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Institutional Approaches to Judicial Restraint

JEFF A. KING*

Abstract—This article addresses the pressing issue of what process courts should use to identify those questions whose resolution lies beyond their appropriate capacity and legitimacy. The search for such a process is a basic constitutional problem that has defied a clear answer for well over a hundred years. The chequered history of earlier attempts illustrates why commentators have once again begun to gravitate towards institutional approaches. The general features of institutional approaches include emphasis on uncertainty, judicial fallibility, systemic impact, collaboration between branches of government and incrementalism in judging. These features, however, are relied upon in support of two conflicting views of the role of judges in public law adjudication. One is restrictive, and advocates sharp limitations to the ambit of judicial review. The other is contextual, and, in stark contrast, it proposes to expand the ambit of review in reliance on the idea of using principles of restraint to structure the exercise of judicial discretion. While this article does not take sides between them, it nonetheless seeks to refine the contextual institutional approach by outlining a general framework for reasoning with principles of restraint, and by addressing some of the key difficulties such a reasoning process would face.

Judges often adjudicate disputes that raise the question of how strictly they should scrutinize government or legislative action. The question arises in a number of contexts: statutory interpretation, judicial review of administrative discretion, review of tribunal findings, adjudication of human rights claims and in the interpretation of international law to mention a few. In all of these contexts, judges have identified certain questions as being inappropriate for judicial resolution, or have refused on competency grounds to substitute their judgment for that of another person on a particular matter. I will use the expression 'judicial restraint' to describe this type of judicial conduct, and intend it to be neutral among competing conceptions of judicial restraint. How judges should exercise judicial restraint is a fundamental matter of constitutional principle that concerns

* Research Fellow and Tutor in Law, Keble College, Oxford. Email: jeff.king@law.ox.ac.uk. The author thanks Paul Craig, Catherine Donnelly, Graham Gee, Jeffrey Jowell, Aileen Kavanagh, Dimitris Kyritsis, Kai Möller, Roger Shiner, Jan van Zyl Smit, Gréggoire Webber, Alison Young, and the participants of the 2008 Annual Meeting of the Society of Legal Scholars (Ireland) for helpful feedback on earlier drafts.

the proper role of each branch of government in relation to significant questions of public policy and morality. It is also important for the more mundane reason that there have been several approaches to judicial restraint proposed to the courts recently by scholars, lawyers and judges.

This article seeks to explain, justify and elaborate what I call institutional approaches to judicial restraint. Institutional approaches focus on the comparative merits and drawbacks of the judicial process as an institutional mechanism for solving problems. On my account, institutional approaches to restraint put emphasis on the problem of uncertainty and judicial fallibility, on the systemic impact of judging and on rights as prima facie claims subject to balancing rather than as trumps over collective welfare. For precisely these reasons, institutional approaches advocate a somewhat modest, case-by-case and incrementalist role for courts in public law adjudication. To understand the reasons why institutional approaches have these features, however, it is necessary to see the faults of their two principal alternatives: non-doctrinal approaches and formalist approaches. Non-doctrinal approaches suggest that we ought to trust judges to use their good sense of restraint on a case-by-case basis rather than employ any conceptual framework. Formalists believe that judges should apply abstract categories such as 'law', 'politics', 'policy' and 'non-justiciable' that they believe properly allocate decision-making functions between different branches of government. Institutional approaches largely grew out of a reaction to the problems with these two alternatives, and can only be properly understood in that light. Therefore, Sections 1 and 2 of the article critique these alternative approaches, before turning to elaborating the general features of the institutional approaches in Section 3.

I refer to institutional 'approaches' because the general features of institutionalism actually lend support to two sharply conflicting views of the judge's role. Restrictive institutionalists believe judges should act wherever possible with great restraint, rejecting a role for balancing and preferring adherence to bright-line rules and containing the expansion of precedent. Contextual institutionalists, on the other hand, believe more in the promise of the judicial process and advocate a particular tool to address the problems of broad judicial discretion under conditions of limited institutional competency—principles of restraint. If the principles of restraint embody the institutional considerations and can be workably incorporated into adjudication, they believe, the concerns can be met without rejecting the role of the courts foreseen in much contemporary public law adjudication.

The contextual institutional approach raises a number of different problems that deserve urgent attention. One reason for such urgency is that the contextual institutional approach is gaining increasing popularity as commentators call for a more 'principled approach' to the issue. However, there has been little sustained discussion of the nature of reasoning with principles of restraint or deference, what should happen when such principles conflict, and how

practically speaking such principles can be brought into judging. In Section 4, therefore, I seek to refine the contextual institutional approach by addressing these questions and by showing where further development is needed. The article ultimately attempts to outline a general institutionalist framework of practical reasoning within which judges can apply principles of judicial restraint with some measure of predictability.

1. *Non-doctrinal Approaches*

One approach to restraint is to suggest that there should be no doctrine articulated in advance, and that judges should decide upon the appropriate degree of restraint on a case-by-case basis. On this view, restraint may be needed in some cases but we should trust either judges or the existing legal standards to meet this need if and when it arises. The key attribute of this approach is the very broad scope of discretion given to judges. Its chief advantage is judicial flexibility to decide cases in context and on the merits.

Of course, considerable room for judicial discretion or judgment will remain in any model. Even so, there are a number of problems with a fully non-doctrinal approach. First, there is too acrimonious a history between law and administration to give such a broad range of discretion to judges without further specification. Such approaches fail to give adequate weight to the possibility, buttressed by so much well-known history, that courts will get things wrong. Second, it would offend our sense of being governed by the rule of law and legal principle, rather than the capacious discretion of some official. Finally, it seems unfair to the losing party not to announce the applicable standard in advance. It offends the moral and legal idea that a party must know the case to be met. While the 'I know it when I see it'[1] standard has obvious practical advantages, it has an equally obvious Kafkaesque undertone.

The idea of using a non-doctrinal approach is by no means wild or unorthodox. It is probably the best description of how most courts operate. It is precisely the approach commended by the unanimous Judicial Committee of the House of Lords in the case of *Huang v Secretary of State for the Home Department*,[2] where the parties offered various models of restraint, including the margin of discretion, due deference, the principle/policy distinction and relative institutional competence. Lord Bingham chastised the parties for this attempt, suggesting it rendered complex what was in fact a straightforward task:

> Giving weight to factors such as these [i.e. the views of public officials, policy and fairness concerns] is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up competing considerations on each

[1] *Jacobellis v Ohio*, 378 US 184, 197 (1964) (Justice Potter).
[2] [2007] UKHL 11, [2007] 2 AC 167.

> side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.[3]

The problem with this approach is that, although it strives to be non-doctrinal, Lord Bingham concedes in the same breath that issues such as 'subject matter' and 'access to special sources of knowledge' are relevant to the degree of weight to be given to another decision-maker's view. We know from many of Lord Bingham's other speeches that he believes that the settled will of a democratic majority is also entitled to great weight. Therefore, the judgment exhibits a common problem recurring in non-doctrinal approaches: that in fact there *will* be a set of considerations conditioning restraint and these will not be set out in full view. The approach shifts to the back door what ought to be considered at the front door.

TRS Allan is a forceful critic of the idea of any independent doctrine of judicial deference.[4] He argues that such a doctrine would allow an abdication of the judicial responsibility to protect legal rights. There are two important limbs to Allan's critique. The first is that, by invoking an independent doctrine of deference, judges are likely to 'short-circuit' the close contextual analysis that is required for determining whether rights have been infringed. In other words, a theory of deference will be a short-cut for judges: if it flags a concern (e.g. expertise), it will effectively discourage judges from giving their views on the merits of the claim. The second is that there are many existing standards in law—such as irrationality review and the concept of proportionality—that already account for the deference due to other branches. A super-added doctrine of deference risks double-counting.

I for one think both of these criticisms are instructive, but that their lessons can be (and are) incorporated into the contextual institutional approach advanced below. What is more relevant for present purposes is the nature of the approach Allan believes judges *should* take. He is clear that there are situations in which the judiciary ought to defer to other decision-makers on democratic grounds.[5] He therefore does not advocate rule by Platonic guardians. He rather believes that judges should simply decide any issue relevant to deference or constraint *in context*, focusing on the 'intrinsic merits' of claims of right and on the 'substance' of the decision, claim or issue.[6] They must always decide consistently with constitutional rights.[7] Reliance on the expertise or good faith of other officials is often misguided, because their judgments in specific cases 'may well be wrong'.[8] This shows, however, that Allan does believe, in common with Plato, that there is a right answer about the meaning of

[3] Ibid [16].
[4] TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' [2006] CLJ 671–95.
[5] Ibid 672.
[6] Ibid 672, 674, 678, 688.
[7] Ibid 682, 685, 686, 688.
[8] Ibid 675.

rights/justice and that judges (like guardians) are likely to arrive at it 'according to the balance of reason',[9] and at any rate well enough not to need any doctrines of restraint that would fetter the exercise of their judgment.

In my view, the prominence given to right answers and judicial reliability—which are often the basis for the advocacy of non-doctrinal approaches—is unjustified. It should by now be clear that there is vast disagreement about the meaning of rights and justice, and Jeremy Waldron is hardly alone in recognizing this issue.[10] Any theory putting such great emphasis on the objective nature of rights is bound to license the imposition of judicial values to a greater than desirable or credible extent. Furthermore, Allan gives no attention to the problem of judicial fallibility, both on moral issues and on matters of fact and human behaviour. Such fallibility has historically been evident with respect to moral issues such as whether a union should be liable in damages for trade disruptions arising from strike action,[11] whether paying women the same wages as men is illegal for being 'eccentric socialistic philanthrophy',[12] whether working time laws illegally infringe a constitutionally protected freedom of contract,[13] or, more recently, whether providing care for the sick or elderly is a 'function of a public nature'.[14] It may be that UK courts have been rather deferential in quite recent years, avoiding significant disruptions to social schemes. But, if the European Court of Justice and the Supreme Court of Canada are viewed as providing guidance, which they most certainly are, then there is renewed cause (if any were needed) for seeing the need for a doctrinal approach to restraint. The European Court of Justice has handed down highly questionable judgments concerning the scope of labour rights,[15] whereas the Supreme Court of Canada may have set into motion a process of privatization that may undermine the national system of health care.[16] As to judicial reliability on factual determinations, problems such as predicting likely patterns of behaviour and other social and legislative facts, and evaluating social science evidence, are so well known that examples are hardly needed.

