

DEFERENCE, AUTHORITY, AND ADMINISTRATIVE REVIEW

DEFERENCE, AUTHORITY, AND ADMINISTRATIVE REVIEW:

NEW FOUNDATIONS FOR THE JUDICIAL REVIEW OF
ADMINISTRATIVE TRIBUNAL DECISION-MAKING

By

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Abstract:

Canadian courts have struggled to develop a consistent and coherent approach for reviewing administrative decision-making. In particular, they have been unable to create a workable framework that will guide when the courts will show deference to administrative tribunal interpretations of law and when they will interfere with them, leading to a system of administrative law that is unpredictable and disorderly. This thesis develops a novel approach to administrative review centered on a conception of judicial due-deference that is correlated with a Razian account of legitimate authority. My argument is that administrative review is best understood as an exercise of inter-institutional decision-making in which diverse institutions within the meta-institution of government must work together to arrive at decisions that best secure government objectives. When reviewing courts recognize that administrative actors are better situated in particular circumstances to make decisions than the courts, they ought to show deference. On the other hand, when courts are better situated to handle these matters, deference is not to be shown. I begin in Part I by analyzing the history of Canadian administrative law jurisprudence through to the Supreme Court's 2008 decision in *Dunsmuir*, highlighting the competing principles of the rule of law and democracy that animate the 'Diceyan Dialectic'. In Part II, I articulate a complex theory of inter-institutional reasoning that demonstrates the important role of deference and authority in good government decision-making. In Part III, I apply this model to the circumstances of Canadian administrative review. I show how there are certain institutional strengths, as well as key limitations, with respect to how our superior courts can play a role in upholding the Rule of Law and democracy. Ultimately, I argue that the superior courts must pay attention to the unique institutional placement of administrative actors relative to them in order to discern if these non-curial actors possess greater authority and hence ought to be shown deference.

For my wife, partner, and best friend - Brenna

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PART I:

***FUNDAMENTAL PROBLEMS – ADMINISTRATIVE LAW AND JUDICIAL
REVIEW***

**SECTION I: INTRODUCTION - ADMINISTRATIVE JUDICIAL REVIEW IN A
COMMON LAW CONSTITUTIONAL STATE**

A. Judicial Review of Administrative Decision-Making

Political theorists and legal theorists are currently engaged in a lively debate over the legitimacy of constitutional rights-based judicial review in democratic societies that have chosen to enact charters of rights as part of their constitutional framework. One pole of this dispute focuses on the issue of democratic legitimacy, arguing that courts, as unelected and thus unaccountable bodies, ought not to thwart the clearly expressed will of a democratically elected legislative assembly.¹ While proponents of this view will typically accept that the judiciary acts legitimately when reviewing the ‘jurisdictional’ boundaries between different legislative bodies (for example federal versus state/provincial legislative jurisdictions), a democratic assembly ought to be able to legislate however it sees fit provided when within its jurisdictional limits.² When courts read a charter of rights in such a way as to invalidate legislation they are effectively declaring that the will of the people is not to be the decisive factor in determining what the law is and therefore we no longer have a democratic political system– the people cease to rule and we move from democracy to what Ran Hirschl terms ‘juristocracy’.³

The other pole of the debate typically argues in one of three ways. First, some theorists claim that democracy is not the only value that ought to matter in a flourishing society. Other considerations, most notably protecting individual and minority rights from abuse, are also of great importance – and these considerations may even be paramount to the preferences of the electorate. This approach recognizes democracy to be a component part of a well-functioning ‘liberal democracy’ – and it remains a defeasible part of the partnership. Thus,

¹ Jeremy Waldron is probably the most ardent advocate proponent of this position today. See, for instance, his ‘A Right-Based Critique of Constitutional Rights’ 13 *Oxford Journal of Legal Studies* 18 (1993), *Law and Disagreement* (Toronto: Oxford University Press, 1999), and ‘The Core of the Case Against Judicial Review’ 115 *Yale Law Journal* (2006).

² Adrienne Stone, however, suggests that while constitutional jurisdictional or ‘structural’ review is rarely considered to be problematic for theorists concerned with the democratic legitimacy of judicial review, it is nevertheless problematic. There is a democratic deficit present even when courts decide matters, through judicial review, that do not involve individual rights. Since the ultimate decision-making in such cases is in the hands of unelected officials, the fundamental constitutional structure of the state suffers from a democratic deficit. See her ‘Judicial Review without Rights’ 28 *Oxford Journal of Legal Studies* 1 (2008) and her more recent ‘Democratic Objections to Structural Judicial Review and Judicial Review in Constitutional Law’ 60 *University of Toronto Law Journal* 109 (2010).

³ Ran Hirschl, *Towards Juristocracy* (Cambridge, MA: Harvard University Press, 2004)

courts are acting legitimately when they ensure that popular legislation does not unduly interfere with core liberal values and rights.⁴

The second sort of approach, popularized by John Ely⁵, is to recognize that certain rights protections are critical if a society can even claim to be ‘democratic’. In particular, basic procedural rights must be protected – particularly, the right of all to participate on even grounds in the democratic procedures themselves. Consequently, there are grounds for striking down democratically enacted legislation based purely in considerations of democracy itself. It is legitimate for courts, for instance, to invalidate legislation that excludes particular individuals from the democratic process or somehow discounts their votes.

Finally, there are those, such as Ronald Dworkin, that refuse to define democracy as strictly a matter of majority rule or the casting of a ballot; instead, it involves something like ‘equal concern’ for all citizens and thus incorporates a substantive conception of justice into its very definition. Therefore, judicial review is not problematic in democratic societies if its purpose is to ensure that the state treats all individuals fairly and with equal concern. It is legitimate insofar as it succeeds in creating a more egalitarian society.

While discussions surrounding the legitimacy of constitutional rights-based judicial review have been at the forefront of much of legal and political philosophy over the last several decades, a much more pervasive form of judicial review has, until relatively recently, been left largely to the margins of philosophical inquiry – namely, the judicial review of administrative decision-making (or simply ‘administrative review’). The fundamental issue of administrative review is the degree to which the courts ought to interfere, not with the legislative branch, but with administrative decision-makers acting according to statutory grants of power. When these agencies act in ways that the courts believe are unconstitutional, illegal, or simply inappropriate, how are courts to respond? While constitutional rights-based judicial review raises important questions about the appropriateness of judicial interference with a democratically elected legislature’s enactments, administrative review raises important questions about the appropriateness of judicial interference with those agents and agencies that legislatures appoint to carry out their objectives. In particular, it raises the following two essential questions: 1. Do courts possess a legitimate power to interfere with the administrative process? 2. If courts do possess a legitimate power to interfere with this process, how ought this power to be used?

The justifiability of administrative review is a problem that has long been present within the history of the English common law. In this introductory

⁴ I would classify Trevor Allan as an example of this sort of theorist. See his *Constitutional Justice: A Liberal Theory of the Rule of Law* (Toronto: Oxford University Press, 2001), and ‘Constitutional Dialogue and the Justification of Judicial Review’ 23 *Oxford Journal of Legal Studies* (2003).

⁵ John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980)

section, I will briefly outline some of this history before proceeding to highlight some of the important tensions and conflicts that arise within administrative review. The purpose of this section is to acquaint the reader with some of the basic history, terms, concepts, justifications, and problems associated with judicial intrusion into regimes of administrative law. It paints a general picture of administrative law that will serve as a backdrop for my more specific and detailed analysis of the intricacies of Canadian administrative review.

B. The Division of Powers and Judicial Control of the Executive

Originally, the three-pronged division of a modern (common law) state's powers into legislative, adjudicative, and executive powers was, in theory, capable of legitimizing judicial interference with the decisions of executive or administrative decision-makers. Simply put, this division of powers meant that *legislatures* were responsible for making law, *courts* were responsible for interpreting the meaning of the law in particular cases, and the *executive* branch of government was responsible for implementing and carrying out the law. By recognizing that legislatures were the supreme law-making authorities and that all government action must be authorized and carried out according to law, the judicial branch argued that they had both the power and the obligation to hold the executive branch accountable for their actions. It was the court's duty to ensure that the wishes of the legislative branches were respected and to guarantee that executive and administrative actors authorized to act by legislators did so in accordance with their true intent.

The traditional legal means through which the courts could do this in English law was through the issuance of the prerogative writs of *certiorari*, *mandamus*, *quo warranto*, *procedendo*, prohibition, and *habeas corpus* as remedies for aggrieved parties in suits against ministers and agents of the crown.⁶ The prerogative writs came into their own as a crucial tool of the superior courts for supervising the executive during the 17th century – particularly through the decisions of Edward Coke in his conflicts with King James I. In *James Bagg's Case*, for instance, Coke held that:

Authority doth belong to the Kings Bench, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either publick or private, can be done but that the same shall be reformed or punished by the due course of Law.⁷

⁶ For an excellent account of the development of the prerogative writs see S.A. De Smith, 'The Prerogative Writs' 11 *Cambridge Law Journal* (1951)

⁷ *James Bagg's Case* (1615) 11 Co. Rep. 93b

The assertion was that the Court of King's Bench was not merely a forum for the settlement and final appeal of disputes arising between private citizens; it was also a forum in which any aggrieved party could seek redress against any government official - whether they be sheriffs, the King's ministers, or even the King himself - for their illicit actions.⁸ The Court of King's Bench thus had the authority to ensure that *all* governmental actors acted according to law. When government officials acted otherwise, the Court could use one of the prerogative writs to transfer jurisdiction over a particular matter to the King's Bench (*certiorari*), to command the performance of a specific duty (*mandamus*), to demand an explanation from a government agent as to the authority under which he acted (*quo warranto*), to order an inferior court to proceed to hear a case (*procedendo*), to prohibit an illegal action from proceeding (prohibition), or to demand that an unlawfully detained prisoner be released (*habeas corpus*).⁹ With the exception of the now defunct *quo warranto* writ, and with the addition of the judicial injunction, specific performance, awards of damages, and declaratory relief as supplementary tools of the court, forms of these prerogative writs remain part of the basic foundation of the superior courts'¹⁰ review powers over administrative and executive actors in the United Kingdom, the United States, Canada, and elsewhere in the Commonwealth.¹¹

While the superior courts relied heavily on the prerogative writs in order to ensure that all governmental actors complied with the will of the legislature, they also assumed, unless there was *clear* statutory language to the contrary, that legislators always intended executive and administrative actors to conform to the

⁸ While Coke's assertions would ultimately triumph, it is important to note that his claims of authority were not without challenge. Lord Ellesmere C, for instance, argued that "in giving excess of authority to the King's Bench [Coke] doth so much as insinuate that this court is all sufficient in itself to manage the state... as if the King's Bench had a superintendency over the government itself." ('Observations on Coke's Reports' quoted in J.H. Baker, *An Introduction to English Legal History*, 4th Edition (Oxford: Oxford University Press, 2002). Notably, Coke's views did not resonate well in his own time and he found himself removed as a justice of the King's Bench by James I in 1616.

⁹ Ironically, the prerogative writs are so named because they were originally part of the 'royal prerogative'. It was originally within the prerogative power of the Crown to control the exercise of authority in his realm. However, this power gradually transferred into the royal courts – particularly the superior courts of Chancery, the Exchequer, Common Pleas and King's Bench – until ultimately the King's courts were using the royal prerogative to control the king and his ministers.

¹⁰ There is an extremely important and complex distinction that must be made between inferior and superior courts in most common law jurisdictions. The power to review administrative decisions belongs by nature only to the *superior* courts and not the other (inferior) courts. Given the complexity of this distinction, I leave it for detailed treatment in Part III – 2, although some comments will be made in Part I – 2 as well.

¹¹ In a number of jurisdictions these prerogative remedies remain in their original 'prerogative' form existing independent of legislative interference. In most jurisdictions, however, the prerogative remedies have been amalgamated and simplified through legislation. For more on this see David Mullan, *Administrative Law*, chapter 16.

common law. Thus, the courts were capable of ‘reading in’ certain standards by supplementing ordinary statutes with principles supplied by and developed in the courts- as Byles J famously maintained in *Cooper* in 1863, “the justice of the common law will supply the omission of the legislator.”¹² Courts would bend and reconstruct the meaning of statutes in order to ensure that governmental actors carried out their powers in accordance with basic common law principles. They were therefore able to ensure that there was a single standard of justice applicable in all forums and against all individuals – including those holding government offices. Superior courts could ‘police’ the executive and administrative branch according to the principles of the common law while claiming to be acting according to the will of the legislature.

C. A New Method of Government: Reasons for the Development of Administrative Agencies

The ‘enforcement of the legislative will’ explanation for the superior courts’ role in judicial review, however, came under serious tension as administrative law began to develop.¹³ As the state burgeoned in size during the 20th century, it became increasingly necessary for legislators to delegate more and more decision-making powers away from ‘traditional’ forums and into newly constructed administrative agencies. In particular, the extensive social and economic programs characteristic of the modern welfare state required new methods of administration previously unknown. Especially in the years following World War II, governments began to delegate large swaths of adjudicative, legislative, and administrative powers to agencies that were tailor made to fit its expanded belly.

Volume

The major reasons for this are five-fold.¹⁴ First, the very breadth of subject matter and number of persons over which the modern state attempts to govern is

¹² *Cooper v. The Board of Works for Wandsworth District* [1863] 14 CBNS 180

¹³ The term ‘administrative law’, as intended in this work, captures the situation in which legal and regulatory issues are determined not by the regular system of courts, but instead by administrative agencies, empowered by the legislature, to hear and determine these adjudicative disputes. For the sake of clarity, I refer to administrative agencies that exercise these adjudicative powers as ‘administrative tribunals’. I should note, however, that the term ‘administrative tribunal’ can also be used, in other contexts, to refer to administrative agencies that do much more than simply adjudicate disputes. The term is generally, however, used to refer to the adjudicative aspect of administrative decision-making, and that is the sense in which I will primarily use this term throughout this work.

¹⁴ For a different account of the reasons for the creation of administrative regimes see Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2009), 227-228 and W.A. Bogart ‘Assessing

beyond the capacity of a single government body. Modern states typically regulate everything from criminal law, to trade and commerce, to workplace health and safety, to municipal zoning, and the list goes on. A single body cannot conceivably deal with the sheer volume of legislation necessary to regulate all of these types of issues. In addition, the great number of persons regulated entails that an enormous volume of disputes about the nature and application of regulations will arise. Neither a single system of courts nor a single legislative body could possibly handle the vast number of issues requiring resolution. Thus, there is a need to delegate dispute-resolution powers to tribunals that are not part of the traditional framework of courts.

Expertise

Secondly, given the complex, multi-dimensional aspects of the issues that the modern state regulates, it makes sense to delegate decision-making powers to ‘experts’ in particular fields. While it may be the case that some legislators and judges have an adequate understanding of some specialized field, it is not certain that there will be legislators available that have the requisite understanding necessary to regulate all matters. Administering industry standards, for instance, typically is best left in the hands of those that actually work in and understand the industry. The desire to have regulations developed, adjudicated, and carried out by those that know best is therefore a crucial reason for legislators to delegate decision-making powers to more competent individuals.

Structural Problems

Thirdly, there are certain basic structural problems either with the courts or with ordinary legislative bodies that might make them less effective venues for achieving particular outcomes. Courts, in particular, are limited by rigorous procedures and protocols. While these may be well suited for the resolution of some sorts of matters, they are often inept for others. For instance, courts are prohibited from looking for particular breaches in order to prosecute them. They must, instead, wait for a live case to come before them. If no individual ever presses a case, the courts cannot rule on the matter. An administrative tribunal, like the CRTC, however, is not so limited. It can actively pursue regulatory breaches and hold perpetrators accountable for doing so. Thus, administrative bodies often are created to overcome unique structural challenges that may exist in the traditional forums.

Efficiency

Tools and the Administrative State’ in Colleen Flood and Lorne Sossin (eds.) *Administrative Law in Context* (Toronto: Emond Montgomery, 2008), 41-42.

Fourthly, and related to the second and third reasons, because administrative regimes are typically concerned with the regulation of particular issues as opposed to regulating a great swath of issues, they are able to develop greater efficiency in handling particular matters, saving costs both for government and potential litigants. Whereas courts and legislatures are generalists that need to resolve a massive array of different issues, administrative agencies are established to deal with specific issues and therefore tend to develop considerable proficiency in handling them.

Legitimacy

Finally, administrative agencies may be developed because of concerns about the appropriateness of having particular individuals make decisions. It makes sense to have decisions that affect certain groups be made by individuals either composed of or intimately familiar with them. By delegating decisions to tribunals that have a particular composition, stake in a matter, or level of accessibility, the legitimacy of the regulations made, applied, and adjudicated vastly increases. Native sentencing circles in which aboriginal people are given custom made ‘sentences’ or ways to be ‘reconciled’ by the elders of a council in lieu of ordinary criminal punishment is an example of this delegation of powers.

D. Problems with the Judicial Review of Administrative Action

While issues associated with *volume*, *expertise*, *structural advantages*, *efficiency*, and *legitimacy* gave clear reasons for the legislative preference to delegate adjudicative powers to administrative tribunals, the question arose as to what role the courts were supposed to play in relation to them. In particular, how were courts supposed to respond to the increasing statutory preference to delegate adjudicative powers away from the traditional method of resolving legal disputes (i.e. the courts) and into specialized tribunals?

It made sense, originally, for courts to recognize that the delegation of adjudicative powers to tribunals was not detrimental to the court’s proper role in the fabric of the state. The court’s role would be to hear appeals and grant judicial review from the decisions of the inferior administrative tribunals, treating these tribunals simply as quasi-courts of first instance. While tribunals might be granted some leeway to make their own decisions independent of the procedures and persons of the courts, in the event that the tribunals got things seriously wrong – particularly, when interpreting law (as opposed to determining questions of fact or exercising discretion) - the traditional courts could step in and ensure that things were made right through the issuance of prerogative writs or other forms of remedies. The idea was that the administrative tribunals existed on a lower tier of

a vertical distribution of adjudicative powers that had the superior courts comfortably placed at the top.

This form of judicial supervision of administrative tribunals, however, led to a series of problems that undermined the very reasons why legislatures wished to establish administrative tribunals in the first place. Firstly, many tribunals were created with the goal of achieving out of court resolutions to regulatory and legal disputes. Judicial review of administrative decisions meant that the number of legal proceedings could get out of control as courts would hear the appeals from a lower tribunal and thus end up making precisely the sorts of decisions that they were not supposed to have to make in the first place.

Secondly, there was the issue of compounding costs for both government and litigants. When the courts interfered with administrative decisions, litigants were dragged through additional adjudicative hearings that defeated the objective of making justice expedient and affordable. In Canada, for instance, it was (and still is) possible that the resolution of a dispute might proceed through four or more separate avenues of appeal or judicial review in addition to the primary tribunal hearing. One could appeal a tribunal's decision to an appellate administrative tribunal within the same administrative agency; from there a request for judicial review could lie in a superior court; from the superior court one could appeal to a provincial appellate court; and finally an appeal from the appellate court could be granted leave by the Supreme Court of Canada. At each stage of the process, both government and (exacerbated) litigants would face ever-increasing costs.

A third major issue was that it was unclear why courts ought to review decisions about which they knew very little. Since courts typically are unfamiliar with the specialized knowledge that is requisite for making good administrative decisions,¹⁵ it seems imprudent to have them making the final decisions over these matters.

Fourthly, judges might be ill-equipped to handle the particular nature of a dispute because of their basic processes. In particular, traditional court settings might be inappropriate, as Lon Fuller noted, to handle adjudicative disputes that raise 'polycentric' issues.¹⁶ Common law courts, based on an adversarial method of adjudication, do not have appropriate processes for balancing the competing interests of a large number of parties – some of which may only be tangentially related to the dispute under consideration. In such circumstances, the courts are structurally inept adequately to resolve the dispute and thus ought, perhaps, to remain out of the matter.

Finally, courts might lack legitimacy in rendering final decisions. The detached nature of courts from particular regulatory environments, in some

¹⁵ Consider, for instance, adjudicative disputes related to intellectual property and patent law. The judges in traditional courts are generally unfamiliar with the technical peculiarities that are crucial for understanding the nature of a particular dispute between competing litigants.

¹⁶ Lon L. Fuller, 'The Forms and Limits of Adjudication' 92 *Harvard Law Review* (1978)

circumstances, might make it unfitting for them to be the ones making the ultimate decisions. Courts generally do not have a personal stake or affiliation with the matters being determined by administrative tribunals and thus may face charges of illegitimacy when they interfere.¹⁷ While often the justification for a court being a superior venue for adjudication is its detached nature from the particular issues at play, sometimes this detachment may actually be regarded as illegitimate. For example, Canada has recently seen an increase in the number of litigants applying for binding forms of faith-based arbitration.¹⁸ The idea is that, at least in part, the ruling by a religious official will be more legitimate for the parties involved than if the ruling was handed down by a court. Given the close relationship between faith and marriage for many, individuals may often consider it more appropriate to have a divorce handled by a religious official than by a judge.

These basic considerations explain why it may be inappropriate for the courts to interfere with the administrative process. By interfering with these agencies, courts undermine the basic legislative objectives that lead to their creation in the first place and thereby undercut legislative intent. A strong argument can be made that judges ought not to interfere with the administrative process when it is clear that a legislator has created an agency specifically with the intention to bypass them. If judicial review is justified according to claims of legislative intent, that justification is incapable of supporting judicial interference when the legislative intent is explicitly to keep the courts *out* of the administrative process.

E. Preventing Judicial Review – The Privative Clause

In fact, to make sure that its intent is crystal clear, legislatures often seek to prevent judicial interference with the administrative process through the enactment of what is known as a ‘privative’ clause when establishing the jurisdiction and powers of an administrative tribunal. A privative clause (also known in UK law as an ‘ouster’ clause) insulates an administrative decision from anywhere between some, and virtually all, judicial scrutiny. For example, Alberta’s *Worker’s Compensation Act* states that:

13.1(1) ...the Appeals Commission has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this

¹⁷ For instance, it may seem inappropriate for courts that are not composed of medical doctors to review a dispute arising within Canada’s College of Physicians and Surgeons.

¹⁸ For instance, many individuals in Ontario of Jewish and Muslim faiths have chosen to handle divorce proceedings outside the ordinary courts using faith-based arbitration before a rabbi or an imam versed in the particular tradition of the couple. While such proceedings remain subject to Canadian law, the parties nevertheless can opt to have their disputes adjudicated through these alternative avenues rather than through the ordinary courts.

Act... and the decision of the Appeals Commission on the appeal or other matter is final and conclusive and is not open to question or review in any court.¹⁹

The purpose of this provision is to preclude the courts from interfering with an administrative decision, ensuring that a matter is settled quickly while preventing the courts from circumventing the legislator's purposes. By doing so, the aforementioned problems with judicial review can effectively be curtailed. It is important to recognize, however, that not all privative clauses are identical; some permit of more and some permit of less curial intrusion.

David Dyzenhaus identifies four general types of privative clauses: *finality clauses*, *'no jurisdiction review' clauses*, *substantive clauses*, and *'if satisfied' clauses*. A finality clause exists when there is a provision in a statute creating an administrative tribunal requiring that "[n]o court could call 'into question' a determination of the administrative body."²⁰ It purports to establish that when the tribunal makes a decision, there are no grounds upon which a court can rely to interfere. It seeks to preclude *all* forms of judicial review whatsoever.

A 'no jurisdiction review' clause "forbids the court from granting the traditional remedies of judicial review for administrative error. The court may not review even when the administration has done something outside of its authority."²¹ This sort of a privative clause prevents courts from using the doctrine of 'jurisdictional error' in order to find a segue into reviewing an administrative decision. In Canada for instance, at least prior to *C.U.P.E. v. New Brunswick Liquor*, courts would often use their ability to ensure that a tribunal operated within its proper powers as grounds for interfering with its decisions. By loosely interpreting the meaning of an 'error going to the tribunal's jurisdiction' courts were able to supplant the decisions of administrative tribunals with their own. The 'substantive' clause establishes that "judicial review lies only on the grounds the clause expressly stipulates and/or expressly excludes grounds of review that the courts would think are relevant... [it] ousts the judicial role of guarding particular rule-of-law values, in particular the common law values of natural justice or fairness."²²

The purpose of substantive privative clauses is to prevent the judiciary from using doctrines such as 'procedural fairness' to interfere with an administrative tribunal. Such a provision is not designed to remove all forms of judicial review; rather, it is designed significantly to curtail the sorts of grounds judges can rely upon when reviewing decisions. These clauses enumerate the appropriate grounds for judicial review with regard to the decisions of a particular administrative tribunal to the exclusion of all possible grounds of review.

¹⁹ R.S.A. 2000, c. W-15

²⁰ David Dyzenhaus, 'Disobeying Parliament? Privative Clauses and the Rule of Law' in Richard Bauman and Tsvi Kahana (eds.) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (West Nyack, NY: Cambridge University Press, 2006), 502

²¹ *Ibid*

²² *Ibid*, 503

Finally, an ‘if satisfied’ privative clause establishes that an administrative actor has the power to make a particular decision on a particular matter at their discretion. It seeks to insulate an administrative decision by making it ‘discretionary’ as opposed to a matter of applying a concrete law or regulation. By using the language of discretion, it signals to the court that the decision, since it is discretionary, is not governed by law and hence is not reviewable. As Dyzenhaus notes, it is debatable whether these are true privative clauses since they do not overtly claim to remove judicial review; instead, they change the nature of the administrative decision-maker’s power from a law interpretation and application power into a discretionary power.

Each of these forms of privative clauses represents a clear pronouncement that anywhere from some to virtually all forms of judicial interference are contrary to legislative intent; thereby cutting the courts off from using some purported claim about legislative will from entering the justification for curial review.

F. *Dicey, Administrative Law, and the Rule of Law*

While the basic rationale for establishing privative clauses seems innocuous (they ensure that courts will not circumvent the very purposes for the creation of an administrative tribunal), their practical implications raise many issues that are central to the legal systems of modern liberal democracies. In particular, the existence of privative clauses (and even administrative law itself) seems, to some, to run contrary to the very notion of the ‘rule of law’.

In his *Introduction to the Study of the Law of the Constitution*, A.V. Dicey maintained that administrative law (*droit administratif*), was incompatible with the English constitution because it patently violated one of its two animating principles – the rule of law. For Dicey, the rule of law consisted (at least in England) of three basic components. The first was that:

...no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land... [It means] the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.²³

I term this the ‘*no arbitrary governance*’ component of Dicey’s conception. It is similar to the core understanding of the rule of law held by Hayek – namely, that

²³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edition (Indianapolis: Liberty Fund, 1992), 110

“government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.”²⁴ It represents the basic notion that government decision-making in concrete cases is not to be carried out according to whim or intuition; rather, it is to be guided (exclusively) by rules and principles known, or minimally knowable, beforehand.

Dicey's second component of the rule of law was that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”²⁵ This I term the ‘*no special exceptions for government*’ component. While the first component of Dicey's rule of law mandates that individuals cannot have their basic liberties violated unless done so under the aegis of clear and prospective laws, this second ensures that government agents are not treated differently than ordinary citizens when law suits are raised against them. To guarantee this, the rule of law requires that there are no ‘special tribunals’ that determine suits against the government in a manner different in form or substance from those of the ordinary courts. Thus, for Dicey, the rule of law requires a single system of courts determining what we might now refer to as both ‘public’ and ‘private’ law matters.

The final component of Dicey's rule of law is that “the general principles of the constitution [are] the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.”²⁶ Put differently, the idea is that “the [English] constitution has not been made but has grown.”²⁷ This component is crucial for Dicey because it captures the idea that the rule of law is not secured through the grandiose pageantry of legislative statutes or bills of rights; instead, it is secured through the day-to-day operation of the courts as they provide real remedies for legal breaches in concrete cases. When courts fail to abide by the dictum *ubi jus ibi remedium*, the rule of law does not exist. I term this component of Dicey's rule of law the ‘*concrete application by courts*’ requirement.

Administrative law and privative clauses, one will quickly notice, seem patently incompatible with each of these basic components of Dicey's rule of law. First, as David Mullan observes, “...statutory discretion is the pre-eminent tool of [administrative] regulation of all kinds.”²⁸ Legislatures typically establish administrative agencies in order to allow experts in a particular field to use their good sense and judgment (or *discretion*) to develop regulations and resolve complicated regulatory disputes. Since these agencies often impose a range of penalties upon particular individuals and interfere with their basic liberties in

²⁴ F.A. Hayek, *The Road to Serfdom* (London, 1944), 54

²⁵ Dicey, 114, 120

²⁶ *Ibid*, 115

²⁷ *Ibid*, 116

²⁸ Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), 8

diverse ways and in the absence of clear and prospective preexisting rules, the existence of administrative law regimes violates Dicey's 'no arbitrary governance' component of the rule of law.

Secondly, as Dicey noted, "[t]he notion which lies at the bottom of the 'administrative law'... is that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies."²⁹ Administrative law involves the creation of agencies that will handle regulatory disputes independently of and with distinct procedures from the ordinary courts. Indeed, they are created *precisely* because the ordinary courts are, in some sense, seen by a legislature to be unable adequately to handle the particular regulatory issues at play. The creation of administrative regimes places particular government agents outside of the ordinary jurisdiction of the courts and implies that some aspects of administrative adjudicative decisions involving the public interest and public officials will not be decided in the 'ordinary' way. More problematically, administrative agencies are directly accountable either to the legislature or, worse still, to the executive. In the event that they do not act as the legislature or the executive would like, administrative positions can be terminated, or salaries reduced, or some other penalty inflicted. This means that these bodies operate under immense pressure from the legislature and the executive, threatening the independence and impartiality of adjudicators. This concern is even more acute when legislatures enact privative clauses in order to prevent judicial oversight. When a privative clause purports to oust all forms of judicial review, there is no way for a court to guarantee that an administrative tribunal has decided a case in a fair and impartial way. Individuals are simply left to the mercy of the tribunal's decision with no recourse to a truly independent body that ensures the legality and fairness of government action. Thus, the enactment of privative clauses by legislatures egregiously violates Dicey's 'no special exceptions for government' component of the rule of law.

Finally, administrative agencies often do not function like ordinary courts by proceeding one case at a time and ensuring that each case is determined solely on its merits.³⁰ Administrative agencies typically develop policy at the same time while they are adjudicating disputes; thus, even where one may believe there is a clear right to a particular decision based on considerations of past tribunal pronouncements, a tribunal may, for policy reasons, refuse to act consistently with prior decisions. They may even impose a fine or other penalty where previously they had opted not to do so. Unlike common law judicial decisions which are bound by the *stare decisis* principle, past decisions of administrative bodies do not necessarily establish concrete rights for future cases and hence the 'rights' that

²⁹ Dicey, 120-121

³⁰ It is, perhaps, questionable if even the courts proceed in this way and avoid considerations of 'policy' in their decision making. I leave this issue for subsequent chapters.

exist in administrative settings may be transient and fleeting – subject to new exercises of discretion or regulatory/policy changes.

Until his death in 1922, Dicey continued to protest the ‘unconstitutional’ growth of regimes of administrative law. In 1915, for instance, he argued that “[t]he objection to bestowing upon the Government of the day, or upon servants of the Crown who come within the control or the influence of the Cabinet, functions which in their nature belong to the law courts, is obvious. Such transference of authority saps the foundation of that rule of law which has been for generations a leading feature of the English Constitution.”³¹ He maintained until the end that the constitution of England, and of those nations founded on the English constitution, must remain hostile in principle to that foreign *droit administratif* which directly contravenes it. Legislative attempts to circumvent the judicial process through establishing regimes of administrative law and to oust the review powers of the courts through the enactment of privative clauses are therefore fundamentally unconstitutional.

G. *New Purposes for the Courts in Administrative Law*

Writing towards the end of the 19th century and into the beginning of the 20th century, Dicey was only witnessing the beginning of the beast that would become the administrative state. Consequently, he was still able to cling to the idea that a single system of courts could resolve all legal and regulatory issues. The problem, however, was that what was already a large and complex legal system in the United Kingdom in Dicey’s era burgeoned into a colossus as the 20th century marched on. Consequently, the notion that a single system of common law courts could, on its own, adequately and efficiently handle all cases falling within the ambit of government regulation became utterly preposterous. While regrettable perhaps, practicality requires that some legal issues not be decided by the judiciary, but instead by specialized agents or tribunals, appointed by and accountable to the government, that oversee the implementation of particular regulatory schemes and often decide legal issues independently of both the persons and procedures of the courts. As Michael Taggart notes, “The [20th] century began with... Dicey’s claim that the common law knew nothing of administrative law, and ended with influential judges and commentators saying that the recognition and rapid development of administrative law was one of the greatest legal developments of the century.”³²

Consequently, the interpretation of law and regulations is no longer a power that resides exclusively within the domain of the courts; now courts are but

³¹ A.V. Dicey, ‘The Development of Administrative Law in England’ 31 *Law Quarterly Review* 148 (1915), 150

³² Michael Taggart, ‘Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century’ 43 *Osgoode Hall Law Journal* 223 (2005), 224

one venue for legal interpretation (even if they remain the most important one). And in each of these extra-judicial venues there is the omnipresent risk of the exercise of arbitrary power by legislative and executive actors that concurrently make, interpret, and enforce their own law by being able directly to control the administrative regimes they establish. As John Willis noted in 1935:

The typical [administrative agency] is a government in miniature. A whole field of human activity... is handed over to a small body of persons who are charged with its regulation according to the terms of the creating statute. Instead of reserving to parliament, or to a department responsible to parliament, the power to lay down new standards... and to a court the power of deciding whether in any particular case... the statute entrusts both functions, traditionally exercised by separate arms of government, to one body, which is usually termed an administrative tribunal.³³

These ‘governments in miniature’ risk supplanting traditional procedures, venues, and values in favor of novel ones. They are new tools of governance designed, often explicitly, to alleviate the shortcomings of tools that have been deemed outdated and ineffective for certain applications.

The legislative preference for administrative law in certain areas, while disempowering traditional courts by reducing or refusing to extend their jurisdiction, has at the same time led to a renewed sense of the courts’ purpose in a constitutional regime. Courts, heavily influenced by Dicey’s understanding of the rule of law, have established new ways of controlling the exercise of adjudicative and discretionary powers by administrative tribunals. First, superior courts assert a right to review administrative decisions when their decisions involve the exercise of powers that were not properly delegated to them by a competent legislature. Administrative grants of power are statutory in origin; they are therefore confined only to the *limited powers* prescribed by the statute (which confers to them jurisdiction over the parties, matters, or remedies that are the subject of their decision). Superior courts, accordingly, have exercised their power to interpret the meaning and application of statutes in order to declare administrative decisions *ultra vires* in the event that these decisions were beyond their proper limits. They have also been willing to interfere with administrative decisions on constitutional grounds, asserting that even if an administrative tribunal has the authority to make particular decisions pursuant to a statutory grant of power, this tribunal is nevertheless unable to exercise that power in a way that contravenes the provisions and principles embedded within the constitution.

In addition, courts in the U.K., Canada, Australia, the U.S. and elsewhere, since at least Lord Greene’s 1948 decision in *Wednesbury*, have asserted remarkable powers for reviewing administrative decision-making on the grounds that the statutory conferral of discretionary power is not tantamount to license –

³³ John Willis, ‘Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional’ (1935) 1 *University of Toronto Law Journal* 53, 57

even within an administrative decision-maker's exclusive jurisdiction. Adhering to requirements of reasonableness and (at least somewhat to) the dictums of natural justice are *mandatory*, courts often claim, for the legality of all government decision-making (regardless of whether these decisions are being made by executive actors, administrative tribunals, or courts). A failure to adhere to these requirements can lead to the superior courts adjusting or quashing a decision. As Lord Green remarked in *Wednesbury*:

When discretion... is granted the law recognizes certain principles upon which that discretion must be exercised... The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters... Bad faith, dishonesty... unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question [of the lawfulness of the exercise of discretion].³⁴

Courts, following *Wednesbury*, recognize that even in the event that an administrative or executive decision-maker has a clear statutory power to exercise her discretion when making a decision, that discretion can be exercised in legally impermissible ways. Claiming that no grant of statutory discretion is ever absolute because that discretion exists in order to secure legislative objectives, courts require administrative discretion to be 'reasonably' directed towards securing those particular objectives. When administrative agencies exercise their discretion 'unreasonably', their decision is liable to quashing by the courts.

In addition, courts have affirmed that where substantial individual rights and liberties are at stake in adjudicative proceedings, administrative decision-makers owe those subject to their decisions certain rights of natural justice or 'procedural fairness' – particularly, the right to be heard by the decision-maker (*audi alteram partem*) and the right to a tolerably independent and impartial tribunal (*nemo iudex in causa sua*). While statutory language may permit administrative tribunals the flexibility to develop their own procedures for adjudicating disputes within their statutorily defined jurisdiction, these procedures have to meet certain thresholds of acceptability proportionate to the rights and liberties at stake. For example, a decision concerning whether an individual ought to be fined a small amount of money for violating some minor municipal ordinance will require substantially fewer procedural protections than when a tribunal, such as the Alberta Securities Commission, is empowered to levy a \$1,000,000 penalty per violation and a life-time prohibition from trading upon an

³⁴ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1947] 2 All ER 680

individual found guilty of securities fraud.³⁵ The right to be heard may simply mean the ability to file a written submission to a tribunal for consideration when deciding the matter. It may mean, in more serious matters, the right to appear before the tribunal, make oral submissions, and have written reasons given for the tribunal's decision. Procedural protections against bias include the right to have a decision made by a tribunal that is not a party in the dispute, but it may even include the requirement that the decision-makers have relative security of tenure and salary (thus, ensuring their independence from executive or legislative interference). The concrete requirements of the emerging doctrine of procedural fairness continue to bedevil courts, administrative and executive actors, legislators, counsel, and litigants alike. Nevertheless, considerations of procedural fairness are major grounds for judicial interference with administrative decision-making. In the event that courts believe the requisite threshold of procedural fairness is not met in a particular administrative process, they are able to send the decision back to the tribunal for reconsideration (this time complying with the necessary procedures) or even to quash the decision outright.

Superior courts, therefore, may interfere with administrative decision-making for at least three different reasons – to ensure administrative compliance with jurisdictional and constitutional boundaries (*jurisdictional* reasons), to ensure that administrative agencies use their powers in good faith and in a reasonable manner (*reasonableness* concerns) and finally to preserve the procedural fairness of the administrative process (*procedural fairness* reasons). The legitimacy of the courts engaging in these particular sorts of judicial review is traditionally argued for on the basis of a (Diceyan) conception of the rule of law that has courts supervising the exercise of administrative and executive power in order to ensure that all government agents are held accountable for their actions.

H. Tensions between Legislatures, Administrative Agencies, and the Courts

The critical issue is what exactly the courts are supposed to do when tensions arise between their duty to hold administrative agencies accountable according to jurisdictional, reasonableness, and procedural fairness considerations, and the legislature's desire to establish administrative agencies in order to circumvent the courts' problems of volume, inefficiency, lack of expertise, inept structure, and, in some cases, illegitimacy. How are courts to proceed when they are asked to review an administrator's decision when there is a conflict of underlying purposes – those associated with the rule of law and those associated with effective governance? When ought courts to interfere and when ought they to stay out of administrative decision-making?

³⁵ *Securities Act (Alberta)*, RSA 2000, c S-4

A simple answer might be that courts are under a strict obligation to adhere to rule of law criteria over and above any considerations of policy or effective governance that underlie the creation of administrative regimes. It is, of course, preferable that the rule of law values and effective governance values coexist whenever possible, but in the event of tension, the rule of law criteria ought to triumph. The argument is that the rule of law is a fundamental constitutional value while the values of efficient and effective governance are not. The rule of law is integral to the protection of our basic liberties and rights and thus it cannot be sacrificed to the idols of efficient and effective governance. This response becomes worrisome, however, in the face of privative clauses. As discussed above, often legislatures respond to or preempt judicial interference with administrative decision-making by enacting privative clauses that oust or curtail judicial review powers. When the legislature declares with manifest clarity that certain administrative decisions are beyond the purview of the courts, are courts not required to respect the will of the legislature and not intervene? The worry here is that courts, while indisputably obligated to uphold the rule of law, are also obligated to uphold another constitutional principle - what Dicey terms the 'supremacy of Parliament'. Judges are not the ultimate lawmakers in our system and they may lack the democratic legitimacy of an elected legislature.³⁶ The existence of privative clauses thus forces the courts into a Janus-faced predicament with one face turning towards the rule of law, while the other turns towards democratic concerns. Complicating the matter, it is by no means clear which of these two constitutional principles ought to be of greater importance for the judiciary, leaving open the possibility that they may simply be incommensurable. In a predicament that mimics the situation of courts in rights-based constitutional review, we are faced with questions of the democratic legitimacy of the judicial policing of legality's borders in the context of administrative review.

Another answer may simply be for the courts to enforce rule of law requirements whenever there is no privative clause; however, when a privative clause exists, courts ought to defer to the expressed will of parliament. This answer, of course, nicely aligns with the basic theory of the common law. The courts apply their best judgment, informed by principles embedded within past judicial practices, to the issues at hand. When legislatures disagree with the interpretation of the courts, they simply create new legislation that clarifies their intent. Thus, a feedback loop exists and the courts rightfully are shown not to be superior to the legislators, but rather to be their agents, interpreting the law in both anticipated and unanticipated cases. While this answer, like the previous one, is plausible, at least two problems still loom. Firstly, what is the court supposed to do when administrative actors exceed the confines of their jurisdiction and these decisions are protected by a privative clause? Surely the courts must at least be

³⁶ In Part III – 4, I challenge the view that judges necessarily lack democratic legitimacy when interfering with legislative preferences to delegate decision-making.

able to review these sorts of errors by administrative actors. Indeed, courts in many jurisdictions have often declared that no amount of statutory protection will give tribunals license to misinterpret the limits of their own powers. Secondly, for the very reasons of effective governance that lead legislatures to delegate powers to administrative decision-makers, is it not sensible for courts to show deference to administrative outcomes, even if they might disagree with them? Although courts may dispute the manner and substance of administrative decisions, particularly with regard to their interpretation of statutes, it might yet be inappropriate for the courts to intrude into their realm. Thus, even in the absence of a privative clause, the legislature's choice to delegate particular decisions away from courts surely ought to be respected, and this ought to include respect for the decisions of the very agents that are chosen to carry out the legislature's intent. Courts owe some sort of respect to administrative agencies, including when there is no privative clause, if for no other reason than simply that the legislature chose a particular method as the most appropriate means to achieve its objectives.

Administrative judicial review is therefore caught in an interesting tension between a range of factors – particularly those associated with the rule of law and the supremacy of parliament. Perhaps the most pertinent question in contemporary administrative judicial review is: *how can we establish a coherent and principled framework for the judicial review of administrative decision-making that makes space for both the rule of law and democratic concerns?* Canadian jurisprudence has been plagued, from *CUPE v. New Brunswick Liquor* (1979) through *Dunsmuir v. New Brunswick* (2008) and beyond, with a poorly conceived series of 'tests' or 'standards of review' establishing the proper degree of curial deference owed to administrative decision-makers. In the next section, I outline the uniquely Canadian response to the general problems associated with the judicial review of administrative action discussed above.

SECTION 2: THE STANDARD OF REVIEW ANALYSIS IN CANADA – THE DICEYAN DIALECTIC

A. The Courts and the Sovereign Gods – Between Democracy and the Rule of Law

Embedded in the very core of the Canadian constitution are two fundamental principles: *democracy* and the *rule of law*. As the Supreme Court noted in the Quebec secession reference, together with federalism and respect for minorities, these “principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood”.³⁷ Indeed, if a government official were willfully to undermine either democracy or the rule of law, their actions would be akin to acts of high treason, for such acts do violence against the sovereign gods which animate all aspects of the Canadian state.

At its most basic, the purpose of the ‘standard of review analysis’ in Canada is to enable our courts to navigate between these two fundamental constitutional principles. On the one hand, they are under an obligation to abide by the directives of a democratically elected legislature – including when the legislature chooses to delegate adjudicative decision-making powers away from the courts and into administrative tribunals. On the other hand, as the primary arm of government assigned to protecting the rule of law, our superior courts are under an obligation to prevent executive and legislative actors from circumventing the law and acting arbitrarily. But how are Canadian courts to respond to a legislature’s attempt to take away their jurisdiction over particular cases and place them in the hands of administrative tribunals? Even more problematically, how are courts to respond when a democratically elected legislature passes legislation that explicitly prevents the courts from holding administrative actors legally accountable for their actions?

This section gives a basic account of how Canadian courts have reconciled these two competing constitutional principles through a doctrine of judicial deference that is articulated in Canada’s standard of review analysis. It focuses on what Matthew Lewans has termed the ‘Diceyan Dialectic’.³⁸ Administrative law in Canada (and elsewhere) remains haunted by the ghost of Albert Venn Dicey.³⁹ His basic conception of the British constitution – particularly, his understanding of the rule of law and the sovereignty of Parliament – for better or worse, continues to structure the judicial understanding of its task in administrative review.

³⁷ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at par. 51. These fundamental constitutional principles were also affirmed in *Re: Manitoba Language Rights*, [1985] 1 S.C.R. 721.

