Plowd 101, 102–3; Kyd (1793) vol 1, 73. But see Grant (1850) 116–18.

³⁵⁶ 1 Bl Comm 466–7; Kyd (1793) vol 1, 136–8; see 120–60 for the tortuous history. For a licence, see *Sutton's Hospital* (n 249) 8a–8b, 30b.

³⁵⁷ Grant (1850) 638–9, 641–2, 645–6; Kyd (1793) vol 1, 108. Statute later intervened: see, eg, Alienation by Bishops Act 1558.

³⁵⁸ (1615) 11 Co Rep 66b, 77a (emphasis added). See also Grant (1850) 134 n (y), 136; Holdsworth (1944–45) vol 9, 45–71; Carr (1905) 4; Bryce (1893) 186. Sales (2014) 14–20, conflating the Sovereign with other corporations sole, argues that government non-statutory power is limited by corporate *ultra vires* rather than proper purposes principles. The practical result is the same, at least as to proper purposes.

³⁵⁹ *Mulliner v Midland Railway Co* (1879) 11 Ch D 611 (Ch) 622–3.

Chancery restrained corporations sole by injunction from wasting their lands.³⁶⁰ None of this constrained an individual.

The Second Proposition is very wide, and a moment's reflection shows it to be overly so. Before Pollock, no English writer had 'thought it necessary to state in terms that a corporation cannot be married or have any next of kin', but it cannot.³⁶¹ This and the other differences surveyed establish that non-regal corporations sole did not have *all* natural person powers and could not — unlike individuals — exercise powers untrammelled by legal limits as to purpose and effect.

(b) Corporations Sole Lack Contracting Power

It follows from sole corporations' inability to take or hold personal property that, unlike individuals, they cannot create or hold contractual rights. As Wightman J said in *Howley v Knight*, '[a] personal contract with a corporation sole, though ... not for his personal benefit, but for that of himself and his successors, would pass to his executors.'³⁶² This expression exemplifies the use of 'corporation sole' to mean the corporator (something confusing this area) and indicates that the corporator has contracting power *because she is a natural person*.

Some commentators suggest that non-regal corporations sole have *some limited* contracting power but provide no supporting authority and fail to reconcile this assertion with the widely accepted inability to hold personal property.³⁶³ For Pollock, it seemed 'that a

³⁶⁰ Grant (1850) 644–5.

³⁶¹ Pollock (1894) 110 n (o).

³⁶² (n 352) 255.

³⁶³ See, eg, above nn 325–326; *Halsbury's* (1910) vol 8, [839] (citing *Bateman v Ashton-under-Lyne Corp* (1858) 3 H&N 323, 335 (Martin B) (statutory corporation)); Adler (1903) 84.

corporation sole cannot enter into a contract (except with statutory authority, *or as incidental to an interest in land*) in his corporate capacity'.³⁶⁴ The authorities cited — *Arundel's Case*,³⁶⁵ *Howley and Coke upon Littleton* — do not support any exception for contracts incidental to interests in land, and Pollock later withdrew this opinion, saying: 'the persons whom we have to call corporations sole in England can do very little in their corporate capacity, and in particular cannot bind or even benefit their official successors by contract, except in one or two peculiar cases'.³⁶⁶ Those cases remained unidentified. For Gray, the unique 'qualities' of corporations sole included entry into contracts that sometimes inure for the benefit of successors.³⁶⁷ He, too, gave neither examples nor authority. Grant tentatively suggests that 'the successor ... would be *liable* on the contract of his predecessor, though not under seal, if the contract was executed, and the thing done, or goods delivered, ... had come to the use of the see, ... not ... the bishop in his private capacity'.³⁶⁸ This simply acknowledges what is now a restitutionary action (then a *quantum meruit* or *quantum valebat*) against the successor for the value of goods or services received. Neither Pollock nor Gray reconciles his views with the inability to hold personal property, and Grant simply suggests that the successor has (personal) liability. None suggests *general* corporate contracting power.

³⁶⁴ Pollock (1894) 109 (emphasis added) (citations omitted).

³⁶⁵ See above n 352.

³⁶⁶ Pollock (1936) 114.

³⁶⁷ Gray (1927) 57.

³⁶⁸ Grant (1850) 633 (emphasis added).

3 *'The Crown' Is a Unique Corporation Sole and Purported Corporate Legal Effects Are Difficult to Divorce from Exclusive Prerogative Power*

Commentators who focussed on corporations sole universally abjure analogies between the Sovereign and non-regal corporations sole, yet the Third Proposition draws precisely this analogy. Holdsworth,³⁶⁹ Allen³⁷⁰ and Pollock³⁷¹ all reject it; so too Grant:³⁷²

the king is altogether upon a different footing from other corporations sole ..., and therefore no argument to other corporations can be drawn from what is laid down with respect to the king.

As Romer J said in *Mason*, approving this passage, 'the Crown' differs from non-regal corporations sole 'in many other respects'.³⁷³ This Section explains several differences, which deny the Third Proposition. It also argues — undermining the Fourth Proposition — that authorities are ambiguous about whether legal effects stem from corporate status or the exclusive prerogative, so the Sovereign's sole corporateness may have done *no work at all*, as Maitland, Holdsworth and others suggest.³⁷⁴

By contrast to non-regal corporations sole, the Sovereign was said as corporation sole to 'take' and 'hold' personal property, in that this descends to successors,³⁷⁵ to have *immediate* succession and no disability, and to have to deal with *all* property by royal grant. *Calvin's*

³⁶⁹ See above n 306.

³⁷⁰ Allen (1849) 5: 'there is a wide difference between the King and other corporations sole'.

³⁷¹ Pollock (1894) 109 (citations omitted): 'The Sovereign is also said to be a corporation sole, but *sui generis*'.

³⁷² Grant (1850) 629.

³⁷³ (n 243) 402.

³⁷⁴ See above n 334, below n 404.

³⁷⁵ *Howley* (n 352) 253 (Coleridge J); *Co Litt* 9a (Hargrave's note 47), 90a; Grant (1850) 629.

Case stated that the King was 'made a body politic' to ensure he received possessions '*in jure Coronæ*, in his politic capacity; for which cause the same shall go [scil — descend] with the Crown', to prevent an interregnum and incapacity by nonage, and so that 'the King cannot give or take but by matter of record for the dignity of his person'.³⁷⁶ Descent, including of personal property, and immediate succession were necessitated by rules like those about *bona vacantia*, escheat and forfeiture.³⁷⁷ Additionally, the Sovereign could not hold copyhold land (the service required being beneath kingly dignity)³⁷⁸ and, strikingly, could sue *but not be sued*.³⁷⁹ These are significant differences between the Sovereign and non-regal corporations sole³⁸⁰ (and individuals, who at common law could not inherit chattels,³⁸¹ could be copyholders, and could sue and be sued).

Other authorities suggest that the *exclusive prerogative and not corporateness* caused *all* these legal consequences. Argument in *Ryves v Duke of Wellington* implied that descent and immediate succession were prerogative effects: 'the property of the Crown, ... on the demise of the Crown, vests, *by prerogative*, in the successor'.³⁸² Similarly, the *Earl of*

³⁷⁶ (n 17) 12a–12b. See also Co Litt 15b (Hargrave's note 87); Grant (1850) 627; Hale (1976) 86; Chitty (1820) 206.

³⁷⁷ See Bacon (1807) vol 5, 554; Chitty (1820) 136, 213–14, 226.

³⁷⁸ *Halsbury's* (1910) vol 6, [780]; Grant (1850) 628.

³⁷⁹ See Parts III(B)(2), V(A)(2). *Contra* Joseph (1993) (Pt 1) 128. Petitions of right and equitable relief were not exceptions: petitions proceeded by the Sovereign's consent and the Attorney-General (not the Sovereign) was the party in equitable suits.

³⁸⁰ See Allen (1849) 27; see also 5–6.

³⁸¹ Co Litt 18b.

³⁸² (1846) 9 Beav 579, 592 (Kindersley, Cockburn and others, in argument) (emphasis added).

Devonshire's Case, without mentioning corporation sole, explained regal descent of personal property thus.³⁸³

the King's Treasury (being the bond of peace, the preserver of the honour and safety of the realm, and the sinews of war) is of so high estimation in law ... and treasure, and other valuable chattels are so necessary and incident to the Crown, that in the King's case they shall go with the Crown to the successor, and not to the executors, as in the case of common persons ...

The contrast to common persons (rather than non-regal corporations sole) and the necessity of treasure to government suggest a prerogative, not corporate, basis for these rules.

The reasoning in *Dutchy of Lancaster* establishing that disability does not affect the Sovereign even when dealing personally explicitly rests on the prerogative: the 'capacity of [the King's] body natural' was accorded the 'pre-eminences which the law gives or attributes to the person of the King' because 'the body politic is conjoined with it', the pre-eminences being called 'prerogative'.³⁸⁴ Chitty regards this as 'no less just and politic than those weighty prerogatives ... inherent in His Majesty for the benefit of the people.'³⁸⁵ Further, when dealing personally the Sovereign was *not* acting for any separate legal person; if this rule is corporate, it ought not to apply to personal dealings, yet it doubtless did.

Disposition of property 'by record' similarly constituted exercise of prerogative power: to make royal grants of property and the revenue.³⁸⁶ Although the Sovereign's 'freehold interests in land, honours, franchise and liberties, offices in fee or for life, and ... chattels real'³⁸⁷ were 'as much at his private disposal as the *private* property of any individual is at the

³⁸³ (n 252) 91b–92a.

³⁸⁴ (n 248) 216–17. See also *Calvin's Case* (n 17) 10a; Cohn (2005) 104 n 32.

³⁸⁵ Chitty (1820) 374–6.

³⁸⁶ See *ibid* 387.

³⁸⁷ Carr (1905) 31.

disposal of its owner'³⁸⁸ until controlled by statute³⁸⁹ (in contrast to non-regal corporations sole), formal requirements qualified dispositive power. The Sovereign could dispose of chattels only by letters patent under the Privy Seal,³⁹⁰ issue treasure only by warrant under the Privy or Great Seal,³⁹¹ and deal with land only by letters patent under the Great Seal.³⁹² Disposition of *personal* property by record was necessary partly because, again by prerogative — and unlike non-regal corporations sole — on ascension parts of the Sovereign's property *became* official, that is, would descend to successors on that Sovereign's death.³⁹³ But for remaining personal property, the logical problem persists of why record is required if the Sovereign acts not for any corporation, unless the rule is prerogative (not corporate). After ascension the Sovereign took property *only* officially 'if ... not in right of his *dutchy*, or an estate-tail by the Statute of Donis',³⁹⁴ whereas non-regal sole corporators took officially on grants 'to successors' and personally on grants 'to heirs'.³⁹⁵ Again, for the Sovereign, this rule was seen as stemming from the prerogative,³⁹⁶ not corporateness. Finally, it was beneath the King's dignity to be a joint tenant,³⁹⁷ so that 'if part of a thing entire comes to the King, the

³⁸⁸ Kyd (1793) vol 1, 76 (original emphasis).