All such issues cannot be resolved by a judge considering the abstract contours of a right. Yet rather than give weight to these problems, Allan goes

[9] Ibid 694.

[10] J Waldron, *Law and Disagreement* (Clarendon Press, Oxford 1999); 'The Core of the Case Against Judicial Review' (2006) 115 Yale L J 1347–406. See the discussion of Rawls, Habermas and Gutman and Thompson, below, text to (n 95).

[11] *Taff Vale Ltd v Amalgamated Society of Railway Servants* [1901] AC 426 (HL).

[12] *Roberts v Hopwood* [1925] AC 578 (HL); see also, *Prescott v Birmingham Corporation* [1955] Ch 210 (CA) (discount fares to the elderly illegal). Both cases were approved in *Bromley v Greater London Council* [1983] 1 AC 768 (HL) 815 (Lord Wilberforce).

[13] *Lochner v New York*, 198 US 45 (1905). There is a voluminous literature on the 30-year *Lochner* era. Affirmative action, election financing and gun control provide good contemporary American examples.

[14] *YL v Birmingham CC* [2007] UKHL 27, [2008] 1 AC 95.

[15] N Reich, 'Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking Cases before the ECJ' (2008) 9 German LJ 128–61; see also, P Zumbansen and D Saam, 'The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism' (2007) 8 German LJ 1027–51.

[16] JA King, 'Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision' (2006) 69 MLR 631–43, esp. 638–9.

precisely in the opposite direction: '[n]o judge should "defer" to any opinion he thinks is doubtful.'[17] However, even the boldest of judges, such as Laws LJ, is more circumspect about judicial capacities to know about the impact of judgment and the nature of morality. They too, as I show in Section 4.A below, see the need for some doctrine of restraint.

2. *Formalist Approaches*

There are three somewhat distinct models of judicial restraint offered in English public law that are premised on a formalist separation of powers between legislatures, the executive and the courts: the distinctions between law and politics, principle and policy, and justiciability and non-justiciability. These models are marked by what HLA Hart called 'the vice known to legal theory as formalism or conceptualism . . .'[18] By formalist, I mean conceptual formalism, a belief in the capacity of judges to deduce objective and apolitical legal answers from abstract legal rules, principles or categories, without recourse to policy considerations.[19]

Conceptual formalism is prone to familiar problems. The obvious one is a false pretence to objectivity. As Hart observed, the belief in objective deduction, so-called 'mechanical jurisprudence',[20] tended to 'disguise' and 'minimize' the role actually played by policy beliefs and personal preferences.[21] As Justice Oliver Wendell Holmes Jr famously wrote, '[g]eneral propositions do not decide concrete cases.'[22] Another problem is that conceptual formalism is rigid and resists revision on the basis of any adverse consequences it produces. The belief in rational objectivity promotes the view that, if a view is logically correct, its consequences are of minor importance. This leads judges and scholars to ignore, lament or gloss over anomalous or unfair cases.[23] This led to another of Holmes' great aphorisms: '[t]he life of the law has not been logic; it has been experience.'[24] The belief in rational objectivity, especially when coupled with the doctrine of *stare decisis*, tends to create conservative inertia in the law. Once lines have been drawn, erasing them becomes difficult. Both of these problems are evident in the models reviewed below.

[17] *Allan* (n 4) 694; see also, 676.

[18] HLA Hart, *The Concept of Law* (2nd edn OUP, Oxford 1994) 129.

[19] See also, N Duxbury, *Patterns of American Jurisprudence* (OUP, Oxford 1992) ch.1 'The Challenge of Formalism', esp. 10; Hart, ibid; D Kennedy, *A Critique of Adjudication: Fin de Siècle* (Harvard University Press, Cambridge, MA 1997) 105. For other varieties of formalism, see M Stone, 'Formalism' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP, Oxford 2002) 166.

[20] R Pound, 'Mechanical Jurisprudence' 8 Columbia L Rev 605–23 (1908).

[21] *Hart* (n 18) 129. See also, MJ Horowitz *The Transformation of American Law 1870–1960* (OUP, Oxford 1992) 200; *Kennedy* (n 19) 105; *Stone* (n 19) 187ff (for criticism).

[22] *Lochner* (n 13) 76.

[23] W Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson, London 1973) 8 (contrasting formalism's '"static" needs of unification' with functionalism's '"dynamic" need for continuous adaptation').

[24] OW Holmes Jr, *The Common Law* (Little Brown, Boston 1881) 1.

A. *The Distinction between Law and Politics*

In several cases, British judges have invoked a distinction between law and politics, implying of course that one is for judges and the other for Parliament and the executive.[25] This approach finds some pedigree in the American doctrine of 'political questions' as developed in *Baker v Carr*.[26] Some functionalist legal scholars also at times appear to advocate this type of bright-line approach, with their strong notion of separate and autonomous functions for the different branches of government.[27]

The problem with this approach is that it is mostly a matter of judicial intuition where this line will be drawn. The conclusion that an issue is 'political' and thus inappropriate to determine in a court of law *might* be acceptable as a conclusory label, but it does not obviate the need for a method of analysis. This criticism is entirely consistent with the 'political questions' approach under *Baker v Carr*, which found that the question should be analysed by determining whether there is, among other factors, 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'[28]

Absent grounding in such a richer approach, such a distinction is liable to be applied in an inconsistent and unfair manner. This occurred with the recommendation of the Donoughmore Committee in 1932 that judges identify issues as 'judicial', 'quasi-judicial' and 'administrative,' a framework that Stanley de Smith later observed to have been used 'loosely and without deliberation' and 'as a contrivance to support a conclusion reached on non-conceptual grounds.'[29] The same problem has rendered all but obsolete the doctrine of *actes de gouvernement* in French administrative law.[30] Many other well-worn examples, such as the rights/privileges and jurisdictional/non-jurisdictional error distinctions, make the point equally well.

[25] *A and others; X and others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [93] (Lord Bingham); *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 [32]; see also, *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 (HL) 544 (Lord Keith, dissenting).

[26] 369 US 186 (1962).

[27] M Loughlin, *The Idea of Public Law* (OUP, Oxford 2003) (on the morality/politics distinction); see N Barber 'Professor Loughlin's Idea of Public Law' (2005) 25 OJLS 157–67, 158–65.

[28] *Baker* (n 26) 217.

[29] *Report of the Committee on Ministers' Powers* (Chair: Earl of Donoughmore) Cmnd: 4060 (1932). SA de Smith, *Judicial Review of Administrative Action* (4th edn Stevens, London 1980) 58–9. See also, C Harlow and R Rawlings, *Law and Administration* (2nd edn Butterworths, London 1997) 31–4.

[30] M Virally, 'L'introuvable acte de gouvernement' (1952) Revue de Droit Publique 317–58; R Chapus, *Droit administratif général* (12th edn Editions Monchrestien, Paris 1998) 871–8 (saying that the expression *actes politiques* 'n'est guère en usage'). See also, G Peiser, *Droit administratif général* (23rd edn Dalloz, Paris 2006) 190–2 (claiming that the doctrine is contrary to the principle of legality, which has gradually superseded it); LN Brown and JS Bell, *French Administrative Law* (5th edn OUP, Oxford 1998) 161–5.

B. *The Principle/Policy Distinction*

A number of judges, and in particular Lord Hoffmann, have also sought to structure judicial restraint by reference to a distinction between principle and policy.[31] The implication is that courts are the forum of principle and that policy is to be decided by democratically accountable bodies. Such judicial uses of the distinction are often thought to have their pedigree in Ronald Dworkin's articulation and defence of the idea, the original statement being as follows:

> [A] 'policy' [is] that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community .... [A] 'principle' [is] a standard that is to be observed, not because it will advance ... an economic, political, or social situation seemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.[32]

Dworkin advanced this thesis as a complement to his 'rights as trumps' model, in part to help illustrate the intuition that majoritarian preferences cannot override rights. The familiar upshot of the analysis is that courts should decide cases on principle, and that policy matters are for accountable bodies and not courts. The distinction is fairly viewed as formalist because (a) it posits a rigid division of decision-making functions as an a priori truth (rather than as a working hypothesis), and (b) the line-drawing exercise itself suffers acutely from the vice of formalism.

The criticism of this idea is so deep and trenchant that one could be forgiven for thinking another round is unnecessary.[33] But as the decided cases show, it still is. And, furthermore, the problems with this distinction illuminate what is promising in the institutional approaches I will shortly turn to elaborating.

[31] *R (on the application of Pro Life Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 [76] (Lord Hoffmann); *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [76] (Lord Hoffmann); *Huang v Secretary of State Home Department* [2005] EWCA Civ 105, [2006] QB 1 [53]. The suggested approach was not followed in the House of Lords. See also, *Bushell v Environment Secretary* [1981] AC 79 (HL) 98 (Lord Diplock) and 105–6, 115 (Viscount Dilhorne); *Report of the Committee on Administrative Tribunals and Inquiries* (Chair: Oliver Franks) Cmnd. 218 (1957) at [288]; see also, C Gearty, *Principles of Human Rights Adjudication* (OUP, Oxford 2004) 121–2.

[32] *Taking Rights Seriously (*Harvard University Press, Cambridge, MA 1978) 22, and see also his discussions at 84–5, 90–100, and especially his 'Reply to Critics' at 294–330 (reply to Kent Greenawalt), as well as his reply to Greenawalt in M Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, London 1984) 263–8; *A Matter of Principle* (Harvard University Press, Cambridge, MA 1985) ch. 3; *Law's Empire* (Harvard University Press, Cambridge, MA 1986) 221–4, 243–4, 310–2, 338–9.