³⁸ Matthew Lewans, ‘Rethinking the Diceyan Dialectic’ 58 *University of Toronto Law Journal* 75 (2008)

³⁹ John A. Rohr, ‘Dicey’s Ghost and Administrative Law’ 34 *Administration and Society* (2002)

In particular, this section examines the historical and philosophical origins of Canadian administrative review, culminating in the Supreme Court's 2008 decision *Dunsmuir v. New Brunswick*. It details the originally hostile position of the courts to administrative tribunals, through to their more receptive and sophisticated relationship with these tribunals in the era following Dickson's 1979 judgment in *C.U.P.E. v. New Brunswick Liquor*. It tells the story of how Canadian courts grew from disdaining administrative tribunals as illegitimate usurpers of judicial power to, eventually, accepting and baptizing them into the Canadian legal order. Our courts have moved from a highly intrusive policy with regard to the decision-making of administrative tribunals towards a largely hands-off approach. This move was precipitated by a policy of judicial 'due deference' which remains the cornerstone of the contemporary approach within Canadian administrative law jurisprudence. While Canadian courts recognize that they have an obligation to ensure that administrative agencies abide by jurisdictional and constitutional constraints, as well as uphold basic requirements of reasonableness and natural justice/procedural fairness, they also recognize that administrative tribunals ought to be allowed to fulfill their assigned role without undue judicial interference – including, sometimes, when the judiciary believes that a tribunal's decisions are incorrect. Even in the interpretation of statutes, Canadian judges have been willing to uphold administrative interpretations that deviated from what courts might have believed 'correct' or 'best'. Thus, our courts, under a doctrine of deference, have conceded that the interpretation of law is not exclusively nor in all cases ultimately within their ambit. At the end of this section, I consider some serious challenges that the new standard of review analysis, as elaborated in *Dunsmuir v. New Brunswick*, pose for the future of the judicial review of administrative action in Canada.

B. Early Judicial Hostility: Administrative Law Pre-1979

Canadian administrative law, as touched upon in the previous section, developed under a shroud of judicial hostility and suspicion. For the most part, Canada's courts adopted a Diceyan self-conception of their role in upholding the rule of law – one that privileged the superior courts as a necessary bulwark protecting individual liberty from arbitrary government action and ensuring that no government powers could escape judicial supervision. Their fear was that the removal of adjudicative powers from the ambit of ordinary courts would lead to grave infringements of the personal liberties of Canadian citizens.⁴⁰ Early academic criticisms, such as those of Dicey and Hewart, resonated with Canadian courts. Hewart, for instance, held that regimes of administrative law existed in

⁴⁰ Notably, the judiciary was concerned that economic liberties would be infringed by administrative tribunals enforcing legislation that was part of the emerging welfare state.

order “to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme.”⁴¹

While Canadian courts recognized that Parliament and the provincial legislatures had the legal power to establish administrative tribunals, the existence of these tribunals was antithetical to the underlying rule of law principle and therefore their powers needed to be curtailed using whatever means possible. Occasionally, the superior courts would assert their powers in no uncertain terms, reminding administrative (and even upper-level executive) actors that their powers would be reined in by the courts when they violated the rule of law. The 1959 case of *Roncarelli v. Duplessis* is a pinnacle example of such a blatant exercise of judicial powers.⁴² Usually, however, Canadian courts were more prone subtly to curtail administrative powers than to make any strong-handed assertions of their own. Yet small seams or cracks allowing the courts entry points into the administrative process would often become gaping holes through which future judicial control could pour through.

First, prior to 1979, Canadian superior courts held that while administrative tribunals could legitimately be empowered to interpret legislation, their decisions, absent a privative clause, were fully reviewable by the courts. When an administrative tribunal arrived at the ‘correct’ decision, the court would let the decision stand and uphold the tribunal’s judgment. When the tribunal got the decision ‘wrong’, however, the courts could rectify the tribunal’s interpretation and ensure that the ‘correct’ decision replaced it. By doing so, the courts showed that the legislature was free to empower administrative actors to interpret the law (therefore the courts did not technically interfere with ‘legislative

⁴¹ Lord Gordon Hewart, *The New Despotism* (London: Ernest Benn Ltd., 1929), 17

⁴² *Roncarelli v. Duplessis*, [1959] S.C.R. 121. A prominent member of the religious sect Jehovah’s Witnesses and Montreal restaurant owner, Frank Roncarelli, frequently posted bail for other members of Jehovah’s Witnesses arrested while soliciting on behalf of their sect in violation of Montreal bylaws. Often individuals who were bailed out by Roncarelli were arrested again shortly afterwards while engaged in the very same activities. Annoyed by the situation, the mayor of Montreal requested that the premier of Quebec, Maurice Duplessis, find a way to stop Roncarelli from continuing to post bail for his fellow Jehovah’s Witnesses. In response, Duplessis requested that the Quebec Liquor Commission revoke Roncarelli’s license to serve alcohol, thereby harming his business to the point that he would not have the requisite funds to continue bailing out his fellow Jehovah’s Witnesses. This commission did as it was directed and revoked the license. Roncarelli appealed the decisions arguing that the revocation of his liquor license was an unlawful exercise of discretion by the Quebec Liquor Commission because the license had been revoked in bad faith and Maurice Duplessis had unlawfully interfered with the process. Duplessis argued that since the granting of a license was a discretionary power, and thus not governed by law, the courts had no ability to interfere with the Quebec Liquor Commission’s decision. The case worked its way up to the Supreme Court wherein the majority held that even though the power to grant a license was discretionary in nature, the court nevertheless could interfere with the decision. While the majority was clear in asserting that the judiciary could review discretionary decisions of a commission, it was unclear about the particular justification for their interference in this particular case, as reflected in the series of concurring judgments. Roncarelli’s license was consequently restored and compensation granted.

sovereignty’); nevertheless, the courts also were able to assert that the rule of law (i.e. judicial supremacy over the interpretation of law) would triumph since the tribunals could not interpret legislation ‘incorrectly’ otherwise their decisions would be set aside by the courts. This enabled the courts jealously to guard their interpretive supremacy over the meaning of law while not interfering with the sovereignty of the legislative branches to make legislation empowering tribunals to interpret law for themselves. In effect, superior courts assumed that their reviewing role relative to an administrative tribunal’s interpretation of the law was akin to their role when hearing appeals from lower court decisions.

Generally Canadian legislatures tolerated this situation, at least at an early stage. However, as judicial review became more expensive and taxing on the justice system, and courts began to interfere with tribunals established by the legislatures with the purpose of excluding particular judicial interpretations and procedures, legislatures answered by protecting some tribunals with privative clauses purporting to oust the superior courts’ review powers. In response, the judiciary burrowed a hole into the administrative law castle by asserting a subtle and seemingly innocuous power to control the limits of an administrative tribunal’s jurisdiction.

Canadian superior courts have always claimed the same power as courts in the U.K. and other common law jurisdictions to police the limits of legislative delegations of power to executive and administrative agents and agencies. At least on the surface, these courts acknowledged that legislatures were within their competence to enact privative clauses and oust the courts’ general powers of judicial review. Yet the existence of a privative clause, they assumed, would not mean that the court was prohibited from engaging in ‘jurisdictional’ review. As the Supreme Court asserted in *Woodward Estate v. Minister of Finance*:

The effect which has been given to [a privative clause] is that, while it precludes a superior court from reviewing, by way of *certiorari*, a decision of an inferior tribunal on the basis of error of law... it does not preclude such review if the inferior tribunal has acted outside its defined jurisdiction. The basis of such decisions is that if such a tribunal has acted beyond its jurisdiction in making a decision, it is not a decision at all within the meaning of the statute which defines its powers because Parliament could not have intended to clothe such tribunal with the power to expand its statutory jurisdiction by an erroneous decision as to the scope of its own powers.⁴³

The argument was quite simple: a legislature created an administrative tribunal to operate within a limited jurisdiction (it was only empowered to act within a particular scope) and in the event that it stepped outside that jurisdiction, the tribunal ceased to be functioning as intended by the legislature and thus the judiciary ought to interfere, ostensibly to ensure that the will of the legislature prevailed. This move preserved the legislature’s right to enact a privative clause,

⁴³ *Woodward Estate v. Minister of Finance*, [1973] S.C.R. 170

thereby demonstrating the superior courts' respect for legislative sovereignty, while at the same time ensuring that judges could supervise the limits of delegated powers. The courts, at least on the surface, even granted that the administrative tribunals, when protected by a privative clause could interpret legislation differently from how the courts might - as the Supreme Court noted in *Nipawin*:

If... a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question [without acting in bad faith or contrary to natural justice and without procedural errors] ... then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the Courts."⁴⁴

The question, however, was what exactly it meant for a tribunal to act 'within its jurisdiction'. The interpretive flexibility of the term 'jurisdiction' allowed the courts a great deal of leeway when reviewing decisions of administrative tribunals that were protected by a privative clause. While Canadian courts never quite went as far as the U.K. courts did in *Anisminic* wherein the justices determined that, in effect, an error in the interpretation of law was akin to a jurisdictional error,⁴⁵ they were willing to adopt tests for jurisdiction that have come to be known as the 'preliminary or collateral matters' test for the limits of a tribunal's jurisdiction.⁴⁶ This test enabled the courts to inquire into whether a tribunal wrongly answered questions preliminary to the exercise of its jurisdiction or that were collateral to a question that was within its jurisdictional boundaries. When courts found that a tribunal made incorrect determinations in either of these respects, even within the protection of a strongly worded privative clause, the tribunal's decision could be quashed for jurisdictional error. Thus a privative clause could only apply to a very narrow determination of a tribunal and left a tribunal's decision open to attack on a wide range of different grounds.

By opening up the meaning of a tribunal's jurisdictional limitations and subtly finding new forms of jurisdictional errors, the superior courts recaptured the reins of supremacy over legal interpretation and were able to thwart virtually all legislative attempts to insulate tribunal interpretations of law from judicial review. As Mullan recognizes, "the concept of jurisdictional error in which the Court was trading [prior to 1979] was so malleable as to be capable of justifying the inclusion within its reach of any question of law or mixed law and fact that a tribunal was called upon to decide in the exercise of its mandate."⁴⁷ Since a jurisdictional error could be interpreted into virtually all administrative decisions with which the courts disagreed, administrative interpretations of law were forced

⁴⁴ *S.E.I.U. v. Nipawin*, [1975] 1 S.C.R. 389

⁴⁵ *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147

⁴⁶ See, for instance, *Jarvis v. Associated Medical Services Inc.*, [1964] S.C.R. 497

⁴⁷ David Mullan, 'The Supreme Court of Canada and Tribunals – Deference to the Administrative Process: A Recent Phenomenon or a Return to Basics' 80 *Canadian Bar Review* (2001), 423

closely to follow judicial preferences, otherwise they risked their decisions being overturned on ‘jurisdictional’ grounds.

C. New Brunswick Liquor - *Giving Administrative Tribunals the Green Light*

In 1979, the Canadian Supreme Court laid the foundations for a new approach to administrative law – one that recognized that the establishment of administrative tribunals was not simply a legislative attempt to circumvent the rule of law but instead represented a new approach to unique problems of modern governance. In particular, Dickson’s judgment in *C.U.P.E. v. New Brunswick Liquor* [*New Brunswick Liquor*] instigated a policy of judicial deference to the decisions of administrative tribunals. As the Supreme Court noted recently in *Dunsmuir*, “Dickson J.’s policy of judicial respect for administrative decision-making [in *New Brunswick Liquor*] marked the beginning of the modern era of Canadian administrative law.”⁴⁸

In *New Brunswick Liquor*, Dickson explicitly denounced previous judicial attempts to use the term ‘jurisdiction’ as an entry point for judicial intervention into the administrative process, famously maintaining that, “[t]he question of what is and is not jurisdictional is often very difficult to determine. The courts... should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.”⁴⁹ He advocated a simplified and honest test for jurisdiction, one that disavowed the “language of ‘preliminary or collateral matter’”⁵⁰ and focused more on whether the legislature intended a particular matter to be within the tribunal’s proper ambit to decide, thus paving the way for the ‘pragmatic and functional analysis’ that characterizes the Supreme Court’s contemporary approach to the proper scope of a tribunal’s powers in substantive review. Further, he avowed that courts ought to let administrative interpretations of law, provided that they are within the proper jurisdiction of a tribunal (understood simply as the power to determine a matter) stand unless they are ‘patently unreasonable’.

As characterized in *New Brunswick Liquor*, the patent unreasonableness test involved a reviewing court asking: “...was the [tribunal’s] interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?”⁵¹ If a tribunal’s interpretation of law appeared reasonable and was made in good faith the court ought not to intervene, even if it might vehemently disagree with the substance of the tribunal’s decision. Courts, post-*New Brunswick Liquor*, were forced to turn their backs on several decades of judicial efforts to circumvent the

⁴⁸ *Dunsmuir*, par. 35

⁴⁹ *C.U.P.E. v. New Brunswick Liquor*, [1979] 2 S.C.R. 227, 233

⁵⁰ *New Brunswick Liquor*, 228

⁵¹ *New Brunswick Liquor*, 237

powers of administrative tribunals. While not completely relinquishing the overseeing role of superior courts, *New Brunswick Liquor* nevertheless baptized administrative tribunals as a legitimate component of the Canadian legal framework. Mullan nicely captures the change in judicial attitude towards administrative tribunals in the following way:

...the Court since the mid to late seventies has by and large espoused a green light rather than a red or even amber light theory of its relationship to the administrative process. Its task is, where possible, to facilitate the smooth - flow of traffic along the highway of administrative and executive action; to allow room for the effective and efficient functioning of statutory regimes and the fulfilment of broad legislative objectives. This contrasts with the red or amber light theories of the relationship between the courts and the various instruments of government policies whereby administrative action of all kinds must be clearly and explicitly justified by those trying to defend its exercise, a world in which the administrative process is constantly under the cautionary flag so common in motor racing over the last twenty years.⁵²

With this decision, the Supreme Court accepted that administrative tribunals were often the preferred method that legislators had chosen for resolving particular legal disputes. It was not the place of Canadian courts to question the wisdom of this choice and, barring circumstances in which tribunals acted with bad faith or made decisions that were patently unreasonable, administrative tribunals were to be left unmolested; the choices of the legislature were to be respected by the courts.

D. Preserving the Rule of Law through Procedural Fairness

While *New Brunswick Liquor* did signify a new judicial acceptance of administrative tribunals, characterized by an attitude of judicial restraint towards the substance of these tribunals' decisions, it is interesting to note that the Supreme Court's judgment in *Nicholson v. Haldimand-Norfolk Regional Police Commissioners* [*Nicholson*], decided not long after *New Brunswick Liquor* in 1979, reflected a renewed emphasis on judicial *intrusion* into administrative processes.

In *Nicholson*, the Supreme Court held that superior courts could render administrative decisions invalid if the decisions are not made following processes that are fair and appropriate in a particular context. Thus tribunals, even when acting within the scope of their statutorily established jurisdiction might nevertheless find their decisions nullified by a court because they breached requirements of *procedural fairness*. Prior to *Nicholson*, administrative agencies

⁵² David Mullan, 'The Supreme Court of Canada and Tribunals', 403. The analogy of courts giving green, amber, or red lights to administrative law was first suggested by Carol Harlow and Richard Rawlings in their text *Law and Administration*, 2nd ed. (London: Butterworth, 1997)

were generally only required to give full procedural protections to individuals if they were operating in what were known as ‘judicial’ or ‘quasi-judicial’ capacities. If an administrative decision-maker was exercising a power that was of a purely ‘administrative’ or ‘discretionary’ nature, however, an individual was not entitled to procedural protections. In *Nicholson*, the Supreme Court recognized that “...the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult... and to endow some [decisions] with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.”⁵³

Nicholson, consequently, eradicated the notion that some administrative decisions could operate according to procedures that were uncontrollable by superior courts.⁵⁴ Even if *New Brunswick Liquor* conceded that the *substance* of an administrative decision would be subject to considerable deference in particular contexts, *Nicholson* established that this judicial deference would only be granted if the *procedures* of administrative decision-makers were appropriate.⁵⁵ By emphasizing the role of courts in ensuring that fair procedures are followed in administrative settings, *Nicholson* reasserted the court’s role in preserving the rule of law – instead of attacking arbitrary exercises of government power through expanding the meaning of a tribunal’s ‘jurisdiction’, courts could control arbitrary exercises of power by ensuring that fair procedures were always followed.

In its 1985 *Cardinal* decision, the Supreme Court expanded upon its decision in *Nicholson*. In this case two inmates who were confined at Kent Institution and who were being held in administrative dissociation (segregated treatment) for their role in a prison riot, challenged whether the prison director could continue to keep them dissociated from the regular prison body without first granting them a hearing. The Supreme Court ruled that even if it was unlikely that the director would have made a different decision about the inmates after a hearing, they were nevertheless entitled to the hearing and the prison director

⁵³ *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311, 325.

⁵⁴ Administrative decision makers were, of course, always required to follow those procedures mandated by their empowering statutes. What *Nicholson* did, however, was establish that even in the absence of mandated procedural protections within legislation, administrative decision makers were nevertheless required to act ‘fairly’ and render decisions according to appropriate procedures, as determined by the courts.

⁵⁵ David Dyzenhaus aptly notes that there is an interesting tension between *New Brunswick Liquor* and *Nicholson*: “The most astonishing fact about the Supreme Court of Canada’s role in administrative law is that two of the Court’s most important decisions in this domain were not only decided in the same year [1979], but are so in tension with each other that they have created a central paradox for Canadian administrative law... [T]he Court in the same year made two landmark decisions which, taken together, tell courts to adopt a non-interventionist and an interventionist stance.” ‘Judicial Review and Democracy’ in Michael Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), 286-287

could not make an administrative decision without doing so. In his judgment, Le Dain J. held that:

... the denial of a right to a fair hearing must always render a decision invalid... The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.⁵⁶

Even though the prison director's decision was one that involved wide discretion, his decision would be rendered invalid if it failed to accord appropriate procedural rights to those affected by the decision.

*Syndicat*⁵⁷ and *Knight*⁵⁸ demonstrated further the willingness of the courts strongly to enforce procedural protections against administrative decision-makers - as well as the desire of courts to determine which procedural protections were appropriate according to their own assessment of the particular circumstances of a decision, rather than that of a tribunal or a legislator. In his judgment in *Syndicat*, Sopinka J. held that:

Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided.... [T]he court decides the content of these rules by reference to all the circumstances under which the tribunal operates.⁵⁹

Knight gave more concrete expression to the particular factors that would influence the appropriate procedural obligations that administrative decision-makers would owe individuals – in L'Heureux-Dube J.'s words:

The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights.... [W]henver those three elements are to be found, there is a general duty to act fairly on a public decision-making body.⁶⁰

⁵⁶ *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, par. 23

⁵⁷ *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879

⁵⁸ *Knight v. Indian Head School Division no. 19*, [1990] 1 S.C.R. 653

⁵⁹ *Syndicat*, *ibid.*

⁶⁰ *Knight*. These factors will be discussed in more detail below since they are incorporated as three of the five components of the *Baker* factors for procedural fairness. Although the Court's judgment in *Knight* recognizes that extensive procedural protections are required of administrative regimes in particular contexts, it nevertheless recognizes that courts and tribunals are permitted to have divergent procedures. As she notes: "...every administrative body is the master of its own procedure and need not assume the trappings of a court. The object [of procedural review] is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is

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The Supreme Court's seminal 1999 decision in *Baker* demonstrated that superior courts would impose procedural fairness obligations even against the executive's exercise of discretionary powers. It remains, to this day, the most important judgment of the Court with regard to procedural fairness. Mavis Baker was a Jamaican citizen who had resided in Canada illegally for 11 years until she was ordered deported in 1992. Baker, however, argued that her deportation ought to be stayed on the basis of humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act* which states that:

The Governor in Council may, by regulation, authorize the Minister [of *Citizenship and Immigration*] to exempt any person from any regulation made under subsection 1 [of section 114 of the *Immigration Act*] or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of humanitarian and compassionate considerations.⁶²

After hearing her case, the office of the Minister of Immigration refused to offer Baker humanitarian and compassionate considerations so that the deportation order would be stayed – even though Baker had two Canadian children and physicians worried that her paranoid schizophrenia, which was in remission, was more likely to return if she was deported. Initially no reasons were offered for the decision. Following a request from Baker's counsel for reasons for the decision, the notes of Officer Lorenz, the reviewing officer for her case, were released. The notes accentuated the fact that Baker had four illegitimate children and that Canada's immigration system had been too lenient allowing her to stay in the country for so long. They also made much of the fact that she was on welfare and was unlikely to be a productive member of Canadian society.⁶³ Baker requested

flexible, adapted to their needs and fair... the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome."

⁶¹ *Ibid*

⁶² *Immigration Act*, R.S.C., 1985 c. I-2

⁶³ Lorenz's notes stated that: "PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT

judicial review of the Immigration Minister's decision to deny humanitarian and compassionate consideration primarily on the basis of a breach of procedural fairness.⁶⁴ Ultimately, the Court agreed with Baker that the procedures used in her case were indeed unfair and that Lorenz's notes, the only stated reasons for the decision, gave the impression of bias. While the Court rejected her contention that an oral hearing was necessary in her case, it did agree that she was owed written reasons for her decision and asserted that in some circumstances even discretionary exercises of power will require written justifications.

Most importantly, Baker established a basic set of factors that would determine when an administrative decision-maker's procedural protections were inadequate and hence the threshold at which superior courts would be required to intervene in order to rectify the breach. These factors included: (1) the nature of the decision and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of individuals involved; and (5) the choices of the legislature and the agency.

The first factor reasserted much existing jurisprudence, highlighting that administrative decision-makers engaged in decisions that closely resemble judicial proceedings will be required to follow procedures similar to those of courts. Decisions, however, that involve 'polycentric' issues that stretch beyond the particular matter being decided would be permitted greater procedural

CHILDREN... Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two)...There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse... Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned - ...Letter of Aug. '93 from psychiatrist from Ont. Govm't.... Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.... Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc. ... This case is a catastrophe [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!... The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region...There is also a potential for violence - see charge of "assault with a weapon" [Capitalization in original.]” *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, par. 5.

⁶⁴ Notably, counsel argued that Lorenz's notes left a 'reasonable apprehension of bias', Baker never received an oral interview, and reasons were not given for the decision.

flexibility. The particular sort of decision being made will have a direct impact on what procedures are appropriate.

Greater procedural protections will be required as well in circumstances where a particular tribunal's decision is intended to be final and no further avenues of appeal are available. In settings where there are alternative avenues of appeal (including statutory rights of appeal to courts), administrative decision-makers will be granted greater procedural leeway.⁶⁵

The third factor identified that procedural protections are proportionally related to the importance of a particular matter to an individual. Issues of greater importance will demand more extensive procedural protections whereas issues involving more trivial matters will involve fewer protections.⁶⁶ A tribunal that determines low stake matters such as parking tickets, for instance, will not be required to offer the same level of procedural protections as a tribunal for the College of Physicians and Surgeons that determines whether to revoke a physician's license to practice medicine.

Additionally, past practices or understandings (whether explicit or implicit) about the procedures that a tribunal will follow might govern requirements of procedural fairness.⁶⁷ A tribunal might be required to follow its own internal policies when making its decisions if an individual has acted on the understanding that these policies would dictate the procedures under which the tribunal would operate. This is particularly true when these policies are published or distributed to the public.

Finally, courts ought to recognize that administrative procedures, when not explicitly required by a statute, are largely up to the tribunals to determine. As noted by L'Heureux-Dube, "the analysis of what the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances."⁶⁸ Courts are not responsible for ensuring that tribunals abide by perfect procedures – their role is only to police the 'threshold' of what procedural fairness requires.

Writing for the majority in *Baker*, L'Heureux-Dube remarked that:

...underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context,

⁶⁵ *Ibid*, par. 24

⁶⁶ *Ibid*, par. 25

⁶⁷ *Ibid*, par. 26

⁶⁸ *Ibid*, par. 27

with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.⁶⁹

Importantly, these factors are not intended to be exhaustive and are simply direction-posts for courts when engaged in a contextual analysis to determine whether a threshold of procedural fairness has, in fact, been met. Courts are encouraged to examine all aspects of an administrative decision and determine whether appropriate procedures have been followed.

The *Baker* test for procedural fairness, much like the ‘preliminary or collateral matters’ test for jurisdiction is incredibly flexible and allows a great deal of judicial latitude when reviewing administrative decisions. In effect, the two tests work in strikingly similar ways, with courts treating a breach of procedural fairness as akin to a jurisdictional error – a failure to accord with procedural fairness, as understood by the courts, will lead to a decision being rendered invalid, followed by the court instructing the tribunal either to decide the matter *de novo* or to reexamine certain aspects of the matter with the proper procedures being followed. As demonstrated with striking force in Mavis Baker’s case, this power of superior courts to review administrative decisions on the basis of procedural fairness enables courts to ensure that government action does not infringe significant personal liberties without fair and open procedures first being followed. In this sense, *Baker* can be seen as a judicial attempt, for better or worse, to reassert its fundamental role in upholding the rule of law in the post-*New Brunswick Liquor* era of administrative law.

E. Privative Clauses, Section 96, and the Exclusive Powers of Superior Courts

While enforcing procedural fairness requirements upon administrative actors was one avenue by which courts maintained their supervisory role over administrative decision-making, they also fought against the increasingly common enactment of strong privative clauses that were intended to oust *all* forms of judicial review - including jurisdictional review. *New Brunswick Liquor* demanded that the judiciary adopt a deferential posture towards tribunals and recognize that often legislatures preferred that tribunals and not courts make final decisions. What it did not settle was whether courts could be utterly excluded from reviewing administrative decisions if the legislature so desired. Privative clauses bring to the very forefront a basic competition between two fundamental constitutional principles: the rule of law (understood, in part, as the ability of all governmental actors to be held legally accountable for their actions before the ordinary courts) and the sovereignty of parliament/legislatures (understood as the

⁶⁹ *Ibid*, par. 22

supremacy of ordinary legislation over executive decision-making, the common law, and customary law).

The Supreme Court addressed this basic conflict in 1981 in *Crevier*⁷⁰ wherein it ruled that no privative clause could wholly oust the power of the superior courts to review an administrative decision since such a clause would contravene Section 96 of the *Constitution Act, 1867*, which forms an essential part of Canada's written constitution. On its surface, Section 96 states only that: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." The purpose of Section 96 was to ensure that the superior courts of each of the provinces were appointed by the federal government to safeguard against the appointment of 'unqualified' judges to the highest benches, to preserve a unified system of law across the country, and, most importantly, to ensure that provinces could not circumvent requirements of the constitution – particularly, the division of powers – through the appointment of friendly judges that would make an expansionary reading of the Section 92.

It is important to note that Section 92(14) grants the provinces exclusive control over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." The combined effect of Sections 92(14) and 96 establishes a carefully calculated balance for a federal system of government, in which the provinces maintain control over the organization and administration of the superior courts, while the federal government appoints the particular individuals who will serve as its justices. This does not, however, prevent the provinces and the federal government from establishing new courts to adjudicate particular matters that are exclusively within provincial or federal jurisdiction. Indeed, there exists an important distinction in Canada between the superior courts, or 'Section 96 courts', and all other courts that do not fall into the category of Section 96 courts (such as lower level provincial courts, appellate courts – including the Supreme Court, and the Federal Court).⁷¹

The Supreme Court stated in *Crevier* that, because of Section 96, it is constitutionally beyond the powers of a provincial legislature to enact a privative clause that will wholly oust the power of a superior court to review a statutory tribunal's decision. Writing for a unanimous court, Laskin emphasized that:

⁷⁰ *Crevier v. A.G. (Quebec) et al.*, [1981] 2 S.C.R. 220

⁷¹ The superior courts in Canada include: the Court of Queen's Bench in Alberta, Manitoba, New Brunswick, and Saskatchewan; the Supreme Court of British Columbia, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Prince Edward Island, and the Yukon Territories; the Quebec Superior Court; the Ontario Superior Court of Justice; and the Nunavut Court of Justice. More will be discussed on the distinction between inferior courts, administrative tribunals, and superior courts in Part III - 2.

Where a... legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions... the legislation must be struck down as unconstitutional because it constitutes, in effect, a s. 96 court. It is unquestioned that privative clauses, when properly framed, may effectively oust judicial review on questions of law and on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, there is nothing that is more the hallmark of a superior court than the vesting of power in a... statutory tribunal to determine the limits of its jurisdiction without appeal or other review. Consequently, a... statutory tribunal could not constitutionally be immunized from review of decisions on questions of jurisdiction.⁷²

Consequently, while privative clauses may insulate a tribunal from certain forms of judicial review, they cannot touch the power of superior courts to assess whether a tribunal has acted within the proper confines of its jurisdiction – again, to quote Laskin’s judgment, “[i]t cannot be left to a... statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.”⁷³ By identifying that the ‘inherent review power’ of the superior courts over administrative tribunals is protected under a provision in Canada’s written constitution, the supervisory power of superior courts over administrative tribunals was put beyond the reach of legislatures in a way that has yet escaped courts in the United Kingdom and the United States.⁷⁴

In addition to limiting the force of full privative clauses, Canadian courts have also prevented legislatures from establishing statutory tribunals that transfer core powers away from superior courts. A major concern was that legislators, seeking to escape the trappings of the superior courts, might attempt to transfer

⁷² *Crevier*, 220

⁷³ *Ibid*, 238

⁷⁴ Notably, Australia has also ‘constitutionalized’ administrative judicial review with reference to particular structural provisions of its constitution (like Canada’s Section 96). Courts in the United Kingdom are, of course, able to claim that such clauses violate the constitutional principle of the ‘rule of law’ (as decisions such as *Anisminic* maintain). U.K. courts, however, are generally forced to ‘read down’ privative clauses under the aegis of parliamentary intent otherwise they risk coming into conflict with the constitutional principle of parliamentary sovereignty (which many commentators and judges in the U.K. regard as a more important constitutional principle than the rule of law principle). Since the U.K. constitution, as attested to in both case law and constitutional history, is instilled with the principle that there is no higher sovereign legal authority than the Queen in Parliament, U.K. courts have a difficult time pointing to any clear source that would give them a constitutional power to review an administrative tribunal’s decision unless it would be the will of the sovereign parliament itself. This leads, in effect, to the judiciary engaging in what is generally a ‘fictitious’ exercise of pretending to abide by parliament’s true wishes while actually subverting them when reading down privative clauses. I should also note that U.S. courts do have the ability to hear ‘constitutional’ challenges to administrative tribunals and that since *Marbury v. Madison*, their power as the final arbiters of the meaning of the constitution has been well entrenched. Whether U.S. courts possess a constitutionally protected position superior to administrative tribunals when it comes to the settlement of non-constitutional issues about statutory interpretation and jurisdiction, however, is not clear.

their powers over to statutorily created tribunals. In its decision in *Reference re: Residential Tenancies Act, 1979*,⁷⁵ [*Residential Tenancies*] the Supreme Court ruled that legislatures are barred from creating tribunals that, in essence, function as superior courts. To determine when a statutory tribunal impermissibly acts as a superior court, the Supreme Court developed a three-part test. The first part of the test involves an *historical inquiry* into the powers that were within the proper jurisdiction of the superior courts when Canada confederated. If a legislator grants an administrative tribunal a power that was not within the ambit of the superior courts at confederation, the imputing of that power to the administrative tribunal is constitutionally permissible. If not, we proceed to stage-two, which is a *structural inquiry* into the nature of the power being used by the tribunal. Even if the power is within the jurisdiction of the superior courts, as it would have been in 1867, a tribunal can exercise that power if used to develop ‘policy’ as opposed to adjudicate disputes; it is only the use of a pre-1867 superior court power in a *judicial* manner that offends the constitution. Finally, even if a statutory tribunal exercises a superior court power in a judicial manner, it exercises that power constitutionally if done so ancillary to a larger statutory scheme. It is only when the judicial exercise of a superior court power is the primary purpose for the existence of a tribunal that the exercise of that power is unconstitutional.⁷⁶

Crevier and *Residential Tenancies* demonstrate the unwillingness of the Canadian judiciary to sacrifice core powers of the superior courts – even when elected legislators feel that these powers ought to be exercised by other institutional actors and even when legislators seek to oust these powers through the enactment of full privative clauses. In a striking assertion of the remarkable constitutional powers of the Canadian courts, judicial constitutional interpretation has established that administrative tribunals can *never* be fully insulated from curial oversight and further that legislators cannot seek to remove core superior court powers and transfer them to other institutional actors.

F. Developing the ‘Pragmatic and Functional’ Test - Bibeault

While Canadian courts have resisted full privative clauses and have imposed judicial standards of procedural fairness on administrative decision-makers, thereby demonstrating an *activist* posture towards legislative preferences for regimes of administrative law, they have also demonstrated a remarkably *restrained* attitude with regard to the substantive decisions of many administrative tribunals that signifies, if not a warm-hearted reception, at least a curial preparedness to work with them. It is in the area of substantive review and the gradual development of the ‘standard of review analysis’ that the deferential spirit

⁷⁵ *Reference re: Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 238

⁷⁶ This three-part test was reaffirmed in *Sobeys Stores v. Yeomans and Labour Standards Tribunal (NS)*, [1989] 1 S.C.R. 238

which animates Dickson's decision in *New Brunswick Liquor* is most clearly exhibited.

As mentioned earlier in this section, the original ground for judicial intervention with the decisions of administrative tribunals was to test whether a tribunal had acted within the confines of its proper jurisdiction. The test for jurisdictional error involved an inquiry into whether the tribunal had decided an issue incorrectly that was 'preliminary or collateral' to the exercise of its proper powers. Unless the preliminary or collateral matters that related to the administrative tribunal's jurisdiction were answered correctly (that is, as a court would have answered them), the tribunal lost jurisdiction. Often minor issues that were deemed 'preliminary or collateral' to the exercise of the tribunal's powers would lead to pedantic wrangling amongst litigants in superior courts.

Even though *New Brunswick Liquor* cautioned against labeling as a jurisdictional issue those matters which were 'doubtfully so', the preliminary or collateral question test for jurisdictional error managed to survive until 1988 when the Supreme Court finally buried it in *Bibeault*.⁷⁷ In his judgment, Beetz J. proclaimed that:

The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis... Courts ought to substitute the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"⁷⁸

Instead of focusing on technicalities about the exercise of a tribunal's powers, Beetz's judgment in *Bibeault* counsels that courts look to the *purpose* the legislator has for establishing an administrative tribunal and which powers they intended the tribunal to have to fulfill that purpose. When a tribunal truly acts beyond the scope of the powers that the legislature intended it to have, the courts have a legitimate role to play in keeping the tribunal in check. But when the tribunal determines matters that the context of a statutory regime makes clear ought to be within the tribunal's jurisdiction, courts need to heed this fact. Beetz noted that:

...a pragmatic or functional analysis... puts renewed emphasis on the superintending and reforming function of the superior courts. When an administrative tribunal exceeds its jurisdiction, the illegality of its act is as serious as if it had acted in bad faith or ignored the rules of natural justice. The role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection... Yet, the importance of judicial review implies

⁷⁷ *u.e.s., local 298 v. Bibeault*, [1988] 2 S.C.R. 1048

⁷⁸ *Ibid*, par. 119

that it should not be exercised unnecessarily, lest this extraordinary remedy lose its meaning.⁷⁹

Excessive and unnecessary interference by the courts with the functioning of administrative tribunals is antithetical to the intent of the legislator and undermines the extraordinariness of judicial review. A pragmatic and functional analysis thus allows judicial review of administrative decision-making to focus on the core purposes for which it exists.

G. Establishing the Standards of Review

Shortly after *Bibeault*, Wilson J., in a famous concurring judgment in *Corn Growers*, asserted that:

[I]f administrative tribunals are to function effectively and efficiently, then we must recognize (1) that their decisions are crafted by those with specialized knowledge of the subject matter before them; and (2) that there is value in limiting the extent to which their decisions may be frustrated through an expansive judicial review.⁸⁰

Wilson's arguments would become the cornerstone for a new rationalization of a judicial policy of deference with regard to administrative tribunals – *expertise*. A key purpose for administrative tribunals, Wilson argued, was to establish expert panels that were more apt than courts to determine particular matters. Even with regard to questions of law (as opposed to simply questions of fact), administrative tribunals might be better placed and more expert than courts; therefore, even if courts might believe that a tribunal erred on a particular matter, provided that the tribunal's decision was supportable by clear reasons, it may be prudent for courts to leave the decision stand despite their disagreement. According to Wilson:

[Courts] may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power... Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. Courts [also] may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work.⁸¹

The last part deserves particular emphasis - when interpreting the meaning of powers conferred upon a tribunal in its home or constituent statute, it may make sense for the judiciary to adopt the tribunal's interpretation since it is often more

⁷⁹ *Ibid*, par. 126

⁸⁰ *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324

⁸¹ *Ibid*

familiar with the context in which its decisions are made than the courts. The tribunal may have a better grasp of what powers the legislature intended it to have in order to fulfill its mandate than the courts. Wilson's reasons in *Corn Growers* reminded the courts that there are often a number of competing interpretations of a particular statute that are plausible and it is foolish for courts to assume that their reading of the statute is the only correct and defensible one.

Looking with favor on Wilson's reasons in *Corn Growers*, the Supreme Court recognized in *Pezim* that there is a 'spectrum of deference' within which superior courts ought to operate when determining the amount of leeway to give administrative tribunals:

Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal... At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question...⁸²

The courts recognized two basic approaches to the decisions of administrative tribunals. On the one hand, there are certain issues that courts are better situated to decide than particular administrative tribunals. Such matters, particularly when there is no privative clause, need to be determined by courts. Administrative decisions on such matters will only be allowed to stand if the decisions are *correct* – that is, if they align with how the courts would have answered such questions. On the other hand, there are matters over which tribunals have more expertise than courts. In such circumstances the tribunal's decisions will be allowed to stand if the decision is not *patently unreasonable* – that is, if it is supported by clear and cogent reasons, even if the courts might not believe the decision to be the best decision all things considered.

Importantly, Iacobucci's decision in *Pezim* recognized that:

...even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.⁸³

⁸² *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557

⁸³ *Ibid*

While the absence of a privative clause or the presence of a statutory right of appeal to a court might signify that the legislature intended minimal deference to be given to a particular tribunal, these factors are not determinative of the degree of deference that is owed.

In 1997, the Supreme Court further refined the standards of review available for courts, establishing three distinct standards of review, each involving different degrees of curial oversight: *patent unreasonableness*, *reasonableness*, and *correctness*. The court reasoned in *Southam* that judicial review of administrative decision-making required:

... a standard more deferential than correctness but less deferential than “not patently unreasonable”... the third standard should be whether the decision of the Tribunal is *unreasonable*. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal’s decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination.⁸⁴

The idea behind instituting a third standard of review was that there exist circumstances in which a tribunal’s decision, upon some curial examination into the matter, will turn out to be an unreasonable decision, even if the tribunal is better placed than a court to determine the matter. Courts when reviewing on the reasonableness standard will not ask whether a tribunal’s decision is correct but instead ask whether their decision can sustain a ‘somewhat probing examination’ from the courts. Whereas the defect of a decision that is reviewed on a patently unreasonable standard must be plain and obvious in order for the court to interfere, on a reasonableness standard the defect requires some curial probing to determine.

H. *Four Factors in the Pragmatic and Functional Analysis: Pushpanathan*

But how exactly is the proper standard of review to be determined? *Southam* left obscure the precise criteria that courts ought to rely upon when deciding the appropriate standard of curial review. In *Pushpanathan*, the Supreme Court sought to restore a modicum of clarity to the developing jurisprudence. In this judgment, Bastarache J. articulated four key factors that are to be taken into account in determining the standard of review according to the ‘pragmatic and functional analysis’: privative clauses, expertise, the purpose of the act as a whole and the provision in particular, and the nature of the problem – ‘is the problem determined by a tribunal a question of *law* or *fact*?’ None of the factors are

⁸⁴*Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748, par. 54 and 56

intended to be fully determinative of the appropriate standard of review and each plays a role in the balance.

While the presence or absence of a privative clause, as noted in *Pezim*, will not be determinative of a matter, it is an important factor in determining the amount of curial interference that was intended by the legislature with regard to tribunal decisions. According to Bastarache, “the presence of a “full” privative clause is compelling evidence that the court ought to show deference to the tribunal’s decision, unless other factors strongly indicate the contrary as regards the particular determination in question.”⁸⁵ Identifying the importance of privative clauses in the pragmatic and functional analysis shows that courts will not simply ignore legislative intent when examining whether a tribunal’s decision will be reviewed; instead, they will treat privative clauses and statutory rights of appeal as legislative signals as to the appropriate degree of curial probing legislatures intend for tribunal decisions.

The second factor, expertise, counsels reviewing courts to be alert to reasons why a tribunal exists in the first place.

If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded.⁸⁶

Courts must recognize the sorts of considerations that lead legislatures to opt for tribunal decision-making over court-based ones and show restraint when reviewing decisions of a tribunal that is staffed by individuals with unique expertise in a particular area relative to that of a court. Bastarache identifies three elements that courts ought to identify when determining whether a tribunal is expert relative to a court with regard to a certain matter:

...the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise...⁸⁷

If a court can find reasons why a tribunal, at the end of this analysis is more ‘expert’ than a court, considerable deference to the tribunal is warranted and a lower standard of review (e.g. reasonableness) is appropriate.

The general purpose of a legislative act and the purpose of a particular provision are also factors in determining the appropriate standard of review. Oftentimes judicial decision-making is inappropriate for certain types of decisions (such as those that involve polycentric elements). Bastarache recognized this important issue in *Pushpanathan*:

⁸⁵ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982

⁸⁶ *Ibid*, par. 32

⁸⁷ *Ibid*, pars. 33-34

[w]here the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes.⁸⁸

While the procedures of courts may be most appropriate when determining disputes between parties, it is far from clear why these procedures are apposite for determining balances that have far-reaching effects beyond the relatively limited confines of the case being adjudicated. Since tribunals are often established by legislatures in order both to determine disputes and concurrently settle basic policies and regulations, excessive judicial interference with particular decisions may throw off the finely-tuned balances arrived at by a particular tribunal. Such considerations ought to lead courts to choose a far less probing standard of review.

The final factor in the *Pushpanathan* analysis is the nature of a particular matter that courts are being asked to review – is the issue one of law, mixed law and fact, or purely one of fact? While the question of how courts are to draw precise distinctions between these sorts of issues remains a source of confusion, the distinction is often a key component in judicial review and appellate settings outside of the administrative law context. Typically reviewing or appellate courts assume that since they were not present during proceedings, they are less able to make an accurate assessment of the truth or falsity of particular facts and thus that the individual that made the original judgment ought to be shown deference with regard to questions of fact. With questions of law, however, there is no reason why an earlier court or tribunal would be in an epistemically privileged position relative to a reviewing or appellate court. Recognizing this basic issue, Bastarache reasoned that "... even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention... Where, however, other factors leave that intention ambiguous, courts should be less deferential of decisions which are pure determinations of law."⁸⁹ Therefore, while courts ought generally to review 'pure' questions of law according to a less deferential standard (correctness), other factors might cause this presumption to be overridden.

I. Dancing with Dicey's Ghost: Dunsmuir and the Current State of Administrative Review in Canada

The pragmatic and functional analysis outlined initially in *Bibeault* and reinforced through *Pezim*, *Southam*, and *Pushpanathan* caused a number of

⁸⁸*Ibid*, par. 36

⁸⁹*Ibid*, par. 37

serious problems for courts, litigants, and tribunals alike. In particular, many complained about a serious lack of certainty surrounding when courts would exercise their review powers. *Pushpanathan* listed a few important factors in selecting the standard of review, but these factors were highly contextual in nature and often different judges would come to different conclusions about which standard of review was appropriate in a particular context leading to an escalating series of appeals. Further compounding the problem was a troubling inability of the courts to articulate the precise difference between reasonableness review and patent unreasonableness review. In cases such as *Ryan*,⁹⁰ *Voice Construction*,⁹¹ and *Via Rail*,⁹² the Supreme Court attempted, but to no avail, to give some clarity concerning how to distinguish the reasonableness *simpliciter* standard of review from the patent unreasonableness standard. Finally, in 2008 the Court recognized that the whole framework for judicial review was becoming completely unwieldy and required re-articulation and revision. The Court sought to put things to right in *Dunsmuir*.

In their majority judgment, Bastarache and Lebel JJ. revisited the basic Diceyan tension that exists at the foundation of Canadian administrative judicial review, highlighting how the courts' approach to judicial review attempts to walk a fine line between the rule of law principle and the democratic principle embedded in the Canadian constitution:

As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law... Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures. By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.⁹³

Yet while judicial review functions to preserve the rule of law, it also plays a key role in preserving legislative supremacy and hence respecting the fundamental democratic principle that animates the Canadian constitution:

⁹⁰ *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247

⁹¹ *Voice Construction v. Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609

⁹² *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650

⁹³ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, pars. 27-28

In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy... In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent... Administrative powers are exercised by decision-makers according to statutory regimes that are themselves confined. A decision-maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision-maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers.⁹⁴

The argument is that curial review of administrative decision-making is instrumental in preserving the rule of law by ensuring that administrative tribunals only act in ways that are legally permissible and it preserves legislative supremacy through the pragmatic and functional analysis that makes the applicable standard of judicial review rest largely on an imputation of legislative intent. This rationale remains the Supreme Court's answer to the dance of the Diceyan dialectic.