³⁸⁹ *Halsbury's* (1910) vol 6, [530].

³⁹⁰ Grant (1850) 629.

³⁹¹ *Earl of Devonshire's Case* (n 252) 92a.

³⁹² *Lane's Case* (1596) 2 Co Rep 16b, 16b; *Dutchy of Lancaster* (n 248) 213.

³⁹³ *Dutchy of Lancaster* (n 248) 214; Chitty (1820) 205–6.

³⁹⁴ *R v Smith* (1702) 7 Mod 78, 78 (Holt CJ) (original emphasis).

³⁹⁵ Co Litt 15b; *Fulmerston* (n 355) 102–3.

³⁹⁶ See, eg, Chitty (1820) 205; Bacon (1807) vol 5, 552.

³⁹⁷ *Halsbury's* (1910) vol 6, [777].

common law gives him the whole’³⁹⁸ — by contrast, non-regal corporations sole took as tenants in common.³⁹⁹ This rule too was part of ‘the mode of acquiring property by prerogative’.⁴⁰⁰ In this context, it seems likely that *no* rules affecting the Sovereign were corporate — royal sole corporateness had no legal effect.

Finally, while the Sovereign can by royal charter under the prerogative create a corporation which, subject to *ultra vires* limits, ‘(speaking generally) can do everything that an ordinary individual can do’,⁴⁰¹ the Sovereign as corporation sole is created by the common law *not* charter.⁴⁰² The existence of *power to create* a legal person with defined powers logically says nothing about the creator’s *other extant* powers⁴⁰³ — otherwise the Sovereign could impose taxes or detain individuals because power to do so *could* be conferred by legislation.

E *Conclusion on Corporation Sole*

There are many differences between the Sovereign and non-regal corporations sole, which falsifies the Third Proposition. Corporations sole might not be separate legal persons, which would falsify the Second and Fourth Propositions. It is very difficult to identify whether legal rules affecting the Sovereign stem from the exclusive prerogative or corporateness, though the

³⁹⁸ *Willion* (n 172) 243 (Weston J).

³⁹⁹ *Law Guarantee* (n 354) 411 (Mathew J). See above n 354.

⁴⁰⁰ *Chitty* (1820) 241.

⁴⁰¹ *Attorney-General v Manchester Corp* [1906] 1 Ch 643 (Ch) 651 (Farwell J). See also *Attorney-General v Leicester Corp* [1943] Ch 86 (Ch) 93 (Bennett J); *Wenlock v River Dee Co* (1883) 36 Ch D 674 (note) (CA) 685 (Bowen LJ).

⁴⁰² See above n 303; Howell (2010) 45. Corporations *sole* by royal charter are rare; the Master of Pembroke College, Oxford, was one: Grant (1850) 594.

⁴⁰³ *Contra* Joseph (1993) (Pt 1) 129.

prerogative's predominance and the Sovereign's governmental position suggest 'the common law paid little more than lip-service to the idea of the Crown as a corporation sole',⁴⁰⁴ that is, the better view is that royal sole corporateness did *no work at all*. Not one decision on corporations sole suggests, and most noteworthy commentators — Kyd, Chitty, Grant, Maitland and Carr — do not suggest, that the Sovereign has contracting power (or power make bonds), or natural person powers, *because she is a corporation sole*, in sharp distinction to corporations aggregate.⁴⁰⁵ This analysis thus falsifies the Fourth Proposition.

M and other recent authorities, and recent commentary, do not undertake analysis like that above. This — and the ineradicable uncertainty surrounding sole corporateness, particularly for the Sovereign — warrant rejection of the brief *obiter* suggestion in *M* and unsupported assertion in *Ex parte C* that sole (or aggregate or some undefined) corporateness explains government contracting power.

F *Corporation Aggregate or Innominate Corporation?*

As mentioned, Lord Simon (alone) in *Town Investments* held 'the Crown' to be a corporation aggregate;⁴⁰⁶ Lord Woolf suggested *obiter* in *M* that 'the Crown ... can be appropriately described as a corporation sole or a corporation aggregate'.⁴⁰⁷ Wade and Forsyth call this a 'strange proposition' unsupported by authority.⁴⁰⁸ Wade elaborates that, before *Town Investments*, '[a]ll previous judicial authority was in favour of ... corporation sole, but none

⁴⁰⁴ Fitzgerald (1966) 323 n (q).

⁴⁰⁵ See Part IV(F).

⁴⁰⁶ See above n 237. See also McLean (2004) 149–51, 154; Joseph (1993) (Pt 2) 179–81.

⁴⁰⁷ See above n 233.

⁴⁰⁸ Wade and Forsyth (2014) 689 n 4.

of it ... [was] referred to' in that case.⁴⁰⁹ He forcefully asks of Lord Woolf's dualist view: 'But how can [the Crown] be both?'⁴¹⁰ Sections B–D above support this critique. As Chitty's and *Halsbury's* definitions demonstrate,⁴¹¹ by contrast to corporations sole, corporations aggregate *are* legal persons distinct from their members — who always number more than one — with natural person powers, including contracting power, most likely subject to *ultra vires* limits.⁴¹² Asserting that 'the Crown' is *both* corporation sole and aggregate is incoherent, and applying common law aggregate corporateness to corporations with *only one* corporator unprincipled. Assertions of some innominate common law corporation, as in *Ex parte C* and *Mason*, similarly founder for failure to engage with authority. If 'the Crown' is a corporation, it is a corporation sole, as Lord Diplock stated in *Town Investments*, not aggregate. As such, neither aggregate nor innominate corporateness can explain government contracting power.

⁴⁰⁹ Wade (1999) 24.

⁴¹⁰ *ibid.*

⁴¹¹ See Part IV(D).

⁴¹² See above n 358. See also Grant (1850) 5; Carr (1905) 29.

V POWER BECAUSE THE SOVEREIGN IS AN INDIVIDUAL

This Part argues that a satisfactory explanation of government's contracting power is the natural person explanation: the Sovereign is an individual and, as such, has natural person powers, exercise of which is subject to the public law limits (including judicial review) explained in Part II(B). There is no separate legal person — no corporation, sole, aggregate or innominate. On this explanation 'the Crown' means simply 'the Sovereign from time to time', in accordance with Maitland's observation that 'the Crown' is not '[i]n strictness ... among the persons known to our law'.⁴¹³ The Sovereign is the contractual party and has power to make contracts *because* she is an individual. In making government contracts, government officers act as the Sovereign's agents. As such, this explanation satisfies the conceptual requirements for an explanation of government contracting power established in Part II(A)(1).

Many government contract and liability cases and several commentators support this view. While English support is inevitably *obiter* because contracting power was not in issue, Commonwealth decisions support it directly. Section A examines these decisions and commentary, not exhaustively but sufficiently to show that support runs much deeper than the *Bankers Case*, which some commentators wrongly treat as the main or only supporting authority. Section B examines and rejects academic objections to this view — essentially anachronism, odd results, the different nature of governmental from individual power, suggestions of some emergent legal person, and Commonwealth difficulties — arguing that these are variously illogical, unpersuasive or met by the application of judicial review to contracting power. This Part therefore concludes that the natural person explanation represents the law's current explanation of government contracting power.

⁴¹³ Maitland (1901) 139.

A *Support for the Natural Person Explanation*

Several constitutional scholars explicitly or implicitly support the natural person explanation. Sir Ivor Jennings exemplifies such views: ‘By “the Crown” we mean normally the Queen exercising her legal powers through one of her servants’ where ‘the power so to act is legally vested in her’, thus ‘we speak of Crown property ... and ... liability of the Crown. ... Whenever a minister or a civil servant performs any function he is acting as a servant of the Crown.’⁴¹⁴ For Brown, ‘the state is no person, ideal or fictitious’ — he equates ‘the state’, ‘the crown’ and ‘the king’ as the person who ‘owns property, is responsible for debts, enjoys rights and privileges’.⁴¹⁵ Many have observed that in England the ‘real personality of the King ... has rendered superfluous any attribution of legal personality to the state itself’,⁴¹⁶ so that ‘all ... property of the State was, in law, the property of the King’.⁴¹⁷ Wade provides indirect support in saying that ““the Crown” means simply the Queen’;⁴¹⁸ his earlier work treated ‘the Crown’ as the Sovereign, describing its contracting power as ‘the ordinary liberty possessed by anyone’.⁴¹⁹ Daintith observes that ‘government ... possesses the legal capacities of an ordinary person of full age’, including (legal) power to ‘conclude contracts, [and] acquire and

⁴¹⁴ Jennings (1959) 220–1.

⁴¹⁵ Brown (1905) 376. See also Patton (1972) 349.

⁴¹⁶ Fitzgerald (1966) 352. See also *Williams (No 1)* [153] (Gummow and Bell JJ); Holdsworth (1944–45) vol 9, 6.

⁴¹⁷ Cobbett (1903) 28.

⁴¹⁸ See above n 216.

⁴¹⁹ Wade (1989) 71. See also Wade (1985) 193, suggesting analogy between ‘the Crown’ and natural persons in employing staff.

dispose of property’⁴²⁰ and, elsewhere, that ‘the Crown’ may mean ‘the Queen or King for the time being’,⁴²¹ perhaps implicitly supporting the natural person explanation.

Commentators who have examined government’s power to make contracts also support, or at least acknowledge, the natural person explanation. Mitchell provides some support, accepting that the law should not ‘deny to the Crown the capacity enjoyed by a subject’.⁴²² So also does Street, saying that ‘no legal acknowledgment ... was made’ of ‘a distinction between the King in his public and private capacities’.⁴²³ Hogg and Monahan, and Arrowsmith, although critical, concede that the Supreme Court of Canada has held that ‘[t]he Crown has the power of a natural person to enter into contracts ... on the basis that the monarch is a natural person who possesses all of the powers of a natural person.’⁴²⁴

What is less often observed in commentary — both supportive of and hostile to this explanation — is the extent of explicit and implicit support, as well as the absence of any *other* explanation of government contracting power, in Crown law cases. Space precludes exhaustive examination of all cases touching government contracts, but the balance of this Section provides several examples of this support.