[33] K Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' 75 Columbia L Rev 359–99 (1975); 'Dworkin's Rights Thesis,' 74 Michigan L Rev 1167–99 (1976); K Greenawalt 'Policy, Rights, and Judicial Decision' 11 Georgia L Rev 991–1053 (1977) (Dworkin replies to this piece in *Taking Rights Seriously*, ibid 294–330); N MacCormick, *Legal Reasoning and Legal Theory* (OUP, Oxford 1978) 259–64; J Bell, *Policy Arguments in Judicial Decisions* (OUP, Oxford 1983) 207–13; M Weaver, 'Is a General Theory of Adjudication Possible? The Example of the Principle/Policy Distinction' (1985) 48 MLR 613–43, esp. at 642–3; EW Thomas, *The Judicial Process* (CUP, Cambridge 2005) 195–201; D Kyritsis, 'Principles, Policies and the Powers of Courts' (2007) 20 Canadian J of L and Jurisprudence 1–19; A Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G Huscroft (ed.) *Expounding the Constitution: Essays in Constitutional Theory* (CUP, New York 2008) 184–215, 194–200.

Dworkin's distinction appears to suffer from three general problems: conceptual difficulties, descriptive inaccuracy and negative consequences. As to the first, one conceptual difficulty is the role played by consequences in his theory. Many have understood him to be saying that judges will determine questions on principle, as matters of fairness and justice, and not yield to arguments about consequences or utility. He accuses his critics of misunderstanding him on this point: judges are allowed fully to consider consequences in defining the requirements of principle.[34] Yet his supporters also often miss this nuance.[35] He ultimately claims that the difference is 'between two kinds of questions that a political institution might put to itself, not a difference in the kinds of facts that can figure in an answer' and that an argument of principle may be 'thoroughly consequentialist in detail.'[36] But, if so, then rights look increasingly less like trumps.[37] This lack of clarity on the role of consequences has led legal theorists to argue that Dworkin's definition is highly stipulative and thus liable to confuse the reader, 'if not the author himself'.[38]

Another conceptual problem is the rigid allocation of decision-making functions and methods he proposes between courts and other institutions.[39] It is neither descriptively accurate nor politically desirable. The truth is that judges consider both types of reasons (as illustrated further below), and so for that matter do legislatures.[40] And, further, we want each of them to consider both. Any view to the contrary will ultimately lead to tedious and strained interpretations of what 'principle' and 'policy' actually are. Dworkin's view of what constitutes a matter of principle is very expansive (one I and many liberal egalitarians would agree with), but others will take a much more restrictive view. The debates between such camps will be intractable.

The second general problem with the distinction is that it is not descriptively accurate. This weakens it conceptually, as noted. But it is also a matter of justice. It is unfair for judges to employ the distinction selectively. The problem of descriptive inaccuracy can be seen in the uneasy way Dworkin manages the many counter-examples presented by authors such as Greenawalt.[41] Dworkin's replies, to borrow his own (unimpeachable) prose from another context, have 'the artificiality and strain of theories that defenders of a sacred faith construct in the face of embarrassing evidence'.[42] In a number of cases, he rejects the

[34] *Taking Rights Seriously* (n 32) 294.
[35] S Guest, *Ronald Dworkin* (2nd edn Edinburgh University Press, Edinburgh 1997) 50–1.
[36] *Taking Rights Seriously* (n 32) 297.
[37] See e.g. ibid 309.
[38] *MacCormick* (n 33) 259; see also, 'Note: Dworkin's Rights Thesis' (n 33) 1179 (accusing the author of 'conceptual gerrymandering').
[39] *Taking Rights Seriously* (n 32) 315–7; *Ronald Dworkin and Contemporary Jurisprudence* (n 32) 265, 267; *A Matter of Principle* (n 32) ch. 3 generally, but esp. 77; *Law's Empire* (n 32) 221–4, 243–4.
[40] The best elaboration of this argument is in *Kyritsis* (n 33) 9 ff.
[41] See generally (n 33), and also the many examples provided by Bell and Weaver.
[42] *Justice in Robes* (Harvard University Press, Cambridge, MA 2006) 212.

reasoning of the courts.[43] In others, he offers what appears like tedious and counter-intuitive reinterpretations of the judges' reasoning to render it consistent with his own theory.[44]

The problem of counter-examples has only strengthened since these early critiques were published. It is now becoming increasingly common for there to be an explicit limitation of rights claims. The most obvious example is the proportionate limitations of human rights.[45] Another is the recognition of substantive legitimate expectations in English law, where the court will weigh 'the requirements of fairness against any overriding interest relied upon for the change of policy'.[46] The question of whether the recognition of a common law duty to give reasons for administrative decisions would lead to undue ossification of bureaucratic discretion provides yet another example.[47] And yet another concerns the negligence liability of public authorities, where it is patently clear that policy concerns can negate any prima facie duty of care.[48]

Some might argue that the principle/policy distinction is meant to *prescribe* rather than *describe* judicial conduct. This would be notably different from what Dworkin claimed. But, furthermore, there is little to think that the cases constituting counter-examples above *should* be decided differently. Suggesting that principle alone resolves such issues would be a gross oversimplification of how to respond to the complex constellation of interests in such cases. Such a proposal would exemplify the vice of formalism.

The third general problem with the principle/policy distinction is that it produces negative consequences. One such consequence can be called the *polarizing effect*. The distinction encourages the judicial view that a matter is either fully within the province of courts, the 'forum of principle,' or wholly without it. The distinction does not tolerate degrees as a concept (though some have tried in my view unpersuasively to use it this way).[49] An issue in the Dworkinian scheme is either a matter of principle, or of policy, with no twilight admitted between them. This raises the problem of judicial hubris on some issues, and judicial passivity on others. Though only few could accuse Dworkin of promoting judicial passivity, or Gearty of promoting judicial hubris, both can take responsibility for promoting a doctrine that predictably can and has led to both results.

[43] *Taking Rights Seriously* (n 32) 309; *Matter of Principle* (n 32) 76, 100 (saying that if Jerry Mashaw's claim that the US Supreme Court's *Matthews v Eldridge*, 424 US 319 (1976) brought a utilitarian balancing test into certain due process claims, which it certainly did, then 'the court was wrong').

[44] *Taking Rights Seriously* (n 32) 296, 299, 306–7, 308–10; *A Matter of Principle* (n 32) 94. On the relevance of third party interests, compare Restatement (Third) of Torts, s 942.

[45] *Allan* (n 4); J Jowell, 'Judicial Deference: servility, civility or institutional capacity?' [2003] PL 592–601 at 593–4.

[46] *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 [57], [83]–[89].

[47] See PP Craig, *Administrative Law* (5th edn Sweet & Maxwell, London 2004) 436–44; *Harlow and Rawlings* (n 29) 522–8.

[48] C Booth and D Squires, *The Negligence Liability of Public Authorities* (OUP, Oxford 2006) 165–228.

[49] See *Gearty* (n 31) 221–2. I think Gearty uses the distinction much the way the law/politics distinction is used above, and it therefore suffers from the same problems.

The other negative consequence is unworkability and inconsistency.[50] The distinction has been applied differently by the House of Lords and Dworkin even to the same disputes or types of dispute. For instance, Dworkin says that the division of responsibilities he outlines is fully consistent with the decision in the House of Lords in *Bushell v Secretary of State for the Environment*.[51] The case involved a challenge in a planning inquiry to the Minister's refusal to disclose for cross-examination the contents of a statistical survey it used to plan a motorway. While Dworkin found it uncontroversial that the decision of 'whether to build a highway in a particular direction is . . . a matter of policy,'[52] the House of Lords, in contrast, distinguished between 'general policy', which they held unreviewable in that context, with questions more reviewable, such as 'what exact line the road should follow'.[53] Furthermore, the House of Lords found that even in cases of general policy, there was a duty to be fair to all concerned and that the content of this duty varied depending on various contextual factors.[54] Another example is presented by Lord Hoffmann's finding in *Begum (Runa) v Tower Hamlets*[55] that the rule of law requires that adjudications of private rights be decided by judges, and that this '*basic principle* does not yield to *utilitarian arguments* that it would be cheaper or more efficient to have these matters decided by administrators'.[56] This is clearly rooted in the Dworkinian idea of principle and its resistance to collective welfare and efficiency arguments. He went on: '[b]ut utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare.'[57] This dichotomy directly conflicts with Dworkin's own view on the same question. While Dworkin criticized the US Supreme Court's finding in *Mathews v Eldgridge*[58] on a very similar issue, Lord Hoffmann quoted the majority opinion with approval.[59] In that case, the Supreme Court found that the due process clause did not guarantee someone a right to an evidentiary hearing before the termination of his disability benefits. Dworkin found that the question in *Mathews* was a question of principle, and that it would be a 'serious mistake' if the court allowed a 'utilitarian analysis.'[60] If Lord Hoffmann and Ronald Dworkin do not have the combined brilliance to agree on the application of such a distinction, the conclusion that it is unworkable in practice looks rather safe.

[50] This is the central point in *Weaver* (n 33) 642–3; see also, *Bell* (n 34).
[51] [1981] AC 75.
[52] *A Matter of Principle* (n 32) 78.
[53] *Bushell* (n 51) 97–8, 108–9, 121–3.
[54] Ibid 95 (Lord Diplock).
[55] [2003] UKHL 5, [2003] 2 AC 430.
[56] Ibid [42] (emphasis added).
[57] Ibid [43]. For a critique, see *Craig* (n 48) 768–9.
[58] See e.g. (n 43).
[59] *A Matter of Principle* (n 32) 100–01; *Begum* (n 55) [45].
[60] *A Matter of Principle* (n 32) 100.

C. *Justiciability*

The idea of justiciability is a commonly employed concept for demarcating judicial restraint. In his important essay on the topic, Geoffrey Marshall explains that the term 'justiciability' has a fact-stating sense and a prescriptive sense.[61] The idea of a 'fact-stating' sense is that a claim may be procedurally unenforceable, regardless of the inherent amenability of the issue to judicial review. Questioning proceedings of Parliament is a good example, as was the non-reviewability of prerogative powers prior to the *GCHQ* case.[62]

The prescriptive sense of justiciability refers to 'the aptness of a question for judicial solution'.[63] Various authors have further broken down this prescriptive sense of justiciability into two categories, best captured by Lorne Sossin's terminology of institutional capacity and institutional legitimacy.[64] Institutional capacity concerns whether there are judicially discoverable and manageable standards for resolving the issue.[65] Polycentric issues, and issues whose resolution requires significant expertise, are commonly regarded as unsuitable for judicial resolution in precisely this way. Institutional legitimacy, in contrast, refers to the normative political legitimacy of the judiciary as an institution for resolving the question. Many issues are said to be best left to politically accountable branches of government, regardless of judicial capacity considerations.