The majority decision in *Dunsmuir* also advocated a simplification of the available standards of review, arguing that a clear distinction between reasonableness *simpliciter* and patent unreasonableness had proven impossible. Bastarache and Lebel noted that the Canadian standard of review analysis:

...has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise.⁹⁵

To help simplify the standard of review analysis, they suggested that reasonableness *simpliciter* and patent unreasonableness collapse into a single standard – *reasonableness*. This leaves superior courts with two standards of review to operate with: correctness and reasonableness. Bastarache and Lebel defined reasonableness as a:

...deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for

⁹⁴ *Ibid*, pars. 29-30

⁹⁵ *Ibid*, par. 43

reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.⁹⁶

By simplifying the applicable standards down to two, the task for litigants seeking judicial review, tribunals defending their decisions, and reviewing courts was made much easier. Instead of wandering within a scale of divergent standards, reviewing courts simply needed to determine whether a particular issue was one that, given the context, counseled judicial deference or whether the matter was one in which the judiciary ought to impose its own assessment of the correct answer. A matter in which the context counsels a deferential posture is carried out according to criteria of the reasonableness standard, whereas a context that does not counsel deference is carried out according to criteria of the correctness standard.

The current state of the standard of review analysis simplifies the task of a reviewing court to a basic question about the appropriateness of deference, using the factors suggested in *Pushpanathan* as the key elements in the inquiry. An understanding about exactly what deference entails is therefore central if a coherent system of administrative judicial review is to take shape. In their judgment, Bastarache and Lebel defined deference as:

...both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision-makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference “is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers”... We agree with David Dyzenhaus where he states that the concept of “deference as respect” requires of the courts “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”.⁹⁷

Deference is thus understood as a judicial willingness to consider the particular reasons that might be offered in defense of a particular decision. It demands that judges examine whether the reasons offered by tribunals would be appropriate to justify a decision. If the reasons offered by a tribunal are sufficient to justify the decision, even if it is not a decision at which the courts would have arrived, judges ought to allow the decision to stand.

⁹⁶ *Ibid*, par. 47

⁹⁷ *Ibid*, par. 48

It is worth reiterating, however, that a ‘reasonable’ decision by a tribunal will only be allowed to stand if the decision is not the sort of decision that would be more appropriately left to a superior court for final determination. *Dunsmuir* does not do away with the correctness standard:

As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision-maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision-maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.⁹⁸

When the correctness standard is determined to be the appropriate standard of review for a particular decision this does not imply that the tribunal was prohibited from arriving at its own determination of the matter. Often making decisions that fall within the ambit of correctness review is integral to the day-to-day functioning of a tribunal. For instance, tribunals often need to determine whether new matters brought before them are properly within their jurisdiction for determination. It is, indeed, proper for tribunals to make such decisions. The only catch is that courts must agree that tribunals have made such determinations ‘correctly’ to permit them to stand.⁹⁹

Seeking also to prevent endless applications for judicial review of administrative decision-making (a significant and pervasive phenomenon that is currently being experienced by the courts¹⁰⁰), Bastarache and Lebel clarified that the standard of review chosen should be governed by the common law principle of *stare decisis* –

...the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.¹⁰¹

⁹⁸ *Ibid*, par. 50

⁹⁹ Canadian courts have even recognized that tribunals have the power to interpret the *Charter* and that tribunal determinations of *Charter* provisions will be upheld provided that courts agree with their interpretation on a correctness standard. See, for instance, *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570.

¹⁰⁰ Ontario, for instance, has established a special branch of its superior courts principally for judicial review and appellate applications from administrative tribunals – the Divisional Court.

¹⁰¹ *Dunsmuir*, par. 62

Each matter that comes before the courts for review does not have to be determined afresh; courts can rely on existing determinations about the appropriate standard of review that will be applicable in cases that share similar basic facts. The hope, one surmises, is that the common law will begin to establish predictable guidelines that will restore clarity to litigants and administrative tribunals about which standard of review will be applicable in which cases.

J. Problems with Dunsmuir – The Task Ahead

While the majority's decision in *Dunsmuir* sought to clarify judicial review through the simplification of the standard of review analysis, the concurring reasons of Binnie and Deschamps questioned whether the new approach to judicial review would have the desired effect. In his reasons, Binnie recognized that:

The present difficulty... does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision-making. The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.¹⁰²

The problem, for Binnie, is that the courts have failed to establish anything beyond vague general conditions that will be important for determining the appropriate level of curial scrutiny. While simplifying the standards of review helps, the majority's decision failed to address the underlying cause of confusion and uncertainty which results from highly contextual analyses displacing concrete legal tests. Binnie noted that: "[w]hile a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case."¹⁰³ *Dunsmuir* therefore did not cure the general ailments that were troubling judicial review.

In her reasons, Deschamps J. (together with Charron and Rothstein JJ.) argued that courts could simplify judicial review by retrieving old distinctions between questions of law, fact, and mixed law and fact:

The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the

¹⁰² *Ibid*, par. 132

¹⁰³ *Ibid*, par. 145

law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.¹⁰⁴

The idea is that courts ought to show deference when it comes to questions of fact and questions of mixed law and fact, but with pure questions of law they ought not to show deference, as decisions about the meaning and application of law are properly within the (exclusive) power of the courts. Thus, the whole pragmatic and functional analysis can be reduced to a single factor. Questions of law will demand a correctness standard of review; all other questions will demand the deferential reasonableness standard.

I am inclined to think that Deschamps' call for reducing the pragmatic and functional analysis simply to an analysis about what are proper 'questions of law', a position she has reiterated in *Khosa*,¹⁰⁵ will fail to restore order and clarity to judicial review. Unless a tenable distinction can be drawn between questions of fact and law, courts will be facing an endless throng of challenges as to the proper sorts of questions that ought to be subject to judicial review.

More importantly, Deschamps' suggestion counsels a 'regressive' approach to administrative law, demanding that judges restore judicial review to formalistic analyses reminiscent of the pre-*New Brunswick Liquor* era. Deschamps' activist posture threatens to undermine legitimate legislative efforts to allow legal interpretation to be carried out in non-traditional, non-court venues in order to secure particular objectives that otherwise may not be as effectively achieved. Particularly worrisome is the fact that her analysis would make no room for privative clauses, rendering these legislative signals otiose.

I do, however, agree with the substance of Binnie's analysis. What judicial review requires is some concrete test that is stable and predictable. The question, however, is whether a concrete test that achieves these objectives is possible. My purpose in the remainder of this thesis is to reformulate the standard of review analysis as an exercise of inter-institutional practical reasoning by the judiciary that, in turn, clarifies the concrete issues and values that animate judicial review while cutting out the unhelpful concepts and terms that have been the bane of courts, legislators, litigants, and tribunals alike. My belief is that philosophical analysis of core elements of judicial review, particularly the doctrine of judicial deference, will clarify the precise reasons why judges ought to adopt certain postures towards decisions made by particular sorts of tribunals. Judges are not isolated actors who render decisions in a vacuum; instead, they are a component part of a vast scheme of institutional decision-makers who collectively seek to achieve specific values and attain particular objectives. Recognizing the unique

¹⁰⁴ *Ibid*, par. 158

¹⁰⁵ *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339

part they play within the larger institution of government and the sort of practical reasoning that is required to fulfill their role, I will argue, ultimately is the key to clarifying administrative review.

PART II:

***JUDICIAL DEFERENCE, AUTHORITY, AND INTER-INSTITUTIONAL PRACTICAL
REASONING***

SECTION I: INTRODUCTION TO PART II

In Part 1, I examined the basic tensions that confound judges when reviewing administrative decision-making in contemporary common law legal systems. In particular, I identified how administrative review is caught in a perpetual dialectic between the demands of the rule of law and democracy. Common law superior courts recognize that they have an important role to play in preserving the rule of law by ensuring that all administrative decision-makers are accountable to law, do not violate basic norms of procedural fairness, and do not use their discretionary powers in an arbitrary manner. These courts also recognize, however, that legislatures are free to design new administrative regimes for the better regulation of particular matters – including granting administrative agencies the power to interpret and apply law in certain circumstances. Additionally, it was shown how in the Canadian context a renewed doctrine of judicial deference, as articulated by the standard of review analysis in *Dunsmuir*, is the courts' best (current) solution to navigating the competing constitutional principles of democracy and the rule of law. By identifying the proper conditions under which deference is appropriate in a generalized test (the 'standard of review analysis'), Bastarache and LeBel claimed to have brought clarity and order back to the judicial review of administrative decision-making.

Resolving the Diceyan dialectic through the articulation of a doctrine of judicial due deference is not, however, a uniquely Canadian solution. Courts in the United States, Australia, and the United Kingdom, in particular, have developed their own conceptions of how courts can reconcile demands of the rule of law and respect for legislative supremacy within a general theory of judicial deference. The doctrine of judicial deference has also attracted much recent academic commentary, particularly amongst public law theorists in the United Kingdom wherein the *Human Rights Act, 1998* has significantly altered the scope and justification of judicial review.¹⁰⁶

My purpose in this part is to examine what a judicial posture of deference might mean. While courts in Canada and elsewhere rely heavily upon a theory of 'due deference' to explain a restrained posture that they will take with regard to the decisions of other institutional actors, they have failed fully to articulate what deference *is* and *why* deference is owed. Yet if the concept of deference is to fulfill its mediating role between the demands of the rule of law and respect for democracy, it needs properly to be understood. Indeed, developing a general theory of judicial deference, I argue, is the fundamental problem that bedevils contemporary judicial review jurisprudence. While our courts in concrete

¹⁰⁶ Notable theorists engaged in this discussion in the U.K. include T.R.S. Allan, Paul Craig, Aileen Kavanagh, Murray Hunt, Jeffery Jowell, Allison Young, Mark Elliott, Johan Steyn, Christopher Forsyth, Timothy Endicott, Jeff King, and Thomas Poole. Notable theorists outside the U.K. include, in particular, David Dyzenhaus, Lorne Sossin, David Mullan, Michael Taggart, Grant Huscroft, Peter Hogg, and Jeffery Goldsworthy.

individual cases do usually have a sense of whether interfering with or deferring to an administrative decision is appropriate, they have failed to develop any *general* theory of judicial deference, relying instead on a disjointed set of basic contextual conditions for guidance. The next few sections develop a unified theory of judicial deference that will provide the basic framework for my future moves. By showing deference as an appropriate response to circumstances of authority, I ultimately will demonstrate how a general theory of deference functions as a solution to some of the most pertinent problems surrounding administrative review.

I proceed in three sections. First, I examine contemporary general theories of judicial deference, particularly the three most common models – deference as *submission*, *respect*, and *inter-institutional comity*. I also consider a serious objection to general theories of due deference – namely, T.R.S. Allan’s view that any attempt to institute such doctrines will result in an abdication of judicial responsibility to uphold Rule of Law values.

Second, I subject the term ‘deference’ to conceptual analysis, arguing that deference is best understood (at least in its ‘ordinary’ or ‘focal’ sense) as a correlative concept to that of authority. I also note that there is a helpful conceptual distinction to be drawn between calls for judicial ‘deference’ and calls for judicial ‘restraint’. I proceed to examine the nature and meaning of the concept of authority in order to highlight its implications for a complete analysis of deference. Utilizing the work of Joseph Raz, I demonstrate the key role that authority plays in our everyday practical reasoning. When circumstances of legitimate authority are present, reason counsels that we adopt a posture of deference to decisions made by an authority acting within its legitimate scope.

Third, my analysis of the role that deference and authority play in our practical reasoning is applied to an inter-institutional setting wherein a number of smaller institutions are established to work together in order to achieve particular goals for a larger meta-institution. My claim is that, while there are particular challenges that inter-institutional decision-makers face that are different from those encountered by individuals outside of these settings, the basic structure and importance of deference and authority remains. I also revisit the issue of judicial due deference, identifying how deference plays a key role in the practical decision-making of the judiciary in inter-institutional circumstances of authority.

SECTION 2: EVALUATING GENERAL THEORIES OF JUDICIAL DUE DEFERENCE

A. Introduction: General Theories of Judicial Due Deference

General theories of judicial due deference attempt to articulate the conditions under which a judge ought to conform their decisions to the decisions of another institutional actor. These theories discern broad standards and principles of deference that can guide the judicial task in concrete circumstances. There are three common general accounts of judicial deference present in contemporary academic discourse – formalist accounts (or deference as *submission*, deference as *respect*, and institutional accounts (or deference as *inter-institutional comity*) – in addition to a skeptical view that denies the appropriateness of any attempts to develop a general theory. The skeptical view, following Jeff King’s terminology, I refer to as a *non-doctrinal* approach to judicial due deference.¹⁰⁷

In this section, I will begin by first examining the skeptic’s case, arguing that ultimately the non-doctrinal approach favored by theorists such as Allan undermines most of the basic reasons that lead legislators to establish administrative tribunals in the first place; a purely case-by-case approach to judicial deference seriously impairs legislative attempts to secure the sorts of ‘effective governance’ values mentioned in Part I. I proceed briefly to discuss formalist general theories of judicial deference that establish particular zones of decision-making into which the judiciary is to be prohibited from entering. The fundamental flaw of these sorts of theories is that they prevent courts from interfering with arbitrary government decision-making in particular realms. Absolute bars to judicial review allow governmental actors seriously to abuse individual rights in unjustifiable ways without permitting any recourse to the courts. This, in turn, prevents the judiciary from fulfilling its constitutional role of preserving the rule of law. Next I examine Dyzenhaus’ highly influential theory of deference as ‘respect’ that requires the judiciary to look to all the reasons offered, or that could be offered, to justify another institutional actor’s decision. The major issue with Dyzenhaus’ position is that it ultimately is not all that different from Allan’s non-doctrinal approach and suffers from the same inability to secure important values associated with effective governance. Finally I examine institutional theories of judicial deference, arguing that these theories show promise because they are able to incorporate concerns about the rule of law, effective governance, and respect for legislative supremacy in ways that other conceptions of judicial deference cannot. In particular, I highlight the important aspects of Kavanagh’s sophisticated analysis of judicial due deference in inter-institutional settings. While I do believe her theory to be incomplete and in need of further clarification, it nevertheless represents the best currently available

¹⁰⁷ Jeff King, ‘Institutional Approaches to Judicial Restraint’, 29 *Oxford Journal of Legal Studies* 409 (2008), 411-414

model and I will use her framework, with some significant alterations, to develop a coherent approach to administrative review in Part III.

B. Worrying Skepticism – Allan’s Non-Doctrinal Approach

Trevor Allan argues that the judiciary ought not to attempt to establish any general doctrine of due deference as this is simply to chase after a 'chimera';¹⁰⁸ instead, he insists, judges ought to focus on a case-by-case analysis of whether another institutional actor has arrived at a decision that a reviewing court finds to be *persuasive*. Deference is thus always contextual and based in the specifics of a case rather than on general rules, factors, or other extrinsic considerations beyond a matter at hand.

Allan’s argument against general doctrines of due deference ultimately rests upon his analysis of the role that courts are supposed to play in the legal order as a whole. In particular, judges have an obligation to ensure that governmental actors respect the legal rights of individuals in all circumstances. They play the role of *neutral arbiters*, hearing competing arguments between the government and individual citizens as to whether individual rights have been violated. If judges adopt a general doctrine of due deference, establishing certain realms in which deference will be granted wholesale to governmental actors, they are prevented from being able to play their neutral role; rather than functioning as impartial adjudicators in disputes about the existence and application of individual rights, they prejudge disputes in favor of governmental actors. As Allan insists: “A judge who defers to official claims of superior wisdom forfeits his neutrality: he allows his own assessment of the merits of the claim to be displaced by the views of the public officials whose decision he is supposed to be reviewing.”¹⁰⁹

A predisposition to defer to a governmental actor results in an abdication of the judicial duty to uphold the rule of law in a constitutional regime committed to the protection of human rights and legality. By presuming that a governmental actor’s decision adequately respects human rights and is in accordance with basic requirements of legality without embarking upon their own thorough analysis of the matter, courts leave legally unregulated zones open for government abuse. The constitutional duty of the court “is to decide each case, after hearing evidence and argument, in accordance with the reasons that it finds persuasive.”¹¹⁰ By hiding behind a doctrine of due deference and failing to address the merits of the issues brought to the fore by individual litigants, judges relinquish their critical role in the constitutional order. Thus, Allan argues that:

¹⁰⁸ T.R.S. Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' 65 *Cambridge Law Journal* 671 (2006), 672.

¹⁰⁹ T.R.S. Allan, 'Common Law Reason and the Limits of Judicial Review' in David Dyzenhaus (ed.), *The Unity of Public Law* (Toronto: Oxford University Press, 2004), 290

¹¹⁰ 'Human Rights and Judicial Review', 683

When deference is elevated to the status of an independent doctrinal requirement, it confuses analysis by suggesting that judges should sometimes surrender their independence of judgment in the face of superior expertise, or superior democratic authority, or the inexorable demands of an unambiguous text. But surrender of judgment is inconsistent with the rigorous scrutiny of governmental action that the protection of human rights requires.¹¹¹

Notably, even claims about the expertise of other administrative actors relative to courts, the primary motivating force behind the reasonableness standard in the Canadian standard of review analysis, cannot provide appropriate grounds for a general policy of judicial deference.¹¹² Since the purpose of judges in administrative review is to ensure that decisions are justified to individual litigants that feel their rights have been violated, “if the legitimate needs of the administration cannot be satisfactorily explained to a non-expert court, they cannot be justified to the citizen whose interests are affected.”¹¹³ While a court reviewing a decision must be alert to the reasons that another institutional agent relied upon in order to arrive at a particular decision,¹¹⁴ the reviewing judge must both *understand* the reasons proffered in defense of a decision and find them *sufficient* to respond to the individual litigant’s claim that their rights were unfairly infringed.

In the end, Allan argues that a general doctrine of judicial due deference will either prove to be ‘empty’ or ‘pernicious’:

¹¹¹ *Ibid*, 694.

¹¹² In ‘Deference, Defiance, and Doctrine’ 60 *University of Toronto Law Journal* 41 (2010), the most recent statement of Allan’s view, he acknowledges that “[w]hen there is scope for different answers or approaches, it is right that the court accept the solution favoured by the public authority. Not only may the authority possess an expertise that the court itself lacks, but it will be accountable in ways that judges are not.” This implies that Allan’s more recent position is much closer to the position of Dyzenhaus (and perhaps even Kavanagh) than suggested by his earlier work. While he does identify the appropriateness of deference when there is judicial uncertainty about what the correct decision ought to be, he likely will still argue that judges need carefully to examine whether there truly is ‘uncertainty’ by engaging in a thorough analysis within the particular context of individual cases. Thus, a general doctrine of deference that would have judges wholly refrain from embarking on their own analysis when there is perceived uncertainty remains inappropriate.

¹¹³ *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), 10

¹¹⁴ It should be noted that Allan is not averse to the idea that there may be good grounds for judicial deference in particular cases with regard to very particular issues, as he argues, “Deference is not due to an administrative decision merely on the ground of its source or ‘pedigree’, but only in the sense (and to the extent) that it is supported by reasons that can withstand proper scrutiny.” ‘Common Law Reason and the Limits of Judicial Review’, 291-292. Thus, Allan’s argument is not that there are no grounds whatsoever for judicial deference, but rather that we ought not to hamper the judiciary with any *general* doctrine of when they ought to exercise deference that abstracts from case specific details.

It is empty if it purports to implement a separation of powers between the courts and other branches of government; that separation is independently secured by the proper application of legal principles defining the scope of individual rights or the limits of public powers. A doctrine of deference is pernicious if, forsaking the separation of powers, correctly conceived, it permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong. In its latter manifestation, judicial deference amounts to the abandonment of impartiality between citizen and state: in acceding to the supposedly superior wisdom of the public agency (or of Parliament), the court is co-opted into the executive (or the legislature), leaving the claimant without any independent means of redress for an arguable violation of rights.¹¹⁵

His argument is that those who would advocate a doctrine of judicial deference in favor of some democratically motivated account of legislative sovereignty fail to recognize that the separation of powers is already preserved in doctrines of constitutional law. A doctrine of judicial deference thus makes no difference with regard to the separation of powers and consequently is empty of any meaningful content. On the other hand, general doctrines of judicial deference threaten key rule of law values and the constitutional position of the judiciary in upholding these values. In such cases, these doctrines prove to be pernicious since they oust the judiciary from their proper role in the legal order. Courts therefore ought to abandon any attempts to develop such a doctrine and focus instead on the merits of individual cases and whether other institutional actors' decisions deserve deference in the particular cases.

Ultimately, Allan may be correct that no general and coherent doctrine of judicial deference is possible that is completely and perfectly compatible with the constitutional obligation of the judiciary to uphold the rule of law and protect human rights in individual cases. While I do not want to dispute the importance of this central judicial obligation, we need to recognize that there are other serious and pressing concerns that exist – including concerns such as expertise, the cost of legal proceedings, timely and effective adjudication, etc... One of the principal reasons why courts have spent enormous efforts attempting to develop general doctrines of judicial deference is in order to respond to the evolving need to resolve an ever-expanding number of legal and regulatory disputes through extra-judicial venues. Issues of volume and expertise, as discussed earlier, are principal reasons that lead to the establishment of administrative tribunals. If ordinary courts were to hear *all* cases in the modern heavily regulated state, justice would grind to a halt and judges would find themselves trying to understand disputes in contexts in which they are inept or unfamiliar. In addition, in order to close endless appeals processes and in order to allow litigators some ability to predict when an appeal from an extra-judicial agency to a court is likely to meet with success, the judiciary has attempted to develop a general framework for

¹¹⁵ 'Human Rights and Judicial Review', 675-676

deference. By identifying some key broad criteria for when curial intrusion into another institutional actor's decisions by the courts is justified, courts have sought to establish some modicum of clarity and certainty for legislators, administrators, litigants, and private citizens alike.¹¹⁶ Without such a doctrine all cases are in principle amenable to judicial review on an infinite number of different issues - all of which must be determined on a case-by-case basis. To prevent the ballooning of such a spectrum of cases appearing before the courts (and thus recreating one of the major problems that extra-judicial agencies often are established explicitly to resolve) courts are required to lean on something like a general doctrine of due deference. It is therefore necessary if a functioning system of judicial review is to be possible in common law states in which all facets of life are ever increasingly becoming regulated. In short, the modern common law state will need to be seriously reconceived if we cannot establish some general doctrine of judicial deference.

We must acknowledge in administrative review an exceedingly important aspect of rule-based decision-making identified by Frederick Schauer. In *Playing by the Rules*, Schauer argues that an essential aspect of any rule-based system is that it will rely upon generalizations that will, inevitably, be under-inclusive and over-inclusive when applied to certain individual cases.¹¹⁷ For example, most highways have a set speed limit (i.e. 'Maximum Speed 100 km/h'). Such a speed limit, we may assume, is designed to capture the appropriate safe speed for ordinary vehicles operated by drivers of average competency and experience. Notably, however, a speed limit will be wholly inappropriate for drivers of poorly engineered vehicles, that are very heavy, and that are being driven by inexperienced drivers with vision loss. It will also be an inappropriate speed limit for someone such as Lewis Hamilton heading home from the track in his well-engineered Mercedes. Our poor driver ought to drive more slowly than the speed limit in order to drive safely while our talented driver probably could drive more quickly and still drive safely. While there are clear failings of the rule, we nevertheless can see the justification for imposing a speed limit of 100 km/h. It represents a calculated balance between the desire to ensure highway safety and at the same time promote expedient travel. The speed limit is a generalization that captures an appropriate balance between safe and efficient travel in the vast majority of cases but fails (oftentimes spectacularly) in some individual cases.

¹¹⁶ In a recent article, Allan has acknowledged that a limited general doctrine of judicial due deference may be beneficial, in fact. He holds that "Legal doctrine may certainly help to structure the necessary inquiry by providing tools of conceptual analysis; but what chiefly matters in practice is the wisdom and sensitivity of their deployment." "Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review", 41. The argument is that while general doctrines of judicial deference ought not to prohibit courts from conducting a full review of government decisions, they may be useful for framing issues and identifying reasons for or against deference in a particular case.

¹¹⁷ Frederick Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991)

General doctrines of judicial due deference are pinnacle examples of just such generalizations. They attempt to achieve an appropriate balance between the judicial obligation to ensure that individual litigants are treated appropriately by administrative, legislative, and executive decision-makers while at the same time allowing these non-court actors to have some latitude to realize both effective governance values and rule of law values independently of the procedures and rules of courts. What Allan's non-doctrinal approach does is artificially elevate one aspect of this judicial balancing act. It makes upholding rule of law values, as these are understood by the judges, the judiciary's only relevant obligation to the neglect of some of its other important obligations (such as respecting democratic decision-making and ensuring that there is a well-functioning and efficient system of adjudication).

C. Formalist Approaches to Judicial Due Deference

Formalist conceptions maintain that deference is a matter of the judiciary *submitting* to another branch of government or institutional decision-maker's determination of some matter. Deference, thus conceived, involves judges putting their own assessment of some particular issue entirely aside and conforming its decision in a particular case to whatever another branch sees fit. It functions as an absolute bar to judicial reconsideration of the merits of a particular decision or at least of some aspects of a particular decision. Deference of this sort is often captured in terms of spatial metaphors¹¹⁸ (there are particular realms into which judges cannot intrude), in terms of justiciability¹¹⁹ (there are certain sorts of issues that courts are prohibited from considering), or in some other sort of formalist terms¹²⁰ (such as the impermissibility of judges engaging 'political questions' or matters of executive 'policy' making). Underlying all formalist accounts is the view that there are matters that ought to be decided by other institutional actors and courts simply should not, and arguably legally or constitutionally cannot, call these decisions into question. The grounds for such a position are varied but typically involve considerations such as constitutional structure and the division of powers (judges ought not to wade into matters that are within the purview of the executive), political propriety (judges ought not to question the wisdom of decisions made by certain democratically elected or accountable officials – including such decisions as to enact a privative clause), and negative

¹¹⁸ Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'' in Nicholas Barnforth (ed.) *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003)

¹¹⁹ Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999)

¹²⁰ See, for instance, Martin Loughlin's, *The Idea of Public Law* (Oxford: Oxford University Press, 2003).

consequences (any judicial intrusion into certain realms will undermine the stability and proper functioning of government).

There are at least two major problems with formalist approaches to judicial deference. First, formalist approaches seem artificially to cut the judiciary off from performing some of its principal tasks – such as ensuring that governance is carried out according to law and that acts of government discretion are always carried out in a manner that is procedurally fair to affected parties. Courts have long exercised these functions in common law systems and it is not clear why, without very good reasons, they ought to relinquish their reviewing powers. By placing certain matters absolutely off the table from curial oversight, formalist accounts of judicial due deference imply that courts will be unable to aid individual litigants that might have good grounds for claiming that they have been treated unfairly by government officials. So a common complaint against formalist accounts of judicial deference is that, if adopted by courts, they prevent judges from upholding particular values typically associated with the rule of law.

Second, there is the pragmatic concern that often the boundaries that formalist proponents would erect as judicial ‘no-fly zones’ resist clear demarcation. A common proposal (as we have seen in Canadian case law) is that judges ought to defer to administrative determinations of fact but not their determinations of law; another is that judges ought to allow determinations of policy to be made by other institutional actors but not matters of legal principle; yet another is that those issues that are ‘polycentric’ in nature ought to be shown deference whereas others ought not. Formalist doctrines often end up with the judiciary constantly redefining and tinkering with the borders of particular subject matter while sidelining or ignoring pertinent issues. This forces judges to set aside the real merits of individual claimants’ cases in favor of resolving them according to artificially constructed and, at point of application in concrete cases, sometimes intolerably unjust formalistic analyses.

D. Dyzenhaus’ Deference as ‘Respect’

David Dyzenhaus, in his highly influential paper ‘The Politics of Deference’, argues that formalist approaches (or deference as ‘submission’) ought to be put aside in favor of a much more attractive model of deference - what he refers to as ‘deference as *respect*.’¹²¹ He argues that deference as submission is premised on a flawed ‘positivistic’ conception of law that emphasizes legal form to the exclusion of any consideration of substance. Deference ought to be conceived as judicial respect for the particular sorts of reasons proffered by another branch of government that could adequately justify a particular decision that they reached. According to Dyzenhaus, “[d]eference as respect requires not

¹²¹ David Dyzenhaus, ‘The Politics of Deference: Judicial Review and Democracy’ in Michael Taggart (ed.) *The Province of Administrative Law* (Oxford: Hart Publishing, 1997)

submission but a respectful attention to the reasons offered or which could be offered in support of a decision...”¹²² Even though judges may substantially disagree with a particular decision that is reached by an administrative decision-maker, judges demonstrate deference as respect if, in their treatment of the decision under review, they recognize and assess the legitimate reasons that another institutional actor has explicitly or implicitly relied upon in arriving at her decision. When another institutional actor’s reasons are ‘appropriate’ and ‘sufficient’ to justify the decision made,¹²³ courts ought not to interfere with the decision; however, when there are insufficient reasons or inappropriate reasons, courts ought to rectify the shortfall and establish a fully justified decision, either by supplementing the reasons of another institutional actor or by arriving at the decision by new reasons that will prove conclusive and appropriate.¹²⁴

Deference as respect entails that there is a presumptive ‘good faith’ attributed to other institutional decision-makers by the courts. The goal of the reviewing court is then to try and understand how another actor has attempted to live up to the demands of making reasonable and justified decisions. It does not necessitate that courts relinquish their role in the constitutional order and it does not demand that they blindly submit to the will of a democratically elected legislature that has enacted a privative clause or has sought to oust review through some other measure; rather, it simply requires that courts assess whether other institutional actors have truly lived up to their task of reaching rationally justifiable decisions.¹²⁵

There are at least three major problems with the ‘deference as respect’ approach. First, there is a pragmatic problem looming with any attempt to develop

¹²² *Ibid*, 286. This position has been identified as the guiding principle for a doctrine of judicial deference by Canada’s Supreme Court in *Baker, Ryan, and Dunsmuir*.

¹²³ As I will argue below, Dyzenhaus is not altogether clear about what exactly constitutes a set of reasons that are both appropriate and sufficient to justify a decision.

¹²⁴ Dyzenhaus’ conception of deference as respect is motivated by his understanding of law as ‘public justification’ – a theory motivated by thinkers such as Ronald Dworkin and Etienne Mureinik (as attested to in Dyzenhaus’ ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ 14 *South African Journal of Human Rights* 11 (1998). The particular role of the courts, for Dyzenhaus, is to ensure that *all* government decisions are sufficiently justified with reasons that are publically articulable. Thus, the decisions of other institutional actors can play an important role in judicial reasoning since they represent presumptive efforts to arrive at fully justified decisions. Judges simply need to check if the other actors are successful in this endeavor in order to allow a decision to stand. For more on Dyzenhaus’ theory of the proper role of judges in a legal order see his ‘The Very Idea of a Judge’ 60 *University of Toronto Law Journal* 61 (2010).

¹²⁵ Notably, Allan seems to endorse Dyzenhaus’ particular approach to a general doctrine of deference in ‘Deference, Defiance and Doctrine’. He claims, for instance, that “A respectful open-mindedness is the necessary accompaniment to steadfast adherence to the rule of law, irrespective of the source of any alleged infringement... The conclusion that a measure is unjustified must be drawn, reluctantly, from close inspection of all promising lines of inquiry.” (44-45) However, as I note below, whether Dyzenhaus’ theory ought to be regarded as a general doctrine rather than a specific doctrine of due deference is unclear.

a deferential standard in judicial review centered around the notion of ‘sufficient reasons’. If courts are to allow decisions to stand only if they are sufficiently justified, we need a complete account of what appropriate, sufficient, and publically articulable reasons for a decision will entail. A decision might be sufficiently justifiable in a number of ways. One sense in which a decision might be sufficiently justifiable is if the reviewing court simply believes that the reasons of another decision-maker are correct. In this case, a court’s conclusion that a decision is sufficiently justified is no more than a judicial stamp of approval and appears to leave no room for deference. Another sense in which a decision might be sufficiently justifiable might be that there it is more than one ‘reasonable’ decision possible for a particular issue and therefore, even if the judge may have chosen an alternative, the decision is equally acceptable. Dyzenhaus, however, does not seem to have this alternative in mind. He argues, for instance that ““reasonable” should not be taken to mean that there could reasonably have been another resolution of that issue.”¹²⁶

If neither of these options is possible, the first because it is incompatible with a deferential attitude and the second because it presumes a ‘multiple right answers’ thesis, Dyzenhaus requires some theory of exactly how it is possible for two individuals to disagree about the particular reasoning that led to a decision and nevertheless agree that the other party decided the matter in a sufficiently reasonable way. He attempts to explain that a sufficiently reasonable decision is one in which: “...the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them.”¹²⁷ Ultimately we must therefore conclude that it will be a matter of an individual judge’s assessment of what she feels to be sufficiently reasonable – the test simply being whether she can somehow ‘plug’ all the important reasons for a decision that she believes to be relevant into the decision reached by another. If she can, the decision is reasonable and worthy of deference; if not, it is unreasonable and is subject to interference.

Given pervasive scholarly disagreement about the nature of reasons and when a particular decision is backed by appropriate reasons, as well as the reality of a wide diversity of judicial backgrounds, values, convictions, and even education and mental competency, it is unclear how Dyzenhaus’ deference as respect could ever provide anything like a stable foundation for judicial review.¹²⁸ It requires some ‘God’s eye view’ from which the reasonableness of a decision can be assessed. The lack of any consensus as to what this view would be means that, whatever the other merits might be of this position, it cannot play the practical role that is required of a general doctrine of due deference.

¹²⁶ *Ibid*, 304

¹²⁷ *Ibid*, 304

¹²⁸ This line of criticism also applies, with equal force, to Allan’s non-doctrinal approach.

This basic concern leads into the second major issue – that requiring judges effectively to replicate the whole administrative reasoning process in order to see if a decision is sufficiently justified is a serious waste of judicial resources and may ultimately undermine the very purpose of administrative regimes in the first place. The task of a reviewing court, for Dyzenhaus, is to determine whether a deferential posture is counseled by examining *all* the reasons present in a decision that could adequately justify it. But a key reason why administrative tribunals exist is because judicial reasoning may be inept in particular matters and the presence of these issues in courts may cause severe backlogs in the system. Yet by forcing courts to examine the reasonableness of particular tribunal decisions, they bring their unique judicial reasoning and processes to bear on the matter, thus forcing them to deal with issues that legislators sought to insulate or prevent them from considering at all.¹²⁹ What Dyzenhaus proposes is that courts must delve deeply into the substance of each decision under review. They need to go as deeply into each matter as the original decision-maker did in order to discern whether there are justifiable grounds for a decision. Thus, each judicial review proceeding involves a complete reexamination of the issue in question in order to search for its justifiability. While this approach may allow judges to pay proper deference to other institutional actors by respecting their abilities and judgment in particular cases, it nevertheless, like non-doctrinal approaches to deference, is impractical insofar as it makes all matters, in principle, reviewable by a court. If our court system is to be tenable in a future of ever-expanding legislative and regulatory programs, there must at least be *some* classes or types of decisions the full merits of which are off the table for curial review.

Indeed, as the attentive reader will notice, this issue makes Dyzenhaus' basic position roughly similar to Allan's in both form and effect, leading to the third and final major problem with his position: *deference as respect seems simply to be a non-doctrinal approach to due deference*. Indeed, I believe that deference as respect ought to be understood more as a non-doctrinal approach than a general theory of judicial due deference because the requirement that administrative and other government decisions be sufficiently justified can only be assessed in the complete context of an individual case. Deference as respect does not answer the concerns of the skeptic of general doctrines of judicial due deference; instead, it appears to admit the very truth of the skeptic's position while masquerading as a solution to it.

¹²⁹ I am not claiming that these are always issues that are in play, only that often administrative tribunals are created for these reasons and thus are undermined when the judges adopt a general policy of deference as respect.

E. *Jeff King on Institutional Approaches*

In recent work Aileen Kavanagh, Jeff King, and others¹³⁰ have developed accounts of ‘judicial due deference’ or ‘judicial restraint’¹³¹ that focus on the unique role of judges in inter-institutional settings. Judicial deference, they claim, ought not to be determined purely by formalistic categories (as models of deference as submission would entail), nor ought they to be purely a matter of whether another institutional actor has arrived at a sufficiently justifiable decision (as per Dyzenhaus’ deference as respect model); instead, judges need to assess their particular placement in the institutional structure of government and determine whether a deferential policy to another institutional actor will lead to the best results or achieve certain values. For both King and Kavanagh, affording due deference to other institutional actors is an important facet of judicial practical reasoning in an inter-institutional decision-making setting.

King argues that what he calls ‘institutional approaches’ to judicial restraint are a significant improvement upon formalistic conceptions of deference (deference as submission) and are a plausible response to Allan’s skeptical arguments. Institutional approaches are characterized by three basic features:

The first is that judges should take an expansive view of what is reviewable and justiciable... The second is that judges should assign significant weight to the views of other decision-makers. The third... is that the analysis of deference should be structured somehow by reference to principles or factors.¹³²

Institutional approaches to restraint identify that there are circumstances in which judicial interference with the decision-making of other institutional agents is appropriate and others where it is not. They acknowledge that judicial competency is limited to particular sorts of subject matters and that judicial reasoning involves a peculiar process (particularly its reliance on interstitial decision-making, the adversarial process, and judicial neutrality and

¹³⁰ Most notably including Jeffery Jowell, Adrian Vermuele, Cass Sunstein, and Neil Komesar. See Jowell’s ‘Judicial Deference: Servility, Civility or Institutional Capacity’ in *Public Law* (2003), and ‘Judicial Deference and Human Rights: A Question of Competence’ in P. Craig and R. Rawlings, *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: Oxford University Press, 2003). Vermuele’s *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, MA: Harvard University Press, 2006). Sunstein’s *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 2001), and ‘Institutions and Interpretation’ 101 *Michigan Law Review* 885 (2003). Komesar’s *Imperfect Alternatives* (Chicago: University of Chicago Press, 1997) and *Law’s Limits* (Cambridge: Cambridge University Press, 2001)

¹³¹ While most theorists seem to treat these terms as synonymous, I will try to distinguish them in Section III. For the purposes of this section, however, I will make no distinction between the terms ‘restraint’ and ‘deference’.

¹³² ‘Institutional Approaches to Judicial Restraint’, 424

independence) that may not be ideal in all contexts.¹³³ An institutional approach to due deference requires courts carefully to examine whether a particular issue can be better determined by other institutional actors than the courts. When the courts are a poor choice for resolving an issue and other institutional actors possess greater competency, judges ought to treat the decisions arrived at by these other, better placed, institutional actors with significant deference. It also recognizes that there are issues that other institutional decision-makers are less well suited to determine than courts. In such circumstances, institutional approaches maintain that courts ought not to adopt a deferential policy.

King identifies two basic sorts of institutional approaches and remains agnostic between them. The first is what he terms ‘contextual institutionalism’. This position maintains that judges:

...should contextualize each issue and consider institutional factors when attributing weight to the views of other officials... 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.¹³⁴

Contextual institutionalism favors giving judges the discretion to determine the appropriateness of their exercise of review powers in particular circumstances. Rather than attempt to pigeonhole reasons for restraint, judges ought to develop unique reasons in particular cases. While the analysis can be guided by general understandings of the purpose of the judiciary in the legal order and the forms and limits of curial adjudication, the courts always need to discern the confines of their competence in the unique context before them.

The second sort of institutional approach is what King refers to as ‘restrictive institutionalism’. Unlike contextual institutionalists, restrictive institutionalists seek to construct “bright line rules that lessen the use of judicial discretion, either in certain pre-designated ‘areas’... or simply as a general posture of judicial restraint...”¹³⁵ Restrictive institutionalists recognize a need for certainty and stability in day-to-day judicial review. They maintain that through the articulation of clear principles, factors, tests, and/or rules that capture the duty of judicial deference, judicial discretion can be reduced.¹³⁶ In addition, they place

¹³³ As King notes, institutional approaches to judicial restraint owe much of their lineage to the work of the ‘legal process’ school that developed in Harvard through the 1960s and 1970s, particularly as reflected in the work of Lon Fuller, Henry Hart, and Albert Sacks. See Fuller’s ‘Forms and Limits of Adjudication’, and Henry Hart and Albert Sacks’ *The Legal Process* (Westbury: Foundation Press 1994).

¹³⁴ ‘Institutional Approaches to Judicial Restraint’, 430

¹³⁵ *Ibid*

¹³⁶ King would likely regard the four basic factors in the pragmatic and functional analysis that underlies the Canadian standard of review analysis as something of a restrictive institutionalist approach – although tempered by the recognition that these factors are not exclusive of other possible factors that could impact the analysis.

an emphasis on judicial fallibility and the consequences of excessive judicial interference with democratic processes, as well as the importance of general rules for effective and efficient governance.¹³⁷

Importantly, King identifies the contextual and restrictive institutional approaches to judicial restraint as “the opposite ends of a spectrum [as] many might refuse to put themselves entirely in one category or another.”¹³⁸ Thus, the spectrum runs from an approach that puts more emphasis on the need for judicial discretion that will enable attention to all the particularities of the case, to an approach that seeks to constrain the discretion through clear guidelines. This particular articulation of the difference between contextual and restrictive institutionalists, however, raises a curious question as to how different the poles of the spectrum are from simply being non-doctrinal or formalist accounts of deference. Unfortunately, King fails adequately to address this problem. It appears that at the extremes a contextual institutionalist is something like a non-doctrinalist (or perhaps an advocate of Dyzenhaus’ deference as respect) and the restrictive institutionalist is an advocate of some type of formalist approach.

What King’s analysis ultimately implies, I suggest, is that the uniqueness of the institutionalist approach is that it is a mean between two extreme positions about the proper approach to judicial deference – which, of course, fits nicely into the basic claims made by courts that a doctrine of due deference is a *via media* between values associated with the rule of law and those associated with democracy and effective governance. Institutionalists are therefore advocates of some form of balance between highly interventionist case-by-case discretion and a dogmatic hands-off approach.

F. *Kavanagh on Deference as Systemic Bias/Inter-Institutional Comity*

The most thorough and coherent defense of an institutional approach to judicial deference available in the current literature is Kavanagh’s. In ‘Deference or Defiance?’ Kavanagh claims that “*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.*” It introduces a “systematic bias” into one’s practical reasoning.¹³⁹ A judicial policy of deference can be both a “rational response to uncertainty”¹⁴⁰ and a way for judges

¹³⁷ See, in particular, Adrian Vermule’s *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge: Cambridge University Press, 2007)

¹³⁸ ‘Institutional Approaches to Judicial Restraint’, 431

¹³⁹ Kavanagh, ‘Deference or Defiance? The Limits of the Judicial Role in Adjudication’ in Grant Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008), 185-186

¹⁴⁰ *Constitutional Review under the UK Human Rights Act* (Oxford: Oxford University Press, 2009)

to create “the *appearance* of regard or respect for another.”¹⁴¹ Deference therefore enables judges to arrive at better decisions while also allowing them to establish an amicable relationship with other branches of government. It is a requirement of

...*interinstitutional comity* – the... mutual respect between the branches of government... Even when judges disagree with a decision... they must, nonetheless, do so respectfully - that is, in a way that does not belittle or ridicule those decisions or delegitimise them.¹⁴²

Judges can demonstrate ‘minimal’ deference through to ‘substantial’ deference when they review the decisions of other institutional actors. Judges demonstrate minimal deference when they give some presumptive weight to the decisions of other institutional actors. Reviewing judges give minimal deference when they treat the fact that another institutional actor believes that a particular conclusion is the correct or best one as a reason to maintain a decision. In all judicial review proceedings, courts ought to recognize that because another branch of government has arrived at a particular decision, that decision needs to be accorded respect; however, this ‘presumptive weight’ in favor of another institutional actor’s decision will not necessarily be dispositive:

... judges always owe a duty of *minimal deference* to legislative and executive decision-making, but *substantial deference* is only owed exceptionally. *Minimal deference* is the judicial attribution of some presumptive weight to the decision... but it is not a very strong presumption. It simply requires that the legislature’s or executive’s decisions are treated with respect in the sense that they should be taken seriously as a bona fide attempt to solve whatever social problem they set out to tackle.”¹⁴³

In circumstances counseling minimal deference, the judiciary recognizes that there are reasons of varying weight to favor the decision reached by another branch (particularly the need for respectful inter-institutional comity between divergent decision-makers), yet countervailing reasons of sufficient weight may also exist that lead the judiciary to decide not to adopt the decision made by another institutional actor. A policy of minimal deference therefore ensures that judges never simply ignore the decisions made by other institutional actors, even if they do end up setting the decision aside upon review.

There may, however, be circumstances wherein the judiciary ought to treat another institutional actor’s decision as giving rise to much more substantial reasons for deference. Substantial deference, unlike minimal deference, however:

...has to be earned by the [other] branches and is only warranted when the courts judge themselves [to] suffer from particular institutional shortcomings with regard to the issue at hand. These are cases in which they judge the legislature or

¹⁴¹ ‘Deference or Defiance?’, 188

¹⁴² *Ibid*, 188-189

¹⁴³ *Ibid*, 191

the executive to have: a. more institutional competence, b. more expertise, and/or c. more legitimacy to assess the particular issue.¹⁴⁴

These three factors establish pertinent reasons for judges to put aside their own particular assessment of the merits of a case and adopt the decision of another. By recognizing that there may be certain issues that the judiciary is ill-suited to address, judges ought to “be aware of their institutional limits and... ensure that they make the decisions to which they are best suited, but leave others to the legislature or the executive.”¹⁴⁵ When a matter is uncertain and another institutional actor is better suited for some or all of the above reasons to determine the issue, judges act rationally by allowing the better-suited institutional actor to determine the issue. For Kavanagh, deference accordingly encompasses both elements of deference as submission and deference as respect, allowing for a spectrum between the two;¹⁴⁶ where the judicial attitude ought to lie on the spectrum depends on the particular sorts of reasons (and their weight) that can be advanced for and against following another institutional actor’s decision. Therefore,

... rather than being a blanket rule preventing scrutiny, deference maintains some flexibility by requiring the courts to assess their institutional competence to deal with a particular issue, and to show restraint to the extent that their competence is limited. The relative flexibility of the doctrine of deference is contained in the fact that it can be partial, ranging from giving minimal through to substantial weight to the decisions of the elected branches. This is different (and significantly so) from declining to adjudicate an issue at all.¹⁴⁷

The task in judicial review is to assess whether a particular decision made by another institutional actor is backed by sufficient reasons. Unlike Dyzenhaus’ position which requires that a decision must be fully and publically justifiable in

¹⁴⁴ *Ibid*, 192. I should note that Kavanagh has recently refined this list: “One can identify at least four institutional reasons for judicial restraint. These are concerns about (1) judicial expertise, (2) the incrementalist nature of judicial law making, (3) institutional legitimacy, and (4) the reputation of the courts.” See her article ‘Judicial Restraint in the Pursuit of Justice’ 60 *University of Toronto Law Journal* 23 (2010), 28. I will incorporate some of the nuances of her position in my forthcoming analysis.