⁴²⁰ Daintith (1994) 211.

⁴²¹ Daintith and Page (1999) 27.

⁴²² See Mitchell (1954) 5, 22, 55.

⁴²³ Street (1953) 3.

⁴²⁴ Hogg and Monahan (2000) 219. See also Arrowsmith (1988) 114–15; Arrowsmith (1992) 6–7.

1 Commonwealth Support

The strongest support for the natural person view comes from Canadian and Australian decisions explicitly grounding government contracting on the Sovereign being a ‘physical person’ with natural person powers.

The Supreme Court of Canada’s decision in *Attorney-General (Quebec) v Labrecque*⁴²⁵ most strongly supports the natural person explanation. A Quebec department employed Labrecque as a casual employee; he sued for unpaid leave entitlements in a court with jurisdiction over ‘contractual’ claims.⁴²⁶ Quebec argued the court lacked jurisdiction because employment relationships between civil servants and government were not contractual.⁴²⁷ Beetz J (for the Court) rejected this submission, reasoning that the employee’s relationship was with ‘the Crown’, which ‘personifies the state’, and that:⁴²⁸

The Crown is also the Sovereign, a physical person who, in addition to the prerogative, enjoys a general capacity to contract in accordance with the rule of ordinary law. This general capacity to contract, like the prerogative, is also one of the attributes of the Crown in right of a province: *Verreault & Fils* ...

Beetz J is clear that ‘the Crown’ is ‘the Sovereign’, whose ‘capacity to contract’ flows from being a ‘physical person’. This was not exclusive prerogative power, which was unnecessary where power ‘can ... be explained by the general capacity of the Crown’.⁴²⁹ The conclusion

⁴²⁵ [1980] 2 SCR 1057.

⁴²⁶ *ibid* 1060–1, 1064–5 (Beetz J).

⁴²⁷ *ibid* 1064, 1079–80 (Beetz J).

⁴²⁸ *ibid* 1082–3.

⁴²⁹ *ibid* 1083.

that ‘the Crown’ was party to the contract was a necessary step in concluding that the court had jurisdiction; Arrowsmith’s unreasoned contrary assertion⁴³⁰ is incorrect.

Beetz J cited *Verreault & Fils v Attorney-General (Quebec)*,⁴³¹ which also (less directly) supports the natural person explanation. A Quebec Order in Council authorised purchase of land but failed to mention construction; Ministers purchased the land and contracted with Verreault to build upon it.⁴³² A new government directed Verreault to cease construction, repudiating the contract; Verreault sued for lost profits. The Court below dismissed the claim because the Order ‘had authorized only the purchase of land, and not the construction, [so] the contract was null and void.’⁴³³ Quebec pressed this argument, requiring the Supreme Court to determine ‘whether, in the absence of any statutory restriction, a minister is capable of contracting in the name of the government.’⁴³⁴ The case thus turned on the Minister-agents’ *authority* to act, not power.⁴³⁵ In holding that no Order in Council was necessary — reversing the decision below — Pigeon J (for the Court) held ‘that ... “a Lieutenant-Governor ... is ... the representative of Her Majesty for all purposes of provincial government”’ and said:⁴³⁶

Her Majesty is clearly a physical person, and I know of no principle on the basis of which the general rules of mandate, including those of apparent mandate, would not be applicable to her.

⁴³⁰ Arrowsmith (1988) 117.

⁴³¹ [1977] 1 SCR 41.

⁴³² *ibid* 42–3 (Pigeon J).

⁴³³ *ibid* 43 (Pigeon J).

⁴³⁴ *ibid* 46 (Pigeon J).

⁴³⁵ See especially *ibid* 46–7 (Pigeon J).

⁴³⁶ *ibid* 47, quoting *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437 (PC) 443 (Lord Watson).

Pigeon J reasoned that *because* the Sovereign is a ‘physical person’ general rules of agency apply to her and her Minister-agents. Again, this was a necessary step in the conclusion that ‘the contract awarded to [Verreault] was not void’ so that the claim succeeded,⁴³⁷ Arrowsmith’s contrary view⁴³⁸ (apparently recanted)⁴³⁹ notwithstanding. As *Labrecque* shows, the logical implication is that the Sovereign has natural person powers.

Evatt J at first instance in the High Court of Australia in *New South Wales v Bardolph*⁴⁴⁰ supports the natural person view in principle, although he suggests a subject-matter limitation to the power. Bardolph sued New South Wales for sums due for running advertisements for the State’s Tourist Bureau; the State argued there was no available appropriation.⁴⁴¹ In holding specific legislative mention of the contract unnecessary for an appropriation to cover it, Evatt J said, statute apart:⁴⁴²

contracts are enforceable against the Crown if (a) the contract is entered into in the ordinary or necessary course of Government administration, (b) it is authorized by the responsible Ministers of the Crown, and (c) the payments ... are covered by or referable to a parliamentary grant ... Under a constitution like that of New South Wales where the legislative and executive authority is not limited by reference to subject matter, the general *capacity of the Crown* to enter into a contract should be regarded from the same point of view as *the capacity of the King would be by the Courts of common law*. No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being *less powerful to enter into contracts than one of his subjects*.

⁴³⁷ *Verreault* (n 431) 49.

⁴³⁸ Arrowsmith (1988) 117.

⁴³⁹ See Arrowsmith (1992) 7–8.

⁴⁴⁰ (1934) 52 CLR 455.

⁴⁴¹ *ibid* 458, 463.

⁴⁴² *ibid* 474–5 (emphasis added).

While Evatt J may suggest that ‘the Crown’ in New South Wales is different from ‘the King’ in England, he is clear that in England the ‘capacity of the King’ to contract was the courts’ concern and the King’s contracting power was as ample as that of his subjects. It is unclear how Evatt J derived the subject-matter limitation (contracts ‘in the ordinary ... course of Government’). He perhaps had in mind the prerogative to establish and run government departments — upon which McTiernan J on appeal to the Full Court explicitly relied⁴⁴³ — no wider power being necessary on the facts.⁴⁴⁴ But he did not invoke the prerogative. The corollary of Evatt J’s comparison of the King and his contracting power with that of his subjects is the natural person explanation.⁴⁴⁵

2 *British Support*

Arrowsmith states that the *Bankers Case* established that ‘the Crown is considered to possess all the legal powers of a natural person, including the power to make contracts[,] ... from the premise that the Crown for purposes of government is to be equated with the person of the reigning monarch’,⁴⁴⁶ but implies this is the *only* English support. This Section, although not surveying exhaustively all Crown law cases, argues that several decisions cast doubt on Arrowsmith’s implication and support the natural person view.

⁴⁴³ *ibid* 517; see also 496 (Rich J), 503 (Starke J), 507 (Dixon J) (it was ‘a matter of primary importance that the subject matter of the contract ... concerned a recognized and regular activity of Government in New South Wales’).

⁴⁴⁴ Twomey (2014) 19. On this prerogative, see Brazier (1997) 203.

⁴⁴⁵ Aronson and Whitmore (1982) 187.

⁴⁴⁶ Arrowsmith (1992) 53–4; see also 7–8; Arrowsmith (1988) 113–18. cf Howell (2010) 47–8.

(a) *General Statements*

Richards J's decision at first instance in *Ex parte C* provides fairly direct support for the natural person explanation:⁴⁴⁷

Save to the extent that its common law powers have been removed or restricted by statute, the Crown — and therefore the Secretary of State acting on behalf of the Crown — has the ordinary powers of *other persons* at common law. I see no reason why those powers should not include the operation of an otherwise lawful scheme enabling a prospective employer to be put in touch with a previous employer for the purpose of obtaining a reference in respect of a would-be employee.

Whilst objectionable for assuming the powers of one legal person equal those of others,⁴⁴⁸ Richards J suggests that 'the Crown' has the powers of natural persons (amongst others) and that Secretaries of State act as agents of the Crown in exercising those powers. It is, however, unclear whether he adheres to this view given his judgment in *Shrewsbury*.⁴⁴⁹

Town Investments also arguably supports the natural person explanation by equating 'the Crown' and 'the Queen'. Lord Diplock regarded acts done by Ministers, parliamentary secretaries and civil servants as 'acts done by "the Crown" in the fictional sense in which that expression is now used in English public law', the 'legal fiction' apparently being that these acts are treated *in law* as if done by 'the Queen herself'.⁴⁵⁰ He objected to the use of 'the Crown' (and preferred 'the government') to refer to government officers because it conveyed the false impression that *in reality* the Queen herself decided to act, even if *in legal fiction* that is deemed to occur. The lease having been entered into by a Minister within his departmental responsibilities and 'executed under his official designation', the tenant was, 'expressed in the

⁴⁴⁷ (n 227) 1082 (emphasis added).

⁴⁴⁸ See Part II(A)(1).

⁴⁴⁹ See above n 227.

⁴⁵⁰ See *Town Investments* 380–1.

term of art in public law, ... the Crown'.⁴⁵¹ Lord Diplock's failure to invoke corporation sole or expressly suggest the existence of a separate legal person in concluding that the tenant and occupier were the same person⁴⁵² suggests that for *legal* purposes the occupier was 'the Crown' as per the fiction: the Queen.

Further, as Loughlin points out,⁴⁵³ Interpretation Act 1889 s 30 suggests a personal understanding of 'the Crown' — akin to the natural person explanation — by providing that 'references to ... the Crown shall, unless the contrary intention appears, be construed as references to the Sovereign for the time being'. Loughlin suggests that this 'surely' cannot inform the understanding of Crown Proceedings Act 1947 s 2,⁴⁵⁴ which subjects 'the Crown' to certain tort liability,⁴⁵⁵ but acknowledges the difficulty of deducing a 'contrary intention'. On the natural person explanation, a personal understanding of 'the Crown' for s 2 makes sense, and the disapplication of the Act by s 40(1) from 'His Majesty in His private capacity' is a reference to *role* rather than a separate legal person.

(b) Petition of Right

Several cases concerning the petition of right — both those holding it to be available and those holding it unavailable — suggest that the basis of government contracting power was the Sovereign's existence as a natural person. Even the form of these cases — with 'the Queen' or 'the King' as respondent — support that view.

⁴⁵¹ *ibid* 381.

⁴⁵² See above n 236.

⁴⁵³ Loughlin (1999) 37. The Interpretation Act 1978 omits equivalent provision.

⁴⁵⁴ Loughlin (1999) 38.

⁴⁵⁵ See above n 183.