The concept thus has dimensions of procedure, capacity and legitimacy, any one of which may colour an issue as non-justiciable. Thus conceived, it appears that the justiciability question asks, or *could be regarded as asking*, essentially the same or very similar question to the institutional approaches discussed in Section 3 below. If so, why is Murray Hunt so critical?

One source of confusion may be the ambiguous usage of the term. Justiciability has variously been described as a property of disputes,[66] areas,[67]

[61] G Marshall, 'Justiciability' in AG Guest (ed.), *Oxford Essays in Jurisprudence* (OUP, Oxford 1961) 265, 267–8.

[62] Bill of Rights 1689; s 3 Parliament Act 1911; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

[63] *Marshall* (n 61) 269.

[64] L Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell, Toronto 1999) 233 ff; see also, DJ Galligan, *Discretionary Powers: A Study of Official Discretion* (OUP, Oxford 1986) 241; *Booth and Squires* (n 48) 33–41.

[65] *Baker v Carr* (n 26) 217 (Brennan J); *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888 (HL) 938 (Lord Wilberforce); *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 22, [2002] 2 AC 883 [24]–[26] (Lord Nicholls).

[66] *Marshall* (n 61) 56 (citing Lord McDermott's usage); R Summers, 'Justiciability' (1963) 26 MLR 530–8, 531.

[67] *R (Douglas) v (1) North Tyneside MBC and (2) Secretary of State for Education and Skills* [2003] EWCA Civ 1847, [2004] 1 WLR 2363 [62] (warning that 'the discretionary area of resource allocation . . . is not justiciable'.); *Pro Life Alliance* (n 31) [44] (Lord Walker, mentioning '"holistic" policy areas which are not readily justiciable'). See also the judgments of Lord Hoffmann in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42 [70] (priorities in water management) and *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 [57] (national security) and *R v Jones and another* [2006] UKHL 16, [2007] 1 AC 136 [67] (power to make war).

decisions,[68] claims,[69] acts[70] and rights.[71] All these uses are unduly broad. Marshall correctly observed that '"Clearing a slum", "Implementing a social policy", "Extinguishing private rights", "Resolving a dispute between parties" are . . . all possible descriptions from different standpoints of what may be the same process.'[72] In this sense, Hunt's critique of what he calls the 'spatial approach'—the tendency to hive off areas of decision-making, such as national security or resource allocation—is justified, and in this Allan agrees.[73] Both authors call for a more nuanced, contextual approach. However, the idea could be, and in fact often is, applied differently. One could argue that the idea should properly apply only to discrete legal issues or questions, understood in their narrow context. In fact, many judges use the term in precisely this careful way,[74] as do scholars such as Lorne Sossin and Robert Summers.[75]

I nonetheless agree that justiciability provides an inappropriate model of judicial restraint because it presents three significant practical problems. The first is that, regardless of whether it is *necessarily* tied to the spatial approach, it is highly vulnerable to such an interpretation. Recasting the doctrine would be to swim against the tide. It *is* viewed as different from the idea of deference or judicial restraint by several commentators[76] and judges.[77] Using it thus constitutes an ongoing risk.

The second concern is the categorical nature of a finding of non-justiciability.[78] The precedential force of a non-justiciability finding can be extremely strong and potentially sweeping. It is a rather nuclear option. When taken, the fact-stating and prescriptive senses of justiciability combine in an insidious way, for once a judge declares something non-justiciable on prescriptive grounds, a decision-making power can become so in the procedural or fact-stating sense. This creates zones of legal unaccountability that can only be

[68] *Carty v Croydon LBC* [2005] EWCA Civ 19, [2005] 1 WLR 2312 [21] (Dyson LJ); see also, P Cane, *Administrative Law* (4th edn OUP, Oxford 2004) 54; H Woolf, J Jowell, AP Le Sueur, *de Smith, Woolf & Jowell's Principles of Judicial Review* (Sweet & Maxwell, London 1999) 169.

[69] *Booth and Squires* (n 48) 29.

[70] *Cane* (n 68) 54.

[71] *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) [78].

[72] *Marshall* (n 61) 269.

[73] M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, Oxford 2003) 339, 346–8; *Allan* (n 4) 671, 672–3.

[74] *Jackson and Others v Her Majesty's Attorney* General [2005] UKHL 56, [2006] 1 AC 262 [110] ff (Lord Hope); *Kuwait Airways* (n 66) [26] (Lord Nicholls); *Barrett v Enfield LBC* [1999] UKHL 25, [2001] 2 AC 550 at 571 (Lord Slynn); *Canada (Auditor General) v Canada Minister of Energy, Mines & Resources* [1989] 2 SCR 49 (SCC) 90–1 (Dickson CJ); *Buttes Gas* (n 65) 938 (Lord Wilberforce).

[75] *Sossin* (n 64) 236–8; *Summers* (n 66) 535–7.

[76] In addition to *Hunt* (n 74), see D Dyzenhaus, 'The Politics of Judicial Deference' in M. Taggart (ed.), *The Province of Administrative Law* (Hart, Oxford 1997) 286; *Cane* (n 68) 58; Dworkin, *A Matter of Principle*, (n 32) 101; JA King, 'Justiciability of Resource Allocation' (2007) 70 MLR 197–224.

[77] See generally, Lord Steyn, 'Deference: A Tangled Story' [2005] PL 346–59; *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA) 556 (Bingham MR); see also, *Operation Dismantle v The Queen* [1985] 1 SCR 441 (SCC) [51]–[54] (Wilson J).

[78] C Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' 141 U Penn L Rev 1–148, 27 (1992).

altered slowly over time or at the behest of a new legal instrument. In fact, this is a problem common to most types of conceptual formalism.

The third and related problem is that the concept has the polarizing effect already discussed earlier in connection with the principle/policy distinction. On the one hand it creates zones of legal unaccountability and, on the other, it has nothing to say about the appropriate degree of judicial restraint when a matter clearly is justiciable. It rather commends judicial hubris. If an issue is justiciable, is it not the province of the judiciary to adjudicate it? The common answer here is that some restraint may still be needed when adjudicating justiciable issues, and this very answer further confirms the poverty of the approach for the task at hand.

3. *Institutional Approaches*

Non-doctrinalism looked particularly troubling after both the *Lochner*[79] era in the United States and Diceyan inspired English judicial hostility to the alleged new despotism of the welfare state. Formalism too lost favour both because its pretensions to truth were philosophically unsound and it gave a veneer of objectivity to a number of inarticulate major premises. Institutional approaches arose out of the awareness of these two problems. In this section, I seek to explain part of its background before turning to defining and refining its general features. I will then discuss how institutionalism has led scholars down two different paths, one taking a restrictive view of the judge's role, and the other an expansive one that preserves much of Allan's concerns over context.

A. *The Rising Tide of Institutionalism*

The terminology of 'institutional competence' can be traced directly to the legal process school of jurisprudence, a post-war American school of thought based at Harvard Law School. It was guided chiefly by Henry Hart, Albert Sacks and Lon Fuller. In the materials for their legal process course, Hart and Sacks elaborated three general themes: the belief in courts as a forum of reason, rational argumentation and neutral principles; the centrality of process in ensuring the integrity of reasoned elaboration, which was the key to 'sound' decision-making; and the principle of 'institutional settlement', namely, that citizens have a duty to follow decisions 'duly arrived at' by the state.[80] For his part, Lon Fuller developed a theory of the role of adjudication in his

[79] *Lochner* (n 13).

[80] See HM Hart Jr and AM Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, Westbury, NY 1994) 102 ff. See generally, Duxbury (n 19) ch 4. On 'institutional settlement', see *Hart and Sacks* at 1–9, and the introductory essay by Eskridge Jr and Frickey, xcvi.

posthumously published 'Forms and Limits of Adjudication,' in which he sought to identify the distinguishing features of adjudication (chiefly, the participation by affected parties in adjudication by way of presenting proofs and reasons for a decision in one's favour).[81] He thereby also identified subject-matter that is unsuited for courts, most notably polycentric tasks.

The concept of relative institutional competence was most clearly imported into English law through the influential writings of Jeffrey Jowell, who had himself conducted advanced research in Boston working in part with Hart and Fuller.[82] Jowell has revived interest in the concept of relative institutional competence in more recent work, largely to address the question of deference under the Human Rights Act 1998. This work was cited with approval by Lord Bingham in his leading speech in the *A and Others* case.[83]

Although the allure of the more deferential forms of legal process faded during the Warren Court-era optimism, there has been an American revival in the idea of institutional competence. A sophisticated example is found in the work of Neil Komesar.[84] He argues that there is a pervasive vice in legal scholarship of viewing the merits of courts in 'single-institutional' terms: one of focusing on the need (or 'demand-side arguments') for courts in a certain area, or in contrast the deficits of courts in a certain area. In his view, the appropriate question is which institution is the best among the available alternatives for resolving a given problem, a question that requires a comparative rather than purely demand-led approach. A similar set of concerns is evident in the work of Cass Sunstein on legal reasoning and later on judicial minimalism, in both of which he argued in favour of case-by-case, casuistic reasoning instead of grand theorizing.[85] In a co-authored piece, Sunstein and Adrian Vermeule proclaim an 'institutional turn' in legal interpretation.[86]

In many ways, institutional competence is merely a way of describing what courts are good and (more often) bad at doing. This type of analysis has existed in Britain since the early advent of functionalism in public law. Functionalism itself built upon legal realist and philosophical pragmatist trends in American jurisprudence and philosophy. Thus while the terminology of 'institutional competence' and much useful analysis has developed across the

[81] L Fuller, 'The Forms and Limits of Adjudication,' 92 Harvard L Rev 353–409 (1978–79).

[82] See JL Jowell, *Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action* (Dunellen Pub Co, New York 1975); 'The Legal control of administrative discretion' [1973] PL 178–220; 'Judicial Deference and Human Rights: A Question of Competence' in P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (OUP, Oxford 2003) 67; see also, *Jowell* (n 46).

[83] See e.g. (n 25).

[84] *Imperfect Alternatives*: *Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press, Chicago 1997); *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (CUP, Cambridge 2001).

[85] CR Sunstein, *Legal Reasoning and Political Conflict* (OUP, New York 1996); *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, Cambridge, MA 2001).