¹⁴⁵ ‘Deference or Defiance?’, 215

¹⁴⁶ In this sense, her position is truly an ‘institutional’ approach as per my clarifications concerning King’s analysis. Her position represents a mean between both contextual and restrictive approaches, allowing for the recognition of particular realms in which judges will grant substantial deference and others in which they will exercise discretion.

¹⁴⁷ *Constitutional Review under the UK Human Rights Act*, 173. Kavanagh’s position does not require judges utterly to abandon their own judgment when they recognize that another institutional decision maker is better suited to make a particular decision. When other institutional actors demonstrate bias or arrive at decisions that are so contrary to anything that looks like reason, it may still be appropriate for judges to intervene. Nevertheless, the presence of substantial reasons for deference means that there must be sufficiently persuasive reasons present as to why judges should interfere with a decision that, for any of the three aforementioned reasons, they are not best suited to make in an inter-institutional context.

order to be upheld by a reviewing court, Kavanagh holds that there are reasons that can favor deference independently of the merits of a particular decision (i.e. ‘content-independent reasons’) which are identified on the basis of how courts are situated relative to other institutional actors with regard to a matter under review.

Another important feature of Kavanagh’s institutional theory of judicial deference is that it makes space for what she calls ‘prudential reasons’: “... judges sometimes defer to [other] branches for... prudential reasons - that is, to placate a hostile legislature or to avoid making an unpopular decision or one that might bring the judicial role into disrepute.”¹⁴⁸ Even if judges do not feel that abiding by another institutional actor’s decision will lead to the best result in a particular case, and even if a court may be a more appropriate venue within which to determine a matter, it may nevertheless be prudent to uphold the decision of another institutional actor in order to prevent the disintegration of a particular relationship with the other institution or to prevent the judiciary from being brought into disrepute with the public. As Kavanagh explains:

It would be irresponsible for judges to decide cases whilst remaining oblivious to their possible consequences, and these include prudential concerns such as whether a particular judicial decision would produce a backlash in society; whether society is ready for the legal change; whether it might be counterproductive to introduce it at this particular time; and whether the elected branches of government would then move to curtail the powers of the court as a result.¹⁴⁹

Notably, prudential reasons might be the sorts of considerations that factor into judicial reasoning about such things as privative clauses. Even if judges, legitimately or otherwise, may be able to supplant the decisions of legislatively established tribunals that are intended to be immune from judicial review, the effect of such actions may be serious hostility between judges and legislators and it may also contribute to public outcry about the judiciary overstepping its powers. As Alexander Hamilton once remarked, the judiciary is the weakest branch of government since judges have “no influence over either the sword or the purse.”¹⁵⁰ Courts therefore risk having their decisions skirted, or perhaps even altogether ignored, if they do not maintain good relationships with the other branches.

Prudential reasons, as well as considerations of justice, may demand that judges, in certain cases, *not* exercise their powers to set right a clear and identifiable injustice which is within their powers to rectify – a position that would be abhorrent to theorists such as Allan and Dyzenhaus. In some contexts, Kavanagh maintains, unjustifiable decisions made by other institutional actors

¹⁴⁸ *Ibid*, 189

¹⁴⁹ *Ibid*, 205

¹⁵⁰ Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Terence Ball (Cambridge: Cambridge University Press, 2003), Federalist no. 78.

might need to be upheld by reviewing courts. In a recent article, for instance, she recognizes that:

... sometimes we have reasons not to act on what we acknowledge are good reasons – especially, when we operate under institutional constraints. Paradoxical though it may appear, judges must sometimes refrain from putting right an injustice contained in [another institutional actors' decision], if to do so would cause more harm than good. Rights are not the only value that judges must take into account in public law adjudication. Rights have to be balanced against institutional reasons pertaining to the limits of the judicial role, the propriety of judicial intervention in certain contexts, and the degree to which an innovative judicial decision will be accepted either by politicians or the populace at large.¹⁵¹

In fact, Kavanagh argues that oftentimes it is precisely the demands of justice that require unjustified decisions to be given deference by the judiciary:

...though institutional reasons may require a court to refrain from putting right an injustice... it must be remembered that institutional reasons are themselves reasons of justice. The appropriate division of labour between the three branches of government in a constitutional democracy is a moral question, and when deciding whether to be more or less restrained, judges are required to make moral judgements about how the powers of government should be distributed, exercised, and constrained. Therefore, what justice requires in an individual case is the judicial decision that is supported by a proper balance between the relevant substantive and institutional reasons. Sometimes, justice will require judicial intervention; at others, it will require more caution and self-restraint.¹⁵²

The important point that Kavanagh recognizes, a point largely left unaccounted for within the theories of Dyzenhaus and Allan, is that it is not merely the substantive issues present in a particular case that determine whether judicial deference is the correct policy - it is also larger issues of legitimacy and institutional design. Courts cannot simply put up blinders to larger realities when deciding whether deference is appropriate in particular cases. Even unjustifiable decisions that violate rights in some manner can be supported by conclusively weighty reasons for judicial deference when these decisions are made by particular actors in particular institutional contexts.

Perhaps the key to Kavanagh's whole analysis is a distinction between what we might call 'merit-based' and 'institution-based' reasons for judicial deference to another actor's decision. Merit-based reasons are discerned solely within the parameters of the decision - are there reasons recognizable by a reviewing court that directly supports a decision as the correct (or best) decision? Institution-based reasons, on the other hand, reflect considerations independent from the direct confines of a decision. They relate to issues of the judicial placement in a larger institutional structure in which judges must cooperate with

¹⁵¹ 'Judicial Restraint in the Pursuit of Justice', 31-32

¹⁵² *Ibid*, 32

other actors. Unlike merit-based reasons, institution-based reasons are not intended to convince the reviewing judge that a decision was correct; rather, they convince the judge that it would be good to uphold a decision independently of her assessment of its merits.

The attractiveness of Kavanagh's position lies in its ability to make space for the wide consortium of disparate reasons that factor into judicial reasoning in review proceedings. By recognizing that judicial review, at its heart, involves a unique form of inter-institutional practical reasoning, she provides a framework within which to address both issues associated with the rule of law and those associated with legislative supremacy in judicial review. Whereas other models of judicial due deference tend to relegate one of the two elements in the Diceyan dialectic to an inferior position in judicial review, Kavanagh provides a synthetic account wherein features of both are placed into a judicial balancing act. With revisions, I believe that this basic framework for approaching judicial due deference holds the key to establishing a coherent and viable theory that Canadian judges ought to adopt as a framework for navigating between reasonableness and correctness in the standard of review analysis. In the next section, I revise Kavanagh's theory by establishing new distinctions and clarifications, as well as a lengthy analysis of authority and its role in practical reasoning, which will serve to strengthen and stabilize her institutional approach.

**SECTION 3: DEFERENCE AND AUTHORITY: EXPLICATING THE CORRELATIVE
RELATIONSHIP**

A. Introduction: From Theology to Pragmatism

John Willis, reflecting on the direction that administrative review was taking in the mid-1970s, lamented that: "...it is not 'what actually happens' but 'theology' which decides issues in administrative law."¹⁵³ His worry was that instead of focusing on the concrete issues that judicial review ought to address, were fixated on such terms as the 'rule of law', 'legislative supremacy', 'jurisdiction', or the '*ultra vires* doctrine' that cramped their understanding of the appropriateness of judicial interference. Judicial review, consequently, became an exercise in theological interpretation with largely unquestioned basic tenets forming the foundation for judicial reasoning. Rather than rely upon these antiquated terms to guide judicial review, Willis suggested that judges only ask one fundamental question – "Is somebody being actually hurt by some actual defect in the machinery of government and, if so, what is that defect and how can it be remedied?"¹⁵⁴

Willis, as many commentators have noted,¹⁵⁵ did go too far by asserting that 'global and theological' approaches to judicial review must be wholly replaced by such a simple analysis. It would be imprudent, as the saying goes, to throw out the baby with the bathwater. There are core values and compelling reasons that are loaded within the central 'theological' concepts of administrative review – and particularly within Dicey's conception of the rule of law and legislative supremacy. Nevertheless, Willis correctly identified the heart of the problem that plagues contemporary administrative judicial review – *the traditional language and forms of judicial review are no longer adequate for the nuanced circumstances of governance to which they are applied*. Archaic understandings of judicial review cannot be forced onto the novel forms of government characteristic of the administrative state that are designed explicitly to overcome the deficiencies of more traditional forms of governance. When dealing with these new forms of governance, judges need to address the concrete issues in play and not hide behind antiquated and distracting analyses that distort the important issues.

In the previous section, I explicated divergent approaches to judicial due deference, arguing ultimately that of the available approaches the 'institutional' approach advanced by Aileen Kavanagh is the most sophisticated and provides the most plausible means for reconciling the divergent judicial obligations that

¹⁵³ John Willis, 'Canadian Administrative Law in Retrospect' 24 *University of Toronto Law Journal* 225 (1974), 244

¹⁵⁴ (Willis) *Ibid*, 228.

¹⁵⁵ In particular, see David Dyzenhaus, 'The Logic of the Rule of Law: Lessons from Willis' 55 *University of Toronto Law Journal* 691 (2005).

confound our courts in administrative review. Kavanagh's institutional approach connects a doctrine of judicial deference to pertinent questions of judicial competency, institutional design, democratic legitimacy, and upholding the reputation and powers of the courts; it establishes a vision of judicial review premised on sound inter-institutional practical reasoning. It is against the backdrop of Willis' concerns about an excess of theology in administrative law that Kavanagh's theory appears tantalizingly refreshing. By focusing her analysis on how a policy of deference is a rational response to conditions of judicial uncertainty, a means to achieve and secure inter-institutional comity, and even a way to preserve the good reputation of the court with both the general public and other branches¹⁵⁶ (thus ensuring that future judicial decisions are respected and adhered to), Kavanagh addresses the key concerns motivating the theological values while ensuring that many prudential matters are not left out of consideration.

In this section and the next, I expand upon Kavanagh's basic theory in order to clarify and strengthen it. This section analyzes the nature of the concept of deference and the role it ought to play in ordinary practical reasoning whereas the next section focuses on how the basic rationality of deference in everyday settings is equally applicable, with important qualifications, in inter-institutional settings. By doing so, I intend, in effect, to rebuild Kavanagh's theory upon a new foundation.

I begin with an examination of how our concept of deference is, in its primary or 'focal'¹⁵⁷ sense, correlatively related to a conception of authority. My argument is that claims of deference and claims of authority presuppose the existence of one another. The upshot of this is that all analyses of deference implicitly require a concept of legitimate authority that can make sense of them. I proceed to explicate Raz's service conception of authority that, with a few important revisions, I adopt as my working model of legitimate authority. Raz's model, while not without its detractors,¹⁵⁸ is plausible and appears to be the model

¹⁵⁶ Interestingly, Kavanagh suggests that the courts must sometimes engage in something of a 'noble lie' by acknowledging the superior wisdom or knowledge of another branch when they, in fact, believe that this is false. As I argue in Part III – 5, judges may sometimes need to operate clandestinely in order to preserve institutional relationships, claiming that deference to another branch is appropriate on the basis of its superior wisdom, while nevertheless recognizing that this is untrue.

¹⁵⁷ By 'focal' sense I have in mind something similar to how Finnis uses this term in *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1979), particularly Chapter 1. Finnis claims that we often need to understand a concept in terms of its central or focal meaning in order to engage in a complete and useful conceptual analysis. While there may be aberrant uses of a concept, it is the use of the concept in what we identify as central cases that best illuminates philosophical inquiry into the proper meaning and extension of the term.

¹⁵⁸ See, for instance, Robert Ladenson 'In Defense of a Hobbesian Conception of Law' in Joseph Raz (ed.) *Authority* (New York: New York University Press, 1990).

that is most likely to attract a consensus view.¹⁵⁹ Finally, I argue that an important distinction needs to be drawn between the concept of *deference* and that of *restraint*. Deference is appropriate only when there are second-order exclusionary reasons for action that are premised on another agent's authority; on the other hand, one can act with restraint relative to another's judgment for either first-order or second-order reasons. Thus, reasons for deference are always reasons for restraint, but reasons for restraint do not always establish appropriate reasons for deference. The importance of this seemingly hair-splitting distinction will become obvious in the next section when reasons of deference and restraint are applied to the context of inter-institutional decision-making.

B. A Correlative Relationship

What exactly do people mean when they claim that they ought to *defer* to another person's judgment about some particular matter? At a very minimum, the idea that an individual ought to defer to someone else entails that there is some form of *disagreement* or minimally that there is some *uncertainty* about what ought to be done, as Kavanagh explains:

When we agree with someone on a particular issue, we do not 'defer' to them. Rather, we simply assess the pros and cons of the issue ourselves, and come to an independent conclusion which matches the other person's conclusion. We only *defer* to the judgment of another when we are uncertain about what the right conclusion should be, or alternatively where we disagree with them, but nonetheless consider it appropriate to attach weight to their judgment.¹⁶⁰

So the first important thing to note about the nature of deference is that it cannot play a role in conditions where diverse individuals all agree with one another about what the uniquely correct solution to a matter ought to be. Deference implies that, at least to some extent, an individual puts aside her own assessment of a matter, at least for the purposes of action,¹⁶¹ and adopts the assessment

¹⁵⁹ At this preliminary stage, I make the suggestion that we accept Raz's conception of authority purely for practical purposes. Deference requires a conception of authority and the most significant and agreed upon conception is currently Raz's 'Service Conception'. I will, however, additionally suggest that if my analysis succeeds in illuminating an important relationship between deference and authority using Raz's Service Conception, this further demonstrates the utility and plausibility of his position.

¹⁶⁰ *Constitutional Review under the UK Human Rights Act*, 169-170. Emphasis in original.

¹⁶¹ There is an important difference that Raz notes between *theoretical* and *practical* authority that is relevant here. Theoretical authorities are authorities about what we ought to think or believe in – as Raz puts it they act as “authority for believing in certain propositions.” Practical authority, on the other hand is “authority with power to require action.” ‘Authority and Justification’, 14 *Philosophy and Public Affairs* 3 (1985), 3, 18. See also Thomas Christiano's discussion of the difference between practical and theoretical authority in ‘Authority’ in the *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/authority> (accessed 5/5/2012) as well as Friedman's

chosen by another individual. When one defers, one therefore recognizes that it would be better that someone else's judgment be acted upon rather than one's own.

This suggests a further important feature about deference – its intimate relationship to authority. Since deference involves adopting another person's decisions instead of one's own, it is always premised on the existence of some other individual whose decisions, for whatever reasons, one ought to heed. The concept of deference, I suggest, is therefore best understood only when it is correlated with the concept of authority. Put in formal terms:

If A claims that it would be appropriate for her to 'defer' her judgment to B on a particular issue X, then A implicitly claims that B has 'authority' relative to A with regard to X.

The inverse of this also seems true – that is, when one claims to possess authority over some other individual, one claims that they ought to defer. Someone's claim to possess authority over some issue is meaningless without consequently implying that there exist at least one other individual that ought to defer. Claims of authority are always addressed to some other agent or agents to whom (at least purportedly) we owe deference. We can therefore explicate authoritative claims as correlative claims to those of deference:

If B claims to possess 'authority' over A with regard to a particular issue X, then B implicitly claims that A ought to 'defer' to B with regard to X.

Deference and authority are correlative terms in much the same way as 'rights' and 'duties' are on the Hohfeldian analysis. A rights claim, for Hohfeld, always entails a corresponding claim about the duties that another person is under. Unless we can identify another individual under a correlative duty relative to the rights claimant, the attribution of a right is meaningless. In much the same way we cannot make sense of particular claims about deference without at the same time recognizing an explicit or implicit claim about authority, and vice versa; the existence of one is conceptually linked to the existence of the other one.

If this reasoning about the conceptual relationship between deference and authority is correct, any coherent account of judicial deference must be explicitly and necessarily linked to a doctrine of authority. A plausible doctrine of judicial deference is thus, in the terms used in the above analysis, *an account of the conditions under which it would be appropriate for a judge to defer her judgment to another institutional decision-maker on a particular issue as a result of the authority that that other decision-maker is purported to have over the judge with regard to that particular issue.* Judicial deference must always involve a claim

analysis of the difference between being 'in' authority (practical authority) versus being 'an' authority (theoretical authority) – see R.B. Friedman 'On the Concept of Authority in Political Philosophy' in Joseph Raz (ed.) *Authority* (New York: New York University Press, 1990), 56.

about the sort of authority that another institutional actor is supposed to have over a judge with regard to some particular matter.

A doctrine of judicial deference consequently ought to be constructed piecemeal. First, there needs to be some general account detailing what it is to be under authority or, what amounts to the inversion of this, to have reason to defer to another person or persons. Second, there needs to be some explanation of how the judiciary can be subjected to authority. Since the judiciary is generally itself regarded as an authority, how and under what conditions can the judiciary be subject to the authority of some other governmental actor or institution? My argument will begin by examining the general nature of authority and how it relates to ordinary non-institutional practical reasoning before turning (in the next section) to the unique circumstances of inter-institutional practical reasoning and how considerations of authority ought to impact it

C. Razian Authority and Second-Order Reasons

As noted above, by deferring to the judgment of another individual, we act *against* what we might, but for the existence of an authority, otherwise assume to be best or correct (otherwise, any notion of deference would be rendered otiose since we simply would *agree* with another person or persons and be acting purely on the basis of our own reasons rather than deferring to the authority). Therefore, we need to analyze the conditions under which the presence of an authority makes it justifiable *not* to act as we might otherwise have believed to be best.¹⁶² This, of course, seems problematic since it suggests that we ought not to act as we think we ought to act. But, as Joseph Raz explains, this need not be true.¹⁶³ Sometimes sound practical reasoning requires that, at least in particular circumstances, we should not act *directly* on the basis of what we believe to be best or correct; rather, for a variety of reasons, we ought to refrain from acting on our own particular assessment of what to do and act instead according to the assessment of another.¹⁶⁴

¹⁶² It is also possible, to clarify, that one may simply have not made up their mind about how to act. In such a circumstance there is the potential to disagree with what authority judges to be best.

¹⁶³ Herein, I adopt Joseph Raz's general conception of authority, with minor tailoring, in order to reconstruct a doctrine of judicial deference. I do so not because I think Raz is correct with regard to all matters of authority; rather, I do so because I believe his work illuminates many of the interesting issues we face with doctrines of deference and because his views on authority have received wide acceptance (although not complete acceptance) amongst legal theorists. My adoption of his position is qualified and I omit many unnecessary features of his position from this analysis (such as, for instance, his belief that law necessarily claims authority).

¹⁶⁴ My analysis of Raz's conception of authority in this section stems primarily from his books *Practical Reasoning and Norms*, 2nd Ed. (Princeton: Princeton University Press, 1990), *The Authority of Law* (Oxford: Oxford University Press, 1979), *The Morality of Freedom* (Oxford: Oxford University Press, 1986) and *Ethics in the Public Domain* (Oxford: Oxford University Press, 2001) as well as his articles 'Authority and Justification' 14 *Philosophy and Public Affairs*

First-Order and Second-Order Reasons

To make this case, Raz distinguishes between two sorts of reasons that may impact our practical decision-making: *first-order* and *second-order*. A first-order reason is a *direct* reason for acting or refraining from acting. For example, my general enjoyment of hockey and my devotion to the Flames are *positive first-order reasons* for me to watch tonight's game between the two teams. That I feel the Leafs are a feeble team that play a dreadfully boring style of hockey are *negative first-order reasons* favoring not watching the game. Notably, whether I ultimately decide to watch the hockey game will depend on whether my general enjoyment of hockey and devotion to the Flames (my positive reasons for action) will be *outweighed* by my desire not to watch a game with a team that is feeble or slow (my negative reasons for action). My decision, at least insofar as it is a reasonable one, will depend on how I weigh each of these reasons in the balance. Since I think the Leafs are a horrible hockey team to watch and I do not want to waste my time watching a poor hockey game, I tentatively resolve not to watch the game, weighing these reasons as stronger reasons for action than my general love of hockey and devotion to the Flames.

Second-order reasons differ from first-order reasons as they are “any reason to act for a reason or to refrain from acting for a reason.”¹⁶⁵ They either add greater weight to a first-order reason than it would ordinarily command (in which case they function as *positive second-order reasons*), or they exclude action on the basis of first-order reasons (in which case they function as *negative second-order reasons* or *exclusionary reasons*).¹⁶⁶ For example, that I believe I am a knowledgeable hockey fan is a positive second-order reason to trust my judgment about the game being very boring. Such a reason adds additional weight to my first-order reason for action. It allows me to give greater credence to my belief that the hockey game will be boring (my negative first-order reason for action). However, I also recognize that I harbor a deep bias against the Leafs as they recently acquired my favorite player from the Flames. This makes me wonder whether I should trust my reasons for believing that the Leafs are a boring and feeble team. This cautions that I may simply be arriving at a rash judgment and that I will consequently fail to watch a game that could be very good. Recognizing that my bias is likely a very strong motivation for my belief that the Leafs are boring and feeble, I resolve not to trust my original judgment and decide

(1985), 'Facing Up: A Reply' in 62 *Southern California Law Review* (1989), and 'The Problem of Authority' 90 *Minnesota Law Review* 1003 (2006). I avoid the use of extensive quotations in this section for the sake of brevity.

¹⁶⁵ *Practical Reason and Norms*, 39

¹⁶⁶ While 'positive' second-order reasons virtually disappear from Raz's later work, he acknowledges them in *Practical Reason and Norms*: “A *second-order reason* is any reason to act for a reason or to refrain from acting for a reason.” (39) Much of my analysis of positive second-order reasons here is an extrapolation of the implications of Raz's views since he ignores an analysis of them and discusses only second-order exclusionary reasons.

to watch the game, recognizing that my negative first-order reasons for action ought to be discounted on account of my bias.

In this example, something interesting occurs: I act in accordance with reason (providing that I was right not to trust my biased opinion) by acting *against* what I otherwise might have thought to be the right answer for my situation. If my practical reasoning were based purely on my weighing of first-order reasons, I would have arrived at the wrong ultimate outcome. My goal was to make a good decision about whether to watch the hockey game. In this situation disregarding some of my reasons for action on the basis of a sufficiently persuasive second-order reason leads to the optimal result. Thus, it seems that it is, at least sometimes, a requirement of sound practical reasoning that we do not act directly on the basis of some of our first-order reasons as a result of the presence of convincing second-order exclusionary reasons.

Importantly, as Raz notes, “[e]xclusionary reasons may exclude action for all or only for some kinds of the conflicting reasons. Exclusionary reasons differ in scope, that is, in the extent to which they exclude different kinds of conflicting reasons.”¹⁶⁷ An exclusionary reason does not necessarily displace *all* first-order reasons, but only those to which it rightly applies. Continuing the above example, my concern about my own bias against the Leafs does not displace all other reasons I might have for watching or not watching the hockey game. It only counsels me against acting on reasons that are affected by my bias against the Leafs. Let’s say that in addition to my negative first-order reasons against watching the game, I also recognize that I have a good deal of material to read before I teach in the morning. Notably, this reason is not impacted by the fact that I am biased against the Leafs. So even if recognizing my bias against the Leafs is a reason to disregard my belief that the game will be boring, it is not a reason that excludes all my other competing first-order reasons for action. Exclusionary reasons generally properly displace only *certain* first-order reasons for action rather than the whole panoply of first-order reasons.

While exclusionary reasons for action ‘displace’ first-order reasons in the sense that they prevent us from acting directly on the basis of *some* first-order reasons, they do not altogether ‘extinguish’ them. This is an extremely significant clarification. The purpose of an exclusionary reason is to resolve the issue of how to balance a particular set of first-order reasons. A proper exclusionary reason therefore does not ignore or toss out any first-order reasons for action; instead, it helps resolve the weight that the first-order reasons within its scope will have for the purposes of action. Exclusionary reasons *always* depend upon the existence of first-order reasons. This is why Raz argues that exclusionary reasons “exclude by kind and not by weight... Their impact is not to change the balance of reasons but to exclude action on the balance of reasons.”¹⁶⁸ Exclusionary reasons prevent us from acting on what we would otherwise believe to be the proper balance of

¹⁶⁷ *Authority of Law*, 22

¹⁶⁸ *Ibid.*, 22-23

reasons but they do not change what the balance of reasons actually requires. The purpose of exclusionary reasons in our practical reasoning is therefore not to alter the balance of reasons but to ensure that we act better in conformity with it.

Exclusionary Reasons and Authority

Our central understanding of practical authority, according to Raz, is intimately connected to the presence of exclusionary reasons for action since authorities are typically regarded as being able to tell us what to do, even when we may not understand their reasoning and even when we may disagree with them. This, *prima facie*, seems to imply that we must act against reason when we follow an authority since we are no longer acting in conformity with what we believe is the balance of reasons; however, as Raz explains, this does not have to be the case. In the example above we saw that not acting according to one's own assessment of what would be best could be perfectly reasonable in cases where one harbored a bias that was likely to skew judgment. In such circumstances, we will make better decisions if we resolve not to act directly on the basis of some of our reasons. Likewise, acting according to the directives of an authority can be perfectly reasonable if we have good reason to act on their assessment of the particular reasons for action rather than our own.

Raz's 'Service Conception of Authority' maintains that the purpose of authority is to help us better conform to reasons which we have for acting. In this sense it provides us with an important service; we rely on the judgment of an authority rather than our own assessment of a particular situation believing that, by doing so, we will make better decisions than we would have without the authority. But if an authority is to be able to fulfill this purpose, we must be willing to surrender at least some of our judgment about what the correct balance of reasons requires in particular situations to the authority. Authorities, on Raz's conception, therefore play a mediating role "between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reason."¹⁶⁹

His basic theory of authority consists of three central theses: the *dependence* thesis, the *normal justification thesis*, and the *pre-emption* thesis. Each of these is intimately connected to the role that authorities are supposed to play in providing exclusionary reasons for action.

According to the dependence thesis, authority is premised on the existence of particular first-order reasons for action existing for those subject to authority. These reasons (what Raz refers to as *dependent* reasons) are what ultimately justify treating an authority's decision as an exclusionary reason for action – as mentioned above, an exclusionary reason 'displaces' first-order reasons for action rather than adding new reasons for action or extinguishing them altogether.

¹⁶⁹ *Ethics in the Public Domain*, 214

The second thesis, the normal justification thesis, holds that:

...the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, rather than by trying to follow the reasons which apply to him directly.¹⁷⁰

An authority is legitimate to the extent that one is more likely to comply with right reason by acting according to the authority's determination rather than acting on one's own assessment of the balance of reasons. Authorities serve us by resolving what the balance of our dependent reasons requires us to do, thereby aiding us in our practical reasoning.

Finally, the pre-emption thesis holds that an authority's assessment, as mentioned above, ought not simply to be added into the balance of reasons; instead, their assessment ought to displace the dependent reasons that are within the legitimate scope of their authority. Authoritative determinations are not meant to create new (first-order) reasons for action for those subject to them, but instead are intended to displace some pre-existing dependent reasons – *“The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”¹⁷¹*

The Justification of Authority – Coordination and Expertise

Needless to say, it is only sensible to defer to an authority if there are circumstances within which we would be better off if we relied upon someone else's judgment rather than our own. Raz identifies two primary circumstances in which it could be justifiable to defer one's assessment of a matter to that of an authority – namely, when the authority can solve coordination problems and/or when the authority possesses greater expertise with regard to a particular matter than we do.

With regard to the issue of expertise, there are situations in which it is obvious that, either due to another's greater familiarity with, or cognitive ability to resolve, some particular issue than my own, I have good reason to act as they would recommend and not on the basis of my own (possibly competing) assessment. For example, assume, going back to my earlier example, that I am trying to figure out whether to watch the game tonight. My big concern is whether to watch a game that might be boring due to the fact that my Flames are playing the pitiful and talentless Leafs. Now while I'm a bit of a hockey expert, I'm not a complete expert. I'm bound to make mistakes and I might even be biased.

¹⁷⁰ *The Morality of Freedom*, 53 . Emphasis in original.

¹⁷¹ ‘Authority and Justification’, 13. Emphasis in original.

Fortunately, however, I know I can trust two of my friends, Ron and Don, who have excellent insights about hockey. Speaking with them they tell me that tonight's game is likely to be excellent and they advise me to watch the game. Further, I know that virtually every time Ron and Don have claimed that a game will be excellent it has in fact been so. In this situation it clearly makes sense to trust their expertise over my own tentative and wavering reasoning. Since they are more likely than I am to know whether the game will be exciting, I trust their judgment and act according to their assessment.

Here it is worth reiterating the importance of scope limitations for exclusionary reasons. Even though Ron and Don have given me authoritative advice that I should watch the game because it will be exciting, they have not resolved the issue of whether I ought to prepare for my teaching in the morning instead of watching the hockey game. Their advice has only helped me to resolve one of the issues that I must consider. I still have other issues that need to be assessed and their authority over all matters hockey related cannot properly solve all of my other, non-hockey related, matters impacting my decision. That an authority has directed me to act in a particular way with regard to a particular matter does not definitively settle the issue. It only definitively settles those issues that are properly within the *scope* of that authority. Thus, *it is only reasonable to defer to authorities on those particular matters which we have reason to think they are better capable of resolving than we are.*

I turn now to a second primary justification for the existence of authority – coordination problems. We face coordination issues when a number of agents require a common solution in order to resolve a particular practical problem. The infamous example is whether to drive on the left or right side of the road. All motorists have reason not to run into one another, but no motorist on their own can establish a convention about what side of the road a society should drive on. In such a circumstance, an authority can issue a directive stipulating which of the two sides one ought to drive on, thus preventing a number of head on collisions. Since I know that others in my society will adopt a particular authority's directive about which side to drive on, I do not need to reason about which of the left and right sides would be better. I simply conform to the authority's decision and thereby avoid crashing into oncoming traffic.

Authorities can also be legitimate when they coordinate human energies and resources to achieve goals that might not be achievable if we were to act purely on our own initiative. Consider, for instance, the construction of a major bridge over a large river. Individuals, at least in most circumstances, possess neither the ability nor the means to carry out such a project. While it may be clear that all the individuals in a particular area will benefit from the construction of a bridge, no one may be capable, on their own, to carry the initiative out. A government official, such as a local mayor, however, may have the ability to do so. By being able to issue directives that will be efficacious, we can be assured that the project will be carried out if the mayor so commands. The mayor, we may say,

is *well-situated* to make the decision. Since the construction of the bridge is a first-order reason we have for action (the construction of a bridge advances some of our interests), and since we cannot achieve the creation of the bridge without some coordinating authority, it makes sense to follow the mayor's commands that we (and others) finance or work on the bridge.

Importantly, following the mayor's directives may even make sense in circumstances where we might be more expert about how to carry out and build a bridge than the mayor. Even if I am an extremely knowledgeable engineer, for instance, I may not be well-situated to direct others in carrying out the bridge building. I am clearly not as capable as the mayor of securing general compliance with my directives about how to build the bridge and even if I could secure some compliance, I may not be able to do so as efficiently and effectively as the mayor. In such a circumstance, even though I may be more knowledgeable than the mayor, I act in accordance with reason by *not* trying to act on my assessment of how to build the bridge and instead relying on hers. Since acting directly on my reasons is unlikely to meet with success, I am better off simply financing and supporting the mayor's sub-optimal but nevertheless effective initiative.

Deviant and Secondary Justifications for Authority

In 'Authority and Justification' and the *Morality of Freedom*, Raz argues that there are also deviant and secondary justifications of authority in addition to the primary ones of superior expertise and greater ability to coordinate. These include 'deviant' reasons for authority, as well as secondary justifications. 'Deviant' reasons exist parasitically upon normal reasons for the justification of authority. For example, a friend of mine may offer advice in a particular situation, suggesting that I ought to act in a particular way. While I may recognize that my friend's advice is poor, and if heeded (independent of considerations of my relationship with my friend) will in fact lead to a sub-optimal conclusion, I may nevertheless have reasons to act according to my friend's advice. In particular, my failure to heed my friend's advice may lead to a breakdown in our relationship or to my friend feeling unintelligent or inadequate. In such circumstances, Raz believes, we have reasons to act as though another's judgment is authoritative, and the balance of reasons may counsel us to do so, even if that person's judgment is not, properly speaking, authoritative. As Raz explains:

The normal reason for accepting a piece of advice is that it is likely to be sound advice. The normal reason to offer advice is the very same. It will be clear that these judgments of normality are normative. But we can understand the very nature of advice only if we understand in what spirit it is meant to be offered and for what reasons it is meant to be taken. The explanation must leave room for deviant cases, for their existence is undeniable. But it must also draw the distinction between the deviant and the normal, for otherwise the very reason

why the "institution" [of authority] exists and why deviant cases take the special form they do remains inexplicable.¹⁷²

In deviant cases of authority, the ‘structure’ of authority is present but the normal justification thesis fails; nevertheless, we still have reasons to treat another’s assessment of an issue as the best one to act upon (it will allow us to preserve a relationship by not offending a friend, etc...) even if the reasons that we displace with that person’s assessment are not displaced for the reasons they intended.

In addition, Raz discusses secondary reasons for authority. These are “valid reasons [for authority] only if they accompany other, primary, reasons which conform to the normal justification thesis (whereas deviant reasons may validly replace the normal reasons).”¹⁷³ The example Raz provides of a secondary reason for authority is that of accepting an individual as an authority because such an individual helps to define a national group. A president, for example, may provide a rallying point around which a nation can gather. In such a situation, adhering to the president’s decisions is justified not only because she is capable of better serving our dependent reasons, but also because by adhering to her directives we demonstrate solidarity with the nation. Raz argues that secondary reasons for an authority “help to meet the burden of proof required to establish a complete justification, i.e. they may suffice in conjunction with the primary justifications when the primary reasons alone will not be enough to establish the legitimacy of an authority. But [secondary reasons] cannot by themselves establish the legitimacy of an authority.”¹⁷⁴

The Independence Condition: Limitations on Legitimate Authority

A final feature of Raz’s conception of authority that is of some importance to my overall project is his ‘independence condition’ that functions as a limiting condition on the normal justification thesis. The independence condition requires that “the matters regarding which the [normal justification thesis] is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority.”¹⁷⁵ This condition is meant to deal with such cases in which it may be more beneficial for personal growth, education, self-reliance, or even some important considerations of moral autonomy, to act in a way that does not maximize acting in accordance with right reason by simply replacing one’s reasoning about how to act with that of an authority. Raz gives the example of children developing the ability to make their own decisions over time. If parents simply are to step in and decide for children what it is best to do in all circumstances they will never develop the ability to reason well for themselves.

¹⁷² ‘Authority and Justification’, 19

¹⁷³ *Morality of Freedom*, 54

¹⁷⁴ *Morality of Freedom*, 54-55

¹⁷⁵ ‘The Problem of Authority’, 1014

Even though, in such circumstances, the child is likely to act better, at least at the time, by simply subscribing to the authority of her parents, there may be good reason to hone the ability to act on one's own assessment rather than relying on the judgment of others.¹⁷⁶ This means that there may be certain matters wherein an authority may well be able to direct individuals in how to make better decisions, but the reliance on the authority will somehow undermine the ability of the agent to act better in future cases. Consequently, even though authorities may be able legitimately to service our dependent reasons for action, continual deference to their assessments may not maximize our ability to act in conformity with right reason over time.

Reconstructing the Role of Deference in Practical Reasoning

This lengthy analysis of authority allows us to develop a coherent account of the role a deferential stance can play in our practical reasoning. In circumstances wherein we are likely to act better by substituting our own assessment of what ought to be done with that of an authority, deferring our judgment to that authority may be a requirement of sound practical reasoning. Deference involves treating another's assessment of a particular matter as an exclusionary reason for action, displacing our assessment of the weighting of a particular set of our initial first-order reasons for action with the authority's. When an authority possesses greater expertise over a particular matter than us or is capable of better coordinating (or is better situated) than we are, acting on the authority's assessment rather than our own is a sensible policy that enables us better to act in conformity with our first-order reasons for action.

The foregoing analysis of authority also establishes a number of important limiting conditions for the reasonableness of deference. *First, deference to an authority is only legitimate if that authority is able to 'serve' some of our first-order reasons.* Purported authoritative determinations that do not address some pre-existing dependent reasons we have cannot truly be 'authoritative', and hence ought not to be treated with deference. *Second, deference to an authoritative determination on some matter is only reasonable if that determination falls within the appropriate scope of that authority.* While authorities may be able to issue legitimate directives about certain matters, they are not necessarily able to issue legitimate directives about *all* matters. Deference, if it is to be in conformity with reason, requires a careful attentiveness to the sorts of matters that an authority can better address and the sorts of matters that we can better address on our own. *Third, we ought not to defer to a legitimate authority in circumstances where the process of making decisions for ourselves is as important as, or even more important than, acting correctly in that particular circumstance.* Often the

¹⁷⁶ *Ibid*, 1015

development and exercise of particular decision-making capacities gives us an important reason not to defer our own judgment to that of an authority.

D. Objections, Rejoinders, and Clarifications

I now conclude this section by addressing a serious objection to Raz's theory and by introducing my own clarifications to his analysis. First, there is an important objection to Raz's general analysis of authority raised by Stephen Perry. In his 1989 article 'Second-Order Reasons, Uncertainty and Legal Theory', Perry argues that Raz's analysis of authority fails to address the fact that oftentimes we do not treat authoritative directives as 'exclusionary' reasons for action and instead treat them as 'weighty' reasons for action. Perry argues that Raz's analysis of authority "pays very little attention... to *positive* second-order reasons,"¹⁷⁷ focusing instead on the nature of how an authoritative directive displaces rather than reweights our first-order reasons. Indeed, part of Kavanagh's conception of deference as a 'systemic bias' in favor of a decision reached by another institutional decision-maker involves assuming some additional weight in favor of another institutional actor's decision that does not, however, completely displace all relevant first-order reasons. For Raz, authority always involves the *displacement* of some first-order reasons (authority always functions as an exclusionary reason), it replaces by kind not by weight. For Perry, while an authority may sometimes function to displace some first-order reasons for a decision, it often actually re-weighs them, giving certain first-order reasons more strength than they might otherwise command. The question I must address is whether deference is only sensible when an authority provides exclusionary reasons for action or whether deference is also sensible when another's assessment causes us to re-weigh our pre-existing first-order reasons.

I agree with Perry that we can treat another's judgment on a matter as a reason to change the balance of our first-order reasons. My concern is that treating an authoritative determination as a positive second-order reason for action simply ends up, in effect, reducing the purported 're-weighing' either into an exclusionary reason or simply into a first-order reason. When we treat an authoritative assessment as a reason to act on a first-order reason, Perry maintains, we adjust our reasoning so as to put presumptive weight in favor of a particular authoritative resolution unless there are countervailing reasons that outweigh that presumptive weight. This means that we resolve to act on the basis of the authority's assessment of what the balance of the first-order reasons requires *unless* there are some reasons of sufficient weight to reject the authority's assessment. But this simply implies that we will uphold the authority's decision provided it fits within the legitimate *scope* of her authority and this is to treat her decision as an *exclusionary* reason for action. A presumptive weight in favor of an authority's assessment would then imply no more than that we will abide by her

¹⁷⁷ Stephen Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' 62 *Southern California Law Review* 913 (1989), 916

assessment so long as her decisions remain within the legitimate scope of her authority.

It is also possible that we can treat a person's assessment of what to do as giving rise to *new* reasons that enter the balance of reasons. In this sense, the other person's assessment does cause our first-order reasons in favor or against a particular course of action to take on a new weighting; however, this does not mean that the reweighting is second-order in nature. In such circumstances, we treat a person's assessment of a matter as a *new* reason to act in a particular way without it thereby impacting the particular weight of other reasons. We do so by treating the person's assessment as an additional *first-order reason* for action that is added to the other first-order reasons we might already have and may, consequently, alter the ultimate balance of reasons for or against a particular course of action.

This suggests that Raz is right that authorities, when they are authorities, provide exclusionary rather than merely 'weighty' reasons for action for we either treat a purported positive second-order authoritative reason simply as an exclusionary reason (properly understood), or as giving rise to a new first-order reason. But this analysis also suggests that Raz's account of 'deviant' reasons for authority should be revisited. Recall that Raz argues that in addition to the primary reasons for authority (expertise and coordination) there are also deviant and secondary justifications. Deviant justifications involve treating another's assessment of a matter as a second-order exclusionary reason for action even though they do not meet the normal justification requirement. It is reasonable to do so, Raz believes, when acting on this assessment will lead to the best results.

Consider, for instance, a situation in which you have a friend, Bob, that believes it would be best for the two of you to go see a particular movie which he has been waiting to see for awhile. You know, thanks to a few of your other friends who have an excellent taste in movies that it would be best to go see a different movie than the one Bob wants to see. But you also know that Bob would be hurt if you raised this issue. You know that he has his heart set on this particular movie and that if you tried to talk him out of going to the movie he might have a visceral reaction and it may even hurt your friendship. You thus decide that it would be best, even though you know that Bob's choice is a poor one, simply to go to the sub-par movie. Thus, you act according to Bob's judgment, recognizing that maintaining your friendship with him is more important than making a good movie choice. Raz's analysis treats Bob's judgment, in this situation, as an exclusionary reason for action – even though it is not justifiable according to the normal justification thesis; Bob is treated as an 'authority' albeit a deviant one.

This, I believe, is a mistake. Deviant authorities are not properly authorities at all because they do not create appropriate exclusionary reasons not to act on the basis of another reason; instead, they may establish additional first-order reasons for or against action that need to be assessed relative to other

reasons in the balance. In the above example, Bob has not displaced my first-order reasons for action – I do not treat his judgment as a legitimate reason to reject my own assessment of whether a movie is worth seeing.¹⁷⁸ What I do, on the contrary, is recognize that not hurting Bob’s feelings is a more pressing reason for action than acting according to my reasons for seeing a good movie. We can therefore treat another’s assessment of a matter as a first-order and as a second-order reason for action. It is only when there are appropriate second-order exclusionary reasons, however, that the assessment transforms into a legitimately ‘authoritative’ one.

Applying this analysis to the larger discussion of deference, it is important to recognize that I can only properly *defer* to another person’s judgment on a particular issue if I believe that person to have authority over me with regard to that issue – that is, deference is only appropriate when there is an authority whose directives can function as legitimate second-order exclusionary reasons by addressing some of my dependent reasons for action. While deference is only appropriate as a response to legitimate authority, I can nevertheless act with *restraint* with regard to another person’s judgment even if there are no compelling reasons to think of her as having authority over me on a particular matter. Even if there are no grounds for believing that another person’s judgment is as good as or better than my own, and even if another person cannot better secure a particular end through a superior ability to coordinate activity, there may nevertheless be reasons why I ought not to act entirely on the basis of my own judgment instead of the other person’s. While a person’s lack of legitimate authority may rightly imply that we ought not to defer our assessment of a particular matter to their judgment, it may nevertheless be the case that we can treat their judgment as an independent reason to act differently than we otherwise would have.

This careful analysis of deference leads to the conclusion that some of our common uses of the term may inapt. It is, of course, possible in colloquial parlance to describe our decision to go to the poor movie that Bob chose as acting out of deference to Bob.¹⁷⁹ This use of the term, however, may cause important confusions and lead us to misidentify the nature of what we are doing. In giving into Bob’s choice for a movie, we claim to treat his determination about which movies we ought to watch as being better than our own. We know that this is,

¹⁷⁸ I may, however, treat Bob’s judgment about seeing the movie as an appropriate second-order exclusionary reason for how to act so as to not hurt his feelings. I then would identify that acting on Bob’s assessment that we see the movie is able appropriately to service my dependent reasons that relate to acting in order to placate Bob’s feelings. My point is not that Bob’s judgment is incapable of playing a role as an exclusionary reason of any sort; rather, it is that his assessment has nothing to do with the dependent reasons for action that I had, independent of Bob, as to whether it would be better for me to see a particular movie. It is the *new* set of first-order reasons that Bob has added by expressing a position about what would be best to see that causes a shift in the balance of reasons.

¹⁷⁹ I wish to thank Matt Grellette, Fabio Shecaira, and Luis Duarte d’Almeida for raising and discussing this important objection with me.

indeed, untrue, but also recognize that negative consequences will arise if we do not treat Bob's flawed judgment as though it was worth heeding. We thus *pretend* to act as though Bob possessed authority with respect to movie choices over us while being aware that this is untrue. In essence we deceive our friend, acting as though he is an authority in order to placate him.