Arrowsmith rightly sees the *Bankers Case* as supporting the natural person explanation. Charles II charged hereditary revenues to satisfy past debts; creditors sought to enforce the grant by petition.⁴⁵⁶ Holt CJ and Treby CJ held that the King could charge revenues and bind successors, for Holt CJ partly because the King otherwise ‘would have less power than any of his subjects, or than he himself had when ... a subject’; revenues were ‘the property of the King’, even though conferred by statute, so like a subject he could alienate them.⁴⁵⁷ Lord Somers used ‘the king’s treasure’ and ‘treasure of the crown’ to describe the Exchequer,⁴⁵⁸ and Treby CJ thought the King ‘indebted to the petitioners’.⁴⁵⁹ (The House of Lords ultimately held that, procedurally, the creditors’ petition to the Barons of the Exchequer sufficed and they need not have proceeded by petition of right.)⁴⁶⁰ Holt CJ plainly did not wish to ‘deny to the Crown the capacity enjoyed by a subject’.⁴⁶¹ The judgments suggest that governmental obligations are personal to the Sovereign.

More modern authority also supports the natural person explanation. *Thomas v The Queen* established that a petition of right lay for breach of contract — there, unpaid reward and costs due under contract with ‘Her Majesty’s government’ for developing new artillery.⁴⁶² Blackburn J (for the Court) rejected the government’s contention that the petition of right did not lie for breach of contract or debt, saying: ‘Contracts can be made *on behalf of Her Majesty*

⁴⁵⁶ *Bankers Case* (1700) Skin 601, 601.

⁴⁵⁷ *ibid* 603–4. Holt CJ’s argument is repeated at 5 Mod 29, 54–5; see also 46 (Treby CJ).

⁴⁵⁸ *Bankers Case* (1690–1700) 14 How St Tr 1, 45–6.

⁴⁵⁹ *Bankers Case* (1700) 5 Mod 29, 49.

⁴⁶⁰ See *ibid* 48–9, 52–3 (Treby CJ), 57 (Holt CJ), 62 (Lord Somers); see also 14 How St Tr 1, 105–14.

⁴⁶¹ Mitchell (1954) 55.

⁴⁶² (1874) LR 10 QB 31, 32.

with subjects, and the Attorney General, suing *on her behalf*, can enforce those contracts against the subject'.⁴⁶³ Discussion of corporation is absent — Her Majesty makes the contract and the Attorney enforces. As McLean argues,⁴⁶⁴ *Thomas v The Queen (No 2)*'s refusing discovery against the War Secretary where statute enabled it against a 'body corporate'⁴⁶⁵ denies a corporate conception of the state. Similarly, in *Windsor & Annapolis Railway Co v The Queen*, Lord Watson thought it 'settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for ... breach ... by the Crown',⁴⁶⁶ equated 'the Crown' with 'the Sovereign' (saying the latter 'cannot be sued in a petition of right, for a wrong done by the executive', as opposed to contractual claims),⁴⁶⁷ and declared that 'the appellants ... are entitled to receive from Her Majesty the Queen the sum of ... \$115,000'.⁴⁶⁸

Cases *denying* petitions of right for wrongs (including most torts) also support the natural person explanation. As McLean observes, '[t]he immunity that was being removed [by the petition of right] had originally been attached to the person of the King.'⁴⁶⁹ Application of that immunity to deny government liability for the executive's wrongs — as occurred — makes sense only if government officers are seen as the Sovereign's agents.

⁴⁶³ *ibid* 33 (emphasis added).

⁴⁶⁴ McLean (2004) 146.

⁴⁶⁵ (1874) LR 10 QB 44, 45–6 (Cockburn CJ, Lush and Quain JJ).

⁴⁶⁶ (1886) 11 App Cas 607 (PC) 613.

⁴⁶⁷ *ibid* 614.

⁴⁶⁸ *ibid* 618.

⁴⁶⁹ McLean (2004) 146.

Viscount Canterbury denied government liability for fire caused by servants' negligence⁴⁷⁰ because the King could do no wrong — personal immunity applied. Lord Lyndhurst LC said: 'for the personal negligence of the Sovereign, neither this nor any other proceedings can be maintained. Upon what ground, then, can it be supported *for the acts of the agent or servant?*'⁴⁷¹ He expressly rejected the argument that the Queen was liable for wrongs during her predecessor's reign because these were 'considered as the acts ... not of the individual wearing the crown, but of the metaphysical abstraction called the King',⁴⁷² instead treating as analogous termination of liability by the subject's death.⁴⁷³ The law thus rejected a corporate conception of liability and embraced the natural person explanation.

Tobin v The Queen reinforces the agency aspect of the natural person explanation. Erle CJ (for the Court) rejected the suppliant's petition for the value of a ship mistakenly destroyed by Her Majesty's ship partly because, although its captain was 'employed by the Queen', albeit 'through an officer of state', he was not at the time 'acting in obedience to a command of Her Majesty'.⁴⁷⁴ A further reason was:⁴⁷⁵

The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong: that which the sovereign does by command to his servants, cannot be a wrong in the sovereign, because, if the command

⁴⁷⁰ (n 260) 307–8.

⁴⁷¹ *ibid* 321 (emphasis added). The then current understanding of vicarious liability as based on the master's fault in employing the servant was also 'inconsistent with the maxim that "the King can do no wrong": Aronson and Whitmore (1982) 1.

⁴⁷² *Viscount Canterbury* (n 260) 314.

⁴⁷³ *ibid* 322.

⁴⁷⁴ (1864) 16 CBNS 310, 347–8, 352.

⁴⁷⁵ *ibid* 353–4.

is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command.

Government occurred by the Sovereign's commands to servants, so the Sovereign's *personal* immunity answered the claim against *her*. *Feather v The Queen* reasoned identically: Cockburn CJ rejected a petition of right for infringement of a common law patent partly because the petition lay neither for 'wrongs done personally by the Sovereign' nor 'injuries done by a subject by the authority of the Sovereign'.⁴⁷⁶ His later statement that 'no wrongful act can be alleged against the Crown'⁴⁷⁷ equates 'the Sovereign' with 'the Crown'.

*Rustomjee v The Queen*⁴⁷⁸ exemplifies the natural person explanation in petitions of right alleging trust. British subjects' debts against Chinese merchants were lost due to war between Britain and China; under treaty, the Chinese Emperor paid Her Majesty for such claims; the suppliants argued she was their agent or trustee or received the money to their use.⁴⁷⁹ Rejecting these arguments, Cockburn CJ thought it impossible:⁴⁸⁰

that *the sovereign* becomes ... trustee for subjects on whose behalf money has been received by *the Crown* ... [*Her Majesty* ... stipulates for the payment *into her hands* of a sum of money [and] ... distribution ... must be left to her Majesty's discretion ...

Blackburn J referred to 'the Queen' and 'her Majesty' receiving and paying money and to 'the ministry acting for the Queen'; he contemplated but rejected factually 'privity of contract between [the suppliant] and the Queen' constituting her an agent.⁴⁸¹ Lush J said: 'the relation [asserted] ... never existed ... between *the Crown* and the subject, and is one which cannot

⁴⁷⁶ (n 52) 295.

⁴⁷⁷ *ibid* 297.

⁴⁷⁸ (1876) 1 QBD 487 (QB)

⁴⁷⁹ *ibid* 488–90.

⁴⁸⁰ *ibid* 492 (emphasis added).

⁴⁸¹ *ibid* 494–5.

exist ... between *the sovereign* and the subject.’⁴⁸² Establishing a ‘debt due from *the Crown*’ required demonstration ‘that *the Queen* ... received it as agent’.⁴⁸³ Lord Coleridge CJ, dismissing an appeal, held that any promise to pay was beyond officers’ ‘authority ... to pledge the Queen to perform’.⁴⁸⁴ ‘The Queen’, ‘her Majesty’, ‘the Sovereign’ and ‘the Crown’ were all interchangeable for obligations purposes — implying the Sovereign personally owed any domestic obligations — and the Sovereign acted by her Ministers. Lord Buckmaster, adopting Lush J’s reasoning when rejecting a similar claim much later in *Civilian War Claimants Association Ltd v The King*, observed that nothing had since ‘changed the constitutional relationship of the Sovereign and the subject’, also using ‘the Sovereign’ and ‘the Crown’ interchangeably.⁴⁸⁵

(c) *Agency*

*Macbeath v Haldimand*⁴⁸⁶ shows that examination of whether ‘Crown’ agents acted personally or officially can illuminate the explanation for government contracting power. The plaintiff alleged a Canadian colonial governor was personally liable on a contract for goods for the colonial government, which refused to pay amounts demanded as exorbitant. Lord Mansfield CJ held that the governor did not contract personally because this was ‘notorious’ and the goods were ‘for the use of the government’.⁴⁸⁷ He reasoned:⁴⁸⁸

⁴⁸² *ibid* 497 (emphasis added).

⁴⁸³ *ibid* (emphasis added).

⁴⁸⁴ *Rustomjee v The Queen* (1876) 2 QBD 69 (CA) 73.

⁴⁸⁵ [1932] AC 14 (HL) 25–6.

⁴⁸⁶ (n 23).

⁴⁸⁷ *ibid* 180; see also 181 (Ashurst J), 182 (Buller J).

⁴⁸⁸ *ibid* 176 (emphasis added).

Before [the Revolution] ... all ... public supplies were given to the King, who *in his individual capacity contracted* for all expenses. He alone had the disposition of the public money. But since that time, the supplies have been appropriated by Parliament to particular purposes ...

Viscount Haldane in *Attorney-General v Great Southern and Western Railway Co of Ireland*, holding that British statute meant liability on contracts relating to what had become the Irish Free State should not be met from the British consolidated fund, echoed this point: ‘before the Revolution Settlement the Crown could be taken to contract personally, ... [but] since that Settlement its ordinary contracts only mean that it will pay out of funds which Parliament may or may not supply.’⁴⁸⁹ Both explain *contracting* by the Sovereign’s or Crown’s *individual* or *personal* power, suggesting the natural person explanation. The mode of *payment* of public money and circumstances of enforceability — but not the mode of *contracting* — changed with the Revolution and statutory appropriation.

(d) Equitable Relief

Decisions granting equitable relief against ‘the Crown’ — albeit different relief from that granted between subjects — support the natural person explanation. In *Pawlett v Attorney-General*, which first allowed such relief,⁴⁹⁰ Hale CB saw liability personally, holding that ‘redemption of a mortgage lies against the King’, even where he took the mortgage by escheat.⁴⁹¹ Farwell LJ in *Dyson v Attorney-General*, which rediscovered this jurisdiction,⁴⁹² referred throughout to ‘the Crown’ yet approved Baron Atkyns’ statement in *Pawlett* that the

⁴⁸⁹ [1925] AC 754 (HL) 773–4; cf 764 (Viscount Cave LC), 774–5 (Lord Dunedin), 780–1 (Lord Phillimore), holding that contractual liability was statutorily transferred.