[86] CR Sunstein and A Vermeule, 'Institutions and Interpretation' 101 Michigan L Rev 885–951 (2003).

Atlantic, there is no reason to think the underlying concerns are in any way foreign.[87]

The increasing Anglo-Canadian attention devoted to the idea of judicial deference stems from a quite similar set of concerns. Commentators such as Richard Clayton, Guy Davidov, David Dyzenhaus, Richard Edwards, Murray Hunt, Aileen Kavanagh, Julian Rivers and Lord Steyn see the refined concept as providing an alternative to outdated forms of justiciability and other instances of conceptual formalism.[88] One finds within this same family of ideas the notion of a discretionary area of judgment developed by Lord Antony Lester and David Pannick.[89] Under the various deference approaches, the authors suggest essentially three key features. The first is that judges should take an expansive view of what is reviewable and justiciable, encapsulated by Etienne Mureinik's idea of a 'culture of justification'.[90] The second is that judges should assign significant *weight* to the views of other decision-makers. The third, though not universal feature, is that the analysis of deference should be structured somehow by reference to principles or factors.

Along the same path broken by Murray Hunt's important essay, Aileen Kavanagh has now provided the most sophisticated analysis. She links the judicial concern for deference to a concern 'about the limits of their institutional role in the constitutional framework'.[91] For Kavanagh, deference 'is a matter of assigning weight to the judgment of another, either where it is at variance with one's own assessment, or where one is uncertain of what the correct assessment should be'.[92] A court ultimately may wish to defer for *epistemic reasons* or for *reasons of authority*. She differs between minimal deference, which is always owed, and substantial deference, which is to be earned by the decision-maker and only when the judge recognizes her 'institutional shortcomings' in respect of an issue. The three main situations where this occurs are when there is a deficit of (a) institutional competence, (b) expertise or (c) institutional or democratic legitimacy.[93] She also identifies situations in which, although there may be no deficit in any of these areas, there may be *prudential* reasons to defer. Kavanagh's analysis is entirely apt and much richer

[87] *Harlow and Rawlings* (n 29); see also, M Loughlin, *Public Law and Political Theory* (Clarendon Press, Oxford 1992) chs 6–8.

[88] *Dyzenhaus* (n 76); G Davidov, 'The Paradox of Judicial Deference,' 12 National J of Const'l L 133–164 (2001); R Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859–882; *Hunt* (n 73); *Lord Steyn* (n 77); R Clayton, 'Principles for Judicial Deference' [2006] JR 109–35; J Rivers, 'Proportionality and the Variable Standard of Review' [2006] CLJ 174–207; *Kavanagh* (n 33).

[89] A Lester and D Pannick (eds), *Human Rights: Law and Practice* (2nd edn Lexis-Nexis, London 2004) [3.19]. I agree with Hunt's critique (n 73) of both the terminology and the authors' list of factors, though Lester and Pannick think the sole difference is one of terminology.

[90] See D Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 South African J of HR 11–37.

[91] *Kavanagh* (n 33) 190.

[92] Ibid 185.

[93] Ibid 192 ff.

than this brief statement, and the contextual institutional approach I develop further travels in precisely the same direction.

B. *General features of institutional approaches*

The following account is in large part reconstructive. Many of its features can be found in the works discussed in the preceding section. However, it may and does depart from the views of the particular authors and, to the extent it does, it is my own elaboration and refinement of the approach.

(i) *Acceptance of uncertainty and judicial fallibility*

Institutional theories accept that in many forms of litigation judges will need to make choices that will be based on assumptions that might turn out not to be true. They may be unsure of the reliability of evidence, expert witness credibility or the likely effect of the judgment on patterns of behaviour. The concern over the judicial capacity to adjudicate 'social' or 'legislative' facts—namely those recurrent patterns of social behaviour upon which policy is to be based—is a case in point.[94] Other familiar examples would include judgments about whether a ruling will generate floods of new claims or create market instability; whether a new common law rule—such as a duty to give reasons—might render administration unworkably difficult; whether imposing a duty of care on a public authority will adversely affect service provision; or whether a given period of pre-trial detention is required to carry out effective counter-terrorism operations. Uncertainty is compounded when the impact of the judgment might or will be widespread. Thus, when the validity or convention compatibility of legislation is in question, the concerns become even more acute as the legislation typically affects many persons. Institutional approaches emphasize that judges have certain *epistemic* deficits in evaluating such effects, and that they should be aware of them when deciding cases.

The preoccupation with uncertainty is not limited solely to impact. One of the most significant issues in contemporary political philosophy, especially liberalism, is how to account for disagreement about justice. John Rawls calls this type of problem the 'fact of reasonable pluralism', whereas Jeremy Waldron calls it 'reasonable disagreement'.[95] Some acceptance of this idea leads (some) institutionalists to be wary of both highly abstract theorizing about rights and with judges handing down sweeping judgments because it is 'simply the right thing to do'. Yet this scepticism can lead to different conclusions, and those

[94] KC Davis, *Administrative Law Treatise* vol 2. (West Publishing Co., St Paul, MN 1958) 353 [15.03]; see also, *A and Others* (n 25) [29].

[95] *Waldron* (n 10); J Rawls, *Political Liberalism* (Columbia University Press, New York 1996); J Habermas, *Between Facts and Norms* (transl by W Rehg) (Polity Press, Cambridge 1996); A Gutman and D Thompson, *Democracy and Disagreement* (Belknap Press, Cambridge, MA 1996). See also JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, MA 1980) ch 3.

who give weight to institutional considerations may disagree quite radically on the extent to which reasonable disagreement should affect the judicial role. Waldron based his critique and rejection of constitutional judicial review of legislation on these grounds. However, Sunstein rather gives weight to this idea by suggesting that adjudication of rights can proceed on the basis of incompletely theorized agreements; that is, that judges could agree on desirable outcomes rather than on deep metaphysical theories.[96] Both Joseph Raz and Aileen Kavanagh believe that there may be good instrumental reasons to have deep disagreement about certain kinds of questions (e.g. rights) resolved by judges.[97] More sanguine still is Rawls' optimistic suggestion in his *Political Liberalism* that people can achieve an overlapping consensus on basic questions of justice within a framework of public reason, in respect of which he found the Supreme Court to be an 'exemplar' institution. All these treatments show that accepting uncertainty in respect of morality and justice does not necessarily close the door to constitutional judicial review. But it does clearly imply some measure both of judicial humility and respect for the moral authority of representative institutions.

(ii) *Concern with consequences and systemic effect*

Due to the problem of uncertainty and disagreement, the consequences of a judgment are of direct concern to institutionalists. The number of people adversely or beneficially affected in concrete terms (e.g. hearings, prison releases, halted deportations, delay, increased costs, ossification etc.) speaks volumes. The vindication of principle alone is worth something less, though it is not irrelevant. Consequences are not important because institutionalists are necessarily consequentialists. It is rather that in the face of uncertainty over institutional capacity and systemic impact, reports of positive or negative consequences tend to appeal neutrally to *both* deontological or consequentialist moral theories. They therefore provide a helpful and often uncontroversial metric by which we can evaluate the success of the judicial role. This is the essence of Sunstein's argument for incompletely theorized agreements: '[t]he distinctly legal solution to the problem of pluralism is to produce agreement on particulars, with the thought that often people who are puzzled by general principles, or who disagree on them, can agree on individual cases'.[98] For this reason, institutional approaches ought to be concerned with the empirical study of law familiar to the law and society and socio-legal studies fields of scholarship.

[96] See e.g. (n 85) (both works address this theme).

[97] J Raz, 'Disagreement in Politics,' 43 Am J Jurisprudence 25–52, 45 (1998); A Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 Law and Philosophy 451–86, 466.

[98] *Legal Reasoning and Political Conflict* (n 85) 47.

(iii) *Rights as prima facie claims subject to balancing*

Given uncertainty, the weight given to consequences, and the rejection of formalism, concerns over fairness, the rule of law and rights tend to become principles or factors that are given considerable weight but are ultimately subject to balancing against competing concerns. Thus, institutionalists often (though not always) reject the idea that rights are trumps, or side-constraints or that they demarcate no-go zones for legislative action. Institutional approaches to restraint are sceptical about the promise of a priori theorizing about the essence of rights. They rather see the process of rights adjudication as a form of accountability in which a challenged decision is filtered through a judicial process of reasoned, public justification according to a set of legal and moral standards. Judging may be one kind of politics, on this view, but one with its own institutional features that provide particular benefits in terms of how arguments are advanced and responded to. In my view, the most sophisticated articulation of such an idea is found in Robert Alexy's *A Theory of Constitutional Rights*.[99] According to Alexy, rights are principles, and principles are *optimization requirements* that require any decision adverse to them to be justified in a particular way (namely, by conformity with the principle of proportionality). Alexy's theory shows how one can reject rights-essentialism or conceptualism without rejecting the idea of strong judicial protection of human rights. At the same time, however, his theory also appears to stand in clear need of an institutional theory of restraint of the very sort being elaborated here.[100]

This approach to rights adjudication tends to take an expansive view of what interests are to be protected under the rubric of a constitutional right. So there is little hand wringing over what liberty or free expression 'really' are, in their essential nature. Rather, under this approach, it is uncontroversial whether feeding pigeons in a square is an exercise of liberty and pornography is an exercise of expression. The balancing stage allows the court to acknowledge that the interest is engaged but that regulation of it is permissible. For similar reasons, institutionalists are less absolutist about rights and this makes them less uneasy about positive rights.[101]

(iv) *Inter-institutional comity and collaboration*

Recognizing the limitations and legitimacy of the judicial process leads quite naturally to courts viewing their merits in comparative light. Kavanagh captures this in the idea of *interinstitutional comity.*[102] I would suggest that to this idea we

[99] (trans J Rivers, OUP, Oxford 2002); see the illuminating review by M Kumm, 'Review Essay: Constitutional rights as principles: On the structure and domain of constitutional justice' (2004) 2 Int'l J Const'l L 574–96.

[100] *Kumm*, ibid 588; *Rivers* (n 88) (also offering a solution to this issue).

[101] See *Alexy* (n 99) ch 9.