The foregoing analysis is best regarded as an exercise of 'conceptual analysis' about the meaning and implications of our concept of deference. My goal was to bring our understanding of deference into something of a 'reflective equilibrium', to borrow John Rawls' term, wherein our intuitions about the meaning of a particular concept are balanced against considered theoretical and logical analysis that relates the concept being analyzed to our other concepts. Ultimately, theoretical analysis needs minimally to track our basic intuitions about what a concept implies but these intuitions may also be adjusted following theoretical analysis.¹⁸⁰ Since deference is generally conceptually linked to a correlated concept of authority, identifying our choice as a deferential one may imply the idea that Bob is somehow being treated as an authority when we 'defer' to him. This causes us to lose sight of the fact that we are not treating Bob's assessment as an authoritative reason when we abide by his decision and restrain our choice; rather, we are treating Bob's assessment as an additional first-order reason that outweighs our other first-order reasons for action. The above distinction between deference and restraint is intended to avoid such a conceptual confusion. It prevents us from elevating reasons that appropriately belong only to the level of first-order reasons to that of the second-order.

¹⁸⁰ See John Rawls' *A Theory of Justice*, 2nd Ed. (Cambridge, MA: Harvard University Press, 1999). Joseph Raz and Scott Shapiro also develop similar understandings of the role of conceptual analysis. See Raz's 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in Jules Coleman (ed.) *Hart's Postscript* (New York: Oxford University Press, 2001) and Shapiro's *Legality* (Cambridge, MA: Harvard University Press, 2010), 14-17

**SECTION 4: PRACTICAL REASONING IN INTER-INSTITUTIONAL DECISION-
MAKING SETTINGS**

A. Introduction: From Individual Practical Reasoning to Institutional Practical Reasoning

In the last section, I argued that deference and authority are best understood as correlative concepts. Deference is appropriate in circumstances wherein we ought to adopt another's assessment of a particular matter that varies from our own assessment - it requires that we act on a determination of a matter that is different than what we might otherwise have decided. The question was how such an approach could be sensible. The answer, I suggested, following Raz, is that deferring to another's judgment is reasonable when that person is either better able to determine the right answer or better situated to resolve the issue than we are. The reasonableness of deference is premised on the reasonableness of believing that another individual can better service our dependent reasons for action than we could on our own. I also suggested that we heed an important distinction between acting in deference to another's assessment and acting with restraint towards it.

In this section, I apply my theory of deference to inter-institutional decision-making settings. By the term 'inter-institutional decision-making settings', I mean circumstances in which a number of different individuals, acting in different capacities (or 'roles') and within a relatively stable and formal social structure (an 'institution'¹⁸¹), must make decisions that represent all of them. A simple example of what I have in mind is the everyday decision-making that occurs in a small company in which a number of different employees work together in order to better the company as a whole. Each employee plays a particular role and is responsible for the implementation of particular company policies or the determination of certain matters that will impact the ultimate success of their enterprise.

The question I want to address is how the account of deference, authority, and reasons for restraint articulated in the previous section applies to these sorts of inter-institutional decision-making settings. This section begins with a basic discussion of the nature of institutions – particularly those that take an 'organizational' form in which individual agents are assigned to particular institutional roles. I proceed to examine how institutional decision-making is critically different from everyday individual decision-making. In particular, I

¹⁸¹ My understanding of the meaning of an institution largely tracks Neil MacCormick's, as articulated in his *Institutions of Law* – primarily Chapter 2 (New York: Oxford University Press, 2007), and his 'Norms, Institutions, and Institutional Facts' 17 *Law and Philosophy* (1998). In particular, I follow his distinction between conventional social order and institutional social order. Conventional social practices involve relatively 'informal normative orders' whereas an institution involves 'formal normative order'.

highlight how inter-institutional reasoning alters the relevant first-order reasons for action by limiting or removing a number of agent-centered reasons for action while adding new first-order reasons that stem from institutional objectives. My discussion then proceeds to an account of how considerations of authority and deference are relevant to decision-making in inter-institutional settings. I show how inter-institutional reasoning is significantly improved when actors show deference to determinations made by those within the institution that possess legitimate authority. Finally, I return to the position of the judicial institution within the larger institution of government, discussing how my analysis of deference and authority in inter-institutional decision-making settings applies equally to them. I apply this analysis to the judiciary in order to clarify their position and the sorts of reasons that are appropriate for them to consider when determining whether to adopt a deferential policy towards other institutional actors.

B. Clarifying the Nature of Institutions

The Purpose of Institutions

The purpose of institutions is to help facilitate the achievement of certain goals through coordinating and stabilizing social activity. This is not to suggest, however, that all institutions actually do achieve their goals. Some institutions may completely fail in achieving their task. It is also not to suggest that even when they do achieve their goals, that they do so in an effective manner; an institution may be grossly inefficient and achieve its purposes in a very cumbersome way. Institutions may also produce important effects, whether positive or negative, independent of any consideration of the unique goals that they are intended to achieve. A corporate business institution, such as an oil company, for instance, while attempting to secure profits for its shareholders may end up causing serious harm to the environment by causing pollution. It may also end up being an important source of employment, having important positive consequences for a local or national economy. In addition, it is worth noting that the ends that institutions serve do not necessarily have to be morally legitimate ones. Both history and our contemporary world attest to the existence of institutions that pursue morally decrepit goals. Slavery, for instance, is a classic example of such a past (and in some unfortunate places, continuing) wicked institution.

Notably, institutions that are established in order to attain one set of goals may develop new purposes. It is also possible that an institution may, over time, cease to pursue some of its earlier goals. The characteristic way that institutions pursue their goals is through ordering and stabilizing social activity in some formalized structure. Yet the formal structure of an institution may well outlast some or all of its original purposes. They are often remarkably malleable, being

able to bend constantly to changing conceptions of their *raison d'être*. In Aristotelian language, the formal cause of an institution (its structure) may be preserved intact while its *telos* or final cause (its objective or objectives) is altered.¹⁸²

Organizational versus Non-Organizational Institutions

Institutions can take either an ‘organizational’ or a ‘non-organizational’ form.¹⁸³ An institution takes on an organizational form when it pursues its objectives through a system of differentiated tasks, offices, or positions for different institutional actors. In such institutions, individuals cooperate with other agents by carrying out particular ‘roles’ in a larger schema of formalized and systematic interaction. Seumas Miller defines an institution that takes an organizational form as:

... an embodied (occupied by human persons) structure of differentiated roles. These roles are defined in terms of tasks, and rules regulating the performance of these tasks. Moreover, there is a degree of interdependence among these roles, such that the performance of the constitutive tasks of one role cannot be undertaken, or cannot be undertaken except with great difficulty, unless the tasks constitutive of some other role or roles in the structure have been undertaken or are being undertaken.¹⁸⁴

Non-organizational institutions, on the other hand, do not involve the attribution of differentiated roles to individuals. Languages, for instance, are generally institutions that take a non-organizational form.¹⁸⁵ While they provide a formal and relatively stable and orderly framework for social interaction (and hence qualify as an ‘institution’), they do not do so by creating a series of differentiated roles for human agents. Thus, language typically endures independently from any organizational form.

¹⁸² See Aristotle’s *Metaphysics*, Book 5.

¹⁸³ My distinction between these two largely tracks W. Richard Scott’s as articulated in *Institutions and Organizations*, 3rd Ed., (Thousand Oaks, CA: Sage Publications, 2008) and Seumas Miller’s ‘Social Institutions’ in the *Stanford Encyclopedia of Philosophy* - (<http://plato.stanford.edu/entries/social-institutions>), accessed 9/26/2011.

¹⁸⁴ Miller, ‘Social Institutions’. In a similar vein, Rom Harre defines (organizational) institutions as “an interlocking double-structure of persons-as-role-holders or office-bearers and the like, and of social practices involving both expressive and practical aims and outcomes.” See Rom Harre, *Social Being* (Oxford: Blackwell, 1997), 98.

¹⁸⁵ There may be organizationally established and controlled languages, however. The *Académie française* that regulates and structures the French language in France is an example of how languages may function as institutions that incorporate organizational elements in addition to non-organizational elements. Importantly, this demonstrates how organizational and non-organizational forms can be incorporated within a single institution.

Horizontal and Vertical Role Differentiation in Organizational Institutions

Institutions that take organizational forms assign roles to different actors in two principal ways – what I refer to as ‘horizontal’ and ‘vertical’ role assignments. When an institution assigns roles *horizontally*, it divvies up diverse tasks between different institutional actors. The institution stipulates that specific actors are to carry out particular tasks, thereby allowing for a division of labor. These sorts of role assignments make certain tasks appropriate or inappropriate for a particular institutional actor to carry out in the institutional setting. Importantly, horizontal role assignments do not necessarily imply that a task is *exclusively* to be undertaken by a single institutional actor. Different institutional roles can involve overlapping tasks on a horizontal role assignment. For example, an institution that needs to fulfill tasks x , y , and z may divvy up the tasks between institutional actors A , B , and C in the following way: A carries out tasks x and y ; B carries out tasks y and z ; and C carries out tasks x and z . Each institutional actor has a differentiable role as each carries out a different set of tasks. Nevertheless, each institutional actor performs a task that is also performed by another actor.

Vertical role assignments are distinguishable from horizontal assignments as they involve different institutional actors being placed in a hierarchical relationship in relation to one another rather than dividing labor between them. With these sorts of role assignments, tasks are shared between institutional actors but one actor will have priority over another with respect to that task, have the ability to overrule a decision made by another, or will possess some power to interfere with another actor’s carrying out of the particular task. Vertical role assignments imply that, with respect to a particular task, one actor occupies a higher position on the institutional pyramid.

Two important clarifications are in order here. First, it is possible that an institutional actor that has priority position over some other institutional actor with regard to a particular task will be herself in an inferior position relative to yet another institutional actor. Having priority over one actor does not necessarily imply that one has total priority over all other actors as there may be many additional levels on an institution’s priority pyramid. Second, occupying a higher priority role with regard to one task does not imply that an institutional actor will be in a priority position with regard to other tasks. Vertical role assignments do not have to assign all-encompassing positions of superiority and inferiority. While an institutional actor A may have priority over another institutional actor B with regard to task x , B may be in a position of priority relative to A with regard to task y . Vertical assignments can therefore lead to incredibly complex interrelationships of superiority and inferiority within an institution.

While organizational institutions must establish the assignment of vertical and horizontal roles with some degree of clarity and certainty with regard to most matters facing them in order to function well, or even simply to exist as an (organizational) institution at all, there can nevertheless be doubt as to which roles

institutional actors are supposed to play at certain times. A great deal of ‘fuzziness’ is possible even within a generally well-functioning institution. When institutions are forced to handle matters with which they have little or no previous familiarity, there may not be any precedent enabling institutional actors to discern who should be given responsibility over them. In such situations, institutions may have preexisting norms that identify how horizontal and vertical role assignments are to be developed in order to address the matters, thereby allowing for a formal and orderly adaptation. In other situations, however, there may be no preexisting norms that explicate how role assignments are to be applied to the novel issue and institutional actors will have to try to develop a consensus as to which institutional actors should be given what roles. Institutions may also, again, develop over time with old role assignments giving way to new ones. While institutions pursue their objectives through coordinating and stabilizing social activity, their structures are not always iron-cast. While some institutions will prove rigid with little to no alteration occurring to their basic structure through time, others may turn out to be extremely malleable, bending their structure in order to address new circumstances and objectives.

Meta-Institutions

A final interesting feature of organizational institutions is that they may themselves be composed of other smaller institutions. In such circumstances there is what we might call a ‘meta-institution’¹⁸⁶ that functions as the overarching institution within which other derivative institutions operate. An example of a meta-institution is a professional sports league such as the National Hockey League. The league functions as an institution in its own right, setting schedules and establishing basic rules and regulations. Individual teams (the smaller institutions) are established to play within the league and contribute to the flourishing of the league as a whole.

Meta-institutions depend upon the good functioning of smaller institutions in order to secure their particular objectives. They establish vertically and horizontally differentiated roles for the smaller institutions, which in turn may establish particular vertical and horizontal roles either for other institutions (thereby functioning themselves as meta-institutions) or they may assign these horizontally and vertically differentiated roles to individual actors within the specific institution. The structure of an institution can therefore be immensely complicated, perhaps consisting of several smaller institutions that may, themselves, consist of further smaller institutions and the regress can continue.

¹⁸⁶ See Miler, *Ibid*

C. Differences between Practical Reasoning in Institutional and Non-Institutional Decision-making Settings

My focus in this section is on articulating the way that considerations of deference, authority, and restraint are conducive to the reasoning of agents involved in decision-making tasks in organizational institutions. *What part ought an understanding of deference and authority to play in an inter-institutional decision-making setting?* This question, of course, relates to practical reasoning; it is concerned with how agents, assigned to particular roles in an institutional order, are to *act* in order to bring about its desired outcomes.¹⁸⁷ I will therefore begin with a brief discussion of how organizational institutional practical reasoning is in two key respects different from non-institutional practical reasoning before proceeding to highlight how considerations of authority, deference, and restraint can play an important role.

Organizational institutional reasoning is critically different from the sort of reasoning that characterizes ordinary individual decision-making in two ways. First, institutional decision-making is characterized by the requirement that *only* particular institutionally recognized objectives are to be pursued within the institutional setting. Individuals acting in their own private capacities are able to consider the whole panoply of possible objectives and reasons that together determine the appropriate way for them and others to act. In non-institutional settings, on the other hand, nothing is *ex ante* off the table as a legitimate reason for individual action. Institutions alter the situation by requiring individual actors that are part of the institution to reason within its confines. It demands that institutional actors, at least when acting within their institutionally assigned roles, make decisions that are conducive to the institution's objectives and *not* according to the objectives recognized as valuable by the individual. While securing the objectives of an institution may (and should) generally converge with the objectives of an individual, they may also sometimes diverge – and even in circumstances where they converge, the individual is expected to act not because the institution's goals match those of the individual, but rather because they are the institution's goals. In terms of the previous analysis of Razian practical reasoning, institutional reasoning both limits and expands the available (first-order) reasons for action for an institutional decision-maker: it *limits* the available reasons by cutting off non-institution-based reasons from consideration as legitimate reasons for action; it *expands* the reasons by adding the unique institutional objectives as reasons for action.

Institutional practical reasoning also diverges from non-institutional practical reasoning as a result of the particular roles that institutional actors are

¹⁸⁷ Practical reasoning, as Raz notes, is “reasoning about what is to be done.” See Joseph Raz, *Engaging Reason* (New York: Oxford University Press, 1999), 50. It is directed towards how we or others ought to act rather than towards the sorts of things that we or others ought to think or believe.

assigned relative to one another. When decision-making tasks are divvied up horizontally, institutional actors may be forced to limit their practical reasoning to considerations that are within their appropriate roles to decide. They may possess neither the power nor the duty to determine all issues related to how to secure an institution's objectives; instead, they may have limited decision-making powers that allow them to address only particular matters relevant to certain institutional goals, relying, in turn, on other institutional actors playing different roles to address other matters. Horizontal role assignments therefore significantly curtail the available reasons for a decision; they force institutional actors to limit their deliberations to only those sorts of reasons that their role allows. The same is true with vertical role assignments. In circumstances of vertical role assignments, decision-makers on lower hierarchical levels may be required fully or partially to adopt determinations of higher-level institutional actors. Lower-level decision-makers therefore are obliged to make decisions that conform to the requirements established by higher-level decision-makers. They are often forced to adopt decisions that they might not otherwise have arrived at had they decided a matter purely for themselves.

Institutional settings significantly alter the sort of practical reasoning appropriate to individual institutional decision-makers. They require that *only* institutionally mandated objectives function as the operative reasons for a decision. Within this already limited set of available reasons, they further limit the available reasons to those that are within the proper jurisdiction of an institutional actor as determined by their particular roles and require that higher-level decision-makers' determinations of a matter are conformed to, even if they may differ from what a lower-level institutional actor reasons to be the correct or best determination. Thus both the *objectives* of an institution and its particular *structure* curtail the reasoning process appropriate to institutional decision-makers.

As a quick but important point of clarification, this analysis in no way is meant to suggest that institutional decision-makers always ought to reason in accordance with institutional objectives and structures. As noted earlier, institutional objectives are often morally abhorrent - and even when an institution's objectives are morally legitimate, the particular structure of an institution may be wholly inept for securing them. Poor institutional design and poor human staffing of vertically and horizontally assigned roles can cause an institution significantly to miss the mark. Whether an individual institutional actor ought to act as the institution requires is always an important moral question that needs to be addressed in the specific context of the institution. What the foregoing analysis is meant to capture is not whether institutional reasoning is always, or even ever, legitimate, but rather how institutional reasoning is unique and how it is to be understood. We are always free to reason differently from how an institution requires, but when we do so we are no longer reasoning 'institutionally'.

D. Authority, Deference, and Restraint in Institutional Decision-making

So how ought the analysis of deference and authority in the previous section to apply to inter-institutional decision-making? The first thing to recognize is that the goal of institutional reasoning is to determine matters in a way that best secures the objectives of the institution. Institutional actors attempt to make decisions that are most conducive to achieving the institution's ends within the confines of particular role assignments. Yet often certain institutional actors are not the best placed actors within the institutional structure to make the most effective decisions. My basic argument is that:

When one institutional actor A is better able to secure some institutional objective x than another institutional actor B, either by being more expert about how to achieve x or by being better placed to coordinate the attainment of x, A possesses legitimate authority over B with respect to decisions concerning how to achieve x and B ought to defer to A with respect to decisions concerning how to achieve x.

Since the purpose of institutional reasoning is to secure institutional goals, institutional decision-makers ought to adopt those decisions that are most likely to bring about these goals. If adopting another institutional actor's determination will make it more likely that an institutional objective will be secured than relying on one's own assessment, one acts in accordance with sound practical (institutional) reasoning by conforming to the other actor's determination. The other institutional actor functions as an authority as they are better able to service the dependent reasons for action (the institutional objectives) than one could on one's own. A deferential policy towards other institutional actors that are legitimate authorities is thus conducive to institutional actors making better decisions for the institution as a whole.

A few qualifications and provisos are in order here. First, the nature of the horizontally and vertically assigned roles in the institutional structure always need to be taken into account when determining the appropriateness of deferring one's judgment to another institutional actor. To function as a legitimate authority in an institutional setting, a purported authority must be able to service the unique dependent reasons that are relevant to another institutional actor's role within the institution. It is therefore inappropriate to adopt a deferential stance toward another institutional actor's decision simply because doing so will allow for a decision that will better achieve *some* objective of the institution. In order to be a legitimate authority in a scheme of horizontally assigned roles, that authority must service the institutional objectives that are appropriate to the particular role of a particular institutional actor.

In addition, it is possible for institutional actors that are more expert or better able to coordinate particular decisions to find themselves placed in a vertically assigned role that is *below* individuals who are less expert or less able to coordinate these same matters. In such cases, they may be in the awkward

position of being forced to conform to decisions that are less capable of securing the objectives of their institution than if they were to make the decisions for themselves, without conforming to the determinations of those in higher vertically assigned roles. A well-designed and well-functioning institution, of course, ideally would limit such situations. Nevertheless, simply because an institutional actor may be a better candidate to function as an authority than another institutional actor does not mean that she *will* be able to play that role in the institutional setting. Notably, it does suggest that there may be an important obligation on institutional actors occupying higher vertically assigned roles to listen to and show deference to the decision-making of more capable institutional actors in lower vertically assigned roles. Much of my future discussion, in fact, will revolve around precisely this point. It must always be kept in mind, however, that one's position in a scheme of vertical role assignments does not necessarily imply anything about whether one possesses or lacks legitimate authority relative to other institutional actors. And what amounts to the correlative of this, one's position in a vertical role assignment has no necessary implications for the appropriateness of deference to another institutional actor.

It is also important to recognize that even if the decisions of other institutional actors provide no legitimate grounds for deference (insofar as they fail to provide appropriate second-order exclusionary reasons for action), they nevertheless may need to be accounted for as significant first-order reasons that might tip the balance of a decision. An essential part of an institutional actor's role may be maintaining cordial and productive relationships with other institutions or institutional actors. Institutional objectives often are undermined when there is infighting or a lack of cordiality amongst institutional actors. As we saw with the example of our friend Bob in the previous section, even poor determinations made by others can be grounds for *restraining* our decisions in significant ways. Treating the decisions of other institutional actors with respect and perhaps even ultimately adopting their (possibly flawed) decisions, as Kavanagh noted, can be a key way of assuring that institutional actors continue to cooperate in a productive and meaningful manner. The role-based nature of organizational institutional reasoning means that the success of a whole institution will rest upon the ability of its agents to collaborate with one another. In contexts wherein significant damage can occur to institutional relationships by *not* adopting another institutional actor's decision, restraining one's decision-making to accommodate this fact is an important aspect of sound institutional practical reasoning.

E. The Courts and Inter-institutional Decision-making

This whole discussion has important implications for our understanding of how the judiciary ought to function in our system of governance. Judges are institutional actors within a larger institution of government. Put more precisely,

judges are institutional actors within an institution (the courts) that is itself part of a meta-institution – government. Individual judges are assigned horizontally and vertically differentiated roles relative to one another within the larger judicial institution as well as within the meta-institution of government. The judicial institution is divided into different types of courts specializing in the adjudication of different sorts of disputes. Family courts, for instance, decide different matters than small claims courts or criminal courts. It is also hierarchically differentiated, with different levels of courts having priority over other levels of courts with regard to the determination of particular matters. Canadian provincial appellate courts, for instance, have priority over all provincial courts with regard to interpreting the meaning of law, while the Canadian Supreme Court has priority over all other Canadian courts in this task. In addition, judges are to facilitate and advance the objectives of the judicial institution as well as the objectives of the government meta-institution while acting within their assigned roles.

The *institutional nature* of judicial reasoning is precisely why considerations of deference, authority, and restraint are critically important to the judiciary. If the purpose of judges is to make the best decisions possible for fulfilling the objectives of both the judicial institution and the larger institution of government, sound practical reasoning may require them sometimes to adopt a deferential policy towards those decisions of other institutional actors (whether they be other judges or non-judicial governmental actors operating within different institutions such as administrative tribunals). When another governmental actor possesses more expertise concerning how best to attain an institutional objective or is better placed to attain an institutional objective than a judge, deference is a requirement of sound inter-institutional practical reasoning.

Restraint based considerations are also of importance to judicial reasoning – a factor that allows us to capture part of what Kavanagh has referred to as ‘prudential’ reasons for a judicial decision. Even if some non-judicial governmental actors may not be legitimate authorities, insofar as they cannot service the unique dependent reasons appropriate to a judicial decision better than a judge and hence cannot commend deference, they may nevertheless be able to provide significant (non-deference based) reasons for judicial restraint. There are often important consequences when judges set aside or interfere with the decisions made by other governmental actors. These include such things as burdening litigants with additional proceedings, undermining the ability of other institutions to function effectively, and undermining the cordiality that may exist between different institutions of government. Importantly, the last consideration need not be limited only to the direct relationship between the judiciary and the institution with whose decisions a judge may interfere. There are also indirect relationships that ought to be accounted for - such as the judicial relationship with a legislature that has established a particular tribunal whose decisions a judge reviews. While none of these considerations provide any legitimate grounds for

deference, properly understood, they may provide important reasons that factor into the larger balance of reasons for or against a particular judicial decision.

F. Conclusion and Future Concerns

I believe that the above analysis of institutional reasoning, coupled with the analysis of authority in the previous section, provides a workable framework within which to begin the process of reconstructing a coherent standard of review analysis in Canadian administrative law (and beyond). The current Canadian standard of review analysis relies heavily upon the appropriateness of a policy of judicial deference in order to navigate between the constitutional demands of the rule of law and democracy. The problem with the standard of review analysis, as I see it, is that it fails adequately to address the important conceptual and philosophical issues that are involved in the concept of deference.

Surveying the literature about the nature of judicial deference, I identified the strengths and shortcomings of non-doctrinal conceptions of judicial deference as well as conceptions as submission and respect, before proceeding to discuss what King refers to as ‘institutional approaches’ to judicial deference. I identified Kavanagh’s institutional approach to judicial deference as the soundest and most convincing account available, while nevertheless being in need of important clarifications and revisions. I have shown how Kavanagh’s analysis of judicial deference is more coherent and consistent when understood in relation to a correlative understanding of authority. I also embarked on a detailed and careful analysis of the nature of authoritative, deferential, and restraint based reasons in order to demonstrate how an understanding of these terms can help clarify how deference can play an important role in fostering sound inter-institutional decision-making.

This analysis, however, provides only a basic framework within which to operate. While it gives a solid foundation, it leaves many of the most important and most controversial matters central to administrative review unresolved. In particular, it leaves the following major questions unanswered:

1. If an essential part of inter-institutional decision-making involves recognizing the institutional actor’s horizontally and vertically assigned roles within their institution, what role do (superior) courts play in the larger meta-institution of government? And also of importance, what role do tribunals play? How are their roles similar and different and how does this impact the appropriate reasons that ought to figure into judicial administrative review proceedings?
2. How do rule of law considerations factor into our understanding of the appropriateness of judicial deference and how do they relate to the broader objectives of the meta-institution of government?

3. How does my redefined doctrine of judicial deference relate to issues of democratic legitimacy and privative clauses?
4. How can the above framework help to make Canada's standard of review analysis more coherent? Can this understanding of judicial deference actually advance the goal of creating a stable and workable analysis for administrative review? How can I avoid the charge that these endless distinctions and conceptual clarifications simply make for a more obscure and cumbersome system of judicial review?

It is to these important questions that I will turn in Part III.

PART III:

A COHERENT APPROACH TO ADMINISTRATIVE REVIEW

SECTION I: INTRODUCTION TO PART III

The ultimate purpose of this work is to establish a tenable framework for the judicial review of administrative decision-making by Canadian superior courts. Part I demonstrated the tensions and confusions latent within Canada's current standard of review analysis. In particular, the current standard of review analysis in Canada lacks a coherent theoretical foundation that can explain why judicial deference to, or interference with, administrative decision-making is appropriate in particular contexts but not in others. As Canada's Supreme Court noted in *Dunsmuir*, "The history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision-makers or judicial review judges."¹⁸⁸ My claim is that the model of inter-institutional reasoning provided in Part II provides a stable, workable, and coherent framework that can underpin the Canadian judiciary's approach to administrative review. The purpose of Part III is to rebuild Canada's standard of review analysis in accordance with the distinctions and principles highlighted in Part II, culminating in Section 5 with a final statement of my 'inter-institutional authority' test for administrative review. To get to this stage, however, I need to develop a few important distinctions, clarifications, and arguments.

Section 2 examines some of the key institutional features of Canada's superior courts and how these institutional features distinguish them from administrative decision-makers. I argued in Part II that an institutional model, such as Kavanagh's, represents the most robust account of judicial due deference. Institutional models maintain that the appropriateness of deference by the judiciary is to be premised on the existence of certain structural features that differentiate them from other institutions. If judges are better placed to make a decision than other governmental actors, they ought to make a decision. On the contrary, if they are less well placed to make the decision, they generally ought to defer to another, better placed, actor. Therefore, everything hinges on exactly what sort of features characterize a superior court that will consequently make them better or worse situated to determine an issue. What exactly is a superior court and why is it so unique?

Sections 3 and 4 revisit the fundamental tension in Canada's standard of review analysis between the demands of the 'rule of law' and those of 'democracy'. Calls for judicial interference with administrative decision-making typically are associated with concerns about the rule of law and the judicial role in upholding it. Administrative decision-makers need to comply with the rule of law and it is the duty of courts to ensure that they do so. Conversely, demands for judicial acquiescence with administrative decision-making are generally couched in arguments about the need for judges to respect democratic decision-making.

¹⁸⁸ *Dunsmuir*, par. 1

When elected legislatures make determinations about who ought to decide particular matters, the courts must respect this choice since to do otherwise would be to undermine democratic governance. Thus, the simple formula seems to be that judicial interference is good for the rule of law but bad for democracy – hence, the ‘Diceyan dialectic’ that is the characteristic tension of administrative law.

Between Sections 3 and 4, I argue that this simplistic formula ultimately fails. It is often the case that judicial interference with administrative decision-making will undermine the rule of law. It is also often the case that judicial deference to legislative choices to delegate judicial powers to administrative tribunals work contrary to democratic objectives. Thus, sometimes judicial deference to administrative decision-makers fosters the rule of law and sometimes judicial interference with legislatively appointed decision-makers works to strengthen and defend democracy. The upshot of all this is that there can be no shortcut answer to the appropriateness of deference by Canada’s superior courts.

Finally, section 5 puts together all the disparate pieces from Parts I, II, and III. While my analysis fundamentally accords with much of the ‘pragmatic and functional’ analysis developed in *Puspanathan* and reinforced in *Dunsmuir*, it nevertheless critically differs as it provides the missing underlying framework that allows this analysis to make sense. The failure of the *Pushpanathan/Dunsmuir* test for the standard of review was its inability to link a doctrine of judicial deference with a coherent account of inter-institutional authority. Consequently, it does not provide a stable and predictable roadmap for the future of judicial review. I believe that the inter-institutional model of authority provided in Part II has the ability significantly to reduce the unpredictable oscillations between judicial deference and interference that bedevils our current system of administrative review. A theoretical grounding for administrative review within a Razian conception of authority allows administrative law to benefit from the wealth of scholarship that has developed both from within and without Raz’s work. Due to the enormous complexities of the subject matter, a coherent underlying philosophy for judicial review can be the only way forward in administrative law. In what follows, I hope to demonstrate the truth of this.

**SECTION 2: A DISTINCTIVE INSTITUTION? SUPERIOR COURTS IN CANADA'S
CONSTITUTIONAL ORDER**

A. Introduction

A significant problem in the literature surrounding judicial review is that theorists frequently fail to identify exactly what they intend by the term ‘judge’ or ‘court’ - as Dyzenhaus notes, “this question... receives only an oblique answer in legal theory.”¹⁸⁹ This, of course, is problematic because the propriety of interference with a decision reached by another governmental actor will turn on the nature of what a court is and how it is supposed to function in a particular context of governance. More pertinent to my larger project, some explanation of what a court is and why it is different from an administrative tribunal is essential if we are to understand the reasons for judicial restraint, deference, and interference in administrative law - if courts and administrative tribunals are indistinguishable, the grounds for judicial review of administrative decision-making largely disappear. So what is it about superior courts that ought to justify their superior placement relative to administrative tribunals?

In this section, I examine the nature and function of superior courts in Canada’s constitutional regime. I begin by expounding the nature of common law courts in general, arguing that these sorts of courts are much more than mere forums for adjudicating disputes about law. Part of the essence of a common law court is that it adjudicates disputes about law in a particular characteristic way and is presided over by judges that possess certain key features (such as impartiality and independence). Following this basic examination of the nature of a common law court, I articulate some important characteristics of superior courts – particularly their general, original, core, and inherent jurisdiction, constitutional entrenchment, and their longstanding institutional history. Finally, I differentiate superior courts from administrative tribunals, highlighting the important features that make superior courts distinctive. By identifying the unique nature of superior courts, I establish important institutional considerations that, in future sections, will underlie strong reasons for both curial deference and interference with administrative decision-making.

B. General Features of Common law Courts

There is obviously a core set of attributes that virtually all theorists will agree at least partially constitutes the nature of a court – it is *an institution that adjudicates disputes according to law*. A judge would then be an institutional actor that adjudicates disputes according to law within a court institution. While

¹⁸⁹ David Dyzenhaus, ‘The Very Idea of a Judge’ 60 *University of Toronto Law Journal* 61 (2010), 64

certainly true, these minimal definitions of what constitutes a court and what makes a judge do not get us very far. Institutions that are generally regarded as not being courts often perform precisely this sort of task. Impeachment proceedings for sitting Prime Ministers in the U.K. House of Commons and House of Lords, and for U.S. Presidents in the House of Representatives and the Senate, are examples of institutions resolving disputes according to law. While such proceedings are generally regarded as being ‘court-like’ most would refrain from referring to any of these bodies in general as courts. Nor would we describe the members of these bodies as *judges* – even if we might claim that they do sit in *judgment* over a particular matter. The simple definitions of courts and judges are therefore over-inclusive as they would describe a great number of institutions in our society as courts when they are doubtfully so and label as judges many institutional actors that clearly are not.

Courts as a Peculiar Forum for Adjudication

While it is certainly true that the central purpose of courts is to resolve disputes according to law,¹⁹⁰ our conception of courts and their principal actors, judges,¹⁹¹ seems to involve much more. Jeremy Waldron, in his article ‘The Concept and the Rule of Law’, argues that our central understanding of courts extends beyond an institution that merely resolves disputes according to law, to one that, when adjudicating disputes, resolves them in a particular way:

...the operation of a court involves *a way of proceeding* that offers to those who are immediately concerned an opportunity to make submissions and present evidence, such evidence being presented in an orderly fashion according to strict rules of relevance and oriented to the norms whose application is in question. The mode of presentation may vary, but the existence of such an opportunity does not. Once presented, the evidence is then made available to be examined and confronted by the other party in open court. Each party has the opportunity to present arguments and submissions at the end of this process and reply to those of the other party. Throughout the process, both sides are treated respectfully and above all listened to by a tribunal that is bound to attend to the

¹⁹⁰ Courts, in most jurisdictions, also may perform many tasks in addition to the adjudication of legal disputes. Canadian courts, for instance, are able to hear and rule on ‘reference questions’ directed to them by legislatures. In addition, common law courts have an important role to play in developing the law. The *ratio* of judicial decisions establishes precedents that become law for future disputes. In many jurisdictions, judges are called upon to sit on government commissions, advise governmental actors, take marriage vows, and perform a number of other diverse tasks in addition to the simple resolution of legal disputes. Nevertheless, while courts can perform these functions their central purpose is the resolution of disputes according to law

¹⁹¹ Judges, of course, are not the only institutional actors involved in a court setting - clerks, for example, can be involved in the court institution and are clearly not judges. Nevertheless, judges constitute the most important actors within the courts as all other actors function to aid the judges.

evidence presented and respond to the submissions that are made in the reasons that are given for its eventual decision.¹⁹²

His claim is that part of what makes courts unique is that they provide a peculiar method of adjudication - one that enables those whose disputes are being determined an opportunity to be fairly heard, both during the presentation of their own arguments and in challenging the arguments of other parties to the dispute.¹⁹³ Judges are supposed to be impartial adjudicators who determine the ‘reasonableness’ of each of the disputants’ submissions and counter-submissions about the proper meaning and application of the law, as well as other norms recognized by the court as legitimate considerations for reaching a decision. Waldron’s analysis therefore suggests additional features that are prominent in our modern conception of the nature of common law courts¹⁹⁴; notably, adherence to the two-fold principles of natural justice mentioned in Part I – prohibitions on

¹⁹² Jeremy Waldron, ‘The Concept and the Rule of Law’ 43 *Georgia Law Review* 1 (2008), 20. Emphasis added.

¹⁹³ Fuller’s classic analysis of the nature of courts and adjudication is a key inspiration for Waldron’s theory. In ‘The Forms and Limits of Adjudication’, for instance, Fuller argues that “the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself. Thus, participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he is insane, has been bribed, or is hopelessly prejudiced.” (364) See also Fuller’s discussion of adjudication in the *The Morality of Law* (Fredericksburg, VA: Yale University Press, 1964). While I agree with Fuller and those in the ‘legality’ tradition in general jurisprudence (including such notable theorists as Ronald Dworkin, David Dyzenhaus, Trevor Allan, Robert Alexy, and others) that our core understanding of courts involves these procedural elements, at least in common law systems, I disagree that these are necessarily inherent features of legal adjudication itself. Matters are often determined (or ‘adjudicated’) without the parties involved being able to offer submissions or counter-submissions. Whether the requirement to hear all submissions from all parties involved in a dispute is part of our core understanding of what it means to adjudicate a dispute is thus highly controversial and I do not wish to be bound by this unnecessarily contentious theory.

¹⁹⁴ Waldron’s analysis is unclear about whether his understanding of courts is limited to common law courts or extends to courts in all systems. If the latter, his theory is clearly flawed since civil law courts are typically constructed according to the inquisitorial rather than adversarial model of adjudication. While presenting arguments and developing counter-arguments are generally encouraged under civil-law regimes, and civil-law courts may even be required to consider these by law, the adversarial process of requiring an impartial forum in which to have divergent sides present their cases is only a *necessary* requirement of common law courts. I should also note that Waldron’s understanding of the nature of courts is only appropriate to a *modern* common law legal system. The adversarial process of adjudication developed throughout the long history of the English courts and what we now recognize as the appropriate functioning of the courts would have seemed strange at earlier periods of the common law. Thus, Waldron’s understanding of a court would be inept for describing the particular institutions we would identify as courts in earlier eras in the English legal system. It was primarily during the 17th century that judges significantly began to assert their role as impartial adjudicators that must not be controlled by executive actors.

bias (*nemo iudex in causa sua*) and providing a fair and appropriate hearing for all sides in a dispute (*audi alteram partem*) - as well as the requirement of judicial independence.

Prohibitions on Bias – Judicial Impartiality

Common law judges are required to be both *impartial* and *independent* adjudicators of disputes. While judicial impartiality and judicial independence are closely related concepts, Canadian courts helpfully have distinguished the two. In *Valente*, Le Dain J. held that:

Impartiality refers to a *state of mind* or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" ... connotes absence of bias, actual or perceived. The word "independent"... reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or *relationship to others*, particularly to the executive branch of government, that rests on objective conditions or guarantees.¹⁹⁵

Judicial impartiality thus is concerned with whether an individual judge in a particular case is able to set aside her own prejudices and interests in order to hear a case fairly. Judicial independence, on the contrary, is the ability of a judge to make decisions without undue interference, or the threat of undue interference, from other institutional actors.

The most important requirement of judicial impartiality is that judges are not to have a vested interest in the matter being disputed. When judges have a financial stake in proceedings, are intimately familiar with one or more of the parties, belong to a particular party in some manner, or otherwise stand to gain or lose from the outcome of proceedings, they have an important obligation to recuse themselves or minimally inform the parties of the potential conflict of interest. This, indeed, is the essence of the Latin maxim *nemo iudex in causa sua* – no one should be a judge in his own cause. The requirement of judicial impartiality is founded in common sense. If an adjudicator has a personal stake in the outcome of a case, the quality of her reasoning is likely to be diminished, whether consciously or otherwise. The prohibition on bias is therefore related to the judicial objective of determining disputes *according to law* rather than according to the arbitrary whims of the adjudicator.¹⁹⁶

¹⁹⁵ *Valente v. The Queen*, [1985] 2 S.C.R. 673. Emphasis added.

¹⁹⁶ The origins of the doctrine of judicial impartiality in English law are mixed and reach back at least to the 16th century. For instance, a treatise on the laws of England penned by Christopher Saint German in 1528 entitled *Dialogus de fundamentis legum Anglie et de conscientia* (translated in English as *Doctor and Student: or, Dialogues Between A Doctor of Divinity and A Student in the Laws of England* in 1530) explained that there was an “old custom of the realm” that required that “all issues that shall be joined between party and party in any court of record within the realm... be tried by twelve free and lawful men... that be not of affinity to none of the parties.”

In addition, judicial impartiality requires, in the words of Lord Campbell, that judges “take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence.”¹⁹⁷ Put more succinctly by Lord Hewart, judicial impartiality requires that “not only must justice be done; it must also be seen to be done.”¹⁹⁸ Even if judges are not actually biased and do not actually exhibit some form of prejudice toward one of the parties in a dispute, the fact that it may *appear* to an external observer that a judge may be partial to one of the disputants constitutes a breach of judicial impartiality. Judges are required carefully to inquire into how they may have any connection to a case. Once some form of connection is discovered, even if she may believe it will not impact her decision-making, she nevertheless must either recuse herself or report the conflict to the disputing parties.¹⁹⁹

Judicial Independence

Judicial *independence* traditionally is associated with a separation of judicial powers from the legislative and executive/administrative powers.²⁰⁰

See the 16th ed. (London: S. Richardson and C. Lintot, 1761), 24. The earliest decision that I have been able to identify that institutes the principle of judicial impartiality as a common law rule is Coke’s decision in *Dr. Bonham’s Case*, 8 Co. Rep. 107a (1610), in which Coke asserted that a judicial decision would be against “common right and reason” if it involved a judge both determining a matter and being a party to the same matter. Whatever its origins, however, by the end of the 17th century it became a clear and established principle of the common law. For more on the origins of the *nemo iudex in causa sua* rule see Frederick Schauer’s ‘English Natural Justice and American Due Process: An Analytical Comparison’ 18 *William and Mary Law Review* 47 (1976).

¹⁹⁷ *Dimes v. Grand Junction Canal* (1852) 3 HLC 759

¹⁹⁸ *R v. Sussex Justices, ex parte McCarthy* [1923] All ER 233

¹⁹⁹ I should note, however, that English, Canadian, American, and many other common law systems have provisions in place that allow judges to continue to hear a case in some circumstances even if they may have a conflict – provided that the parties are informed of this conflict and that all parties consent to the judge continuing in spite of the conflict. See, for instance, *Wakefield Local Board of Health v. West Riding and Grimsby Rly Co.* (1865) 1 QB 84 and *R. v. Byles ex p. Hollidge* (1912) 77 JP 40.

²⁰⁰ While the Westminster system of governance, adopted by most commonwealth countries including Canada, does fuse executive and legislative powers through the cabinet and the office of Prime Minister, judicial powers are intended to be separate - as Holdsworth once remarked: “[t]he separation of powers in the British Constitution has never been complete. But some of the powers in the constitution were, and still are, so separated that their holders have autonomous powers, that is, powers which they can exercise independently, subject only to the law... The judges have powers of this nature because, being entrusted with the maintenance of the supremacy of the law, they are and always have been regarded as a separate and independent part of the constitution. It is true that this view of the law was contested by the Stuart kings; but the result of the Great Rebellion and the Revolution was to affirm it.” See W.S. Holdsworth ‘His Majesty’s Judges’ 173 *Law Times* 336 (1932), 377.

Judges are not the primary institution responsible for the development of law;²⁰¹ instead, courts are neutrally to apply the law, as they best understand its meaning, in concrete cases without fear of reprisal from other institutional actors or the larger public. As Canada's Supreme Court remarked in *Mackin*, judicial independence is fundamentally concerned with the ability of the judiciary "to render decisions based solely on the requirements of the law and justice."²⁰²

The independence of the judiciary from other institutional actors, in Canada, involves three essential elements: security of tenure, financial security, and administrative independence.²⁰³ The first element, security of tenure, entails that judges are to hold office during 'good behavior' (*quamdiu se bene gesserint*) rather than 'at pleasure' (*durante bene placito*). Judges are not to be dismissed purely because they no longer act as another governmental actor wishes them to act; instead, judges are only to be dismissed from office if they violate some clearly established conditions of their office (e.g. if they take bribes).²⁰⁴ Provided

²⁰¹ There is an ongoing dispute as to whether judges 'make' or 'find' law in a common law system of precedent when they decide cases that appear to be unregulated by law or when the law is unclear so as to allow diverse results. Contemporary theorists, most notably Ronald Dworkin, argue that in such cases the law never truly 'runs out' but instead judges are forced to look deeply into the underlying moral and legal principles in the law in order to 'find' what the law actually always has been. See, in particular, Dworkin's 'The Model of Rules I' 35 *University of Chicago Law Review* 14 (1967), *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1978) and *Law's Empire* (Cambridge, Mass: Harvard University Press, 1985). The other approach, favored most notably by H.L.A. Hart, is to recognize that judges in common law systems exercise 'interstitial' law-making powers whereby the courts make new law when espousing a binding precedent in unregulated or unclear cases. See *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), particularly the postscript, p. 273-275. While I am inclined to agree with Hart in this dispute, the debate is of little practical importance with regard to the issue of judicial independence. Provided that judicial law-making powers are confined to situations in which the law either runs out or is unclear, the exercise of these powers represents acts of 'secondary' legislation. In addition, judges cannot exercise these already limited (secondary) legislative powers outside of the context of a live dispute. These serious limitations mean that judicial legislative powers, albeit important, nevertheless do not threaten the basic separation of legislative powers from judicial powers.

²⁰² *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405 at par. 37

²⁰³ The Canadian Supreme Court defined these basic principles in *Valente* and reaffirmed them in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473. See also W.R. Lederman 'The Independence of the Judiciary' 34 *Canadian Bar Review* 769 (1956).

²⁰⁴ This understanding of judicial independence, of course, implies that American judges in certain jurisdictions where judges are elected on a regular basis are not properly understood as independent judges. I exclude courts that involve regularly elected judges from my central conception of common law judges. While the election of judges will not in itself compromise the essence of judicial independence, requiring judges to submit to *regular* elections does. This makes the judicial tenure subject to the 'pleasure' of the electorate rather than allowing them to serve during 'good behaviour'.

that judges do not stray from these conditions while exercising the powers associated with their office, their positions are to be guaranteed.²⁰⁵

Financial security entails at least two things. First, that judges are adequately to be remunerated for their work so that they are not forced to engage in other pursuits or be at the mercy of other actors for their attainment of a decent living.²⁰⁶ Judicial independence is compromised when judges have financial incentives either for taking or refusing cases or for deciding cases in particular ways. Second, it entails that the salaries of judges are not arbitrarily to be adjusted. Salaries are to be clearly established²⁰⁷ in order to ensure that other governmental actors do not attempt to interfere with judicial reasoning by controlling their purses.