⁴⁹⁰ Street (1953) 131–2.

⁴⁹¹ (1668) Hardres 465, 467–9.

⁴⁹² Hogg and Monahan (2000) 5.

mortgagor ‘ought in this case to be relieved against *the King*’,⁴⁹³ implying no difference in their purport.

(e) Crown Servants

Cases considering the legal position of ‘Crown’ servants suggest the Sovereign *personally* engages them — contractually or otherwise — which supports the natural person explanation. In *Riordan v War Office*, rejecting Riordan’s wrongful dismissal claim (as a civil employee), Diplock J held that, if Riordan (as argued) had not resigned, ‘it is well established law that *the Sovereign, through her officers ...*, can terminate at pleasure the employment of any person in the public service except ... where ... otherwise provided by law’.⁴⁹⁴ Non-statutory ‘regulations’ providing for notice were ‘no more than instructions by the Army Council *on behalf of the Sovereign* of the terms’ of civilian employee engagement.⁴⁹⁵ Similarly, Lord Goddard CJ in *IRC v Hambrook* rejected the Commissioners’ claim *per quod servitium amisit* for tortious injury to a tax collector because the collector’s engagement was ‘wholly different in kind’ from the relationship of master and servant, which grounded the action.⁴⁹⁶ A civil servant was ‘properly described as an officer *in the civil employment of Her Majesty*’; his Lordship’s observation that no decision established whether a ‘contract of service between the Crown and its officers in the Civil Service’⁴⁹⁷ exists suggests he equated ‘Her Majesty’ with ‘the Crown’, implying no artificial legal person exists.

⁴⁹³ [1911] 1 KB 410 (CA) 421, quoting *Pawlett* (n 491) 469 (emphasis added).

⁴⁹⁴ [1959] 1 WLR 1046 (QB) 1048–9 (emphasis added).

⁴⁹⁵ *ibid* 1050 (emphasis added).

⁴⁹⁶ [1956] 2 QB 641 (QB and CA) 655.

⁴⁹⁷ *ibid* 653 (emphasis added). An appeal was dismissed, Parker LJ expressly adopting this part of Lord Goddard CJ’s reasoning: at 666 (Denning LJ), 669 (Birkett LJ), 670 (Parker LJ).

(f) Commonwealth Divisibility

Cases about government liability for obligations in different colonies — like *Williams v Howarth* — examine *who* is liable; their conclusions support the natural person explanation. Howarth contracted with the government of New South Wales to perform military services in South Africa, where the Imperial Government paid his wages; New South Wales later set these off from outstanding wages.⁴⁹⁸ The Lord Chancellor upheld this, reasoning that it mattered not whether wages were paid ‘by the Colony or the Mother Country’ because the employer was ‘the Crown’ and ‘[t]he Government in relation to this contract is the King himself’, to whom supplies were granted by *any* legislature.⁴⁹⁹

With colonial independence, the British courts have reversed this position, without undermining the natural person explanation. *R v Foreign Secretary, ex parte Indian Association of Alberta* refused a declaration that pre-twentieth century British treaty obligations towards Canadian Indian people still bound the United Kingdom, because, as Lord Denning MR held, ‘the Crown’ had ‘by constitutional usage and practice’ since 1919 become ‘separate and divisible’.⁵⁰⁰ He held that ‘obligations ... previously binding on the Crown simpliciter are now to be treated as divided’ and to be ‘applied to the ... territory to which they relate: and confined to it’.⁵⁰¹ May LJ reasoned that ‘in matters of law ... the Queen of the United Kingdom ... is entirely independent and distinct from the Queen of Canada’; once a colony controlled finances locally, ‘any rights or obligations of what had been the Imperial

⁴⁹⁸ [1905] AC 551 (PC) 551–2.

⁴⁹⁹ *ibid* 554 (emphasis added).

⁵⁰⁰ [1982] QB 892 (CA) 916. Kerr LJ reasons identically: at 927.

⁵⁰¹ *ibid* 917.

Crown ... devolve upon the Crown in right of the particular territory'.⁵⁰² This phenomenon of Commonwealth law is mysterious. However, the Court did not invoke corporateness to explain it, nor is a corporate explanation necessary.⁵⁰³

B *Objections to the Natural Person Explanation*

This Section explains and rejects commentators' five main objections to the natural person explanation.

1 *Anachronism to Equate 'the State' with the Sovereign?*

Howell colourfully argues that: 'Treating what the Government may do as being done by the physical person who is the monarch is antiquarianism masquerading as contemporary legal analysis.'⁵⁰⁴ Sales, and Hogg and Monahan previously,⁵⁰⁵ characterise this view as 'not a realistic analysis in modern constitutional terms';⁵⁰⁶ Arrowsmith calls it 'anachronism' that 'can only detract from the proper consideration of the problems of modern public law'.⁵⁰⁷ It is however, on each of their approaches, acceptably modern to regard government action as done by a 'corporation'. For Hogg and Monahan, it was⁵⁰⁸ (and for Sales still is) 'more realistic to think of each [Commonwealth] government ... as a common law corporation with

⁵⁰² *ibid* 928.

⁵⁰³ See Part V(B)(4).

⁵⁰⁴ Howell (2010) 50.

⁵⁰⁵ See now Hogg, Monahan and Wright (2011) 313: natural person explanation 'not entirely successful' but 'works well in most contexts'.

⁵⁰⁶ Sales (2014) 4. See also Hogg and Monahan (2000) 219.

⁵⁰⁷ Arrowsmith (1992) 8.

⁵⁰⁸ See now Hogg, Monahan and Wright (2011) 313: 'sometimes helpful' to see 'the Crown' in this way.

all the powers of a natural person to enter into contracts’⁵⁰⁹ *because* ‘the state is a legal person.’⁵¹⁰ For Arrowsmith, corporateness is the ‘better view’.⁵¹¹

It may be that rules applicable to natural persons should also be applied to the Crown in many cases, but this should be done only after proper consideration of the question, and not by logical deduction from what is in reality a fiction.

She later asserts — without further analysis — that this corporation has ‘all the powers of a natural person’.⁵¹² These arguments are, on analysis, unpersuasive.

Anachronism and antiquarianism as objections of themselves prove too much. Their acceptance as a fatal criticism would require the jettison of myriad rules of constitutional law. Equally ‘anachronistic’ and ‘antiquarian’ are prerogative writs issuing in the Sovereign’s name, courts being the Queen’s courts and ‘exercis[ing] authority *on behalf of the monarch* in deciding cases’,⁵¹³ the Sovereign commissioning a government and assenting to Bills and, indeed, the subsistence of exclusive prerogative powers, especially those conferring *coercive* legal power. Examples multiply. Yet, as Brazier says in terms equally applicable to all non-statutory legal powers, ‘Royal prerogative powers ... have survived the encroachments of statute ... because they are essential if government is to be carried on.’⁵¹⁴ Natural person powers, including contracting power, are not ill-suited to modern times. Unless *all* antiquated rules are to be abandoned — and this can, not unfairly, be said to include most of the common law — this objection is not fatal.

⁵⁰⁹ Hogg and Monahan (2000) 219 (citations omitted).

⁵¹⁰ *ibid* 14 (especially n 70).

⁵¹¹ Arrowsmith (1992) 8.

⁵¹² *ibid* 27.

⁵¹³ *McFarland* (n 96) [27] (Lord Steyn) (emphasis added).

⁵¹⁴ Brazier (1997) 203.

It is, additionally, incoherent to deny, on the one hand, that government has natural person powers *because* the Sovereign is an individual yet assert that it has the *very same* powers because it is a corporation. If the objection is to analogy with the individual, the interposition of a separate legal person *without further analysis* does not make ascription of natural person powers any less offensive. Further, as argued in Part IV(F), assertion of some innominate corporation is doctrinally unsupportable and, as argued in Part II(A)(1), arrogation to it of natural person powers without further analysis flawed. Hogg and Monahan's obverse reasoning — recognition as a legal person *implies* corporateness — is also unsound: individuals are not corporations yet are legal persons.

Arrowsmith's concern that not recognising a separate legal person 'may ... detract from a proper consideration of the need for special public law rules' about government contracting⁵¹⁵ is also questionable. Some rules specific to government contracts, such as 'executive necessity' (controversially),⁵¹⁶ have developed without clear recognition of a separate legal person. Further, lower courts' reluctance to apply judicial review to contracting decisions stems not from the explanation of the power but its perceived 'private' nature.⁵¹⁷ In any case, this claim is more an assertion of psychology than law.

Howell's analysis, inspired by his disdain for 'antiquarianism', is more nuanced but his proposed solution unsatisfactory. Although he thinks government actions should be seen as 'done by the Crown in its public, institutional capacity, not by a physical person, but rather (if so desired) by the Crown as a corporation sole',⁵¹⁸ he recognises — consistently with

⁵¹⁵ Arrowsmith (1988) 116.

⁵¹⁶ See above n 73.

⁵¹⁷ See Part II(B)(2).

⁵¹⁸ Howell (2010) 50.

Part II(A)(1) — that its powers cannot be assumed by reference to an individual or another corporation.⁵¹⁹ Attribution of *any* power to ‘the Crown’ as corporation sole is, however, as Part IV(D) explains, unsupportable. Further, Howell’s argument that ‘new *primary* activities which are not authorised by ... an established non-statutory power’ require statutory authorisation — contracting being a ‘secondary’ activity⁵²⁰ — is unconvincing. It is doctrinally flawed because his reasoning adds Dicey’s definition of ‘prerogative’ (‘the residue of discretionary or arbitrary authority ... legally left in the hands of the Crown’⁵²¹ — *all* non-statutory power) to the *Case of Proclamations* (‘the King hath no prerogative, but that which the law of the land allows him’),⁵²² yet the judges in that case would not have understood ‘prerogative’ in the Diceyan sense. Conceptually, it hangs from a distinction between ‘primary’ and ‘secondary’ powers⁵²³ that is unstable and unworkable: Is contracting to borrow large amounts for a construction project the exercise of ‘secondary’ power? Does the happenstance of whether government has executed a (sufficiently) similar project before determine whether it may now do so? If so, by when must the precedent have occurred? Howell’s alternative view — which attempts to answer the monolithic question of when positive statutory authorisation is needed — is unworkable, unpersuasive and unsupported by authority.