[102] *Kavanagh* (n 33) 188.

must join that of collaboration (or complementarity). Comity can exist between two wholly separate institutions—such as the respect accorded by one national court to the judgment of another. But the institutional approach also takes the view that the three primary branches of government essentially collaborate in the general promotion of commonly accepted public values such as fairness, autonomy, welfare, transparency, efficiency, etc. Parliament, the executive and courts are on this vision part of a joint-enterprise for the betterment of society. Conflicts between them are subsumed within one vision of governance. Tension and disagreement between institutions is not regarded as a cacophonous power struggle, but rather as part of the dynamic process of give and take that the public chooses as part of the complete package of modern democratic government. This may just be a different way of reiterating old observations about the value of checks and balances. And clearly one could pay lip service to this idea while advocating a highly interventionist judicial role. But the idea ought to have and in the hands of institutionalists normally does have certain practical implications. Judges are more humble on this vision than under non-doctrinal approaches and the vision of the distribution of decision-making functions is less compartmentalized and is rather more fluid than formalist ones. Tasks may be addressed in a multi-institutional rather than in the single-institutional fashion envisaged by the more rigid functionalist and formalist approaches. It also means that courts are not the exclusive 'forum of principle' in which legislative pronouncements are viewed as entirely unprincipled and compromised. A better, but of course not uncontroversial, view is the metaphor of institutional or democratic dialogue between courts, the executive and Parliament. On this view, courts take part in an iterative process within which all branches of government contribute to sound decision-making.[103] Whether the judicial review of constitutional rights actually meets the lofty aspirations of this label is a hotly debated question, but that such aspirations are reflected in most institutional approaches is beyond doubt.

The extent to which democratic legitimacy ought to be regarded as a relevant factor is a divisive and controversial issue even among those who accept the legitimacy of judicial review of constitutional rights. Jowell, on the one hand, emphasizes that the Human Rights Act 1998 secured the 'constitutional competence' of the courts in respect of rights and that strong deference to Parliament on legitimacy grounds would be misplaced.[104] Kavanagh, Hunt and Rivers believe that the views of Parliament remain important and relevant.[105] In one sense, there is less distance between these thinkers than one might

[103] See (2007) 45 Osgoode Hall LJ 1–201 for a critical retrospective on the use of this metaphor in Canadian constitutional theory. See also, TR Hickman 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' [2005] PL 306–35.

[104] 'Judicial Deference and Human Rights' (n 82).

[105] *Kavanagh* (n 33); *Hunt* and *Rivers* (n 88).

initially think. I believe they would all agree, as I would, on the following passage from *R v Lichniak* by Lord Bingham:

> [T]he fact that [the statute] represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a social problem is best tackled.[106]

However, their reasons for agreement with this claim may differ. Whereas some would agree on grounds of both institutional capacity and legitimacy, Jowell would do so for reasons of institutional capacity alone. Indeed, he claims that the decision about 'whether the overall benefit of limiting the relevant right is necessary to democracy . . . is for the courts alone . . . .'[107] In agreement with Kavanagh and Hunt, I feel that this statement goes too far. It does seem true to say that the courts do have the last word on this issue under the Human Rights Act 1998. But that is not quite the same as saying that democratic legitimacy is *irrelevant*, and the tenor of Jowell's piece approximates this latter claim. I think that this would fall afoul of the institutional approach. If we accept judicial fallibility in respect of consequences and impact, as Jowell does, can we assume their infallibility with respect to reasoning on moral and political matters? And, if not, is not *some* reliance on the comparative *legitimacy* of representative self-government, warts and all, not a logical response to such judicial uncertainty?

(v) *Incrementalism*

One strategy for judges to deal with all the above is to decide cases in incremental steps. This means deciding cases, where possible, on narrow rather than sweeping grounds, trying where possible to localize the effects of the decision. This is a rational approach to dealing with uncertainty. It preserves a sphere for the executive and Parliament. It is iterative, giving other branches input. And it is experimental, allowing courts to test a solution on a particularized scale and await the results rather than imposing finality on a large area. This is a familiar approach in the common law. Reasoning by analogy, following precedent, and deciding cases on narrow grounds are all familiar tools of the common law judge. Lord Bingham's judgment in *A and others; X and others v Secretary of State for the Home Department* provides a good example of deciding a case on narrow grounds,[108] whereas Lord Hoffmann's more sweeping judgment demonstrates the opposite.

Another less obvious way in which courts employ this form of incrementalism is to adopt vague standards in rights or administrative law adjudication. To say that an official must act 'reasonably' or 'fairly' or with 'due diligence' or 'all deliberate speed' or to 'negotiate in good faith', is essentially to send a message to other branches that they have a margin of latitude but can ultimately be

[106] *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903. This is cited by *Jowell* (n 45) 598, n 22.
[107] 'Judicial Deference and Human Rights' (n 82) 81.
[108] *A and Others* (n 25).

accountable under the judge's gavel. It is thus incremental because it does not confine too greatly the decision-maker's general scope of discretion. Of course, while it may have incremental impact in one way, it may foster litigation and thus create unintended systemic impact in another.[109] Judges must steer safely between these two hazards, as they have done in much of public law adjudication.

The idea of incrementalism has not thus far been highlighted by many commentators in Britain,[110] though Martin Loughlin commends the 'method of prudence' which would involve casuistic, case-by-case and prudential decision-making for many of the same epistemic reasons covered here.[111] In my view, incrementalism is a natural consequence of everything that has been set out above.

C. *Two paths diverge: restrictive versus contextual institutionalism*

People can and seemingly do agree on much of the above while disagreeing about the role of courts in public law adjudication. In fact, there is an almost radical disagreement on precisely this point from *within* the institutional approaches.

(i) *Contextual institutionalism*

Contextual institutionalists are those that believe judges should bear in mind the foregoing considerations during the course of adjudication. They should contextualize each issue and consider institutional factors when attributing weight to the views of other officials or the threat of uncertainty. They believe that judicial discretion can be structured by the use of principles of judicial restraint and that judges can be trusted to balance these occasionally under-represented considerations in the course of adjudication. Contextual institutionalists also believe more in the power of ideas, that there is some intersubjectively stable normative content to the idea of human rights and other public values, and that they express something important and worth protecting. There is weight given to the role of rational argumentation in courts, and some credence given to the capacity of courts to deliver predictable results under those terms. I believe this description fits the theories of a number of those public law scholars and judges who advocate a doctrine of judicial deference at the present time.

(ii) *Restrictive institutionalism*

Others would propose, on the same grounds of institutional competency, retaining bright line rules that lessen the use of judicial discretion, either in certain pre-designated 'areas' (e.g. resource allocation, immigration, national security) or simply as a more general posture of judicial restraint (e.g. political

[109] *Sunstein and Vermeule* (n 86) 912 take a strong view of this problem.

[110] Sunstein's 'minimalism' is quite similar, though in my view the term carries the wrong connotation outside of the United States: see *Legal Reasoning and Political Conflict*, chs 1, 3, 5 and *One Case at a Time*, Part I, both (n 85).

[111] See e.g. (n 27) 148–52, 163.

constitutionalism).[112] The stronger form's advocates are so thoroughly convinced of judicial fallibility and the prominence of uncertainty that they would restrict the role of courts whenever possible. They would put less emphasis on the idea of inter-institutional collaboration, preferring the absolute supremacy of legislatures, which they find more legitimate. They might find the contextual institutionalists naïve for thinking that the process of balancing under expansive notions of justiciability will not lead to an unsustainable proliferation of the institutional competency problems that they have themselves identified. The net social consequences of employing bright-line rules (even if occasionally arbitrary) may be superior to allowing multi-factoral judicial weighing to take place on a case-by-case basis. This argument is made well in the American context in a book by Adrian Vermeule.[113] It appears that the work of political constitutionalists such as Adam Tomkins and Richard Bellamy, and possibly functionalists such as Carol Harlow and Richard Rawlings, would lend strong support to this approach.

These two categories in fact represent points at the opposite ends of a spectrum. Many might refuse to put themselves entirely in one category or another. And those happy to be in one category might disagree with others in the same group. So, some restrictive institutionalists might reject some models of constitutional rights while accepting others, while others might reject them all. They may also take different views on the value of the rule of law. And some contextual institutionalists may advocate contextualism on some issues (e.g. civil rights) while being more restrictive on others (e.g. social rights or national security). Some might fall squarely between the two points of the spectrum. None of this should be surprising, if they all accept the basics of institutionalism. It is to be expected that they have different appraisals of acceptable levels of impact and uncertainty. This spectrum is only a rough heuristic representing two poles.

D. *Measuring the success of institutional approaches*

Because institutional approaches focus on so many variables and are overtly concerned with instrumentality and impact, estimating the value of institutional approaches must be a *dynamic process*. Doctrines (e.g. restrictive or contextual) must be tried, their results analysed and be open to revisitation as circumstances change. Whether courts are a good choice for implementing specific objectives is both geographically specific and temporally specific. Any approach must remain open to review.

[112] JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1–21; A Tomkins, *Our Republican Constitution* (Hart, Oxford 2004); R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, Cambridge 2007).

[113] A Vermuele, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, Cambridge, MA 2006).

This also means that the value of a given institutional approach to judicial restraint depends on its *potential* to bring about desirable or undesirable outcomes. The question is not 'does it work?' but rather 'can it be made to work?' This is true because all the relevant variables can and do change over time. In my view, potential must be assessed by reference to (i) the history and empirical record of judging, both in terms of new the decisions as between parties as well as their systemic effects; (ii) the analytical coherence and instrumental value of any newly proposed legal doctrines (e.g. a theory of deference, the abandonment of a distinction, adoption of new civil procedure rules), by which I mean their ability to improve outcomes; (iii) the prevailing public culture and its likely impact on judging; and (iv) judicial attitudes, both actual and likely. Notably, items (ii)–(iv) can be changed. Scholars and judges invent new doctrines when old ones appear obsolete. Public awareness campaigns and new institutions (e.g. ombudspersons and parliamentary committees) or instruments (e.g. the Human Rights Act 1998) can change public views on values and the need for accountability, just as judicial education and a more representative judicary can improve judging. The evaluation process would have to be dynamic and experimental. If history demonstrates failure, we can tinker with items (ii)–(iv), then try again, in a perhaps more chastened manner.