Finally, judicial independence requires that judges have control over their own administration. This means, in particular, that judges are to determine which individual judges will hear which cases without interference from other governmental actors.²⁰⁸ Judicial independence would be severely compromised if executive and legislative actors were able to ensure that important cases were tried before particular judges more amicable to their agenda than others.

Requirement of a Fair Hearing, the Adversarial Process, and the Duty to Give Reasons

Not only do common law courts exist in order to give litigants an opportunity to have their cases tried before an impartial and independent tribunal; they also provide litigants the chance to raise and challenge all relevant aspects of a dispute. The requirement that courts provide a fair hearing entails, at least: that notice be given, that the parties be given an opportunity to be heard, that a hearing

²⁰⁵ This requirement of judicial independence has a long history, but is most famously ‘constitutionalized’ in the *Act of Settlement, 1701* wherein it was required that: “judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them.”

²⁰⁶ At earlier times in English history, judges would often hold positions in addition to their judicial ones or collect fees for their services in order to sustain an adequate salary. See Lederman ‘The Independence of the Judiciary’, 789-796.

²⁰⁷ Judicial salaries can be adjusted in order to address pressing matters (such as financial shortfalls by governments). In the *Provincial Judges’ Reference*, the Supreme Court of Canada held that in order to do this “there must be some commission established” in order to ensure that the reasons for reducing judicial salaries was not related to judicial performance but related to true financial problems. “Although provincial executives and legislatures, as the case may be, are constitutionally permitted to change or freeze judicial remuneration, those decisions have the potential to jeopardize judicial independence. The imperative of protecting the courts from political interference through economic manipulation is served by interposing an independent body — a judicial compensation commission between the judiciary and the other branches of government.” (166)

²⁰⁸ In Canada, for instance, it is usually the chief justice of a particular court that sets the schedule of cases.

be conducted in an appropriate and orderly way, and that reasons be given for a decision. Prior to a hearing, courts are obligated to inform parties that a dispute exists and then to arrange a particular setting and time in which they will meet with the parties or their representatives to adjudicate the matter. The *audi alteram partem* principle requires that in all disputes – whether concerning civil or public law matters – parties, or their representatives, are able physically to appear (together) before a court when having their case determined. It also requires that courts inform parties prior to the hearing as to what central issues are being decided.

With regard to their procedures during a hearing, common law courts use the ‘adversarial’ system. Unlike civil-law courts in which judges are expected to be active participants in the hearings (i.e. the ‘inquisitorial’ system), common law courts are expected generally not to interfere with proceedings. It is primarily the responsibility of the parties to raise issues and make arguments rather than the judge. Common law courts proceed by allowing each party to make their own submissions and contradict the submissions of others thereby ensuring that the judicial decision is made in full awareness of the particular matters that are at issue. This includes, in general, the ability to present evidence, call and examine witnesses, and to raise issues about the proper application of law. Throughout, judges are expected to remain neutral and not to take an active role.

When the hearing is concluded and all evidence and arguments are submitted, judges are obligated to render a decision together with reasons for why that decision was made.²⁰⁹ The requirement to provide reasons is founded upon considerations of the judicial role in a system of precedent in which appeals are always possible, while also ensuring the integrity of judicial decisions - as Binnie J stated in *Sheppard*: “The delivery of reasoned decisions is inherent in the judge’s role. It is part of his or her accountability for the discharge of the responsibilities of the office.”²¹⁰ The *ratio decidendi* of judicial decisions, in common law legal systems, develops the law and provides a binding precedent for future decisions of courts on the same level or on lower levels of the court hierarchy. It is therefore important to have a precise explanation for why a determination is made by a particular court in order to know the meaning of its decision for the state of the law. In addition, all court decisions (except those made by final ‘supreme’ courts) are subject to appeals. In order to determine if an error was made, however, an appellate court needs to know the reasons for the decision.

The provision of reasons is also essential for ensuring that the decision-making of courts is not tainted by bias or a lack of independence and that key

²⁰⁹ In trials by jury, however, the court will not be the trier of fact; nevertheless, it will be responsible for providing an explanation of the law. The ultimate decision about what the meaning of law is lies with the presiding judge in a jury trial and the obligation to give reasons and to ensure fair proceedings is incumbent upon the judge.

²¹⁰ *R. v. Sheppard*, [2002] 1 S.C.R. 869, at par. 55

arguments and evidence presented at a hearing are accounted for in the decision. When courts are required to give grounds for why they have reached a particular conclusion, their reasonableness can be checked by other judges, governmental actors, and even the public at large. The requirement to give reasons is therefore an important bulwark protecting all parties against arbitrary treatment from a court.

The Central Understanding of a Common law Court

Putting all of these elements together we can supplement the simple definition of a common law court mentioned earlier with a more fruitful one:

A common law court is an institution within the meta-institution of government, staffed by impartial and independent judges, that adjudicates particular disputes, on the basis of law, in accordance with the adversarial system, by giving parties to the dispute the opportunity to raise and challenge relevant evidentiary and legal issues and then provides a determination, together with its reasons for that determination.

This definition, I believe, is sufficiently broad as to cover the vast majority of institutions that would be recognized as courts in common law legal systems. It is also narrow enough as to exclude a number of institutions that ought not to be identified as courts. In any case, whatever the merits of this definition (and I believe there are many), I will use this definition in the remainder of this work as my core understanding of a ‘common law court’.

C. Superior Courts in Common law Legal Systems

While part of the meta-institution of common law courts, superior courts possess additional characteristics that distinguish them from other sorts of courts. Central to our understanding of superior courts, I suggest, is that they are common law courts that possess a general, original, core, and inherent jurisdiction, are constitutionally entrenched, and can claim a long institutional history. These features differentiate superior courts from other common law courts and provide additional important institutional considerations for evaluating the appropriateness of their exercise of judicial review powers over administrative decision-makers.

General Jurisdiction

Superior courts have the ability to hear and resolve *all* legal issues that may arise –provided, of course, that legislatures have not prohibited them from hearing the issue by statute and have not granted another court or tribunal

exclusive jurisdiction over the issue.²¹¹ Barring these exceptions, superior courts have no limits as to the sorts of legal disputes that can be heard before them. The general jurisdiction of a superior court ensures that there will always be a competent court available to try an issue since there is no subject matter that a superior court is prohibited from considering. The fact that superior courts are defined in part by the possession of a general jurisdiction also has ramifications for the sorts of persons that are apt to sit on its benches – namely, that its judges ought to be legal *generalists* rather than legal specialists.

Original Jurisdiction

In addition, superior courts possess original jurisdiction over all matters, again provided that legislatures have not prevented them from doing so and have not granted exclusive jurisdiction to other courts or tribunals. This means that they are the appropriate courts of first instance for trying all matters that have not been statutorily assigned to other courts or tribunals. Importantly, this implies that appellate courts (such as a Supreme Court or provincial/state appellate courts) cannot hear cases prior to them being heard and determined first by a superior court unless explicitly permitted by statute.²¹² The original jurisdiction of superior courts, in conjunction with their possession of a general jurisdiction, ensures that they can hear all relevant issues to a case at first instance. It allows the whole panoply of legal issues to come together before a single competent court before a decision may be subjected to appellate review.

Core Jurisdiction

In general, most common law systems recognize that there is a ‘core’ jurisdiction of superior courts that legislatures are either constitutionally barred from removing or that it would be otherwise inappropriate for legislatures to remove.²¹³ While many aspects of the superior courts’ original and general jurisdiction can and may be statutorily altered, there are other aspects that must remain within their power and which cannot be removed by ordinary

²¹¹ Note, however, that legislatures cannot bar superior courts from hearing matters that fall within their core jurisdiction or assign such matters exclusively to other tribunals. (See *Reference re: Residential Tenancies Act*).

²¹² For instance, the Canadian Supreme Court, pursuant to Section 53 of the *Supreme Court Act*, is able to hear reference questions without these having to first be heard by a superior court.

²¹³ In Canada, Section 96 of the *Constitution Act, 1867*, as discussed in Part I, prevents legislatures from assigning certain core functions of superior courts to statutory tribunals. In the U.K. there is considerable debate as to whether a legislature, as a matter of constitutional law, can remove a core aspect of a superior court’s jurisdiction. I am inclined to say, following Dicey, that as a matter of constitutional law this is permitted in the U.K. but there is nevertheless an existing constitutional convention that such an act would be inappropriate.

legislation.²¹⁴ What exactly constitutes the core jurisdiction of a superior court will differ from system to system; however, there is a single underlying rationale that motivates this protection - a core jurisdiction ensures that at least some of the most important matters (such as criminal law) will be heard by an independent and impartial court. It guarantees that with respect to these serious issues, legislative and executive actors cannot simply bypass a court by creating a non-court like tribunal that will be more responsive to their wishes. Inferior courts and statutory tribunals only possess that jurisdiction conferred upon them by statute and this jurisdiction can be removed by revoking a statute or a particular statutory provision. The core jurisdiction of superior courts, on the other hand cannot be so easily removed.

Inherent Jurisdiction

More difficult to define is the idea of a superior courts' inherent jurisdiction. Put in its simplest form, the inherent jurisdiction of the superior court is the ability for the court to act so as to ensure that its decisions are respected and that its processes are not interfered with – as Jack Jacob notes,

...superior courts of common law have exercised the power which has come to be called "inherent jurisdiction" from the earliest times, and . . . the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.²¹⁵

Possession of an inherent jurisdiction allows “the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.”²¹⁶

The doctrine of inherent jurisdiction, according to Keith Mason, enables superior courts to exercise a number of loosely defined discretionary powers in order to: (1) ensure convenience and fairness in legal proceedings, (2) prevent steps from being taken that would render judicial proceedings inefficacious, (3) prevent abuse of process, and (4) act in aid of other superior courts and in aid or control of inferior courts and tribunals.²¹⁷ These include the ability to grant injunctions, to issue publication bans, to punish individuals for contempt of court, to stay proceedings in lower courts or tribunals, to dismiss frivolous actions, and

²¹⁴ I use the term ‘ordinary legislation’ here to signify that a special constitutional enactment or amendment could legitimately curtail a superior court’s core jurisdiction.

²¹⁵ I.H. Jacob, ‘The Inherent Jurisdiction of the Court’ 23 *Current Legal Problems* 23 (1970), 25

²¹⁶ *Ibid*, 28

²¹⁷ See Keith Mason, ‘The Inherent Jurisdiction of the Court’ 57 *Australian Law Journal* 449 (1983). Wendy Lacey nicely unpacks some of the concrete implications of each of these in her article ‘Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution’ 31 *Federal Law Review* 57 (2003).

to instruct executive and administrative agents to carry out particular actions.²¹⁸ The ability actively, creatively, and of its own volition to enforce adherence to its interpretation of the law, as Lamer remarked in *MacMillan*, is:

... of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its "essential character" or "immanent attribute". To remove any part of this core emasculates the court, making it something other than a superior court.²¹⁹

While these powers of a superior court may be circumscribed or brought under statutory control, they do not originate from statute but instead originate from common law decisions that gave the judiciary the necessary means to carry out its mandate to apply the law in a meaningful way, as Jacob explains:

...the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent."... For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.²²⁰

Possession of the powers associated with inherent jurisdiction therefore ensures that the decisions of superior courts have real force. It prevents both private individuals and government officials from ignoring or circumventing judicial decisions and therefore is a fundamental tool of the superior courts for fulfilling their constitutional mandate to uphold the rule of law.

Institutional History

Superior courts can trace their lineage back to at least the 11th century with the *curia regis*. Prior to the establishment of the superior courts, important legal matters, or matters involving notable individuals, were heard before the King and his advisors while other matters were heard in local courts according to customs

²¹⁸ There is a close relationship between the prerogative remedies discussed in Part I and the inherent jurisdiction of a superior court. The issuance of prerogative writs by courts was its traditional means of carrying out the powers of its inherent jurisdiction. Writs such as *mandamus*, for instance, were used to direct other institutional actors so as to ensure that they conformed with judicial decisions. In addition, the inherent jurisdiction of a superior court is closely related to its core jurisdiction as protecting a certain set of core issues from ordinary legislative expulsion or executive interference is part of being able effectively to enforce its decisions.

²¹⁹ *MacMillan Blodel Ltd. v. Simpson*, [1995] 4 SCR 725, at par. 30

²²⁰ Jacob, 'The Inherent Jurisdiction of the Court', 27

and practices associated with a local area.²²¹ Legal reforms undertaken by Henry I in 1166²²² established a tradition of justices being assigned to hear and determine cases (*oyer et terminer*), in the name of the King, not only for the “great men and the great causes”²²³ but for the whole of the realm. These *justiciars* would travel through the realm and dispense uniform justice, marking the beginnings of a ‘common’ law for England. Gradually the *curia regis* morphed into four major separate courts that were to be permanently stationed out of Westminster – the King’s Bench, the Court of Common Pleas, the Exchequer, and (eventually) the Court of Chancery. These courts acted with (or at least claimed to act with) the authority of the King himself and their judgments were given the same force as a royal decision. They could issue writs, in the name of the King, directing particular actions from a sheriff, inferior courts, or other government officials. Within one of these four courts, all cases arising within English law could be heard either at first instance or by way of appeal from a lower court. The interpretation and development of the vast majority of English common law and equity ultimately rested within their chambers.

While 19th century reforms in England (particularly the *Supreme Court of Judicature Act, 1873*) amalgamated the disparate superior courts into a single court (the High Court of Justice), the basic importance of the superior courts remained untouched. Outside of England, the basic framework of superior courts was adopted in the English colonies and provided the primary understanding of a court system for the United States. Superior courts in all these common law systems are therefore connected to an institutional history of over 900 years. While the powers and importance of the superior courts experienced ebbs and flows throughout this history and numerous developments and alterations have occurred – particularly as these courts were adapted to fit the unique settings present in the disparate English colonies and protectorates - they nevertheless can trace an unbroken lineage, surviving relatively unscathed through struggles with numerous hostile crowns, civil wars, and social and political revolutions. The common law superior courts are an ancient institution, deeply embedded within the understanding of how a common law system functions, that has played a crucial role in the legal system since early in its historical development.

²²¹ See J.H. Baker, *An Introduction to English Legal History*, 4th Ed. (Oxford: Oxford University Press, 2007), Chapters 2 and 3.

²²² Ralph Turner, ‘The Origins of Common Pleas and King’s Bench’ 21 *American Journal of Legal History* 238 (1977), 240

²²³ Pollock and Maitland, *The History of English Law before the Time of Edward I*, 2nd ed. (Indianapolis: Liberty Fund, 2010), 117

Constitutional Entrenchment

A further feature of superior courts in many jurisdictions is their constitutional entrenchment.²²⁴ In Canada, as discussed in Part I, Section 96 of the *Constitution Act, 1867* prevents legislatures from removing both the institution of the superior court and its core powers. As Patrick Macklem notes, this section of the Canadian constitution is “the basis for the claim that the judicial function (at least, the judicial function as performed by superior courts on the English model) cannot be eroded through provincial legislatures, or even Parliament, enacting legislation that assigns such functions to non-court (or executive) decision-making agencies.”²²⁵ The constitutional protection often given to superior courts further ensures their ultimate independence from the legislative and executive branches of government. Whereas ordinary (or inferior) common law courts possess a degree of independence from executive and legislative actors in carrying out their functions, there is no guarantee of their continued existence since an aggravated legislature, unhappy with the decisions from a particular ordinary court, can simply extinguish their jurisdiction by a regular statutory enactment.

D. Distinguishing Common law Superior Courts from Administrative Tribunals

Summarizing the preceding analysis, we can define a superior court in the following way:

A superior court is an institution within the meta-institution of common law courts that is part of the further meta-institution of government, staffed by impartial and independent judges, that adjudicates particular disputes, on the basis of law, in accordance with the adversarial system, by giving parties to the dispute the opportunity to raise and challenge relevant evidentiary and legal issues and then provides a determination, together with its reasons for that determination, and which further possesses a general, original, core, and inherent jurisdiction, is part of an ancient institutional lineage, and (possibly) protected by constitutional entrenchment.

²²⁴ While Canada, Australia, New Zealand, and most other commonwealth countries have constitutionally protected the role of their superior courts, it is unclear whether English superior courts have constitutional protection – particularly given a generally accepted constitutional principle of the supremacy of (the Queen in) Parliament. Unwritten constitutional principles surrounding the rule of law and the role of the superior courts in maintaining this lends credence to the view that the superior courts are constitutionally entrenched and that it would therefore be unconstitutional for Parliament altogether to extinguish them or interfere with their core powers. This would remain true even if *de facto* the Parliament may be able to do so. In the United States, however, it is quite clear that Article III of the U.S. Constitution only grants the federal Supreme Court constitutional protection. Given these concerns, I am hesitant to classify superior courts as being necessarily constitutionally entrenched – even if in most systems this may be true.

²²⁵ Patrick Macklem *et al.*, *Canadian Constitutional Law*, 4th Ed. (Toronto: Emond Montgomery Publications, 2010), 510

This basic conception of a superior court allows us to compare some of the fundamental differences between this important institution and administrative tribunals that may be assigned similar tasks within the inter-institutional setting of government. While often similar in many respects, we can nevertheless distinguish administrative tribunals from superior courts in at least six key ways.

(1) *Administrative tribunals are neither required to be independent nor impartial adjudicators*

Administrative actors are ultimately accountable to the legislative body that establishes them. In the Westminster system with the fusion of executive and legislative power, this means that administrative decision-makers may find themselves accountable both to the legislature in general and individual executive actors (notably cabinet ministers) in particular. While some administrative agencies may be established with the explicit goal of distancing their decision-making from executive and legislative interference (e.g. an ombudsmen or an independent auditor), often administrative actors will be directly accountable for the sorts of decisions that they make. Often lacking security of tenure, financial security, and control over their internal operating procedures, administrative actors constantly risk reprimand for their decisions.

In addition, while common law courts are required to be impartial from the decisions that they make, personnel comprising administrative regimes are often closely linked to the outcome of particular cases. Members within the legal profession, for instance, have a vested interest in how their fellow members are disciplined within a law society. The reputation of the society is determined by the quality of its members and how they conduct themselves. Therefore, when a tribunal overhearing a disciplinary proceeding against a member is largely comprised of members within the bar association, impartiality may be violated. The decision-makers have a clear interest in the outcome of the case.

(2) *Administrative tribunals do not necessarily follow the strict procedural safeguards of a court*

While Canadian case law has forced administrative decision-makers to adhere minimally to the principle of *audi alteram partem*, most administrative decision-makers are not required to grant the full panoply of procedural protections to affected parties that would be required under this principle in a court. Administrative regimes, for instance, are not always required to grant in person hearings. Depending on the matter in dispute, administrative decision-makers may be permitted only to accept written submissions – and they may even limit the extent of these. The exact procedures that are to be followed by administrative regimes are determined, in part, by general legislative guides (such

as Ontario's *Statutory Powers Procedure Act*²²⁶) and specific procedures mandated by statute (which may call for procedures that are more or less stringent than those outlined in general procedures acts).

In addition, administrative decision-makers do not need fully to explain the reasons for their decisions. Depending on the context, a simple statement of its conclusions may be enough. Whereas common law courts are required to give a thorough written account of their conclusions and why they have reached them, there is no general requirement for administrative decision-makers to do so. They will only be required to give thorough reasons if mandated by statute, or if a reviewing court finds that the interests of an affected party are significant enough to require a thorough explanation of the reasons for a decision.

There is also no absolute requirement for administrative regimes to have a procedure in place for appeals. While there will generally be some opportunity afforded to an aggrieved party to appeal an unfavorable administrative decision, there is no absolute right to it. Further, even if appeals are granted, administrative regimes may be structured in such a way as to force appeals before the exact same body that rendered the original decision. Appeals within the court system, on the other hand, require that a new judge will always hear the matter.

(3) Administrative tribunals have a specific rather than a general jurisdiction to hear legal issues

Another crucial difference between superior courts and administrative decision-makers is that the superior courts will be able to determine all (or virtually all) matters that may be relevant to a particular case whereas a tribunal will only be able to make determinations on those matters within its jurisdiction or that are directly relevant to it exercising its jurisdiction. When there are complex issues that involve intersecting issues from different areas of law, administrative decision-makers will lack the requisite authority to deal with all applicable matters. They will, instead, be forced to render decisions based only on those considerations that they are properly empowered to determine.

(4) Administrative tribunals lack an inherent jurisdiction to enforce their decisions

There are only two ways for administrative decision-makers to enforce their decisions. They must either rely upon the statutory remedial powers that have been granted to them or they must seek the aid of a superior court. Administrative decision-makers cannot directly enforce their decisions by any methods other than those granted to them by their enabling statutes. When litigants choose to ignore a particular administrative ruling, the administrator is

²²⁶ *Statutory Powers Procedure Act*, R.S.O. 1990, S.22

severely limited in terms of the methods they can use to ensure conformity. Absent statutory powers, they cannot, for instance, issue a warrant directing the police to arrest an individual. They must rely on the limited tools they are given or the cooperation of a court in order to ensure that their decisions are respected and enforced.

(5) Statutorily created administrative tribunals represent novel rather than ancient methods of governance

While the longevity of an institution, on its own, provides no guarantee of its continued existence, it nevertheless gives us reason to believe it is extremely likely to continue. The superior courts have continually played an important role within the English legal system and within systems derived from the English model. Administrative regimes, on the contrary, do not have a long-standing institutional history – at least, no administrative regimes have a history that compares to that of the superior courts within our system. Whether particular administrative regimes are likely to exist in the future is therefore an open question; whether the superior courts are likely to exist is not. Administrative regimes, because of their lack of a long-standing institutional tradition, are much more easily extinguished or altered than the superior courts. History has cast the superior courts into a relatively solid shape while administrative regimes are still in the process of being forged.

(6) Administrative regimes are not constitutionally protected

Finally, the constitutional protection afforded to the superior courts further ensures that they will be able to survive hostile legislatures and executives. Administrative regimes can be created, destroyed, and altered at will by ordinary legislation; their mandates are statutorily limited. The position of the superior courts, on the contrary, cannot be altered without constitutional changes – at least in Canada. Sections 96-101 of the *Constitution Act, 1867* ensures that the superior courts will persist until such time as Canada undergoes constitutional amendment. To remove the superior courts, or even to tinker with their basic powers, will require a monumental effort. No such effort is required with administrative regimes – passage of an ordinary bill in a legislature will be sufficient to reshape an administrative regime or remove its powers.

Unique Advantages of Administrative Tribunals

I want to stress, however, that these differences do not necessarily make administrative tribunals poor choices for the adjudication of legal disputes. In fact, some of these six key features differentiating administrative tribunals from courts give them important institutional advantages. Administrative tribunals can often

handle a greater *volume* of cases because they are not trapped by the strict procedures of a common law court. Since they have a limited jurisdiction rather than a general one, administrative tribunals are able to develop *expertise* in particular areas. This also leads to their ability more *efficiently* to resolve certain sorts of disputes than the superior courts, since they are not forced to address a panoply of legal issues and can instead focus on very specific matters. They also possess important *structural advantages* over the courts that result from their procedural flexibility and lack of constitutional entrenchment. Since tribunals constantly can be tinkered with, legislatures can alter their nature to fit changing circumstances. Finally, administrative tribunals do not require the impartiality necessary for common law courts. They therefore can be composed of individuals that have a vested interest in the outcome of cases – hence, they may possess greater *legitimacy* when deciding cases. Thus, each of the basic five advantages noted in Part I is directly linked to these crucial institutional differences between administrative tribunals and superior courts.

SECTION 3: THE RULE OF LAW AND THE ROLE OF THE SUPERIOR COURTS

A. Introduction

In Part I, I discussed how Canadian administrative review is caught between the competing Diceyan principles of the rule of law and legislative supremacy. On the one hand, Canadian superior courts recognize that they have an essential role to play in upholding the rule of law by ensuring that all governmental actors carry out their tasks in accordance with the law. Thus, when administrative tribunals act contrary to the law, in an arbitrary manner, or without jurisdiction, superior courts are required to intervene and ensure that things are put right. On the other hand, our superior courts recognize that they are constitutionally required to uphold the popular will, as expressed by a legislature - including when legislatures establish venues for interpreting and implementing law independent of the courts. The question is how our superior courts are to respond to these competing constitutional principles when reviewing the decisions of administrative tribunals.

When navigating between these conflicting demands in administrative review, Canadian courts rely upon the ‘standard of review analysis’, which is loosely organized around an inarticulate conception of judicial deference. In circumstances wherein deference is warranted, courts ought simply to determine whether an administrative tribunal’s interpretation of the law was ‘reasonable’. If the interpretation is reasonable, even if the courts disagree, that decision ought to be upheld. When deference is not warranted, however, courts ought to determine the ‘correct’ interpretation of the law. If the administrative tribunal’s interpretation conforms to that arrived at by the courts, the decision is upheld; otherwise, courts are obligated to interfere with the administrative interpretation and set things right.

The standard of review analysis is thus supposed to help us navigate between the Scylla of the rule of law and the Charybdis of legislative supremacy: imposing the correctness standard on administrative decision-makers preserves the rule of law; imposing the reasonableness standard preserves legislative supremacy. In this section and the next, I examine the plausibility of this account of the judicial role in administrative law. Particularly, I question whether judicial interference with administrative regimes is always valuable to the rule of law and whether judicial acquiescence to statutorily appointed administrative decision-makers always fosters the democratic objectives that underlie our system’s commitment to legislative supremacy.

This section develops several arguments against the notion that superior courts always further the rule of law when they interfere with decisions reached by administrative tribunals. My claim is that there are circumstances in which curial interference with administrative processes function to undermine the rule of law rather than further it. Therefore, in situations wherein our superior courts

possess a horizontally shared task with an administrative tribunal to settle particular disputes according to law (and perhaps even a vertical superiority over this task), our superior courts need to address the issue of whether they are actually a better authority for determining some aspect of the dispute. They must also determine whether there are restraint-based reasons to acquiesce to an administrative decision. The conclusions of administrative tribunals ought to be given deference by the superior courts, at least on rule of law grounds, when these tribunals can better secure rule of law objectives than the courts.

B. *Confusions about the Meaning of the Rule of Law*

While Canadian courts have described the rule of law as “a fundamental postulate of our constitutional structure”²²⁷ that is “at the root of our system of government”²²⁸ its concrete meaning is far from clear within our legal system. The Supreme Court of Canada has articulated the general principle in a number of ways – not all of which are necessarily consistent and not all of which obviously are suitable for grouping under the single concept of the rule of law. In its decision in *Reference re Resolution to Amend the Constitution*, the Supreme Court conceded that the rule of law is a “highly textured expression... conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”²²⁹ But what exactly is supposed to be derived from these ‘senses’ of the rule of law remains an unfortunate mystery.

A haphazard, and by no means exhaustive, survey of some of the statements from the Supreme Court about the rule of law testifies to this confusion. The rule of law is claimed to guarantee “the rights of citizens to protection against arbitrary and unconstitutional government action.”²³⁰ It prevents government from making unjustifiable decisions - “It is... inconsistent with the rule of law to retain an irrational decision.”²³¹ It prohibits the making of vague laws – “The “doctrine of vagueness” is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion... a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate.”²³² It requires that all government decisions be sufficiently justified and treat individuals fairly - “societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law... Where a society is marked by a culture of justification, an exercise of public power is only

²²⁷ *Roncarelli v. Duplessis*, [1959] S.C.R. 121, p. 142

²²⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at par. 70

²²⁹ *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, p. 805-806

²³⁰ *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236

²³¹ *Dunsmuir*, at par. 42

²³² *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606

appropriate where it can be justified to citizens in terms of *rationality and fairness*.²³³ It necessitates the equal handling of all members of the political community - “Divergent applications of legal rules undermine the integrity of the rule of law. Dating back to the time of Dicey’s theory of British constitutionalism, almost all rule of law theories include a requirement that each person in the political community be subject to or guided by the same general law.”²³⁴ It demands that governmental actors only make decisions if they are authorized to do so by law - “By virtue of the rule of law principle, all exercises of public authority must find their source in law.”²³⁵ It also, oddly, implies the right to vote - “The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside...”²³⁶

The rule of law principle, according to the Supreme Court, also has important concrete implications related to the role of our courts. It implies that superior courts must have the power to enforce their decisions - “The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect.”²³⁷ It requires that superior courts have full control over their processes - “...the power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself.”²³⁸ It entails that the superior courts are at the core of the rule of law in our system - “the provincial superior courts are the foundation of the rule of law itself.”²³⁹ It also requires that the government (and others) not deny individuals access to the courts - “There cannot be a rule of law without access [to the courts], otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.”²⁴⁰

Attempting to cut through the varied meanings and implications associated with the rule of law, our Supreme Court, in the *Secession Reference*, asserted that the rule of law consists of three fundamental principles that dominate our jurisprudence and from which the above sorts of disparate claims can be derived:

The first principle is that the “law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.”²⁴¹ ... The second principle “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general

²³³ *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at par. 130. Quoting B. McLachlin, ‘The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law’ 12 *Canadian Journal of Administrative Law and Practices* 171 (1998-1999), 174. Emphasis in original.

²³⁴ *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at par. 90

²³⁵ *Dunsmuir*, at par. 28

²³⁶ *Sauve v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, at par. 9, 38, and 58

²³⁷ *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901

²³⁸ *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 15

²³⁹ *Ibid*, 37

²⁴⁰ *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214

²⁴¹ See *Reference re Manitoba Language Rights*, 748

principle of normative order.”²⁴²... The third principle requires that “the relationship between the state and the individual . . . be regulated by law.”²⁴³

The influence of Dicey’s conception of the rule of law is clear within these three principles. In particular, the idea that government officials must not be beyond the reach of the law and that there must be no arbitrary governance are noticeably Diceyan.

While this (inclusive) list of principles is helpful as a starting point for discussing the meaning of the rule of law, at least within our system, what justifies these principles and why they ought to be categorized under the single concept of the ‘rule of law’ is unclear. As demonstrated above, our Supreme Court has relied heavily upon intuitive and largely unarticulated beliefs about the rule of law that are compatible with a number of different theoretical models. This creates a serious problem insofar as these models are often incompatible with one another and therefore relying on a particular justification in one case and a divergent one in another makes the judicial understanding of the rule of law hard both to decipher and predict. It is particularly problematic when the judiciary bounces between competing conceptions to justify its claim that the courts, or at least the superior courts, rather than administrative tribunals, ought to have the final say over the meaning and application of law and therefore that they ought to interfere with tribunal decisions that they disagree with in order to preserve the rule of law.

In his critique of the rule of law in Canada’s constitutional order, Luc Tremblay asks the important question of whether:

...the rule of law represents an intelligible concept, or, at least...whether there is some agreement about its meaning, that is whether it has a (single) meaning, or, on the contrary, whether it merely constitutes “rhetorical flourish” used by theorists so as to advance their own (different) concepts based upon inconsistent emotive, personal, or subjective conceptions of the good society.²⁴⁴

In addressing this question, Tremblay follows the lead taken by Rawls and Dworkin by distinguishing the *concept* of the rule of law from particular *conceptions* of this concept.²⁴⁵ The idea is that even though we may strongly disagree about the concrete meaning and application of a concept, there may be some core aspect of that concept that is shared amongst its users – is there a rough basic and general idea that we all hold to at some higher level of abstraction, even

²⁴² *Ibid*, 749

²⁴³ See *Reference re: Secession of Quebec*, at par. 71. The full quotation is taken from *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, at par. 20

²⁴⁴ Luc Tremblay, *The Rule of Law, Justice and Interpretation* (Canada: McGill-Queen’s University Press, 1998), 30-31

²⁴⁵ See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 5 and Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986), 70-71

if we may disagree (perhaps intractably) on lower levels of concretization? This distinction between a concept of the rule of law and particular conceptions of this concept allows us to recognize that the rule of law is not, to use W.B. Gallie's term, an 'essentially contested concept'.²⁴⁶ Tremblay's claim is that there are two propositions that are constitutive of our shared abstract *concept* of the rule of law: that "government must decide and act rationally, that is, its decisions and actions must be based on "reasons"; and the reasons for governmental decisions must be, in a sense, legal."²⁴⁷ Governments must act for *reasons* rather than acting arbitrarily and government decisions must be based on *law* rather than discretion.

Following Paul Craig, we can helpfully distinguish two basic categories into which most divergent *conceptions* of the rule of law fall - *formal* and *substantive*:

Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorized person, in a properly authorized manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.); Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself... Those who espouse substantive conceptions of the rule of law... accept that the rule of law has... formal attributes... but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. [Their conception] is used as the foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws which do not.²⁴⁸

Within the category of formal conceptions of the rule of law are theorists such as Dicey, Hayek, Fuller, and Raz, while amongst substantive conceptions we find the work of theorists such as Dworkin, Allan, and Dyzenhaus.²⁴⁹

Formalist theorists of the rule of law maintain that government decisions are appropriately based on legal reasons when they rely, wholly or mostly,²⁵⁰

²⁴⁶ W.B. Gallie, 'Essentially Contested Concepts', 56 *Proceedings of the Aristotelian Society* 167 (1956), 167-198. Jeremy Waldron uses the distinction between concepts and conceptions of concepts to similar effect as that of Tremblay's in his 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' 21 *Journal of Law and Philosophy* (2002).

²⁴⁷ Tremblay, *Ibid*, 32

²⁴⁸ Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law* 467 (1997), 467.

²⁴⁹ See Dicey's *Introduction to the Study of the Law of the Constitution*; Hayek's *The Road to Serfdom* (New York: Routledge Classics, 2006) and *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978); Fuller's *The Morality of Law*; Dworkin's *Law's Empire*, Allan's *Constitutional Justice*, and Dyzenhaus' *Legality and Legitimacy* (Toronto: Oxford University Press, 1997) and 'The Rule of Law as the Rule of Liberal Principle' in Arthur Ripstein, ed., *Ronald Dworkin* (Cambridge: Cambridge University Press, 2006).

²⁵⁰ According to most formalist theorists (including Raz, Dicey, Hayek, and Fuller), a certain degree of 'discretionary' decision-making is compatible with the rule of law – provided that the bulk of a decision is rooted in appropriate legal norms.

upon official norms that are prospectively applied and publically known (or at least knowable). A system of governance as a whole is therefore considered to conform to the rule of law to the extent that its official norms actually dictate the concrete results of individual cases. When particular government decisions are not, at least for the most part, based on prospective, officially adopted, and publically known norms, the rule of law is compromised. These sorts of theorists tend to focus on how the rule of law provides certainty and predictability to governance, giving those that may be affected by government action clarity about how they will be treated.

Substantive rule of law theorists typically do not dispute the importance of the rule of law for predictability and certainty; however, they assert further that there are limits on the appropriate *content* of particular laws that can conform to the rule of law. For a formalist theorist, what is essential for the rule of law is that individual citizens can know the content of the law and rely on its consistent application. For a substantive theorist, there is the additional requirement that positive laws not violate certain core rights or values that are integral to the existence of law itself. A system, for instance, that posits laws that systematically and without reason discriminate against particular segments of the population is antithetical to the rule of law on some substantive theories. The purpose of law, substantive theorists often claim, is to ensure that all citizens are treated with equal respect by the state. A purported law that fails to live up to this objective is patently contradictory to the underlying purpose of the legal endeavor. Substantive theorists therefore significantly reduce the pool of appropriate ‘reasons’ that can be classified as legal reasons for a decision; positive legal norms are only appropriate reasons for a government decision, regardless of any of their formal attributes, if they conform to fundamental values of legality.²⁵¹

I do not wish to mediate between these two competing general conceptions of the rule of law in this work – although I should note that the three core principles of the rule of law mentioned by the Supreme Court in its *Secession Reference* are clearly derived more from a formalist conception of the rule of law than a substantive one. While, in general, a formalist conception seems most apt to describe the function of the rule of law principle in our current system, there are clear hints that substantive conceptions are also often in place. Whatever the case, I want to address how the differentiating characteristics of superior courts, as discussed in the previous section, provide reasons to think that curial interference with administrative decision-making is likely to foster the rule of law

²⁵¹ As a point of clarification, I do not want to be saddled with the view that Craig and Trembaly have adequately captured the whole debate between formal and substantive conceptions of the rule of law. There is a great deal more that ought to be said about the important aspects of the rule of law that escape this relatively simplistic breakdown of the concept. I have chosen to follow their positions here since I think the distinction between formal and substantive is illuminating – even if it has been insufficiently articulated. A more complete analysis of the two positions is something I have in mind for future work.

– on both formal and substantive conceptions of the rule of law - before proceeding to show how curial interference, for precisely these sorts of reasons, actually may undermine the rule of law.

C. Rule of Law Arguments for Curial Interference with Administrative Decision-Making

Why exactly ought we to believe that the superior courts are likely to secure the rule of law by using their review powers to interfere with decisions reached by administrative tribunals? There are at least four prevalent arguments that may give us reason to think that curial interference is likely to foster the rule of law. I will discuss each of these separately.

1. Superior courts are not discretionary decision-makers

One of the central reasons for the creation of administrative regimes is to allow discretionary decision-making in complex regulatory settings. Legislators recognize that they cannot adequately foresee all the possible matters that will arise and often opt to leave a wide scope of discretion available to administrative decision-makers. While this may have the advantage of providing flexibility to governance, such discretionary decision-making, for most rule of law theorists of both formalist and substantive stripes, comes at a significant cost. Discretionary decision-making undermines the goals of predictability and certainty that are integral to the program of legality. Exercises of discretion imply that it may be unclear what standards a particular decision-maker will ultimately adopt. Thus, the more discretion that a decision-maker exercises, the less parties that will be affected by the decision generally can know with certainty what considerations a decision-maker will use to determine their matter.

A common argument in favor of superior court interference with administrative decision-making is that it works to limit the scope of discretionary powers and hence minimizes the damage that this sort of decision-making can do to the rule of law. Superior courts, we are often told, make decisions in accordance with the law rather than with discretion; their purpose in our system, just like all other courts, is to settle disputes according to the requirements of the law. They are therefore not supposed to function as discretionary decision-makers. When exercising their review powers over administrative tribunals, the courts ensure that discretion is circumscribed, changing the reasons for a decision from discretionary ones to legal ones if need be. They guarantee, for example, that there will be predictable and fair procedures used to arrive at administrative decisions. Even if the ultimate reasons that the decision-maker will rely upon are unclear and unpredictable, superior courts ensure a modicum of predictability when it comes to the procedural requirements that must be in place.

Superior courts are also able to rein in acts of administrative discretion that conflict with established legal rules and principles. They ensure that the substance of administrative decision-making conforms to the law, keeping the outcomes of administrative processes within certain parameters. When administrative tribunals render discretionary decisions that violate established legal norms, the superior courts can interfere in order to ensure that the law is not consequently undermined.

2. *Superior courts are independent rather than accountable to government*

The rule of law presumably entails that all governmental actors must be accountable to the law. A serious problem with administrative law, however, is that it implies that government itself will be able to determine if it has acted in accordance with the law. This, in fact, was Dicey's primary concern motivating his uncompromising critique of administrative law. Administrative tribunals are established by legislatures and typically accountable to the executive branches. In general, members of administrative tribunals are removable when executive actors (such as cabinet ministers) grow weary of them – they exist *durante bene pacito* of other governmental actors, with their salaries, appointments, and ongoing structure determined as the executive sees fit. Superior courts, on the other hand, are not under the control of government and have a constitutionally protected security of tenure – that is, they hold their positions *quamdiu se bene gesserint*.

This difference is supposed to provide important reasons for labeling the superior courts as a superior institution to administrative tribunals for upholding the law. When the law dictates results that work contrary to the particular wishes of the legislature or the executive, administrative tribunals face a serious pragmatic difficulty for rendering honest legal decisions. Superior court judges do not need to worry about their tenures or salaries being altered as a result of a legal decision that is unpopular with the government of the day; members of administrative tribunals, on the other hand, face this risk. A legislative act can extinguish the very existence of the tribunal or seriously reduce its members' salaries. The executive may also try to remove tribunal members that are hostile to its particular objectives and replace them with much more amicable personnel.

This often makes it difficult for us to trust administrative tribunals to take significant political and personal risks to ensure that the law is applied properly. We anticipate that administrative interpretations of law will generally align with government wishes when there is an ongoing threat of serious repercussions for non-conformity lurking in the background. Interference by superior courts ensures that these incumbent pressures working upon administrative tribunals are not allowed to work against the rule of law. When tribunal decisions clearly reflect government objectives rather than the appropriate meaning of the law, superior courts can rectify the situation and restore the rule of law; they ensure that the law, properly understood, is not undermined by allowing improper considerations extrinsic to it to dictate the outcome of individual cases.

3. *Superior courts are designed to protect rights rather than advance policies*

Another central argument cited in favor of curial interference with administrative decision-making is that it will ensure that government policy objectives are not permitted to undermine central legal rights. Administrative tribunals are typically created in order to fulfill some ‘policy’ purpose – for instance, one of the key reasons Canada’s Immigration and Refugee Board (the ‘IRB’) was created was “to permit Canada to pursue the maximum social, cultural and economic benefits of immigration.”²⁵² Thus, in rendering its decisions about the appropriateness of a particular immigrant’s application to reside in Canada, the IRB assesses the degree to which that immigrant will contribute to Canada’s economy. While an IRB decision will also be concerned with any important rights that the immigrant has, these rights can easily fall prey to underlying policy concerns (i.e. will the immigrant be able to support herself or will she require welfare?).

In particular, substantive rule of law theorists may challenge the appropriateness of allowing ‘policy’ considerations to override or compete with ‘rights’ considerations in the context of legal adjudication. Theorists such as Ronald Dworkin contend that allowing policy considerations to interfere with the law undermines the rule of law. Law, for Dworkin, exists within the realm of ‘principle’ rather than that of ‘policy’.²⁵³ It is not concerned with arriving at decisions that will achieve particular government ends or ensure the best results; instead, it is concerned with safeguarding the fair and just treatment of individuals threatened with the government’s coercive powers. Law’s grounding within the realm of principle requires that individual litigants are not to have their rights determined in a ‘checkerboard’ fashion - with some individuals receiving special treatment (whether negative or positive) relative to others by government agents. On the contrary, law ought to ‘speak with one voice’, treating like cases alike and justifying any differences in treatment between litigants on the basis of sound principles of political morality. This implies that a decision by the IRB that allows the outcome of a case to depend, in part, upon economic considerations that are relative to each particular immigrant and that are likely to be more or less important in different economic environments is unfair and works contrary to the rule of law.

Dworkin, and others,²⁵⁴ argue that a significant difference between courts and administrative tribunals (as well as other government non-judicial decision-making venues) is that in courts an individual will have their decision made on the basis of their *rights* alone, as determined by existing legal principles. Extrinsic factors (such as economic conditions in Canada) will have no bearing on the

²⁵² *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, 3.1(a)

²⁵³ See *Taking Rights Seriously*, 22

²⁵⁴ Particularly Dyzenhaus and Allan

legitimate claims of litigants to particular decisions within a court. In the context of judicial review, rule of law theorists persuaded by Dworkin's distinction between principle and policy argue that courts ought to interfere with administrative decision-making to ensure that legal principles always are paramount in government decisions. Even if administrative tribunals may sometimes be permitted to rely on policy considerations when making their decisions,²⁵⁵ they cannot deny litigants any of the rights that they are entitled to – rights flowing from legal principles embedded in the constitution, legislation, and the common law. Superior courts ought to exercise their review powers to ensure that legal rights always are respected; since they are a venue in which the only appropriate considerations are those of legal principle, they are far more likely to preserve the rule of law by keeping policy from undermining legality.

4. *Superior courts provide public reasons for their decisions*

A central component of our shared 'concept' of the rule of law (as opposed to particular 'conceptions' of it) is that government decision-making must be based on legal reasons – yet if there is no publically available account of the reasons for a decision, it is difficult to be sure that *law* is what dictated the result, rather than the arbitrary fiat of a decision-maker. The problem with administrative tribunals, some argue, is that they are under no obligation to provide extensive reasons for a decision. While they may be under a statutory or common law duty to provide some form of reasons, the extent of this duty is limited. Superior courts, on the other hand, must fully justify their reasons for a decision, giving written explanations that appear in an official and publically available record.

The difference is of crucial importance and is used to justify curial interference with administrative decision-making. When administrative decision-making is incomplete, curial interference is justified, or so the argument goes, because it forces the reasons for government actions to be brought to the surface. The rule of law cannot exist in secret; instead, it must be *demonstrated*. Judicial interference is therefore appropriate when administrative tribunals arrive at decisions without providing adequate legal reasons supporting them. It is also suitable when the reasons provided are internally contradictory or incoherent. In order for the rule of law to be preserved, some argue, government decisions must make sense – otherwise, governance by law is simply a charade. For substantive theorists in particular, judicial interference may even be justified when the reasons given by an administrative tribunal conflict with certain moral principles (such as 'equality') that underpin the law itself.

²⁵⁵ For Dworkin, there is nothing necessarily wrong with policy considerations guiding government decision-making. It is only problematic when policy considerations prevent the full realization of the legal rights of individuals.

Superior courts are to interfere in order to ensure that the reasons for a decision are: (1) provided to litigants, (2) publically available, (3) sufficient to arrive at the decision made, (4) complete, (5) coherent and non-contradictory, and perhaps even (6) compatible with underlying legal values. To the extent that an administrative tribunal's reasons are found lacking in one or more of these regards, it may be the duty of a superior court to supplement the decision with the appropriate reasons, alter the decision to ensure it conforms to appropriate reasons, or toss out the decision for being based on no reasons at all or for reasons that cannot be defended.