⁵¹⁹ *ibid* 46, 53.

⁵²⁰ *ibid* 47, 54, 59–60.

⁵²¹ Dicey (1967) 424.

⁵²² (1610) 12 Co Rep 74, 76.

⁵²³ Sedley (2014) 12–13 makes a similar argument.

2 *Odd Results?*

Howell and Arrowsmith argue that three odd results necessarily follow from the natural person explanation. Each claim is incorrect. Howell argues that, on the natural person explanation, if the Sovereign is incapacitated, government becomes paralysed.⁵²⁴ *Dutchy of Lancaster* falsifies this view: incapacity does not affect the Sovereign's transactions, even (and as a matter of prerogative) personal transactions.⁵²⁵ Howell further argues that the natural person explanation may carry the unjust result that government liability does not pass to royal successors. However, *Thomas* implies that it does so pass, relying on the Sovereign's *personal* liability.⁵²⁶ Conversely, *Köhler* invoked corporation yet reached the unjust result.⁵²⁷ Arrowsmith argues that not recognising a separate entity makes it 'impossible to apply different rules to the monarch personally and to the government'.⁵²⁸ She admits this lacks practical significance, but it is also incorrect. As explained below in Section 4 regarding 'divisibility of the Crown', conferring different rights on the same individual in differing roles is conceptually possible — different legal persons are not *necessary* to achieve this. The reasoning in *Dutchy of Lancaster*, invoking the exclusive prerogative in relation to *personal* dispositions, exemplifies this approach. If Arrowsmith is right, its consideration of whether the same rule applies to official and personal dispositions was entirely redundant.

⁵²⁴ Howell (2010) 48–9.

⁵²⁵ See above nn 293–294.

⁵²⁶ (n 462) 39, 41–2 (Blackburn J).

⁵²⁷ See above n 260.

⁵²⁸ Arrowsmith (1988) 116.

3 *Governmental Power Is Fundamentally Different?*

Many commentators argue that *governmental* exercise of contracting power is *always* fundamentally different from that of individuals, making the natural person explanation inappropriate. Harris, for example, says:⁵²⁹

The theoretical explanation that ... government has freedom of action ... because of its technical status as a corporation sole, corporation aggregate or a natural person is not ... convincing because the government is so different in nature and magnitude of influence from other legal persons. ... Freedom of government action threatens the liberty of individuals ...

As Mitchell pithily says: 'It is impossible to eliminate the element of command from governmental action'.⁵³⁰ Lord Sumption in *New London College* similarly thought it:⁵³¹

open to question whether the analogy with a natural person is really apt in the case of public or governmental action, as opposed to purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like.

As Daintith points out, government has both *dominium* power — through large resources — and *imperium* power — coercive legal power (including under legislation).⁵³² This emphasises what for Mitchell justifies a principle of executive necessity: the 'differences of nature and purposes [between public and private persons] require that they should be treated differently'; in particular 'powers of government are conferred not for the benefit of government as such but ... benefit of the community as a whole.'⁵³³

⁵²⁹ Harris (2007) 239. See also Jennings (1959) 229–30.

⁵³⁰ Mitchell (1954) 14.

⁵³¹ *New London College* [28].

⁵³² cf Daintith (1979) 41–2. See also Cohn (2005) 111.

⁵³³ Mitchell (1954) 8.

Many important differences between government and individuals exist, but it does not logically, inevitably or necessarily follow that the explanation of their powers — as opposed to constraints on their exercise — must differ. To defeat the natural person explanation, these differences must dictate an altogether different starting point in defining government power. Constraint through judicial review and other government-specific contracting principles⁵³⁴ responds to the twin concerns of difference in magnitude of power (and thus greater practical ability to harm or adversely affect the individual) and limited permissible purposes (government's purpose being general public benefit). Even if judicial review responds insufficiently to these concerns, they do not lead inexorably to *some other* starting point in defining contracting power nor to a limit of a *particular width* on its scope. They might suggest government contracting power should be narrower than an individual's, but *how much narrower* is a matter of normative choice. As Mathieson observes, '[w]e cannot decipher the characteristics of a legal person by empirical observations and comparisons' because '[a]ll legal personality is artificial ... [being] a deliberate creation of statute or the common law, not a natural phenomenon.'⁵³⁵

Howell makes a similar argument, saying that the natural person explanation 'equat[es] the Crown with something else, ignoring the legal fact that the Crown is unique.'⁵³⁶ This, of course, assumes the answer to the question to be decided — that 'the Crown' *is* something other than a natural person. Further, insofar as the Crown exercises benign legal powers the effects of which are *legally* indistinguishable from an individual's, 'uniqueness' of the Crown

⁵³⁴ See Part II(B). Zellick (1985) 294 sees this explanation as unacceptable because '[i]f the official and the citizen are treated alike ... he is unrestrained where the citizen is unrestrained.' The subsequent development of judicial review falsifies this.

⁵³⁵ Mathieson (1992) 119–20.

⁵³⁶ Howell (2010) 50.

generally loses force as an objection. As explained, that general uniqueness is accommodated by judicial review and government-specific contract rules. This objection, too, is unpersuasive.

4 Divisibility of 'the Crown' Is Difficult to Accommodate on the Natural Person Explanation?

Hogg and Monahan and Howell suggest that the natural person view 'makes it hard to explain the division of the Crown into different [Commonwealth] governments, each bearing separate responsibility for its own contracts.'⁵³⁷ But while conceptualising 'the Crown' as a separate corporation for each territory provides an intuitive explanation for distinct governmental rights and obligations, a separate legal person for each territory is not conceptually *necessary* and this analysis draws a false analogy.

The reasoning in *Indian Association* demonstrates that separate legal persons are not conceptually necessary for 'separate' rights for each territory: it does not invoke corporateness, sole, aggregate or innominate. Equally conceptually plausible explanations include concepts akin to trust, status or office. Cobbett suggested that, in relation to self-governing colonies, 'the King ... as chief of the executive power of one community might ... be distinguished, from the King ... in ... others; in the same way as a trustee, acting on behalf of different trust estates would constitute in equity a different legal person'.⁵³⁸ Similarly, the law of status admits that an individual may have multiple statuses which entail different rights and obligations in relation to different third parties: for example, a person may be married, which

⁵³⁷ Hogg and Monahan (2000) 219. See also *ibid* 49.

⁵³⁸ Cobbett (1903) 24.

entails certain spousal duties, and insane, which entails incapacity.⁵³⁹ As conceptual explanations of divisibility other than corporateness are plausible, this objection is not fatal.

Hogg and Monahan's and Arrowsmith's invocation of separate corporations additionally conflates British explanation of *domestic* liability with that of other legal systems. May LJ's reference in *Indian Association* to 'devolution' of rights and liabilities envisages a transfer between legal persons akin to transfer of property between individuals in England. Yet he really describes different legal effects within *two* legal systems. Where previously one legal system existed (as *Howarth* contemplates) there are now two (as *Indian Association* contemplates); the British domestic system ceases to recognise certain rights and liabilities; the new colonial system *may* — but need not necessarily — recognise rights and liabilities defined by reference to those formerly recognised by the single system. As such, it is not obvious that the British domestic conceptualisation of government — as an individual or artificial legal person — necessarily says anything about the content of other legal systems. Further, as local financial control entailed Imperial legislation conferring that control over taxation and creating a consolidated fund, Viscount Haldane's approach in *Great Southern* explains cessation of rights and liabilities in the *British* system as statutory implication:⁵⁴⁰ the legislation implies that the British consolidated fund may no longer be used to fulfil those obligations (whether or not they technically cease). Crown divisibility is not a fatal objection.

5 *An Artificial Legal Person Representing 'the State' Has Emerged?*

A final objection to the natural person explanation is the argument that an artificial legal person has emerged that is recognised and accorded powers by law. If such a legal person exists, this

⁵³⁹ See Graveson (1953) 6, 112–14.

⁵⁴⁰ See above n 489.

— not the Sovereign’s powers as a natural person — potentially explains government contracting. The problem is the absence of evidence of anything other than the Sovereign as corporation sole (which Part IV argues cannot explain contracting power). Further, the contrast with the Australian Commonwealth — an artificial legal person created by the *Australian Constitution* — confirms the absence in Britain of an artificial legal person.

(a) No Evidence of an Artificial Legal Person

Arrowsmith and Hogg and Monahan advance essentially normative arguments suggesting that a corporate conception of government *should* be developed (it is ‘*preferable* to recognize a distinct corporate entity’).⁵⁴¹ Mathieson, however, goes further, arguing that the law *has recognised* ‘the Crown’ as a separate legal person. For him, ‘mystery about the Crown’s *persona* stems from ... lingering confusion between the Crown and the reigning king or queen’.⁵⁴²

It is ... better to speak simply of the artificial legal person which is the Crown: with all due deference to Maitland ..., the Crown is not a corporation, it is a legal person, ... not another name for Her Majesty the Queen. ... It ... started with the king’s personally exercised legislative and executive powers. ... Much later Blackstone felt able to bisect the king into his two capacities, the personal and political. *Under the pressures of modern governmental administration the evolution has been completed. We now have an entirely abstract Crown which wields the executive powers of the State.* Over none (or virtually none) of those powers does the monarch acting personally ... have any legal control.

⁵⁴¹ Arrowsmith (1988) 117 (emphasis added). See also Hogg and Monahan (2000) 219.

⁵⁴² Mathieson (1992) 123–4 (emphasis added) (citations omitted).

The Crown ‘is not to be regarded as ... a human being’ and logic does not require attribution to it of human powers; its powers are ‘a question of policy which should not be influenced by ... misleading analogies.’⁵⁴³

Mathieson’s only evidence is ‘the pressures of modern governmental administration’. What this means, and how it creates a legal person, remain obscure. Mathieson regards *delegation* of powers over time as implying their *source* has changed, yet this does not follow: that the Sovereign now acts on advice does not change the *basis* of prerogative power, for example. Further, if Mathieson is correct, his theory is incomplete: it fails to explain why the Sovereign lost power to act for the state — which he accepts existed historically — given that, as he (rightly) says, one legal person’s power implies nothing about the powers of another.