If the two types of institutionalists are to stay true to the underlying approach, they must meet one another half-way. The restrictive institutionalists must be willing to recognize that history is but one admittedly important (and equivocal) part of the equation, and be willing to experiment further. They have tended to under-emphasize the importance of changing circumstances and principled idealism, of the possibility of fixing what they regard as hopelessly broken. They may be unduly fatalistic. And the contextual institutionalists must in turn not take a Panglossian attitude in the light of persistent failure. They must give weight to the equivocal record of judicial success. They—even as institutionalists—have often not done this.

This is a rich debate and it would be unwise to try to defend one side against the other within the context of this article. Rather, I will aim to further develop the contextual institutional approach so that a true comparison between it and the proposed alternatives can be carried out on another day.

4. *Developing the contextual institutional approach*

The leading problem with the contextual institutional approach is that it gives judges expansive jurisdiction over important questions of the public interest. One often finds a particular tool offered in response to this problem: principles of restraint. These principles would structure the exercise of judicial discretion, and that is the key difference from the non-doctrinal approaches. Using such principles or factors nonetheless raises a number of concerns and questions.

I will address these in the attempt to refine the approach and indicating what work remains to be done.

A. *The nature of legal reasoning under a 'principled approach'*

(i) *Reasoning with principles and factors*

Institutional considerations such as expertise and democratic legitimacy can be stated as principles or factors. Principles will likely have more profound significance and be stated at a higher level of generality, whereas factors may be more mundane and specific. So a statutory indication to consider the jurisprudence of the European Court of Human Rights may be a factor, and the view that respect ought to be accorded to the views of Parliament may be encapsulated in a principle of democratic legitimacy. But both principles and factors have the same same key quality—weight. Since they have weight, they exert a pull on outcomes, but are not decisive. They can both give way to other considerations. They can therefore be contrasted with rules and can to some extent conflict with one another in the circumstances of a given case. Judicial reasoning with both principles and factors is a well-established and much studied part of judging.[114] As used within this approach to restraint, they are perhaps most usefully described as 'guiding standards.' Their purpose is to structure and confine the exercise of judicial discretion where institutional considerations are relevant.

(ii) *Choosing principles*

There have been a number of principles of restraint or deference offered by various judges and scholars discussed in Section 3A above: relative expertise, availability of alternatives for accountability, polycentricity and complexity, nature of the interest or right, democratic legitimacy, whether there has been legislative protection of a vulnerable group, consideration of social science evidence and risk of judicial error. In the United Kingdom, the natural starting point concerning legal interpretation of European Convention rights under the Human Rights Act 1998 is the highly structured set of principles provided by Laws LJ in his minority judgment in *International Transport Roth Gmbh v Secretary of State for the Home Department*:[115]

(a) 'greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure';

[114] Dworkin, *Taking Rights Seriously* (n 32) 22–28; *MacCormick* (n 33), ch.VII; *Alexy* (n 99) ch 3; see also, T Eckhoff, 'Guiding Standards in Legal Reasoning' (1976) 29 Current Legal Problems 205–19; Sunstein, *Legal Reasoning and Political Conflict* (n 85) 28–31.

[115] [2002] EWCA Civ 158, [2003] QB 728 [81]–[87].

(b) 'there is more scope for deference where the "Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified"',
(c) 'greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts'; and
(d) 'greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts.'[116]

This list comprises both principles and factors. It is not free from problems. The first principle is not always warranted—an antiquated or arcane part of an Act may be entitled to less deference than the unequivocal and highly publicized decision of a Minister on a matter of national importance. The second factor seems rather uncontroversial, whereas the third is both vague and reminiscent of formalism. In any case, the potential for variation from this list is clear and some years after the judgment the proposal has still to be applied in any consistent fashion.

Other courts have used principled or factoral approaches to judicial restraint in public law adjudication. For over a decade, the Supreme Court of Canada has replaced the formalistic collateral fact doctrine in administrative law with what it until recently has called the 'pragmatic and functional approach' to determining the correct standard of review of tribunals, and later to administrative discretion. It is a well-known four-part analysis focusing on (i) the existence of an ouster clause, (ii) relative expertise (iii) the purpose of the provision and the Act and (iv) the nature of the problem, specifically, whether it is a question of law or fact.[117] This test is quite evidently oriented towards the needs of administrative law. So far as human rights cases are concerned, Justice Bastarache proposed in the *M v H*[118] case another set of factors for assisting in evaluating judicial deference within the proportionality enquiry under Section 1 of the Charter of Rights. The principles included asking whether (i) the interest is fundamental, (ii) the groups concerned are particularly vulnerable, (iii) the scheme is highly complex and/or expertise is required, (iv) the source or democratic origins of the rule and (v) whether there is a strong role for moral judgments in setting policy.[119] While each of these factors do appear to be relevant to restraint in Canadian caselaw,

[116] Ibid [82]–[87] (citation omitted).
[117] *Pushpanathan v Minister of Citizenship and Immigration* [1998] 1 SCR 982 [26] ff; *Baker v Minister of Citizenship and Immigration* [1999] 2 SCR 817; *Dunsmuir v New Brunswick* [2008] 1 SCR 190 (revisiting and slightly modifying the analysis).
[118] [1999] 2 SCR 3.
[119] Ibid [302] ff.

Bastarache J wrote alone and such principles have not caught on as a freestanding deference test.

One interesting feature of these approaches is that they have tended to vary between different subject matters. This is natural, as the role of the court and the needs of administration and claimants will indeed vary between areas of law. It may even vary between rights or types of rights. This variation is likely to be achieved through combinations of subject-specific factors as well as general principles. This variety, as well as general prudence, also suggests that any list of factors should remain open to review and be non-exhaustive.

In my view, an institutional approach, given all that has been noted so far, would commend the consideration of at least four general principles of restraint: polycentricity (concerning the nature of the effect of the judgment on unrepresented third parties); expertise (concerning the ability of courts to assess particular evidence, estimate the impact of the judgment or question the views of another official); flexibility (concerning the judicial imposition of finality or fettering of an area of administrative or legislative decision-making); and democratic legitimacy (concerned with the problem of legitimacy in the face of judicial fallibility and reasonable disagreement about morality and rights). I do not propose to expound these principles here, but rather turn to an apology for not doing so.

(iii) *Refinement*

Perhaps the greatest need in this field is for the refinement of the principles and factors of restraint that have so far been proposed. It is necessary that we unpack such ideas if they are to serve as guiding standards. If they remain so vague, it is not clear that we have in fact lessened the problem of excessive judicial discretion. The more concrete they are, the better we can structure judicial discretion and direct argument to the crucial issues.

One may illustrate the need for this by reference to three of the principles identified above. Fuller's doctrine of polycentricity still exerts a powerful sway over the English law of justiciability and deference. Yet there are widely acknowledged flaws in the analysis. If it is to be used in public law, it should be elaborated and defended at a deeper level.[120]

The same holds true with the principle that courts should defer to the superior expertise of other decision-makers, something prominent in all discussions so far. The idea of expertise was a central rationale for judicial deference in the post-New Deal era.[121] However, over time it has been subject to a barrage of criticism[122] and American courts have for some time been no longer

[120] Fuller (n 81) 397 ff; JA King 'The Pervasiveness of Polycentricity' [2008] PL 101–24.

[121] See the discussion in JO Freedman, *Crisis and Legitimacy: the administrative process and American government* (CUP, Cambridge 1978) 45.

[122] Ibid 48–52; GE Frug 'The Ideology of Bureaucracy in American Law' 97 Harvard L Rev 1276–388 (1984); L Jaffe, 'The Illusion of Ideal Administration' 86 Harvard L Rev 1183–99 (1973).

willing to 'bow to the mysteries of administrative expertise'.[123] And, furthermore, there are varieties of expertise that need to be identified. A welfare officer's expertise will differ from that of a Minister, whose expertise in turn differs from the expertise of a doctor or an engineer, and is in turn different from expert agencies. And all these are different from ombudsmen and tribunals. Yet all have expertise that call for judicial deference in potentially different ways.

The role of democratic legitimacy is no less problematic. Once we have accepted that it is relevant, the issue becomes what role it should play. What should be made of the process theory of John Hart Ely and the approach of the American Supreme Court in *United States v Carolene Products Company*?[124] What groups should qualify as minorities? Is deliberative democracy and republican theory helpful? To what extent is it plausible to evaluate what Richard Edwards calls the democratic pedigree of a government's measure?[125] These are complicated issues still requiring resolution within the context of a workable model of judicial restraint.

This form of refinement, if done well, must be done in a careful and elaborate way and is therefore beyond the scope of this article.[126] What is prior to the elaboration of such principles is a general outline of the framework within which such principles are to be taken into consideration.

(iv) *Conflict, incommensurability and equilibrium*

There is a strong likelihood that different principles will counsel different outcomes in the context of a single case. This is to be expected. Both conflict and incommensurability are common to both moral reasoning and in any form of adjudication and indeed practical reasoning.[127] The idea is captured succinctly by Waldron's reference to someone looking for the fastest car at the lowest price.[128] There are often conflicts between fairness and efficiency, expression and reputational interests, parents and children in child protection cases, and security and liberty. Incommensurability presents problems but is something that judges are accustomed to dealing with. It is part of the imperfect world of judging, just as intuitive judgments under uncertainty form part of administration and politics, and compromise and intentional ambiguity are part of parliamentary lawmaking and private contractual bargaining.

In some cases, all the factors will point one way. However, where they do not, the degree of conflict will increase the element of legal uncertainty.

[123] *Environmental Defense Fund, Inc v Ruckelshaus*, 142 US App DC 74, 439 F 2d 584, 597 (DC Cir. 1971).
[124] 304 US 144 (1938) (introducing the 'discrete and insular minorities' rationale for stricter review in fn 4); JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, MA 1980).
[125] See e.g. (n 88) 876.
[126] I undertake this task in my doctoral dissertation.
[127] J Raz, *Engaging Reason: On the Theory of Value and Action* (OUP, Oxford 1999) ch 6; *The Morality of Freedom* (OUP, Oxford 1986) ch 13.
[128] 'The Core of the Case Against Judicial Review' (n 10) 1375.