D. Rule of Law Arguments against Curial Interference with Administrative Decision-Making

Often the four sorts of arguments provided above, or similar ones, are considered to provide decisive reasons for believing that curial interference with administrative decision-making will foster the rule of law. Whatever cost such interference may come at in terms of democratic legitimacy, economic efficiency, etc..., it works to preserve the rule of law. While the superior courts may need to temper their interference in order to ensure that these other objectives of governance are not significantly curtailed, they need not worry about how their interference will affect the rule of law, as their involvement in the administrative process works to secure and preserve the rule of law rather than to hinder and undermine it.

I do not wish to question the capacity of our superior courts to achieve rule of law objectives – there are important features of their institutional makeup that, in certain circumstances, makes their interference with administrative decision-making beneficial to procuring the rule of law in our system of governance. What I am concerned about, however, is the notion that their interference *always* works to its benefit. Competing with many of the institutional features that make superior court interference beneficial to the rule of law are institutional features that work to its detriment. I briefly will discuss a few arguments to this effect.

1. The Rule of Law, Discretionary Decision-Making, and the Common Law System of Adjudication

In the *stare decisis* system of the common law, the power of superior courts to make important distinctions between cases with similar fact patterns and to overrule their own judgments (or the judgments of other courts that are vertically inferior or on the same horizontal level) means that what may appear to be clear and settled law governing one's case may be turned upside down when there is a judicial desire to develop the law in a new direction.

According to Frederick Schauer, the common law exhibits the following four characteristics differentiating it from statutory legislative regimes:

First, the rules of the common law are nowhere canonically formulated. Indeed, the absence of a single authoritative formulation is what distinguishes common law rules from legislative rules. Second, common law rules are not made by legislatures; they are created by courts simultaneously with the application of those rules to concrete cases. Third, not only are common law rules created in the very process of application, but they are also applied in- and to – the very case that prompted the rulemaking. Thus, common law rules are applied retroactively to facts arising prior to the establishment of the rule. Finally... the law-making power of common law courts... extends to modifying or replacing what had previously been thought to be the governing rule...²⁵⁶

These unique features of the common law may lead us to question the degree to which the common law itself conforms to the rule of law. Bentham, for instance, once inflammatorily criticized the English common law system in the following way:

It is the judges... who make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then you beat him for it... They won't tell a man beforehand what it is he *should not do* – they won't so much as allow of his being told; they lie by till he has done something which they say he should not *have done*... What way, then, has any man of coming at this dog-law?²⁵⁷

The argument raised by many critics of the common law, and the judiciary that develops and applies it, is that it often turns out that judicial reasoning is haphazard and retroactive, relying on peculiarities of individual cases and judicial preferences more than on the concrete application of prospective legal rules. The charges once raised by Dicey against the growth of administrative tribunals therefore are somewhat ironic - most notably, given that it appears common law courts quite often act in what appears to be a discretionary and *ex post facto* manner.

At some of the earlier stages in its history, legal interpretation by common law courts, to be sure, was characterized by a rigid formalism that refused to make exceptions for the circumstances of an individual case - both with regard to the substance of the law and the processes associated with the original forms of action. A litigant in the 17th century, for instance, would have to be extremely careful to ensure that she applied for the correct original writ. Choosing the wrong writ and instigating the wrong procedures would lead to a case being thrown out of court, regardless of whether there may have been a clear and important substantive issue in play.

Contemporary legal interpretation by common law courts, on the contrary, exhibits a remarkable flexibility and, with respect to the meaning and implications

²⁵⁶ Frederick Schauer, 'Is the Common Law Law?', 77 *California Law Review* (1989), 455

²⁵⁷ Jeremy Bentham, *The Works of Jeremy Bentham*, vol. 5 (Edinburgh: William Tait, 1843), 235. [Emphasis in original] For more on Bentham's concerns about the common law see, in particular, Gerald Postema's *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), and H.L.A. Hart's *Essays on Bentham*, (Oxford: Clarendon Press, 1982).

of the law, is often frustratingly unpredictable for litigants and their counsel.²⁵⁸ In fact, the malleability of law in the hands of common law courts led Oliver Wendell Holmes famously to declare that:

The life of the law [in modern times] has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuition of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.²⁵⁹

Judicial determinations, as the American Legal Realists were apt to point out, are often better predicted by generally shared judicial political and social attitudes than the seemingly clear requirements of law.²⁶⁰ Brian Leiter nicely captures the basic argument of this school of thought in the following way:

...judges respond primarily to the stimulus of the underlying facts of the case, rather than to legal rules and reasons. Observation of courts' decisions, in other words, shows that judges are deciding largely based on their response to the facts of the case – what they think would be “right” or “fair” on these facts – rather than because of legal rules and reasons.²⁶¹

Some therefore maintain that judicial decision-making is better understood as being ‘fact-responsive’ rather than ‘rule-responsive’.

Taking a slightly different perspective but ultimately arriving at a similar position, Baker, in his history of English law, argues that, at least for our contemporary common law courts, “equity, in the old sense of deciding every case on its own facts, has begun to replace and not merely to supplement the law.”²⁶² His claim is that, to an important extent, legal decision-making is not merely being supplemented by discretionary decision-making by our judiciary;

²⁵⁸ As a point of clarification, I am not arguing that the sort of flexibility exhibited within the common law is necessarily a bad thing. I agree with Schauer’s argument that “By ameliorating rule-based decision-making, the common law allocates power to its judges, treating the risks consequent to that empowerment as less dangerous than those flowing from the application of crude canonical rules to circumstances their makers might not have imagined and producing results the society might not be willing to tolerate.” *Playing by the Rules*, 179. Also, as Waluchow notes in *The Living Tree* (Cambridge: Cambridge University Press, 2007), a well-designed system of legal regulation will involve a certain trade-off between fixity and flexibility. My argument is simply that the claim that courts determine disputes in a less discretionary or arbitrary manner than administrative decision-makers is oftentimes suspect, and sometimes even patently false.

²⁵⁹ Oliver Wendell Holmes Jr., *The Common Law*, ed. G. Edward White (Cambridge, MA: Harvard University Press, 2009), 5

²⁶⁰ See, for instance, Jeffery Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002) wherein they argue that a combination of judicial ideology and recurrent facts provide a much more replicable guide to judicial decision making than the plain requirements or entailments of law.

²⁶¹ Brian Leiter, ‘American Legal Realism’ in Dennis Patterson (ed.) *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. (Oxford: Blackwell, 2010), 257

²⁶² Baker, *Introduction to English Legal History*, 93

instead, it is being supplanted by it. While occasionally this proves beneficial, as when strict adherence to the law will work egregious injustices,²⁶³ the pervasive reliance on ‘equity’ (here meaning ‘discretion’) rather than strict law, often undermines an important aspect of the legal endeavor - ensuring that the same standards will apply to all individuals in a predictable and prospective manner. There is an argument to be made that constant tinkering with a legal rule will undermine its ability to achieve the general good for which law exists. As Aristotle notes:

We infer that sometimes and in certain cases laws may be changed; but when we look at the matter from another point of view, great caution would seem to be required. For the habit of lightly changing the laws is an evil, and, when the advantage is small, some errors both of lawgivers and rulers had better be left.²⁶⁴

Importantly, by engaging in this sort of ‘equitable’ decision-making, the courts place the basis of their decisions outside the realm of legal rules. The basis for a decision instead is whatever particular conception of justice that a particular judge has adopted and that the law has failed in some way to achieve or respect. Yet this is precisely the sort of adjudication that is supposed to be so problematic for the rule of law when engaged in by administrative tribunals.

If Baker and the legal realists are correct that our contemporary superior courts have tended to turn away from the strict application of law and more towards equity as the basis for their decisions, it seems that their decision-making will be highly problematic for the rule of law; it places the resolution of individual matters under the discretion of the individual judge. An excessive reliance on equitable decision-making by our courts therefore puts us under the ‘rule of man’ rather than under the ‘rule of law’. Thus, we ought to be aware that our courts might prove as prone to interpret and apply the law in a discretionary or arbitrary manner as an administrative tribunal. It may even be the case that administrative tribunals, as a result of a combination of particular attitudes prevalent within the tribunal and the strict confines of their powers, could well be more likely to interpret law in a formalistic and rigid manner than the superior courts.

²⁶³ This, in fact, was the original reason for the creation of the Chancellor’s equity jurisdiction. The purpose of equitable remedies was to alleviate the excesses of law and ensure that its strict application would not allow grave injustice to prevail. The gradual incorporation of equitable remedies into the common law system during the 18th and 19th centuries meant that common law judges, rather than strictly enforcing the common law, could begin to mitigate the effect of the law. A strict distinction between law and equity fell by the wayside with the result being a common law system with both formalist and contextual approaches legal interpretation. Subsuming equitable remedies (such as injunction, declaratory relief, and specific performance) allowed common law flexible remedies – as opposed to the rather limited traditional forms of relief available at common law (such as the prerogative writs).

²⁶⁴ Aristotle, *Politics* in Richard McKeon (ed.) the *Collected Works of Aristotle* (New York: The Modern Library, 2001), 1269a12-15

In addition, while administrative decision-making is generally characterized by the legislative delegation of large swaths of discretionary powers to administrative actors, it must be remembered that our courts (particularly the superior courts) also possess remarkable discretionary powers. The choice of superior courts to issue injunctive, declaratory, and other sorts of relief rests largely upon the judge's assessment of its propriety in a particular case. Many of the remedial powers of superior courts, while always guided in part by statutory and common law principles, nevertheless are exercised with striking latitude. Also notorious is the leeway courts often have over the applicable penalties for legal breaches (whether civil or criminal), often operating with very few guidelines other than statutorily prescribed minimums and maximums.

Courts therefore may exercise the same sort of discretionary liberty that Dicey thought so problematic for regimes of administrative law. It is particularly ironic here that one of the key problems with the judicial review of administrative action is the fact that the available judicial remedies are of such a highly discretionary nature and it is unclear exactly how courts ought to use them. The development of judicial doctrines such as the 'jurisdiction' test for *certiorari* speaks volumes about how a superior court can arbitrarily exercise its review powers. *Judicial interference with administrative processes carries with it an incumbent risk to introduce (or reintroduce) the sort of discretionary decision-making that is problematic for the rule of law.* There are many subtle, and a few overt, ways that our superior courts exercise discretionary powers, and we must therefore not adopt an overly simplistic analysis of their role in preserving the rule of law in light of this fact.

If all of this is true, curial interference with administrative decision-making adds serious uncertainty into our legal system and thus, particularly for formalist theorists, comes at a cost to the rule of law itself. When statutory provisions are clear, stipulating that administrative agents are to make particular sorts of decisions, following particular sorts of regulations, in particular sorts of ways, curial interference threatens to take away the ability of the individual to rely on the law. Individuals trust that legislative programs will be implemented and that these programs will be faithfully carried out according to existing statutory provisions and agency regulations. They count on their matters being resolved as required by these instruments and, for the most part, do not anticipate that there will be judicial interference with the administrative process. Unless curial interference is premised *strictly* on keeping administrative actors within the proper confines of their powers (true questions of *vires*) or forcing them to follow statutorily mandated procedures, judicial review functions to add serious uncertainty into the administrative process – with the ultimate consequence being that one or more parties will find that what they were led to believe was clear law that could be relied upon to settle their matter is subject to being overturned by a zealous judiciary.

2. *Judicial Independence versus Administrative Independence*

In addition to these worries about how curial interference undermines the certainty that law ought to provide to individuals, we need to examine the veracity of the claim that administrative tribunals are far more amicable to legislative and executive interference than superior courts – particularly in light of how Canada’s judicial appointment process works. Justices to the superior courts are ultimately chosen by the Governor General on the advice of the Prime Minister (and his advisors) and are just as likely to be appointed for ‘inappropriate’ political reasons as persons sitting on administrative tribunals. Given the importance of the superior courts in our system of government, in fact, there is far more incentive to make an appointment to the bench that reflects the ideological bent of the current government than the appointment of a comparatively powerless administrative decision-maker. We ought not subscribe to the myth that judicial appointments are wholly neutral, apolitical exercises, even if there are some processes in place that seek to minimize the impact of politics both during and after the appointment of justices. The sometimes excessively rosy portrayal of the independence of the courts found within Canadian case law, influenced largely by Dicey’s views about the nature of common law courts, does not jive with the often patently politically motivated judgments of courts.²⁶⁵ There are many ways, both overt and subtle, that superior courts can be coopted, influenced, and controlled and we must not be too quick to discount the potential for administrative tribunals to be created, maintained, and appointed so as to function with a similar or even greater degree of impartiality and independence than a superior court.

There is also an interesting argument to be made that judicial independence is a double-edged sword. While it ensures that our courts will be able to interpret and apply law without undue government interference, it also *prevents* governments from reigning in curial abuses – including when judges take inappropriate liberties with the exercise of their powers. The guarantee of security of tenure that constitutes part of the essence of judicial independence carries with it the incumbent risk that courts will be able to hijack legislative schemes to which they are personally or politically opposed. An administrative tribunal that systematically oversteps the boundaries of its powers can be corrected – executive and legislative actors can remove individuals that abuse their powers or extinguish tribunals that have gone rogue. When non-judicial institutional actors undermine legitimate legislative schemes, they are generally subject to discipline or removal – whether this is done by other governmental actors or ultimately by the ballot box.

A significant component of the rule of law, particularly on formalist accounts, is that duly enacted legislation is to be given its proper effect. Yet the wide-ranging powers of superior courts and the political distaste of individual

²⁶⁵ Perhaps the best example, although not in the Canadian context, is the infamous case of *Bush v. Gore*, 531 US 98 (2000)

judges to certain legislative schemes often combine to prevent clear legislation from being appropriately interpreted and applied. Without serious fear of being removed from office when they exercise their powers to push their own moral and political agendas, the judiciary can be a serious threat to the ability of legislators properly to implement their programs. Judges appointed during previous regimes, for instance, may find themselves at odds with current executives and legislatures and may seek to slow down, alter, or outright reject legitimate governmental efforts to create and implement new legislative endeavors. *By failing to give law its proper force and effect, a securely established and politically motivated judiciary can be as serious a threat to the rule of law as any politically accountable administrative tribunal.*

3. *Administrative Expertise and the Rule of Law*

Substantive rule of law theorists, in particular, focus on the role the rule of law plays in preserving certain underlying legal values – including, most notably, fairness, justice, and equality. A central argument in favor of curial interference is that the judiciary is able to protect these core values against undue policy encroachment from administrative actors. The courts, as Dworkin argues, ensure that legal rights will triumph over administrative policy. The problem, however, is that courts are not always the best institutional actors for discerning how fairness, justice, and equality are to be fostered in particular administrative settings. Administrative agencies tend to have a unique and specialized knowledge of their regulatory environment that the superior courts, as generalists, lack. When interfering with administrative decision-making through judicial review, our superior courts transplant judicial conceptions of how best to foster particular legal values that may not be appropriate in the administrative context and circumstances.

Administrative actors are often forced to balance the competing interests of large numbers of individuals – their decisions are polycentric, sometimes having significant implications for parties that are not directly involved in a decision. The specialization of administrators enables them to develop expertise with regard to how particular decisions will affect the concrete rights of individuals beyond the scope of a matter being determined. Further, they are able to develop regulations, policies, and other sorts of plans for future issues.

The problem curial interference poses for administrative decision-making and the rule of law is therefore that the courts may be unable, in Lord Reid's words, "to foresee all the consequences of tampering with it."²⁶⁶ Administrators may develop complex ways of preserving and balancing the rights of a multitude of persons; when courts interfere to uphold the rights of one individual that claims to have been treated unfairly, unjustly, or unequally, they may end up simply transferring the unfairness, injustice, or inequality to other parties. Unless courts

²⁶⁶ *Steadman v. Steadman* [1976] A.C. 536, 542c

are certain of the whole context in which an administrative decision is made, their involvement threatens to upset what may be a finely tuned balance of individual rights. *Curial interference with administrative decision-making threatens to place the rights of the individual claimant directly appearing before a court ahead of all other potential rights-bearers.* When our superior courts lack the requisite expertise to determine the widespread consequences of their interference, they ought to recognize that judicial review threatens to multiply injustice, unfairness, and inequality, rather than to reduce it.

4. *Costs, the Rule of Law and Judicial Restraint*

An extremely important structural disadvantage of the judicial review of administrative action is that both applying for a proceeding before a superior court, as well as defending against one, involves significant costs for litigants and our legal system as a whole. Judicial review proceedings require litigants to hire counsel, thereby incurring the, often exorbitant, expenses associable with legal representation. The more complex or serious the matter, the greater the number of issues that counsel will be required to inquire into and the greater the resulting legal fees are likely to be. Also, there is always an incumbent risk that an unsuccessful judicial review application will lead to an award of costs against the party filing the application.

In addition, depending on the backlog of cases in the system and the nature of the subject matter under review, the resolution of a dispute by judicial review may take an extremely long time. Several years may lapse between the filing of a judicial review application to its final outcome, with all parties being left in a state of limbo while the matter is left undetermined. Taken in conjunction with the endless possibilities for appeals from a court's decision and there may be a massive time lapse between the raising of an issue and its ultimate resolution.

What this implies is that judicial review is only fully available to those aggrieved parties that have the requisite means. Thus, we ought to recognize with Lon Fuller, that

...there are... serious disadvantages in any system that looks... to the courts as a bulwark against the lawless administration of the law. It makes the correction of abuses dependent upon the willingness and financial ability of the affected part to take his case to litigation.²⁶⁷

In assessing whether our superior courts truly are better placed than administrative tribunals to uphold the rule of law in our system, we cannot overlook such basic practical realities as financial costs and time commitments that will prevent many justified claims from ever being litigated. The strict procedures of a court, together with the requirement that counsel within the courts

²⁶⁷ Fuller, 'Forms and Limits of Adjudication', 81

come from the within the law societies, conspire to make judicial review realistically unavailable to large swaths of the population.²⁶⁸

Making matters far worse, when there is a serious disparity between two parties in a dispute, the heightened financial ability of one party relative to another may lead to serious abuse. Seeking to erode another party's resources to the point that they are no longer willing to defend a legitimate claim, a better financially off litigant can force the worse off to go through endless legal hurdles in the hopes that a matter will be dropped or a more desirable conclusion reached. Even if costs are expected to be awarded, it is rare that these will recuperate the full costs associated with litigation and it may simply be easier for a litigant to surrender than to continue fighting their case. Ultimately, the law may not be what provides the ultimate reasons for the outcome of a dispute for the mundane reason that a litigant has neither the time nor the money to allow the law to triumph – and the greater the extent to which this is true in our society, the less the rule of law exists.

Our superior courts therefore ought to be extremely careful when they interfere with administrative decision-making. Administrative tribunals are not limited to the strict procedures of courts and do not require parties to retain counsel.²⁶⁹ In most contexts, administrative procedures are far less onerous than curial ones. The more our superior courts interfere with tribunal decisions, the greater the costs they impose on litigants and the more likely it is that potential litigants will find justice in the courts beyond their resources. This provides an important reason for judicial restraint. Even if superior courts are more apt to arrive at the best conclusion for a case, setting a precedent for judicial interference may lead to more harm than good. While a question may be best answered within a court, practical realities may make it better to allow a sub-optimal conclusion to be reached by a suboptimal decision-maker in order to preserve the rule of law in a larger context. A judicial policy not to interfere with administrative tribunal decisions, except in the case of the most egregious violations, may well work to achieve the best rule of law outcomes – even if this is not a result of an administrative regime being more authoritative in its decision-making than the court.

²⁶⁸ At least with regard to certain sorts of issues that are not adequately covered by legal aid or other sources of funding.

²⁶⁹ Although, in most administrative tribunal hearings involving serious matters, parties will retain counsel.

E. Lessons for Curial Deference – Reconceiving the Role of Courts for the Rule of Law in Canada

I now want to turn, to conclude this section, to a discussion of what the preceding analysis implies about how our superior courts ought to exercise their review powers to secure rule of law objectives.

Institutional Powers Available to Enforce the Rule of Law

While it may be questionable whether our superior courts *ought* to possess wide review powers over all decisions made by government officials, it nevertheless is an accepted fact, as a matter of Canadian law, that our superior courts *do* possess these powers. It is a generally accepted proposition in our legal system that there are no questions that are completely beyond the scope of the superior courts to review.²⁷⁰ Indeed, this basic principle is considered to be constitutionally entrenched as a result of the implications of Section 96 of the *Constitution Act, 1867*.

Put in terms suggested in Part II, I think we can fairly state that as a matter of institutional fact in our system of governance, *Canadian superior courts (and appellate courts) possess vertical priority over an institutionally shared task of interpreting the meaning of law over all other government officials*. While agents other than the superior courts may, and oftentimes must,²⁷¹ participate in the task of interpreting questions of law, the assessment of whether such interpretations are appropriate resides, ultimately, with the superior courts and the appellate courts.

Notably, this implies that, whatever we may determine the particular content of the concept of the rule of law to be, superior courts in our system have the ultimate power to interpret its requirements in particular cases.²⁷² Explicit

²⁷⁰ The Supreme Court's decision in *Dunsmuir* makes it clear that even though a strongly worded privative clause may provide reasons for a court not to intervene with a government action or decision, it nevertheless cannot entirely take any matter of fact or law completely out of the purview of judicial review in a superior court.

²⁷¹ Governmental actors are required in their daily activities to interpret whether they have the appropriate power to make particular decisions and whether a particular matter falls within their jurisdiction to determine. Thus, interpretation of law and fact is always going to occur outside the superior courts – even if such determinations are always reviewable in court.

²⁷² Here I want to be careful to distinguish an 'institutional power' (a normative power related to the appropriate differential assignment of tasks within a particular organizational institutional order) from a 'practical power' (a power physically or otherwise to force another agent to comply with one's will). That the courts possess an institutional power to make particular determinations will not necessarily imply that they have the practical power to enforce them. Of course, possession of important curial remedies such as injunctive relief, habeas corpus, etc... will generally enable superior courts to transfer their institutional power to pronounce on a rule of law violation into some method for meaningfully stopping or rectifying the contrary government action or decision. Nevertheless, even if there is no available judicial remedy (other than perhaps a

recognition of the rule of law as an underlying legal principle in the preamble to the 1982 *Constitution Act*,²⁷³ its clear implication in the 1867 *Constitution Act*,²⁷⁴ and embedding of the principle within endless volumes of Canadian case law make it clear that the rule of law is a recognized source for legal claims in our system. Hence, the superior courts have vertical priority over all other government officials (other than appellate courts) with regard to determining the concrete implications and requirements of the rule of law.

Institutional Obligations Associated with the Rule of Law for the Courts

However, as was also discussed in Part II, possessing an institutional power to make a decision carries no necessary implications about an obligation (of any nature) to use that power. As noted by Hohfeld, a normative *power* (such as an institutional power) on its own necessitates no more than that there exist some individual that is *liable* to the exercise of that power. That is, the possession of a power by some individual only means that if that power is exercised then someone will consequently have an obligation to comply with the use of that power. There is nothing in the simple possession of a power that mandates its exercise. For example, that a father has the power to ground his son for misbehaving does not mean that he should do so when his son misbehaves. He may opt simply to ignore the misbehavior or may determine an alternative punishment for his son.

An individual can, however, be under an obligation to exercise a power if there are other institutional (or other relevant) norms that obligate the exercise of that power. Our father in the above example, for instance, may have made an agreement with the child's mother that in the event that the child misbehaves he will ground the child. This agreement, consequently, may create an obligation for the father to exercise his power to ground the child when the child misbehaves. The coupling of the possession of a particular power together with a duty to exercise that power in particular circumstances establishes what Joseph Raz refers to as a 'directed power'.²⁷⁵ Most of Canada's judicial review jurisprudence in administrative law is concerned with the basic issue of when our superior courts ought to exercise their review powers to interfere with an administrative decision-maker.

grant of declaratory relief), superior courts nevertheless still possess vertical priority over the task – and this remains true regardless of whether the governmental actor ever is forced into practical compliance with the curial decision.

²⁷³ The preamble to the *Constitution Act, 1982* recognizes that: "Canada is founded upon principles that recognize the supremacy of God and the rule of law."

²⁷⁴ The *Constitution Act, 1867* provides that Canada will have "a Constitution similar in Principle to that of the United Kingdom." Recognition of the rule of law principle in the legal system of the United Kingdom was well established at this point, even if it had not been clearly formulated.

²⁷⁵ *Ethics in the Public Domain*, 242

A critical obligation of our superior courts, one that is clearly explicated in our case law, is to uphold the rule of law. However, the precise meaning of this term is heavily contested, with the central core of the concept (that government actions be based on reasons and be based on the ‘law’) permitting of a whole range of conceptual instantiations. Again, I neither intend, nor am I capable of, offering a conclusive solution to this ongoing dispute as to the appropriate meaning of Canada’s constitutional principle of the rule of law. Nevertheless, I do think there is a promising way forward. What we can identify is a set of obligations, commonly clothed in the colors of the rule of law principle (whether appropriately or not), that our superior courts have generally recognized as binding upon them and that are supported by several of the legal sources mentioned above. Included prominently amongst these are:

1. The duty to ensure that government decisions are made in accordance with predictable, preexisting law.
2. The duty to ensure that these decisions are made in accordance with fair and well-known procedures.
3. The duty to ensure that government decisions are ‘reasonable’ – reflecting appropriate considerations applicable to the decision being made.

These are the same basic concerns I addressed in Part I. Superior courts are under an obligation to ensure that government officials act within the parameters of the law, that they make decisions that are procedurally fair, and that these decisions be reasonable. In Canadian jurisprudence at least, these three principles receive overwhelming attention in any discussion of when the superior courts are under an obligation to interfere with the decisions of government officials. My claim is that the superior courts are under a ‘directed power’ to interfere with government decisions that damage these basic principles.

Institutional Limitations for Achieving the Rule of Law

While superior courts are clearly under an institutional obligation, at least in Canada, to interfere with the decision-making of government officials when the above principles associated with the rule of law are violated, the preceding analysis also makes clear that curial interference through judicial review does not always work to foster these principles. Oftentimes judicial interference with particular government decisions will actually undermine the rule of law.

I have given a number of arguments above suggesting how judicial action threatens to undermine each of these. The discretionary nature of much of judicial review introduces uncertainty as to the appropriate reach of an administrator’s jurisdiction – it makes it difficult for individuals to discern how, when, and to what extent they can rely on an administrative decision to be upheld. Excessive

judicial interference destabilizes the predictability and certainty law is supposed to offer. The enormous costs associated with litigating disputes before superior courts undercut the fairness of procedures in place. When administrative regimes have procedures mandated by statute or internal regulation that prevent undue hardships to litigants, curial interference often makes justice inaccessible. A lack of judicial expertise in handling administrative matters means that they are not often the best agents for assessing the ‘reasonableness’ of a decision. Courts do not always fully understand how a particular decision is justified within a larger context of balancing the competing rights of individuals. And there is always a risk that the courts will interfere with administrative decision-making not because their decisions were insufficiently justified but rather because the reasons did not conform to the reviewing judge’s particular moral or political fancies.

Our superior courts must therefore always be attentive to how the exercise of their review powers may be detrimental to rule of law considerations. While our superior courts are under an obligation to interfere with government decisions in order to ensure their fairness, reasonableness, and jurisdictional propriety, when such interference will do greater damage, their obligation is extinguished; rather than interfering, the proper obligation in such circumstances is for the superior courts to restrain the exercise of their powers. Superior courts must be aware of the myriad ways in which they can be their own worst enemies in the pursuit of the rule of law. When they travel into the decision-making of other branches of government, they carry their own heavy baggage. Judicial review proceedings always entail adherence to the processes, customs, knowledge base, and understandings that are characteristic of superior courts. And when these run contrary to or hinder the rule of law, there are pertinent reasons for the superior courts to curtail the use of their review powers.

The Role of Deference in Curial Review of Rule of Law Considerations

This brings us back full circle to the essential importance of deference and restraint to the judicial review of administrative decision-making on rule of law grounds. If I am correct that judicial review is only contingently (rather than necessarily) beneficial to the rule of law, courts cannot simply assert that if they believe that there may have been a rule of law violation, they must intervene. Our superior courts do have an obligation to ensure that the rule of law is upheld, but this does not mean that their intervention will always be beneficial for securing the principle.

First, other institutions and institutional actors may be better placed to determine the appropriate limits of a government official’s jurisdiction, the reasonableness of a decision, or the fairness of a procedure used in arriving at a decision than a superior court. Recognizing that other agents are sometimes better situated to determine when rule of law violations occur than superior courts, it may be wise for our courts to stand aside when these better situated agents make

decisions in this regard. Judicial interference in such circumstances prevents the more knowledgeable agent from making and implementing a more ideal decision with regard to rule of law considerations.

Second, even if another agent may be less expert than the courts about how to procure or ensure the rule of law, there may be reasons to settle for the suboptimal choice made by these agents. In particular, important institutional factors (such as the limitations of court procedures or the organization and coordination resulting from a particular statutory program) make it plausible to assert that other officials will be better placed to achieve rule of law objectives.

Even if judges may be more expert about how to ensure the rule of law than the individuals that make decisions in these non-judicial settings, it may nevertheless be the case that curial interference will undermine the general stability, finality, and predictability that are essential if these institutions are effectively to fulfill their objective of securing the rule of law. Excessive judicial interference with an administrative regime that handles disputes between landlords and tenants, for instance, may significantly undermine the jurisdiction of these disputes from the better situated, less expensive, and more procedurally appropriate tribunal. Such interference makes the decisions reached by this tribunal of uncertain status, with litigants being constantly aware of the possibility that judicial review will topple the decision that was made.

**SECTION 4: LEGISLATURES AND THE DEMOCRATIC AUTHORITY OF THE
SUPERIOR COURTS**

A. Introduction

The previous section examined whether judicial interference is always appropriate when courts believe that there has been some rule of law violation by another governmental actor. I argued that although there is an extremely important judicial obligation (at least in Canada) to uphold the rule of law, there are good reasons why courts ought not always to intervene when they feel that a violation has been committed. It is plausible that in many cases judicial interference with the decision making of other institutional actors will have the ironic effect of undermining the rule of law, even if the intent is to preserve or further it. In circumstances wherein other institutional actors possess greater expertise about, or a better ability to coordinate towards, rule of law objectives, it is a wise policy for courts not to interfere. The legitimate *authority* that other institutional actors may possess for procuring and sustaining the rule of law therefore provides a sound reason for judicial deference to their decisions.

In this section, I want to examine the other pole of the ‘Diceyan Dialectic’ discussed in Part I. A perpetual tension in administrative law is between the sometimes competing principles of democracy and the rule of law. Often courts feel that they are caught in an irresolvable tension between the demands of the rule of law that require them to interfere with an administrative decision, and the demands of democracy that require them to respect the decisions arrived at by the democratically elected representatives of the people. The last section showed that it is not always the case that the rule of law is best secured by the courts; now I want to demonstrate that the courts are not always democratically illegitimate when they interfere with the decisions reached by legislatively created tribunals – and this remains true even when there are strong privative clauses passed by legislators that attempt to insulate administrative decisions from curial review. Simply put, my central claim is that *judges are sometimes more expert or better placed than certain legislative actors for securing democratic objectives*. When this is the case, judicial interference with the decisions reached by statutorily established decision makers may actually work to preserve democratic objectives.

B. Dicey, Legislative Supremacy, and Democracy

In his original formulation of the constitutional principle of the supremacy of parliament, Dicey did not rely on any arguments about democracy. He simply asserted that there was an existing principle, embedded within the English constitution, that resolutions passed by the supreme legislature (i.e. the Queen in Parliament) constituted the highest source of law in England. In principle this supreme legislature could make any resolutions it wished, save perhaps a

resolution binding itself in the future. There is, however, an ongoing dispute as to whether Dicey believed that the principle of legislative supremacy was of greater importance than the rule of law. He claims, for instance, that “no one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence... This doctrine of the legislative supremacy of Parliament is the very keystone of the law of the constitution.”²⁷⁶

The contemporary formulation of the tension between the rule of law and legislative supremacy, however, is more meaningfully appreciated, particularly in common law jurisdictions outside of the U.K., in terms of a fundamental tension between the constitutional principles of ‘democracy’ and the ‘rule of law’.²⁷⁷ As mentioned in the *Quebec Secession Reference*, the Canadian constitution recognizes ‘democracy’ as part of its quadrat of constitutional principles rather than ‘legislative supremacy’. The reasoning behind this is relatively straightforward: the legitimacy of Canada’s central legislative bodies (i.e. the House of Commons and the provincial legislatures) is primarily derived from their purported democratic credentials, not their connection to some transcendent historical principle.²⁷⁸ Without the appropriate democratic credentials, these legislative bodies would be unable fully to claim the legitimacy that they do. Their ongoing composition, importance, and perhaps even existence, is contingent upon their continued democratic legitimacy.

It is the underlying assumption that the central legislatures in modern Western common law jurisdictions are, at least tolerably, democratic that gives rise to many contemporary claims about why we ought to recognize ‘legislative supremacy’. Legislatures are thought to be the most legitimate source of law in a democratic state because these institutions are chosen by the state’s citizens according to one of a variety of electoral arrangements and are accountable to

²⁷⁶Dicey, 25

²⁷⁷One of Dicey’s central arguments against incorporating democratic considerations into the principle of Parliamentary sovereignty was that the judiciary would not recognize the ‘will of the people’ as a separate ground for a decision. “The electors can in the long run always enforce their will. But the courts know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors.” *Introduction to the Study of the Law of the Constitution* at 28.

²⁷⁸Notably, the Senate, while technically an equal part of Canada’s bicameral federal legislature, is *not* an elected body but an appointed one. This institution typically does not rest its claims to legitimacy on its democratic pedigree but rather on its status in Canada’s constitutional framework, particularly the 1867 *Constitution Act* (which also provides additional justification for the legitimacy of the House of Commons). It is important to note, however, that the Senate’s perceived lack of democratic legitimacy has been an ongoing source of criticism, contributing to its relative insignificance as an avenue for the creation of new legislative initiatives. In fact, there seems to be an unwritten ‘constitutional convention’ in existence, based on an understanding of the constitutional importance of democratic accountability, requiring that the Senate ultimately approve all bills passed by the House of Commons. (There have, in fact, been very few exceptions to this convention in recent history) While it may propose amendments and changes, it has in only very few circumstances ultimately refused assent to a bill passed through the lower house.

these citizens through ongoing elections. They also are expected to make decisions for the general welfare of all citizens - and when they do not, individual legislators risk losing their positions in favor of new ones that will. Since the 'rule of the people' is principally demonstrated through the primary legislative organs in our system of governance, and since these are supposed to possess greater democratic legitimacy than other unelected institutional actors (whether they be executive,²⁷⁹ administrative, or adjudicative actors), other agents in our system of government ought to recognize that their interference with legislative actions is to act 'undemocratically'.²⁸⁰ This significant, but I believe ultimately flawed, claim we can refer to as the '*Superior Legislative Democratic Legitimacy Thesis*' (SLDLT).

Importantly, a proponent of the SLDLT can recognize that there may be other competing values in our system of governance to the value of democracy²⁸¹ and sometimes these other values ought to be given greater weight. In Canada, for instance, a SLDLT supporter can make the case that respect for minorities and the rule of law are equally important constitutional principles to that of democracy. It might therefore be necessary for non-legislative actors, particularly the judiciary, occasionally to interfere with a legislative decision in order to protect these other competing values. In what follows, I will have more to say about this possible conflict. Here, however, I simply want to note that adherence to the SLDLT does not commit its proponent to the much stronger view that non-legislative actors must *always* comply with legislative directives; instead, it only commits its proponent to the view that non-compliance with a legislative directive by other institutional agents is undemocratic.

²⁷⁹ In Canada, executive actors are not directly *elected* to this position (as per the Westminster system), but technically are appointed by the Governor General. The convention is that the leader of the largest party elected to the House of Commons will be asked by the Governor General to become the Prime Minister, who will then ask the Governor General to appoint to cabinet the particular ministers that she favors. The executive or 'government' is thereafter accountable to the House of Commons (and Senate) for all decisions made and when the government no longer holds the confidence of the House of Commons, a new election ensues. While the executive is technically not an elected body, it nevertheless is virtually always headed by elected officials that become its ministers. Thus, executive actors stand in a peculiar relation to legislatures with regard to their democratic legitimacy. They are elected and democratically accountable as Members of Parliament, but are not popularly elected to the executive.

²⁸⁰ This is not to suggest that, for the proponent of the SLDLT that all other branches of government are necessarily undemocratic, only that to interfere with the quintessential democratic branch is to act undemocratically.

²⁸¹ As I will note below, however, there are a number of conceptions of democracy and the mere fact that an institution is likely to reflect popular will may not be the only, or even the most important, aspect of democratic governance.

C. *Judicial Interference with Administrative Decision-Making and the SLDLT*

There is a general commitment in Canada's administrative review jurisprudence to the SLDLT - and Canada is not alone in this respect. Courts in the United Kingdom, United States, Australia, New Zealand, and elsewhere in the common law world have generally recognized that legislatures possess superior democratic legitimacy relative to them; thus, when they interfere with legislative choices, they are acting less democratically legitimately than if they acquiesced with these choices. In the sphere of administrative law, this implies that legislative decisions to establish novel tribunals and administrative regimes are, at least *prima facie*, democratically legitimate. Interference by the judiciary with the exercise of delegated powers given to administrative actors by the legislature, or so the argument goes, is consequently democratically illegitimate. By refusing to comply with legislative preferences about how administrative decisions ought to be carried out, the superior courts, which are supposed to foster democracy by giving legal effect to the democratically legitimate decisions of the legislature, end up undermining it.

A proponent of the SLDLT, nevertheless, might recognize a limited scope in which curial interference with legislative decisions is appropriate in order to preserve democracy. First, a proponent of the SLDLT can argue that in a federal system of governance (such as what we find, for instance, in Canada or Australia) there is an important role for the courts to ensure that one democratic body does not unduly tread upon the proper jurisdiction of another democratic body. When there is a constitutional sharing of powers between diverse legislative bodies, it makes sense to have courts prevent a rogue legislature from delegating a power to an administrative decision-maker that rightfully can only be delegated by another legislative body. If, for instance, a federal legislature has the exclusive power to print currency and a provincial or state legislature establishes an administrative body purporting to have this same power, it is not contrary to the democratic principle for courts to mediate the dispute and ensure that the powers of one legislative body are not eroded or usurped by another. This 'structural' form of judicial review is thought to be compatible with the SLDLT because it does not involve the judiciary entirely usurping the legislative process; review on federalism grounds involves the judiciary protecting the powers of the more appropriate legislature and therefore ensures that one form of democratic decision-making is not able to undermine another.²⁸²

Another possible defense of judicial intrusion into administrative decision-making that is compatible with the SLDLT is the infamous *ultra vires* doctrine

²⁸² But see Adrienne Stone's complaints about how even 'structural' judicial review like this may yet be problematic. She argues that we ought to recognize that even with the review of structural issues, courts act undemocratically by interfering; instead, in a truly democratic system, legislatures ought to be allowed to resolve and interpret the provisions of a constitutional arrangement amongst themselves, free of judicial oversight.

that was (and arguably still is) the fundamental basis for judicial review of administrative and executive action in the United Kingdom. This doctrine maintains that curial interference with administrative decision-making is legitimate when the courts believe that administrative actors have exercised powers that were not appropriately delegated to them by a legislature. If, for instance, an administrative tribunal empowered *exclusively* to make adjudicative decisions about transportation safety begins to make decisions about appropriate levels of income tax, it clearly acts beyond the confines of its legislatively established powers. A judicial declaration that the tribunal's decisions about taxation are null and void because they are *ultra vires* conforms to the SLDLT, at least in theory, because it preserves the will of the democratic legislature. It ensures that tribunal decisions do not exceed their intended scope and begin to interfere with the intent of the legislature. Courts remain but a humble servant, preserving the superiority of the legislature's will from being usurped by an unfaithful (or perhaps simply confused) administrative tribunal. Provided, however, that an administrative decision-maker acts according to the *intent* of the legislature and provided that the legislature has not delegated a power to a tribunal that it did not itself have the power to delegate, the proponent of the SLDLT maintains that the judiciary cannot interfere with the administrative process without consequently acting with democratic illegitimacy.

D. From Legitimacy to Authority

In order to assess whether the SLDLT is an appropriate principle for guiding our courts in administrative review, we need to examine what 'democratic legitimacy' is supposed to imply. Why exactly is one particular agent considered to be 'democratically legitimate' and another 'democratically illegitimate' according to the SLDLT?

My assertion is that the SLDLT's conception of democratic legitimacy is best understood as the superior institutional capacity of a particular government agency (the legislature) that always allows it better to secure democratic objectives than other governmental actors and agencies. The SLDLT's argument about the democratic illegitimacy of the superior courts in administrative review can therefore be transposed into a particular claim about the *authority* of legislatures in inter-institutional decision-making settings – namely, that democratically elected legislatures will *always* possess superior authority over unelected, non-legislative bodies with respect to the inter-institutional attainment and preservation of democratic objectives. Its tacit claim is that *by following the decisions made by the elected legislative bodies other institutional actors are more likely to secure the institutional objective of fostering and preserving democracy than if they engaged in and attempted to act upon their own analysis. Other institutional actors therefore ought to defer to the legitimate authority*

*possessed by the legislature(s) with respect to those matters falling within the scope of how the government institution can best secure democratic objectives.*²⁸³

With respect to the establishment of administrative tribunals, this implies that superior courts must defer to the legislative choice to delegate decision-making powers to non-curial agents, since interference with this choice would undermine the ability of the state to secure democratic objectives.

The SLDLT makes far too strong a claim. While it may be true that elected legislatures are often better suited than many unelected non-legislative actors to secure democratic objectives, in some situations there are other institutions within the meta-institution of government that may prove more capable. More specifically, there are institutional features of the superior courts that, in certain circumstances, make them better agents for realizing democratic objectives than the elected legislatures. To claim that legislative actors are always better placed to secure democratic objectives is therefore to misunderstand the proper *scope* of legislative democratic legitimacy. My present goal is to show how the superior courts can play an essential role in fostering democratic governance in common law systems – both when elected legislatures lack the basic capacity to respond to the democratic issues in play and when legislatures themselves act in ways that undermine the democratic objectives of the state. If this is true, the SLDLT needs to be rejected and we need to reconceive the way that judicial power is related to achieving democratic objectives in the context of administrative law.

Of course, in order to prove that the SLDLT is mistaken, we need to address the perplexing question of what exactly it means for a government to secure ‘democratic objectives’. Unfortunately, there is fairly pervasive disagreement about precisely what the term ‘democracy’ entails - a plethora of different positions is available, not all of which are mutually compatible, represented by an ever-increasing number of disparate theorists. I will not have the audacity to claim that in this short work I can proffer some ultimate solution to this riddle about the nature of democracy; instead, what I want to offer is a basic analysis of the root concerns that motivate different democratic theories. The SLDLT, I will argue, can be challenged from within each of these divergent understandings of democracy.

²⁸³ While my argument largely implies an instrumentalist account of democratic legitimacy, this ought not imply that I am committed to the view that democracy is only justifiable on instrumentalist grounds. For example, democracy may entail the view that popular positions ought to be the basis for government actions. A government act could then be judged as legitimate to that extent that it fulfills this basic requirement. Notably, however, this does not imply that there is anything instrumentally (or even intrinsically) valuable about popular rule itself. Governance according to popular rule may prove to be wholly unjustifiable and foolish with no instrumental value whatsoever. Nevertheless, we could still regard a government action as democratically illegitimate if it fails to preserve popular rule. The standard of legitimacy is then the degree to which some institution actually achieves or reflects the core underlying democratic objective or objectives.

E. *Root Concerns of Disparate Democratic Theorists*

At a minimum, all theorists agree that democracy is related to the idea that, in some relevant sense, ‘the people rule’. Etymologically, the term democracy captures just this – it is the rule or power (κράτος) of the people (δῆμος). Democracy is therefore usefully contrasted with systems in which the state’s political power is exercised by a single individual or some privileged group principally for their own benefit. And this fact helps to explain why at some level all democratic theories must be related to some conception of equality - if the people are to rule, rather than a privileged group, there must be some political sense in which ‘the people’ are equal to one another.²⁸⁴ If this were not the case, we could identify the individuals or groups that possess political power rather than the bulk of the population.

It is, however, unclear exactly what it means for ‘the people’ to possess equal and ultimate political power. While there is major disagreement as to what this is supposed to mean, I think there are three central aspects, one or more of which will be central in virtually all democratic theories. The three aspects I have in mind are attested to in Abraham Lincoln’s famous remarks at Gettysburg in which he held that we ought to uphold “government *of* the people, *by* the people, *for* the people.” Democracy may involve government: (1) being conducted in accordance with the will of the state’s citizens, (2) being carried out by the state’s citizens, or (3) rendering decisions that work for the interests of the state’s citizens. Thus, democracy may involve a *reflective* aspect (government decisions reflect the ongoing will of its citizens), a *participatory* aspect (citizens must be participants in the state’s decision-making processes), and a *substantive* aspect (government actions must work towards the benefit of the citizens themselves).

Substance-Focused Theories

Different approaches to democratic theories can usefully be distinguished according to which of these aspects of democracy is given prominence. Some theorists, such as Dworkin, focus primarily on the substantive aspect to the exclusion of the others.²⁸⁵ Dworkin argues in favor of “a *dependent* interpretation

²⁸⁴ This basic equality can be described either in some ‘formal’ sense in which each person, at least in principle, holds equal power with others, or in some more ‘substantive’ sense in which there are relevant structures put in place to ensure that each is able to hold power on an equal level with others.