Mathieson is in good company in wanting British (and New Zealand) law to develop a coherent conception of the state as a distinct legal person. Loughlin thinks ‘it ... doubtful that the monarch any longer provides an adequate synonym for the State’⁵⁴⁴ and Maitland suggested a ‘way out of this mess’ is to *recognise* the state as a ‘complex and highly organised “corporation aggregate of many”’.⁵⁴⁵ These are, however, admitted calls for change. Many commentators, including Maitland, Loughlin and Cobbett — after surveys much more exhaustive than Mathieson’s — and those mentioned in Section A, conclude that ‘the attempt to unravel the King from the Crown ... has foundered’⁵⁴⁶ and that ‘the State had no other legal personality than that which it possessed through the King.’⁵⁴⁷ The ‘slow, laborious’ evolution

⁵⁴³ *ibid* 124.

⁵⁴⁴ Loughlin (1999) 37.

⁵⁴⁵ Maitland (1901) 140.

⁵⁴⁶ Loughlin (1999) 57; see also 37, 58–9, 74.

⁵⁴⁷ Cobbett (1903) 28.

of British constitutional law means that without a ‘critical reconstruction ... the ancient legal concepts have lingered on’.⁵⁴⁸ Recently, *M* ‘refrained from ... differentiating ... the Crown from the personality of the monarch’⁵⁴⁹ and the cases in Section A reinforce the non-existence of Mathieson’s evolution.

(b) Contrast with the Australian Commonwealth

The contrast between the construction by Imperial statute of the Commonwealth of Australia as a legal person and the *absence* of such a ‘critical reconstruction’ in Britain further undermine Mathieson’s argument: no similar legal event plausibly causing the birth of a separate legal person has occurred in Britain.

Section 4 of the Commonwealth of Australia Constitution Act 1900 provides that upon proclamation ‘[t]he Commonwealth shall be established’. Section 9 contains the *Australian Constitution*, which vests the Commonwealth’s legislative power in the Federal Parliament⁵⁵⁰ but also vests its ‘executive power’ in the Queen.⁵⁵¹ Several provisions indicate that executive power includes some benign legal powers: s 85 for example⁵⁵² enables ‘property of [a] State’ and ‘land, or ... an interest in land’ to ‘become vested in the Commonwealth’ and the Commonwealth to ‘acquire ... property’ and ‘assume ... obligations’ to third parties. Recent

⁵⁴⁸ Loughlin (1999) 47–8.

⁵⁴⁹ *ibid* 75.

⁵⁵⁰ *Australian Constitution* s 1; see also ss 51–2, 122.

⁵⁵¹ *Australian Constitution* s 61.

⁵⁵² See also ss 69, 81–4, 87, 89, 93(ii), 105, 105A.

High Court decisions have recognised — despite earlier occasional reliance on ‘the Crown’⁵⁵³ — that the *Australian Constitution* constitutes the Commonwealth as a legal person. Gummow and Kirby JJ’s decision (Brennan CJ and Gaudron J agreeing) in *Commonwealth v Mewett* that Commonwealth tort ‘liability is created by the common law’ and the *Constitution* merely ‘den[ied] any operation to ... doctrines of Crown ... immunity’ implied this.⁵⁵⁴ It became explicit in *Williams (No 1)*, where five Justices called the Commonwealth a ‘juristic’ or ‘legal person’ and rejected submissions that *the executive*, rather than the Commonwealth, was a right-and-duty-bearing entity.⁵⁵⁵ ‘The Crown’ was in fact never needed to explain the Commonwealth’s existence as a legal person or the extent of its legal personality,⁵⁵⁶ which statute implies.⁵⁵⁷ The contrast to Britain could hardly be starker.

C Conclusion on the Sovereign as an Individual

Much authority (and commentary), explicitly and implicitly, supports the natural person explanation, and objections to it are unpersuasive. It therefore represents a plausible explanation of government contracting power, subject always to judicial review and the other limits Part II(B) mentions.

⁵⁵³ See, eg, *Commonwealth v Bogle* (1953) 89 CLR 229, 259 (Fullagar J): ‘The Commonwealth — or the Crown in right of the Commonwealth, whatever you choose to call it — is to all intents and purposes, a juristic person.’

⁵⁵⁴ (n 181) 551.

⁵⁵⁵ *Williams (No 1)* [21] (French CJ), [154] (Gummow and Bell JJ), [173], [204]–[207] (Hayne J), [484] (Crennan J).

⁵⁵⁶ Harrison Moore (1904) 359; Saunders (2015) 887–8.

⁵⁵⁷ The ‘basal consideration’ of Commonwealth–State distribution of power effected especially by s 51 limits the ‘fields of action’ in which the Commonwealth may exercise executive — including contracting — power: *Williams v Commonwealth (No 2)* [2014] HCA 23, (2014) 252 CLR 416 [83] (French CJ, Hayne, Kiefel, Keane and Bell JJ), [99] (Crennan J).

VI CONCLUSION

If ‘government’ contracts — and undertakes other benign legal action equivalent to that of individuals — ‘government’ must refer to a legal person with legal personality extending to contractual and other rights. This amounts to a requirement to show positive legal authorisation for contracting power. Further, government exercise of contracting power is often — and should, in principle, always be — subject to judicial review, which constrains the manner in and purposes for which government may act.

Two commonly advanced explanations of government contracting power do not withstand scrutiny. Professor Harris’s ‘third source’ theory falls at the first hurdle: it does not identify what legal person ‘government’ is or why its legal personality extends to contracting, instead assuming equivalence to an individual. Proper, necessarily legal-historical examination of corporations sole, both non-regal and the Sovereign, suggests that — contrary to Wade’s and other recent academic assertions — they are not artificial legal persons and, even if they are, sole corporateness does not carry power to contract. Its only recognised legal effect is to change the descent of property and constrain disposition, and for the Sovereign it is doubtful that these legal effects stem from sole corporateness; the exclusive prerogative seems a much more likely explanation.

The idea that the Sovereign is a natural person and like other natural persons has contracting power (although, unlike them, subject to judicial review), while doubtless unfashionable, is both conceptually coherent and supported by more British and Commonwealth authority than is often suggested. Objections to this view — particularly those that assert the birth of an innominate artificial legal person — are unpersuasive and often incoherent. The natural person explanation represents the best explanation of the legal basis of government contracting power as the law stands. Further work could usefully consider

whether this approach explains other benign legal powers (such as power to own property, although not exclusive prerogative power to dispose thereof) and provides positive authorisation, if needed, for non-legal action.

One further approach, although beyond the scope of this thesis because not elsewhere suggested and inconsistent with the cases supporting the natural person explanation (so not an understanding of the law), might usefully be considered in future. It seems *conceptually* possible to explain all non-statutory legal powers on the same basis as prerogative powers, while acknowledging their non-exclusivity to government. Some argue that the courts can no longer *recognise* prerogative powers (that is, powers are limited to those that happen to have been the subject of historical judicial decision), but the common law's conferral of such powers⁵⁵⁸ implies criteria for recognition. While no 'overarching definition' of prerogative power exists,⁵⁵⁹ pre-Glorious Revolution historical use by government as of right⁵⁶⁰ appears to be one criterion. Although new government practice cannot now create new prerogative powers,⁵⁶¹ 'the later rediscovery ... of a hidden ... prerogative power already existing by 1689' seems possible in principle.⁵⁶² A common objection to this explanation of benign legal power is that some prerogative powers override individuals' rights.⁵⁶³ However, not *all* prerogative

⁵⁵⁸ See above n 522.

⁵⁵⁹ Woolf (2013) [3-030]. See also Payne (1999) 78.

⁵⁶⁰ *Entick* (n 51) 292; *Burmah Oil* (n 50) 100–1 (Lord Reid), 115 (Viscount Radcliffe), 156 (Lord Pearce), 167 (Lord Upjohn); *Bancoult* [69] (Lord Bingham).

⁵⁶¹ *BBC v Johns* [1965] 2 Ch 32 (CA) 79 (Diplock LJ).

⁵⁶² Hadfield (1999) 199. See, eg, *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] 1 QB 26 (CA).

⁵⁶³ See, eg, Stellios (2015) 374–5.

powers do so.⁵⁶⁴ The nature of *each power* — in particular whether it derogates from existing rights — is itself defined by specific historical use. On the other hand, historical use as a criterion generates problems: acute practical difficulties in identifying past practice⁵⁶⁵ and questions of scope — in particular, how close legal action must be to historical action.⁵⁶⁶ Government has long purported to make contracts (and before that bonds and debts).⁵⁶⁷ But does this establish power to contract on a subject-matter where government had not, before the Revolution, done so?

As stated, a non-exclusive prerogative approach is impossible to reconcile with cases supporting the natural person explanation, and the latter reflects the law as it stands. Further study is needed of the normative justifications for non-statutory power, the circumstances in which the courts can appropriately recognise government power, and whether judicial review is a sufficient answer to concerns about the fundamentally different nature of even benign governmental legal power. Further research building on Davies' and Arrowsmith's consideration of how judicial review constrains non-statutory legal power would also be fruitful.

The natural person explanation is conceptually coherent and supported by authority, and application of judicial review establishes some limits to which government contracting power is subject. Most fundamentally, however, this thesis has argued that the basis of non-statutory power — which is increasingly frequently before the courts — cannot be assumed or ignored.

⁵⁶⁴ See above n 49; Vincenzi (1998) 14.

⁵⁶⁵ See, eg, *Burmah Oil* (n 50).

⁵⁶⁶ cf *Bancoult* [31], [44] (Lord Hoffmann), [70]–[71] (Lord Bingham).

⁵⁶⁷ Bailey (1932) 251–9.

Its explanation necessarily defines the scope of the power. Only by tackling this question, as this thesis seeks to do, can the courts satisfactorily uphold the rule of law in Britain.