This uncertainty can impede access to justice for claimants seeking advice. I will shortly turn to how practically this might be dealt with, but it is necessary to consider further how this process of balancing might take place. First, it can be hoped that greater refinement of the principles themselves will help settle their application to concrete instances. It ought to be a goal of such refinement that workability and specificity are achieved. Yet where they remain unclear or conflict with one another in a given case, we will be thrown back to the judge's sense of judgment, informed by the submissions of the parties. Thus, second, the judge must try to balance and adjust the application of the various principles and factors, together with an intuitive sense of the justice of their application to the concrete case, all in the attempt to achieve coherence and equilibrium between them. It must be acknowledged that, even though the principles leave room for discretion, the scope of that discretion is still significantly structured by the elaborated principles and factors. While the remaining scope for judgment may still be unsatisfactory for restrictive institutionalists, we have doubtless travelled considerable distance from the expansive non-doctrinal options.

(v) *Complexity and workability*

Institutional approaches ought always to be concerned with systemic impact. It should be clear that the process just laid out can lead to highly complex determinations.[129] If there is to be this form of multi-factoral balancing, what are the 'transaction costs' of this process? Does the degree of discretion shot through the entire process make each trial or appeal like a throw of the dice? As I will explain below, the principles would not be uniformly applicable in public law—they would still be exceptional and this would itself lower transaction costs. Nonetheless, the problem remains.

I see three techniques for dealing with this issue. First, the greater the degree of uncertainty and conflict between the principles, where the impact could be significant, the more reason for the judge to exercise restraint or act incrementally. Second, the greater the degree of elaborate argumentation heard on the issue of restraint at the trial or first instance level, the more appellate courts should defer to the findings of those judges. This is a way of containing costs and increasing predictability at the appellate level. Third, the elaboration of the principles themselves should be undertaken with careful attention to this problem. Standards should try to avoid undue generality where this is possible (and of course it will not always be possible). Overall, then, this issue of

[129] See *Dunsmuir* (n 117), esp. [192] ff, where Binnie J noted that '[t]here is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums.' The practical complexity and other problems created by the use of the 'pragmatic and functional approach' to determining the standard of review in Canadian administrative law is instructive, but it is also a problem relating to a particular and not generalizable feature of that regime. After *Dunsmuir*, the basic use of the factors—which is most relevant to the present article—remains intact (though less clear – see [51]–[55]).

complexity and workability is one that can be managed at these various points and reviewed from time to time if the approach leads to this problem.

(vi) *Trust and judicial fallibility*

Trusting judges to carry out this balancing exercise appropriately is the major article of faith in the contextual institutional approach. It is the one the restrictive institutionalists reject. Sunstein and Vermuele place much emphasis on judicial fallibility.[130] They claim that too many theorists adopt theories on the assumption that judges should decide cases like academic specialists, and that such theorists disregard the generalist persuasion of such judges. This comment contains some truth. Indeed, they may have added that judges also need to decide under far more severe time constraints as well. But I do not think the proposals contained in this part stray far from the ordinary business of judging. The use of factors and contextual-tests rather than bright line rules has not posed insurmountable problems for judges thus far. Indeed, it appears that public law judging in Britain has in fact moved more in that direction, in the area of determining the meaning of a public authority under section 6 of the Human Rights Act 1998, procedural fairness, whether a mistake of fact can amount to a mistake of law, and with substantive legitimate expectations.

This issue of trust and fallibility goes to the core of the dispute between restrictive and contextual institutionalists, and it cannot be resolved here. However, one relevant factor commended by the institutional approach is the idea of incrementalism. This idea is an entirely consistent way to assuage some of the valid concerns over trust and judicial fallibility held by those who take the restrictive view, while also permitting contextual institutionalism.

B. *Pragmatics: how should judges apply an institutional approach?*

(i) *When the principles are relevant*

The principles of restraint are relevant whenever existing legal standards leave significant judicial discretion, and either (i) there is potential for significant impact beyond the parties to the dispute or (ii) there is a significant measure of uncertainty as to a relevant fact or moral principle. Few institutionalists would accept the Dworkinian idea that there is very little judicial discretion in law. However, if one were inclined to take that view, I would argue that institutional considerations are relevant when the arguments on both sides of an issue are finely balanced (or there are two finely matched rival theories that justify an interpretation of the law), and it is arguable that institutional competence or legitimacy is relevant.

[130] See e.g. (n 87).

(ii) *When the principles are not relevant*

In many run of the mill cases, the parties will accept that the development or application of a given standard is part of the judge's ordinary function and any reference to institutional competence will appear out of place. The parties will play a crucial role in determining this. A useful heuristic device that accounts for the concerns of institutionalism is the application of precedent or the analogical extension of precedent.[131] In both cases, the relevant institutions have typically adjusted to earlier findings, and the systemic distortions one expects from an analogical extension of precedent are both modest and conducted in a context in which earlier cases have put the public on notice of the direction of the law. There is, however, one case where this presumption should not apply. Where there is evidence that an earlier precedent or approach has created significant problems—such as regulatory ossification in the United States—courts ought to have regard for this and ought to be hesitant to extend its application in the light of the new evidence. This is captured in the idea that evaluation of institutional approaches to restraint must remain dynamic.

Another case where the principles will seem out of place is where the case involves a dispute having little more than minimal impact beyond the parties. In such cases the epistemic concerns are minor. And yet another is where the legal standard appears clearly to indicate one outcome, where something like a 'plain meaning' or core case appears evident. There may of course be the familiar cases where courts should refuse to apply the standard because the outcome would lead to absurdity or manifest injustice, but such situations would remain exceptional.

(iii) *Where in the judgment should the principles be addressed?*

Allan argues against the idea that there should be a freestanding 'doctrine' of deference, one that operates as a stand-alone test or checklist that judges must address in their judgments. He worries this would short circuit a contextual inquiry. I think he is correct in worrying about this, and he is not alone. It was precisely the view of Iaccobucci J, when he responded for the majority of the Supreme Court of Canada to Bastarache J's approach to applying principles of deference in the context of Section 1 of the Canadian Charter (the general proportionality limitations clause):

> Courts must be cautious not to overstep the bounds of their institutional competence. . . . The question of deference . . . is intimately tied up with the nature of the particular claim or evidence at issue and not in the general application of the s. 1 [proportionality] test; it can only be discussed in relation to such specific claims or evidence and not at the outset of the analysis.
>
> I am concerned that Bastarache J implies that the question of deference in a general sense should also be determined at the outset of the inquiry. . . . The question of

[131] Sunstein, *Legal Reasoning and Political Conflict* (n 85) ch 3.

> deference to the role of the legislature certainly enters into any discussion of remedy, . . . and can enter into the discussion of whether the legislature has discharged its burden under any of the steps of the s. 1 test. However, the question of deference is not an issue that can be determined prior to engaging in any of these specific inquiries. Nor should it be determined at the outset of the inquiry, given the court's important role in applying s 1 of the Charter to determine whether the infringement of a guaranteed right can be justified in a free and democratic society.[132]

I believe that Iacobucci J's comments meet both Allan's criticism and the essence of the contextual institutional approach. The key is that any reference to principles of restraint should remain contextual. This means, likely, that a structured test of the sort advocated by Laws LJ in *Roth*[133] may be inadvisable. What can be the alternative? It is surely right to identify a list of principles, but that is different from showing how they might be applied. In my view, the principles should not be fixed as a test to be met at an early schematic point in the judgment. The courts should adjudicate the claims by reference to the ordinarily applicable legal standards, contextualize the narrow legal issues, and then consider the principles of restraint if and when they become 'relevant' in the sense identified above. Some will be relevant in some cases and others obviously inapplicable. Invariably the parties will play a significant role in showing where they are relevant. This approach deflects both of Allan's valid criticisms: the concern to preserve contextual application, and the concern about double-counting deference at multiple points in the legal analysis.

One final question is whether, ultimately, this proposal amounts to anything other than an *ad hoc*, non-doctrinal approach. In my view it is significantly different because it is an approach taken against a set of background assumptions that embody the general features of institutional approaches. Non-doctrinal approaches are in contrast often set off against a background theory of right answers and a robust, anti-majoritarian conception of rights. This is a difference in both principle and practice.

5. *Conclusion*

The question of how judges ought to exercise judicial restraint is a crucially important constitutional issue that cuts across most areas of public law and possibly across much of private law as well. Institutional approaches to restraint build on a century of problems with formalism and non-doctrinalism. The lessons learned suggest that uncertainty and judicial fallibility remain important issues and should stay in the foreground. They suggest that approaches that are almost entirely dependent on the sound exercise of judicial discretion are to be suspect. And further, they suggest that judges should view rights as prima facie

[132] *M v H* (n 108) [79]–[80] (citations omitted).
[133] See e.g. (n 115).

entitlements rather than as absolute trumps over collective welfare, and that the judicial role is not privileged above common politics but is one institutional method of problem solving acting in concert with other institutions.

This may all strike some as unduly conservative, but this would be the wrong reading entirely. Neither the restrictive nor contextual institutional approaches are necessarily politically conservative. The former is most often preoccupied with what such advocates might describe as right-wing judicial radicalism, whereas the latter approximates the view taken by some of the most fervent advocates of rights-based judicial review. Both are concerned with promoting human rights, expansively understood, but they disagree on the merit of the judicial process as a mechanism. What this article has aimed to do is help to explain how one can admit the limitations of the judicial process, while still having faith in it as a way of promoting it as a mechanism for accountability. This is the essence of the contextual institutional approach. Recall that the culture of justification is one of expansive jurisdiction, one that stretches further than the formalist distinctions typically allow. In the light of the pitfalls and experiences with judging in the 20th century, however, the necessary corollary to such expanded jurisdiction is a theory of restraint (much the way proportionality is the necessary corollary to an expansive set of rights). The irony, then, is that far from being a conservative ideology, the contextual institutional approach to judicial restraint provides a relatively subtle framework of judicial reasoning that will carry legal accountability into new frontiers.

Of course, the devil is in the details. The claim about respecting institutional limitations while preserving or even expanding legal accountability is the part the restrictive institutionalists refuse to accept. This article will not convince them, nor did it have that goal. It did attempt, however, to refine the option that is being put on the table. Having outlined the general institutionalist framework of practical reasoning with principles of restraint, the crucial remaining work now lies with elaborating the principles and demonstrating the promise of the completed approach.