Bibliography

Articles

- Alder, John, 'Hunting the Chimera — The End of *O'Reilly v Mackman*?' (1993) 13 Legal Studies 183
- Appleby, Gabrielle and McDonald, Stephen, 'Looking at Executive Power through the High Court's New Spectacles' (2013) 35 Sydney LR 253
- Bailey, SH, 'Judicial Review of Contracting Decisions' [2007] PL 444
- Bailey, Stanley J, 'Assignments of Debts in England' (Pt 2) (1932) 48 LQR 248
- Bevan, Vaughan, 'Is Anybody There?' [1980] PL 431
- Brown, W Jethro, 'The Personality of the Corporation and the State' (1905) 21 LQR 365
- Cobbett, P, 'The "Crown" as Representing the "State"' (1903) 1 Commonwealth LR 23
- Cohn, Margit, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25 OJLS 97
- Daintith, Terence, 'Regulation by Contract: The New Prerogative' (1979) 32 CLP 41
- Harris, BV, 'The "Third Source" of Authority for Government Action' (1992) 108 LQR 626
- Harris, BV, 'The "Third Source" of Authority for Government Action Revisited' (2007) 123 LQR 225
- Harris, BV, 'Government "Third Source" Action and Common Law Constitutionalism' (2010) 126 LQR 373
- Harris, BV, 'Recent Judicial Recognition of the Third Source of Authority for Government Action' (2014) 26 New Zealand Universities LR 60
- Harrison Moore, W, 'The Crown as Corporation' (1904) 20 LQR 351
- Hohfeld, Wesley, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16
- Howell, John, 'What the Crown May Do' [2010] Judicial Review 36
- Joseph, Philip, 'The Crown as a Legal Concept (I)' [1993] New Zealand LJ 126
- Joseph, Philip, 'The Crown as a Legal Concept (II)' [1993] New Zealand LJ 179
- Lester, Lord and Weait, Matthew, 'The Use of Ministerial Powers without Parliamentary Authority: The Ram Doctrine' [2003] PL 415
- Maitland, FW, 'The Corporation Sole' (1900) 16 LQR 335
- Maitland, FW, 'The Crown as Corporation' (1901) 17 LQR 131
- Mathieson, DL, 'Does the Crown Have Human Powers?' (1992) 15 New Zealand Universities LR 117
- McLean, Janet, 'The Crown in Contract and Administrative Law' (2004) 24 OJLS 129
- McManus, Richard, 'The Crown's Common Law Powers' [2010] Judicial Review 27
- Saunders, Ben, 'Democracy, Liberty and the Prerogative' (2013) 41 Federal LR 363
- Saunders, Cheryl, 'The Concept of the Crown' (2015) 38 Melbourne University LR 873

- Twomey, Anne, 'Post-*Williams* Expenditure — When Can the Commonwealth and States Spend Public Money without Parliamentary Authorisation?' (2014) 33 *University of Queensland LJ* 9
- Wade, HWR, 'Procedure and Prerogative in Public Law' (1985) 101 *LQR* 180
- Wade, HWR, 'Judicial Review of Ministerial Guidance' (1986) 102 *LQR* 173
- WIJ, Note (1928) 44 *LQR* 410
- Winterton, George, 'The Prerogative in Novel Situations' (1983) 99 *LQR* 407
- Zellick, Graham, 'Government Beyond Law' [1985] *PL* 283

Books

- Adler, Herbert M, *A Summary of the Law Relating to Corporations Being an Analysis of the Powers and Limitations of All Corporate Bodies, Commercial, Municipal and Otherwise* (William Clowes 1903)
- Allen, John, *Inquiry into the Rise and Growth of the Royal Prerogative in England* (rev edn, Longman 1849)
- Aronson, Mark and Whitmore, Harry, *Public Torts and Contracts* (Law Book 1982)
- Arrowsmith, Sue, *Government Procurement and Judicial Review* (Carswell 1988)
- Arrowsmith, Sue, *Civil Liability and Public Authorities* (Earlsgate 1992)
- Arrowsmith, Sue, *The Law of Public and Utilities Procurement* (2nd edn, Sweet & Maxwell 2005)
- Bacon, Matthew, *A New Abridgment of the Law: With Considerable Additions by Henry Gwillim* (6th edn, A Strahan 1807)
- Beale, HG et al (eds), *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012)
- Blackstone, William, *Commentaries on the Laws of England* (Clarendon 1765)
- Booth, Cherie and Squires, Dan, *The Negligence Liability of Public Authorities* (OUP 2006)
- Brazier, Rodney, *Ministers of the Crown* (Clarendon 1997)
- Bryce, Seward, *The Law of Corporations and Companies: A Treatise on the Doctrine of Ultra Vires* (3rd edn, Stephens & Haynes 1893)
- Cane, Peter and Conaghan, Joanne (eds), *The New Oxford Companion to Law* (OUP 2008)
- Cane, Peter, *Administrative Law* (5th edn, OUP 2011)
- Carr, CT, *General Principles of the Law of Corporations* (CUP 1905)
- Chitty, Joseph, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (Joseph Butterworth 1820)
- Coke, Edward, *The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton* (Butler (ed) with Hale's, Hargrave's and Butler's notes, 19th corrected edn, J & WT Clarke 1832)
- Craig, PP, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon 1990)

- Craig, Paul, *Administrative Law* (7th edn, Sweet & Maxwell 2012)
- Daintith, Terence and Page, Alan, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (OUP 1999)
- Davies, ACL, *The Public Law of Government Contracts* (OUP 2008)
- Dicey, AV, *The Study of the Law of the Constitution* (10th edn, Macmillan 1967)
- Elliott, Mark, *The Constitutional Foundations of Judicial Review* (Hart 2001)
- Fitzgerald, PJ, *Salmond on Jurisprudence* (12th edn, Sweet & Maxwell 1966)
- Garner, Bryan A, *Black's Law Dictionary* (9th edn, West 2009)
- Grant, James, *A Practical Treatise on the Law of Corporations in General, As Well Aggregate as Sole* (Butterworths 1850)
- Graveson, RH, *Status in the Common Law* (Athlone 1953)
- Gray, John, *The Nature and Sources of Law* (2nd edn, Macmillan 1927)
- Hale, Sir Matthew, *The Prerogatives of the King* (DEC Yale (ed), date unknown, Selden Society 1976 edn)
- Hart, HLA, *The Concept of Law* (Clarendon 1961)
- Hogg, Peter W and Monahan, Patrick J, *Liability of the Crown* (3rd edn, Carswell 2000)
- Hogg, Peter W, Monahan, Patrick J and Wright, Wade K, *Liability of the Crown* (4th edn, Carswell 2011)
- Holdsworth, Sir William, *A History of English Law* (3rd edn, OUP 1944–45)
- Jenks, Edward, *The Government of Victoria (Australia)* (George Robertson 1897)
- Jennings, Sir Ivor, *The Law and the Constitution* (5th edn, University of London 1959)
- Jones, Michael et al (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014)
- Kyd, Stewart, *A Treatise on the Law of Corporations* (Butterworth 1793)
- Maitland, FW, *The Constitutional History of England* (CUP 1908)
- McLean, Janet, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012)
- Mitchell, JDB, *The Contracts of Public Authorities: A Comparative Study* (G Bell & Sons 1954)
- Patton, George Whitecross, *A Textbook of Jurisprudence* (GW Paton and David Derham (eds), 4th edn, Clarendon 1972)
- Pollock, Sir Frederick, *A First Book of Jurisprudence for Students of the Common Law* (Macmillan 1896)
- Pollock, Sir Frederick, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* (6th edn, Stevens 1894)
- Pollock, Sir Frederick, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* (10th edn, Stevens 1936)
- Raz, Joseph, *The Concept of a Legal System — An Introduction to the Theory of Legal System* (2nd edn, OUP 1980)
- Raz, Joseph, *The Morality of Freedom* (Clarendon 1986)

- Robertson, George, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (Sevens 1908)
- Seddon, Nicholas, *Government Contracts — Federal, State and Local* (5th edn, Federation 2013)
- Stellios, James, *Zines's The High Court and the Constitution* (6th edn, Federation 2015)
- Street, H, *Governmental Liability — A Comparative Study* (CUP 1953)
- Sunkin, Maurice and Payne, Sebastian (eds), *The Nature of the Crown — A Legal and Political Analysis* (OUP 1999)
- Turpin, Colin, *Government Contracts* (Penguin 1972)
- Vincenzi, Christopher, *Crown Powers, Subjects and Citizens* (Pinter 1998)
- Wade, Sir William, *Administrative Law* (6th edn, Clarendon 1988)
- Wade, Sir William, *Constitutional Fundamentals* (rev edn, Stevens 1989)
- Wade, HWR and Forsyth, Christopher, *Administrative Law* (Christopher Forsyth, 11th edn, OUP 2014)
- Watts, Peter and Reynolds, FMB, *Bowstead and Reynolds on Agency* (20th edn, Sweet & Maxwell 2014)
- Williams, Glanville L, *Crown Proceedings* (1948)
- Woolf, Lord et al, *De Smith's Judicial Review* (7th edn, Sweet & Maxwell 2013)

Chapters in Edited Books

- Cornford, Tom, 'Legal Remedies against the Crown and Its Officers before and after *M*' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown — A Legal and Political Analysis* (OUP 1999)
- Daintith, TC, 'The Techniques of Government' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (3rd edn, Clarendon 1994)
- Hadfield, Brigit, 'Judicial Review and the Prerogative Powers' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown — A Legal and Political Analysis* (OUP 1999)
- Loughlin, Martin, 'The State, the Crown and the Law' in M Sunkin and S Payne (eds), *The Nature of the Crown — A Legal and Political Analysis* (OUP 1999)
- Payne, Sebastian, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown — A Legal and Political Analysis* (OUP 1999)
- Tomkins, Adam, 'The Struggle to Delimit Executive Power in Britain' in Paul Craig and Adam Tomkins (eds), *The Executive in Public Law — Power and Accountability in Comparative Perspective* (OUP 2006)
- Wade, Sir William, 'The Crown, Ministers and Officials: Legal Status and Liability' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown — A Legal and Political Analysis* (OUP 1999)

Working Papers and Speeches

Sales, Philip, ‘Crown Powers, the Royal Prerogative and Fundamental Rights’ (Paper presented at the Powers and Perceptions of the Crown Workshop, University of Oxford, 27 May 2014)

Sedley, Sir Stephen, ‘The Royal Prerogative — Then and Now’ (Speech delivered at the Inner Temple, London, 10 November 2014)

United Kingdom Government Publications

Cabinet Office, *The Cabinet Manual — A Guide to Laws, Convention and Rules on the Operation of Government* (1st edn, Cabinet Office 2011)

Crown Commercial Service, *Annual Report and Accounts 2014/15* (HC 2015–16, 207)

Government Communication Service, *Government Communication Service Propriety Guidance* (Cabinet Office 2014)

HL Deb 25 February 2003, vol 645, col WA12

National Audit Office, *Reforming Defence Acquisition* (HC 2014–15, 946)

Office of Public Service, *Agency Chief Executives’ Handbook* (Cabinet Office 1996)

Select Committee on the Constitution, House of Lords, *The Pre-Emption of Parliament* (HL 2012–13, 165)

Treasury, *Government Accounting: A Guide on Accounting and Financial Procedures for Use of Government Departments* (HMSO 1989)

Legal Encyclopaedia

Hailsham, Lord (ed), *Halsbury’s Laws of England* (4th edn (reissue), 1996)

Halsbury, Earl of (ed), *The Laws of England Being a Complete Statement of the Whole Law of England* (1910)