²⁸⁵ To be clear, Dworkin does not argue that participatory and reflective aspects of democracy are unimportant; rather, he argues that they play an ancillary role to the more important aspect of democratic governance – that the decisions made by government respect the fundamental equality of each of the state’s citizens. The advantage of citizen engagement in political processes and having government decisions generally reflect the will of the majority is that these are instrumentally valuable, in general, to ensuring that the outcomes of government decisions will be democratically just – “an egalitarian society wishes its citizens to engage in politics out of a shared

of democracy [that] supposes that... democracy is whatever form is most likely to produce the *substantive* decisions and results that treat all members of the community with equal concern.”²⁸⁶ His basic thesis is that what ultimately matters for a democracy is that the *outcomes* of government decisions respect the basic equality of each individual within the citizen body. Our political processes are meaningfully democratic only to the extent that they produce outcomes that are genuinely egalitarian.²⁸⁷ Democracy is government *for* the people; the other aspects of democracy (the participatory and reflective aspects) are only important insofar as they are instrumentally valuable to achieving its substantive end of treating all citizens with equal concern. The substantive outputs of the political process must work to secure the interests of all of the state’s citizens if the system is to have a genuine claim to being democratic.

Reflection-Focused Theories

Alternatively, theorists such as Jeremy Waldron argue that what is most important for democracy is not that the substance of government decisions works to preserve certain democratic goals (such as respecting ‘equality’), but rather that government decisions *reflect* the particular views of the citizenry. His argument for this is that individual citizens will have pervasive and reasonable disagreements as to what the proper ends of the state are and what, for instance, constitutes justice – as he asserts, “disagreement on matters of principle is... not the exception but the rule in politics.”²⁸⁸ Since there is deep disagreement as to what constitutes the proper ends of the state, the only legitimate way to resolve this disagreement while respecting the basic equality of citizens is to act on that conception which is favored by the majority of the citizens (or where the choice is not binary, by the largest portion thereof).

It is impossible, of course, for citizens, given the complexity of the modern state, to be able to attend to all of the decisions made by their government and give their particular opinion. To rectify this problem, modern democratic legislatures are composed principally of elected officials that are to ‘represent’ the will of their constituents. Their decisions are supposed to reflect the views that are most prevalent in their community about how government is to be conducted. Regular elections then serve to guarantee that what the elected officials are doing does, in fact, mirror what the majority of their constituents wish done.

Purely ‘procedural’ accounts of democracy, to use Thomas Christiano’s term, are therefore typically reflection-focused theories; a democracy is only a

and intense concern for the justice of the results.” Ronald Dworkin, ‘What is Equality? Part 4: Political Equality’ in Thomas Christiano (ed.) *Philosophy and Democracy: An Anthology* (Oxford: Oxford University Press, 2003), 127.

²⁸⁶ *Ibid.*, 117. Emphasis in original.

²⁸⁷ *Ibid.*, 127

²⁸⁸ Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 15.

democracy to the extent that it possesses adequate procedures for making government actions accord with what the majority wish to see done. Associating democratic decision-making with voting procedures, for instance, is generally premised on the idea that the process of casting ballots – whether to determine a specific issue through a referendum or to elect a particular official – will lead to decisions that are reflective of what the majority of the citizenry wishes to see done.²⁸⁹

Also generally included within the category of reflection-focused theories are ‘consent-based’ theories of democratic legitimacy. These theories maintain that democracy is essentially concerned with people giving those in political power their consent to be governed in a particular way. For theorists such as Locke and those that have followed his lead, the essence of legitimate governance is that it allows individuals freely to choose to surrender, at least some of, their basic autonomy to a political community. While in a ‘state of nature’ (i.e. outside of political society) human beings would choose purely for themselves, to secure the benefits of life available only within a community they must act in unison, as Locke explains:

Men being... by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the *bonds of civil society*, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.²⁹⁰

A political community, however, must act in a unified manner if it is to achieve its ends. The problem, however, is that there will be situations in which the individual will disagree with the community as to how best to act collectively. The only solution, Locke believes, that a reasonable individual would give her consent to is to agree to act as the majority of the community believes best - “When any number of men have so *consented to make one community or government*, they are thereby presently incorporated, and make *one body politic*, wherein the *majority* have a right to act and conclude the rest.”²⁹¹

Again, given the pragmatic difficulties that surround having each individual citizen participate in every aspect of communal decision-making, there is a need for representative government. The purpose of the political representatives, on consent-based theories, is to act as stand-in agents for those individuals that are not present. The representatives are democratically legitimate

²⁸⁹ Voting can also play an important role in participation-focused theories, although typically theorists of this bent will downplay the significance of voting, arguing that meaningful participation requires more than simply casting a ballot once every few years.

²⁹⁰ John Locke, *Second Treatise on Government*, ed. C.B. Macpherson (Indianapolis: Hackett, 1980), 52

²⁹¹ *Ibid.*

to the extent that their legislative activities adequately mirror the basic views of the *majority* of the citizens that they represent. By acting in such a manner, the representatives preserve the basic consent of the governed that is the foundation for any form of legitimate political decision-making.

Participation-Focused Theories

In opposition to theories focused primarily on reflective or substantive aspects are theories that regard actual and meaningful citizen participation in government as the centrally important aspect of democracy. Theorists of this camp typically are concerned that when our conception of democracy revolves around reflective or substantive concerns, we lose sight of the fact that ultimately democracy must be about the real participation of citizens in the public sphere. In *Democracy in America*, for instance, Alexis de Tocqueville expressed his concern that American democracy was starting to evolve into a ‘soft despotism’ in which:

[e]ach [citizen] is as a stranger to the fate of all the rest... Above this race of men stands an immense and tutelary power [an elected government], which takes upon itself alone to secure their gratifications, and to watch over their fate. That power is absolute, minute, regular, provident, and mild. It would be like the authority of a parent... Thus, it every day renders the exercise of free agency of man less useful and less frequent... Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd.²⁹²

Theorists that elevate the participatory aspect of democracy as its central purpose tend to focus on how popular surrender to government decision-making undermines the very notion that democracy involves *self*-rule. It is not enough that governments make decisions that reflect our views and uphold our interests; instead, we must be *active* participants in day-to-day self-governance.

This does not, of course, require that we eradicate legislatures and seek to implement some form of ‘direct’ democracy – there are numerous pragmatic reasons why we cannot make all decisions for ourselves. Nevertheless, there is a multitude of ways in which we can participate in self-governance in our daily lives. We may, for instance, participate in local decision making by attending ‘town hall’ style meetings. Even simple things such as reading the newspaper and staying informed with what is happening in government constitutes a form of self-education that enables us actively to engage with the political world around us. Participation-focused democratic theorists recognize that democracy must involve placing real power in the hands of the people actively to engage in the decision-making process in order to defend their own rights and interests, as well as the

²⁹² Alexis de Tocqueville, *Democracy in America*, ed. Richard D. Heffner (London: Signet Classics, 2001), 303-304.

rights and interests of others in their political society. A society is therefore democratic to the extent that its citizens actively govern themselves.

Another approach of participation-focused theories is to hold, as Jurgen Habermas does, that individuals can only meaningfully participate in public decision-making when it is conducted under ‘ideal-speech’ conditions in which each person is able to have her position fully understood and appreciated, as well as fully to challenge and discuss the positions of others, without threats of coercion and retribution.²⁹³ The idea is that citizens can only be under a truly democratic system of governance when they are all able to participate. They can only fully do so, however, when important obstacles to their participation are removed. Democracy is therefore a system in which conditions exist that enable everyone actively to participate in the political process in a meaningful way, with the unique collective rationality that results from widespread participation in ideal-speech conditions ultimately guiding the decisions in the public sphere.

Mixed Theories

Of course democratic theorists are not necessarily forced to elevate any of these three aspects to being *the* central aspect of democracy. It is possible to argue that democracy simply has a number of different aspects, none of which deserve priority over any of the others. One might argue, for instance, that a proper conception of democracy ought to provide sufficient and meaningful opportunities for civic participation, it must ensure that those in public office act in accordance with the will of the majority of the citizens, and it must guarantee that the outcomes of political processes minimally respect the basic equality of citizens and work to the benefit of all – particularly the most disadvantaged. A mixed approach would then refuse to define democracy as being predominately about securing any one of these sorts of considerations; instead, it regards participatory, reflective, and substantive aspects to be individually necessary and collectively sufficient conditions for the realization of democracy.²⁹⁴

²⁹³ Jurgen Habermas, *Moral Consciousness and Communicative Action*, trans. Christian Lenhart and Shierry Weber Nicholson. (Cambridge, MA: MIT Press, 1990), 86. See also Habermas’ views on Discourse-Theory in *Between Facts and Norms*, trans. William Rehg (Cambridge, MA: MIT Press, 1998), chapter 7.

²⁹⁴ I should also note that there is logical space available for a theory that might opt to make two out of the three aspects central to democracy to the exclusion of a third (e.g. a theory that maintains that there must be participatory and reflective aspects present if democracy is to exist, but that substantive elements are unnecessary or of secondary importance).

F. Legislatures, Superior Courts, and the Procurement of Democratic Objectives

While I believe that mixed theories about the nature of democracy are more likely accurately to reflect our underlying intuitions about what constitutes a properly democratic system, I will not argue for this here.²⁹⁵ What I hope has been established, however, is that whatever sort of democratic theory proponents of the SLDLT rely upon, they will understand democratic legitimacy as essentially a matter of achieving participatory, reflective, or substantive democratic objectives – or some combination of the three. If this is true, we can evaluate the truth of the SLDLT on the basis of whether it actually is the case that elected legislatures are always and everywhere the best sorts of institutions for achieving any or all of these aspects of democracy. More importantly for my current project, we can evaluate whether superior courts are, at least sometimes, more competent than elected legislatures at achieving democratic objectives. If I provide examples of how our superior courts are often better placed to secure participatory, reflective, and substantive democratic objectives than our legislatures, there is a strong argument against the SLDLT. I begin with what I believe is the easiest case to make – that superior courts can sometimes better procure substantive objectives. I proceed to discuss how this is also true with participatory objectives, before finally discussing the more difficult case of how courts can better secure reflective objectives than an elected legislature.

Achieving Substantive Objectives

Substantive democratic theorists hold that in order for a system of governance to qualify as a democracy, the system must elicit outcomes that advance the values appropriate to democracy (i.e. treating all citizens with equal concern). For a substantive theorist, the SLDLT would be true if and only if it was the case that legislatures were more capable, whether as a result of their superior expertise or placement, than superior courts for bringing about these outcomes. Is it the case, for instance, that the legislature is better placed or possesses more expertise than the superior courts for assessing how to treat a particular individual with ‘equal concern’? This, of course, is a very difficult position to maintain. While the answer ultimately will depend on the particular outcomes that a theorist

²⁹⁵ As a simple thought experiment, I suggest that the reader contemplate a system in which any of the three basic aspects of a democratic theory is not present and ask ‘would I consider this system to be a fully democratic system?’ If the answer is no, as I suspect is the likely result for most of my readers, there is a *prima facie* case to be made that our understanding of democracy necessarily requires that all three aspects be present. Of course, this intuitive claim needs much more rigorous argumentation to rest upon a firm foundation – particularly given that it seems quite plausible that participatory, reflective, and substantive aspects of a democracy may come into conflict. What if, for instance, the majority of the population does not desire fair outcomes? I will set this issue aside for the present, but hope to return to it in future work.

believes are essential to a democracy, the proponent of the SLDLT will have to demonstrate that the most apt agent for bringing about these outcomes is always a legislature.

If one adopts Dworkin's theory that a democratic system must arrive at political decisions that treat all individuals with equal concern, the SLDLT is unjustified. Due to the overwhelming volume, scale, and limited ability to foresee the disparate effects of its decisions, legislatures are often unaware of the impact of its decisions on individual citizens and unable to take into account the needs of each individual citizen. Legislatures, by their very nature, make decisions that have a broad perspective; typically, their decisions attempt to resolve large-scale matters and achieve wide-ranging goals. There is, of course, nothing wrong with such decision-making – it is both necessary and beneficial that legislatures focus on generalities as opposed to particularities. When legislatures create general rules that will lead to the fair and equitable treatment of its citizens (such as human rights codes), their decisions certainly advance the democratic goal of treating all citizens of the state with equal concern.

The issue for the SLDLT, however, is that if we hold that a system of governance is democratic only to the extent that it treats *each* individual citizen with equal concern, we can see how legislatures are often institutionally limited relative to the superior courts. Superior courts make determinations in *particular* cases, with individual litigants raising their unique concerns and perspectives about how political decisions do and ought to affect them. The requirements of procedural fairness and the provision of reasons for a judicial decision ensure that issues relevant to individual citizens are addressed and that the state provides an account for why its general policies are justified in particular cases. The superior courts therefore can ensure that the outcomes of the legislative process actually lead to individual citizens being treated with equal concern; legislatures, on the contrary, are incapable of providing an appropriate venue for raising each individual issue that may be associated with the effects of a general policy.

If this sort of reasoning is correct, the superior courts play a crucial role in ensuring that democratically appropriate outcomes result from the state's decision-making processes. In some circumstances, such as assessing the impact of state actions on individual citizens, the superior courts are structurally more adept than legislatures at procuring the best democratic outcomes. If this is true, then the SLDLT cannot be held by (at least the Dworkinian) substantive democratic theorist.²⁹⁶

A proponent of the SLDLT might argue that administrative regimes created by the legislature might nevertheless be better than the superior courts for

²⁹⁶ Again, this argument will need to be adjusted if a theorist holds that there is some other value in addition to or rather than 'equal concern' that is an appropriate substantive objective of a democracy. Suffice it to say that all that is required to disprove the SLDLT for the substantive theorist is to show some structural advantage of a superior court in a particular case or a particular range of cases over a legislature for achieving whatever the appropriate goal of a democracy is.

achieving democratic objectives. A particular administrative agency, for instance, may be better situated to assess the impact of a particular government action on individual citizens than the superior courts. In such a circumstance, the administrative agency, which was established by the legislature, possesses superior democratic legitimacy to the superior courts. This, I believe, is often true – and I will have more to say about this below; nevertheless, this does not establish that the SLDLT itself is defensible for a substantive theorist – it only establishes that *sometimes* the legislature may create agencies that are more apt at achieving the objective of treating individual citizens with equal concern. We should note, first, that it is the empowered agency and not the legislature in this circumstance that possesses the superior democratic legitimacy. The agency is better situated than the legislature to assess how best to treat individual citizens with equal concern. The simple fact that a legislature created an administrative agency that is more likely to ensure that an individual is treated with equal concern in a particular circumstance than a court does not consequently make that legislature itself superior in democratic legitimacy. Second, even if we could somehow tie the legitimacy of the legislature to the administrative agency, it would take much more to show how in *all* circumstances agencies created by the legislature would be better situated than the courts. If there are any circumstances in which the superior courts will prove to be a better choice for ensuring that individuals are treated with equal concern than any existing legislatively established tribunals, the SLDLT is false.

Achieving Participatory Objectives

Participation-focused theories claim that the essence of democracy is citizen involvement in day-to-day governance. While casting ballots in order to elect particular representatives to a legislative assembly or the executive branches might be an important way of participating in government, it is rarely recognized by participation-focused theorists as adequate in and of itself to mark a political system as democratic. Citizens ought to *rule* themselves rather than being *ruled* by their political representatives. Legislative bodies, of course, can provide an important service to the ongoing project of self-rule; they deliberate pertinent issues, allowing citizens to become aware of the sorts of reasons in favor and against certain political choices.

Legislatures, however, run a serious risk of becoming despotic when their decisions are allowed to stand without further thought or challenge. It is precisely here that we can begin to see a case develop for how the superior courts are useful for giving citizens an active role in ongoing self-governance. When citizens disagree with or want to challenge the sorts of resolutions arrived at by the legislatures, courts provide a meaningful venue in which to have their individual concerns heard. As mentioned above, the superior courts allow citizens the opportunity to raise disagreements about how they are being governed. While

they are limited to raising only certain sorts of issues in a superior court,²⁹⁷ this venue nevertheless enables them to have a voice in how political governance is conducted that might not be possible beyond its walls. Ordinary citizens may, in some circumstances, have much better direct access to the courts than to the legislature – and if the goal of democratic governance is to ensure that individuals participate in their own self-rule, the superior courts are an invaluable resource.

In addition, there are certain structural features of the superior courts that ensure that the individual citizen will be able meaningfully to participate – particularly, the independence of the superior courts, their ability to grant significant remedies to aggrieved parties, their adherence to the adversarial process, and the requirement that they provide reasons for their decisions. The independence of the courts helps to ensure that a superior court will be able to hear and determine a case purely on its merits, rather than on extraneous factors (such as interest group politics, etc...). While there is always the risk of extraneous interference with the judiciary, their security of tenure and administrative independence better enables them to deal with an issue purely on its merits rather than legislative actors who are accountable to their parties and important voting blocs. The ability of the superior courts to grant significant remedies ensures that there is a real stake in the proceedings before them; citizen participation in the judicial process has the potential to elicit a real and tangible effect in political life. The adversarial process ensures that all directly affected parties involved can have their positions fully aired and challenged. In conjunction with the duty of courts to provide reasons, the judicial process ensures that an individual's argument cannot be ignored but must be adequately addressed. The fact that judicial reasons, in all but the rarest of cases,²⁹⁸ are also publically available means that what transpires in a court can be accessed by all other citizens and lead to their future involvement in the political life of the state.

Superior courts therefore provide a venue that both encourages citizen participation in the ongoing political life of their society and makes that participation meaningful, thereby aiding in the objective of securing democratic governance, at least for certain sorts of participation-focused theorists. The claim of the SLDLT, however, is that the legislature is *superior* in democratic legitimacy to other government institutions. Its claim is that legislatures are better situated to secure democratic objectives, not that other institutions are altogether incapable of doing so.

²⁹⁷ Only certain sorts of arguments will be regarded as appropriately 'justiciable' in a court; how this is defined, however, will depend on the sorts of 'sources' recognized within a legal system as appropriate for judicial determination. Whether 'moral' arguments, for instance, are appropriate in a judicial setting will depend on the unique norms in place in a society – as well as on the conception of law adopted by the system in general and the individual courts in particular.

²⁹⁸ For instance, judicial reasons in proceedings involving minors or national security matters are often either not publically available or only available in a censored form.

The above analysis, I believe, demonstrates that there are situations in which the forms of participation available within legislatures are democratically *inferior* to those available within the courts. When individual citizens wish to raise issues that are politically unpopular or that legislative representatives have a vested interest in ignoring (for instance, because raising the issues in the legislature would lead to censure from their political party or would threaten campaign financing from certain lobby groups), the superior courts often prove to be a superior venue for political participation.²⁹⁹ There are circumstances, therefore, in which superior courts better allow for citizen involvement in the political process than would otherwise be possible in the legislature. If this is true, the SLDLT is false – at least for the participation-focused theorist.

Relating this back to the context of administrative law, I think we can clearly see that the SLDLT cannot be relied upon to support judicial acquiescence with legislative choices to delegate particular powers away from the superior courts and into administrative agencies. We should first recognize that legislatures may create tribunals with either the intention or the effect of cutting-off citizen participation in the judicial system. When legislatures establish tribunals to expedite decisions and prevent citizens from accessing the procedures and remedies available in superior courts, these tribunals may work contrary to the participatory objectives of a democracy. Superior courts, in such circumstances, actually act in *furtherance* rather than in hindrance of democratic objectives by refusing to uphold the legislative preference to delegate decisions to a tribunal. The superior courts provide a unique form of participation in our system of governance and they may therefore be preserving democratic objectives by ensuring that their unique form of participation is available to citizens.

Legislatures, of course, may also establish tribunals with the explicit goal or ultimate effect of encouraging citizen participation in the political process. Superior courts, as I have argued in previous sections, are often backlogged with cases and are sometimes heavily taxing on citizen resources; therefore, they are often less accessible than a statutorily established tribunal. Further, there are circumstances in which the procedures of the courts are likely to hinder rather than further citizen participation. A specialized tribunal might be established in order to rectify the procedural shortcomings of a court and thereby allow more meaningful citizen involvement with political decision-making. In such cases, the tribunal does possess greater democratic legitimacy to a superior court since it can better secure the democratic objective of active and meaningful citizen participation.

²⁹⁹ As a prime example of such a situation, consider the Canadian Supreme Court's decision in *R. v. Morgentaler* [1993] 1 S.C.R. 30. Whatever we may think of the substance of the Court's decision, *Morgentaler* politically addressed issues that legislative representatives were unwilling to touch. In addition, it provided both pro-choice and pro-life activists an opportunity to discuss their concerns and have them challenged by the other side.

Achieving Reflective Objectives

The strongest and most pertinent defense of the SLDLT, however, is provided by reflection-focused theories. The reason that legislatures are democratically legitimate, according to these theories, is because they are popularly elected and accountable, and hence they are apt to make decisions that align with views held by the majority of citizens. The SLDLT is supported by reflection-focused theories if it is true that legislatures are more likely to make decisions that will ultimately reflect the views of the majority of citizens than any other governmental actors, including the superior courts.³⁰⁰

The assumption that legislatures always are better able to reflect the will of the majority than the courts simply because of their accountability through regular elections is highly suspect. This is challengeable on a number of grounds only one of which I will discuss here – namely, the problem of citizen (and legislator) awareness of the meaning and scope of legislative enactments, particularly in extremely complex circumstances.

While legislation related to relatively straightforward matters of great importance is generally known by a good portion of the voting public, the vast majority of the business of the legislature is unknown to most of the state's citizens. It therefore seems a bit odd to claim that the majority gives its will to some particular legislative enactment about which very few within the electorate have any knowledge whatsoever. Nevertheless, one may argue that even if citizens do not know exactly what is passed in the legislature, it is expected that their elected representatives will act in good faith and vote for or against an enactment according to what they believe the majority in their constituency would wish if they were fully aware of the issue. Now assuming that the elected representative will act in good faith (an assumption highly contestable in today's highly partisan legislatures where the risk of party discipline is often even more of a threat to a politician's career than the anger of their constituency) there is still the problem of whether the legislator herself is fully aware of the matter under debate. Most legislative business is conducted in smaller committees that involve only a few elected representatives. These committees draft and amend legislation that will subsequently be deliberated and voted on in the legislature. With extremely complex problems, only the committee members are likely to have a complete grasp of the matter in dispute and the elected representatives that did not sit on the committee will be forced to make a decision on the committee's proposals according either to their own incomplete understanding of the proposals, or more commonly, according to what their party wishes to see done. In such complex circumstances we must trust the uninformed legislator,

³⁰⁰ I must reiterate that the SLDLT only necessarily implies that it would be *democratically* illegitimate for the superior courts to interfere, not that it would be illegitimate on all possible grounds. Rule of law considerations, for example, still may be legitimate grounds for curial interference on the SLDLT.

representing an electorate generally uninformed about the particular issue under consideration, to be able adequately to capture that to which the majority would have hypothetically consented.

If this analysis is on the right track, the question we must then ask the proponent of the SLDLT is why it is that a superior court, when asked to review a legislative enactment with the sort of complexity considered above, is always less likely than the legislature to make a decision that accords with what the majority of the electorate would wish to see done. My argument is that *the presence of certain unique institutional features within superior courts sometimes gives us good reason to think that they are, in fact, better situated to arrive at decisions that will reflect the views of the majority than the legislature.* In particular, the requirement that the superior courts provide coherent reasons for their decisions, accounting for a wide range of legal principles and values embedded within the state's legislation and constitution, coupled with the fact that interstitially, often makes them more apt than legislatures to arrive at decisions that reflect what the majority would wish to see done.

An important aspect of judicial reasoning is that it attempts to present the law in a *coherent* manner – that is, it attempts to show how the plethora of norms that constitute the law of a particular jurisdiction relate to a common set of underlying principles and values. Coherence, as defined by Neil MacCormick, “is the property of a set of propositions which, taken together, ‘makes sense’ in its entirety.”³⁰¹ Common law judges rely upon the idea that the law ought to make sense as a whole, with individual legal norms being interpreted and applied in a way that is coherent with other legal norms. Instead of treating each individual legal norm in isolation, judicial reasoning typically subsumes the particular norm within larger legal principles, showing how the individual norm is an instantiation of some pervasive legal principle.³⁰² As MacCormick argues, judicial reasoning proceeds by attempting to show how an individual norm is justifiable “under higher-order principles and values.”³⁰³ Thus, when judges argue about what the norms of our system are or how to interpret these norms, they appeal to certain principles that are latent within the legal system. Importantly, this implies that a particular legal norm appears as ‘aberrant’ and in need of alteration or negation if it works contrary to principles that are well-established within our system.

While legislative enactments are, perhaps, better justified when they cohere with other constitutional, common law, and statutory sources, there is no

³⁰¹ Neil MacCormick, *Rhetoric and the Rule of Law* (New York: Oxford University Press, 2005), 190. Coherence, as understood by MacCormick, is distinguishable from ‘consistency’ - which simply implies non-contradiction. A set of propositions are thus coherent to the extent that they ‘hang together’ or mutually support one another. A set of propositions is consistent to the extent that each of the propositions is logically compatible with the other propositions in the set. Importantly, a perfectly consistent set of claims by no means necessitates any coherence, but coherence is only possible if a set of propositions is at least minimally consistent.

³⁰² Global versus local coherence – Raz and Levenbook.

³⁰³ MacCormick, 193

institutional requirement that these enactments must cohere with them. A bill typically becomes law simply when it passes the required threshold of votes in a legislature on a final reading. On the other hand, common law courts, when deciding live cases, must attempt to give legislation a reading coherent with other existing pieces of legislation, as well as additional constitutional and common law sources. Further, they must articulate these principles in official reasons for the decision that are publically accessible.

The different sorts of concerns that shape the reasoning of legislatures and courts is of critical importance to the discussion of how the superior courts can be a superior venue for ensuring that government decision-making adequately reflects majority views. My claim is that in complex circumstances wherein the general public, and even many legislators themselves, are unlikely to have the requisite familiarity with the issues in dispute, superior courts are able to ensure that underlying legal principles that the majority of citizens support are ultimately used to determine the outcome of particular cases. When individual legislative enactments work contrary to widely supported and deeply embedded legal principles, superior courts are more likely to act in accordance with the will of the majority by interfering with a legislative enactment than by simply conforming to it.

This argument relies on two tacit assumptions. The first is that when judges interfere with legislative enactments on the basis of principles embedded within the law, it is the case that these principles are currently supported by the majority of citizens. If principles found within the law have either become abhorrent to today's citizens, or are simply no longer considered valuable, my argument cannot threaten the SLDLT. The coherentist reasoning that is characteristic of the judicial approach to legal interpretation therefore is only able to procure reflective democratic objectives when there is continued citizen support for embedded legal principles.

The second assumption is that citizens, for the most part, wish to have decisions that cohere with underlying legal principles. It is possible, for instance, that in some circumstances citizens may desire results that are incoherent with embedded legal principles. As Raz argues,³⁰⁴ we must be careful when we assume that individuals intend all their principles to be coherent. Oftentimes legal principles compete with one another and we must not forget that oftentimes law is the product of political compromises, rather than strong principles. Expecting the law to exhibit widespread coherence is therefore circumspect. In some circumstances the outcome that is favored by the majority of citizens may not necessarily cohere with some prevalent legal principles – and this is precisely what is desired.

While I grant that both assumptions are problematic in certain circumstances, as a general rule I think we can safely maintain that the majority of

³⁰⁴ Joseph Raz, 'The Relevance of Coherence' 72 *Boston University Law Review* 2 (1992). Reprinted in *Ethics in the Public Domain*.

citizens in Canada support the majority of the principles embedded within their legal system and, further, that they desire that these principles be upheld as coherently as possible. Resting on the strength of these assumptions, my argument against the SLDLT ought to go through. Legislatures are institutionally inept at making decisions for particular cases as their purpose is to establish wide-ranging rules that will capture a number of situations. The institutional limitation they face is that they cannot adequately predict how their catchall legislative schemes will lead to tensions with other legal sources in concrete settings. And the more complex the legislative scheme, the more it is likely to give rise to tensions.

It is the fact that the legislator cannot entirely predict the circumstances in which her legislation will apply that makes the superior court such a valuable democratic asset. If the goal is to ensure that the decisions made by our government institutions best reflect the will of the majority, surely we wish to have that majority will reflected not merely in abstract legislative schemes but also in the resolution of concrete cases. Superior courts, because of their institutional requirement to provide coherent public reasons for their decisions are able to ensure that legal norms in individual cases are applied in a way that accords with what the majority of citizens support. Taken in conjunction with their institutional feature of possessing general (as opposed to specialized) knowledge of the law, and the fact that they arrive at decisions on a case-by-case basis, thereby accounting for the plethora of nuances in which legal rules, principles, and values interact, superior courts are often institutionally better-situated to uphold the will of the majority than legislatures. In the individual cases before them, superior courts determine how embedded legal principles, supported by the majority of the citizens, can provide a coherent resolution to the matter under dispute.³⁰⁵

Notably, even if this ‘coherentist’ reasoning by a superior court leads to an outcome different than what would have been required by statute (even a manifestly clear one), this does not mean that the superior court’s decision ought necessarily to be ‘undemocratic’ for a reflection-focused theorist. It might, perhaps, be ‘unconstitutional’ or ‘contrary to a proper separation of powers’ or ‘a violation of institutional vertical or horizontal task divisions’ or some other argument to this effect – but none of these have any necessary effect on democratic legitimacy. The decision is democratically legitimate for the reflection-focused theorist only to the extent that the decision does (or minimally, is likely to) conform to the will of the majority of citizens. If it is true that the

³⁰⁵ Judicial decisions can provide an extremely useful tool for future legislation. Kent Roach, for instance, suggests that when judges interfere with legislation on the basis of constitutional or common law principles, they provide opportunities for ‘dialogue’ between the courts and the legislators. The courts make the legislators aware of the concrete impact of their legislation and thereby afford them an opportunity to revise in a way that addresses the violated legal principles. Legislation is thereby improved as a result of curial decision-making. See his *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001)

application of coherentist legal reasoning in complex cases by the superior courts will lead to decisions that better reflect what the majority of citizens would wish done than simple adherence to a legislative provision, the SLDLT is false.

This conclusion has important implications for administrative law. It implies that when superior courts are reviewing the decisions of an administrative tribunal, *the mere fact that a legislature has established an administrative tribunal to make a certain type of decision is insufficient to establish that tribunal's democratic legitimacy*. A reflection-focused theorist ought to concede that what matters is not whether an elected legislature has appointed a tribunal to make a decision, but whether that tribunal is well-situated to arrive at decisions that will reflect what the majority of citizens wish to see done. The democratic legitimacy of the tribunal will therefore depend on whether it possesses the sort of institutional features that make it apt to arrive at such decisions. If superior courts end up being better placed than certain administrative tribunals to render decisions that accord with the will of the majority, the superior courts and not the legislatively appointed tribunals possess greater democratic legitimacy.

G. Democratic Legitimacy and Privative Clauses

The above argument is meant to establish a simple but important claim: *merely because a legislature determines that a particular decision ought to be made by an administrative tribunal rather than the superior courts, it is not necessarily the case that superior court conformity to this choice best secures democratic objectives*. While there may be many features of elected legislatures that make them apt to arrive at better decisions for securing participatory, substantive, and reflective democratic objectives, the superior courts ought to remember that they can play an important role and that sometimes there are features of their institution that make them fit to secure these objectives. This obviates a facile line of argument that is persistent within administrative review jurisprudence suggesting that superior courts ought always to acknowledge the superior democratic credentials of legislatures when interfering with the administrative regimes that they have established.

This argument is most acute when it comes to how superior courts treat privative clauses that express a legislative desire to keep them either wholly or partially out of administrative decision-making. The standard answer given in Canadian case law for why reviewing courts ought to respect privative clauses is because they must respect the democratic preference, as expressed by the legislature, to keep the courts out of the administrative process. While our jurisprudence recognizes that a privative clause cannot *wholly* remove judicial review, curial interference with a privative clause protected administrative decision is often thought to imply a necessary democratic deficit. Yet if the above analysis is correct, this sort of claim is mistaken. When judicial involvement in the administrative process will better secure substantive, reflective, and

participatory objectives than their acquiescence, there is no foundation for the claim that a privative clause, enacted by the legislature, ought to be upheld on democratic grounds.

This has at least two important implications for how the superior courts ought to handle legislative attempts to shelter administrative decisions from curial oversight. First, it implies that *the mere existence of a privative clause is insufficient to establish that there are compelling democratic reasons for the courts to stay out of administrative decisions without further inquiry*. Canadian courts need to assess how their involvement in the administrative process may be conducive to ensuring that democratic objectives are procured. They must inquire, for instance, into whether a privative clause is being used to stifle opposition, to deny important forms of citizen participation in government decision-making, or simply to ram through decisions that might be politically unpopular if exposed to public scrutiny in a court. If privative clauses are being used for purposes contrary to democracy, judicial acquiescence is unlikely to be sufficiently justified by appeals to democracy. Superior courts need to be attentive to how a privative clause is being used before proceeding to claim that democracy demands that they respect it.

Second, my analysis suggests that *Canadian administrative review jurisprudence must develop a more sophisticated account of how the judicial role can foster democratic objectives*. Adequately to address whether a privative clause secures or hinders democratic objectives requires some framework for understanding how different institutions within government, including the superior courts, play a role in democratic governance.

Articulating their role, however, is not a task for the judiciary alone. Each institution within government may *prima facie* be capable of securing democratic objectives, depending on the sorts of issues in question and particular institutional structures. Recognizing the abilities and limitations of one's own institution, as well as those of other institutions, is crucial for achieving democratic objectives. Legislatures, courts, and other governmental actors therefore need to discuss which institutions will best secure democratic objectives in which situations. Acknowledging that other institutional actors may be better placed to secure these objectives is not a duty applicable only to the courts. Legislatures must also be aware of their limited democratic credentials relative to other institutional actors. When they enact privative clauses, they must therefore consider how they may do so contrary to democracy – as such clauses, if heeded, may undermine the ability of the superior courts to achieve key substantive, procedural, or reflective democratic objectives.³⁰⁶

³⁰⁶ Privative clauses, of course, may be enacted to secure other sorts of objectives (such as to reduce costs). My argument is not meant to critique the legislative desire to limit the role of superior courts in order to secure other, non-democracy related objectives. It only speaks to the fact that legislatures must be aware that there may be an important democratic cost associated with the issuance of a privative clause.

SECTION 5: A NEW APPROACH TO CANADA'S STANDARD OF REVIEW ANALYSIS

A. Introduction

The purpose of this thesis is to establish a workable foundation for Canadian administrative review that will enable superior courts adequately and coherently to respond to the exercise of adjudicative powers over the interpretation of the meaning of law by statutorily established administrative tribunals. In this final section, I articulate how my inter-institutional model of judicial deference provides a tenable footing upon which to develop Canada's standard of review analysis. I show that a doctrine of judicial due deference, premised on a revised Razian conception of authority, is capable of restoring greater order and clarity to the unwieldy system of administrative review currently in place.

So far in this work I have analyzed several aspects of administrative review. I now want to put all of these disparate pieces together into a unified whole. First, I connect administrative review with institutional practical reasoning. This form of reasoning is premised on horizontal and/or vertical task differentiations between diverse agents who then attempt to achieve particular institutional goals within the context of their unique roles. My argument is that superior courts and administrative tribunals possess a horizontally shared institutional task of interpreting and applying law; however, when this task is shared, the superior courts possess vertical priority over the task.

Having vertical priority over a task, however, does not necessarily mean that one ought always to exercise that priority. The second part of this section therefore examines the conditions under which judicial restraint is appropriate for the superior courts with respect to their horizontally shared tasks with administrative tribunals. My argument is that there are crucial function-based and expertise-based reasons for judicial deference to administrative interpretations of law. Sometimes courts must acknowledge that administrative interpretations and applications of law possess greater legitimate authority than they do, and hence that they ought to show deference to them – provided that there are no confounding reasons that might mitigate that authority. I also argue that even if there are no proper grounds for deference, there may be certain other considerations present counseling judicial restraint – particularly, preventing the proliferation of judicial review and preserving harmonious relationships with other institutional actors.

Third, I reexamine some of the essential features of Canadian administrative review jurisprudence, including the role of superior courts in upholding the rule of law, the nature of procedural fairness, the importance of privative clauses, and the current reasonableness and correctness standards of review. My claim is that many of these central features of Canadian administrative law ought to be reexamined, redefined, and perhaps substantially altered as a consequence of the analysis I have provided. By focusing

administrative review squarely on the issue of how an administrative tribunal may possess authority relative to a superior court, a good deal of confusion about the judicial role in administrative review can be resolved.

Finally, I address two of the most pertinent objections that may be posed to my analysis: specifically, that the complexity of my analysis will only lead to greater confusion and that it will undermine the judicial role in upholding the rule of law.

B. The Nature of Institutional Reasoning and Administrative Review

As I argued in Part II–5, organizational institutional reasoning is premised on horizontal and vertical task differentiations. Institutions of this sort assign certain roles to particular individuals in order to secure institutional objectives. These agents may either be given different tasks to fulfill (horizontally differentiated roles) or they may be subject to a priority scheme (vertically differentiated roles) in which their role in the procurement of an institutional objective will replace or be displaced by another agent on a lower or higher rung.

Horizontally shared Tasks between Superior Courts and Tribunals

Administrative tribunals have an institutional role of adjudicating disputes by applying and interpreting the law³⁰⁷ in particular cases arising within their jurisdiction.³⁰⁸ However, in many circumstances, superior courts and administrative tribunals will *share* the same institutional task of applying and interpreting legal norms. For example, interpreting the boundaries of an administrative tribunal's jurisdiction is a task that both administrative tribunals and the superior courts share. Administrative tribunals need to establish whether the persons, subjects, and remedies over which litigants ask them to adjudicate are actually within their statutory powers. They must always determine if they are appropriately empowered to resolve a dispute. The superior courts also possess a power to render decisions about these matters. If a litigant requests judicial review, challenging that the administrative tribunal's interpretation of a statute is incorrect, a superior court has the task of determining the same matters. In such a circumstance, superior courts and administrative tribunals therefore possess a horizontally shared task. They are *both* appropriate institutional actors for interpreting the meaning and proper application of the tribunal's jurisdiction. The meta-institutional structure of Canadian government permits a number of

³⁰⁷ As well as other sorts of 'quasi-legal' norms requiring adjudication such as regulations, by-laws, etc...

³⁰⁸ This is not to suggest that administrative tribunals are limited simply to adjudicating disputes. Tribunals may (and usually do) serve a number of functions in addition to the adjudication of disputes. They may, as I noted in Part I – 1, also be involved in the creation and development of regulations and policies for particular areas.

divergent institutions to share responsibility over the interpretation and application of certain legal matters.

Arguments for the Vertical Priority of the Superior Courts over the Interpretation of Law

While there is nothing necessarily problematic about the possession of a horizontally shared task between two (or more) institutional actors,³⁰⁹ there is a possibility that the horizontal sharing of tasks will give rise to confusion and conflict. When it is not clear which actor has priority with regard to the task, diverse institutional actors sharing the same role may act in contradictory ways, creating confusion and uncertainty. A common solution to this challenge is to give one of the institutional actors vertical priority over the horizontally shared task. The vertically superior actor is then able to claim precedence over the shared task in the event that there is a conflict.

In the Canadian system of governance, *superior courts always have vertical priority over administrative tribunals when they possess a horizontally shared task of interpreting the meaning and proper application of law*. To clarify, this does not mean that superior courts possess vertical priority over administrative tribunals with respect to the appropriate interpretation and application of law in *all* cases. There may be certain legal matters that are simply beyond the jurisdiction of the superior courts.³¹⁰ Notably, the test proposed by the Supreme Court in the *Residential Tenancies* reference acknowledges that superior courts do not have the task of adjudicating and interpreting *all* questions of law.³¹¹ Superior courts are the appropriate courts of first instance for the resolution of all legal matters that have not been statutorily delegated to administrative tribunals. While the superior courts have a constitutionally protected core jurisdiction encompassing all matters over which they had jurisdiction prior to 1867 (pursuant to Section 96 of the *Constitution Act, 1867*), legislatures can empower administrative tribunals to interpret and apply novel legislative schemes. The presumption that all legal matters are to be determined by superior courts may thus be defeasible by statutory enactment.³¹² With respect to matters that are

³⁰⁹ For instance, a (typically) non-problematic horizontally shared task of creating legislation exists in the Canadian system. The House of Commons and the Senate both share the task of bringing forward new legislative proposals. Legislation can originate in either body, and this, at least so far, has proven not to be problematic.

³¹⁰ This is not to say, however, that tribunal decisions are not reviewable on other grounds over which the superior court may possess vertical priority. There may, for instance, be grounds derived from the *Canadian Charter of Rights and Freedoms* for a superior court to review the tribunal's decisions. With respect to the interpretation and application of the *Charter*, the court retains vertical priority over the horizontally shared task.

³¹¹ See Part I – 2 above.

³¹² In *re: Residential Tenancies Act, 1979*, the Supreme Court noted that even if a power was within the 'historical' powers of a superior court, an administrative tribunal may nevertheless

delegated to administrative tribunals to the exclusion of the superior courts, the courts are not in a position of vertical superiority because these matters are not assigned to them at all. When, however, there is a horizontally shared task of legal interpretation and application, the superior court's determinations are given *institutional priority* over those of an administrative tribunal. The superior court's decision represents the institutionally appropriate determination and displaces, to the extent that it diverges from it, the decision reached by an administrative tribunal.

It is, of course, often difficult to ascertain exactly how an institution is structured. Although organizational institutions are premised on horizontal and vertical task differentiations, it is common for there to be a certain degree of 'fuzziness' as to when tasks are horizontally shared and when one institutional agent possesses vertical superiority over another. With respect to the vertical priority of superior courts over administrative tribunals over a shared task of interpretation and application of law, however, I do not believe there is much fuzziness. The most basic consideration supporting my claim that superior courts always possess vertical superiority over shared tasks is the simple fact that curial interpretations have always supplanted administrative interpretations. In the event that the superior courts have arrived at an interpretation of law that conflicts with that of an administrative tribunal, the interpretation favored by the superior courts has received institutional uptake (that is, other institutional agents have treated the superior court's decision as the one that is to be followed) until, perhaps, such a decision by a superior court is itself supplanted by an appellate court that possesses priority over the superior court. *My claim that the superior courts always possess vertical superiority over administrative tribunals is an assertion of institutional fact.* Although I think it unlikely, this fact is liable to change if Canada's inter-institutional government structure changes.

Simply identifying that superior courts possess vertical priority over administrative tribunals when interpreting and applying law is insufficient to establish that this priority ought to be exercised. First, and least significantly, the superior courts and the administrative tribunals may be in agreement over how to interpret and apply the law in a particular case. In such circumstances, there would generally be little reason for the superior courts to intervene.³¹³ When the superior courts fundamentally *agree* with the decision of another institutional

interpret law in a 'judicial manner' if done ancillary to a statutory scheme. If, for instance, an administrative tribunal must answer a question that is within the core powers of a superior court (such as the interpretation of the *Charter*) in the process of carrying out a role assigned to it by the legislature, the intrusion into the superior courts protected jurisdiction is permissible and the task of legal interpretation becomes a horizontally shared one between the superior courts and the administrative tribunals, with the superior courts possessing vertical priority.

³¹³ While there is generally little reason for the courts to intervene, such issues as the appearance of partiality might provide grounds for the superior courts to render their own assessment of what the proper resolution of the matter ought to be.

actor that shares a certain task, exercising their vertical priority over the task is, barring confounding circumstances, pointless.

Second, and more significantly, superior courts may recognize that even though they possess vertical priority over a task, there are pertinent reasons of deference and restraint counseling that they ought not to exercise that priority. Administrative tribunals are established to achieve legislative objectives. They exist because legislatures believe that there is some advantage in having these tribunals, rather than the superior courts that would otherwise possess jurisdiction, adjudicate particular matters. Legislatures create administrative tribunals because they believe that they will be better suited to handle the volume of disputes, be more competent with technical issues, have more appropriate structures or procedures, be more efficient in resolving disputes, or have greater accountability to affected parties than the superior courts. In circumstances wherein the superior courts possess vertical priority over the horizontally shared task of the application and interpretation of law relative to an administrative tribunal, they therefore need to ascertain whether there are sufficient reasons to believe that a tribunal is more apt to procure legislative objectives than the courts.

C. Administrative Authority for Obtaining Institutional Objectives

Administrative *authority* over the interpretation and application of law is established either by showing that a tribunal is more *expert* than a court to arrive at a decision that achieves the legislative objectives, or by showing that a tribunal *functions* in such a way as to make it better-situated to arrive at such a decision. By demonstrating superior administrative authority in either or both of these respects, grounds for a posture of judicial deference are established for the courts.

1. The Expertise of Administrative Tribunals

An administrative tribunal is regarded as being more ‘expert’ than a court when it is composed of individuals that, either because of their initial knowledge base or background, or their acquired familiarity with a particular subject matter, are better able to understand the complex matters that are dealt with by the tribunal. The expertise of such individuals gives courts reason to trust the administrator’s understanding of how best to achieve the legislative objectives underlying a particular statutory regime. The presumption is that the agent with a greater understanding of a particular subject matter will be better able to interpret and apply the law so as to make it accord with legislative objectives. This expertise provides a strong second-order reason for administrative authority \and hence provides a foundation for judicial deference.

(A) The ‘Natural’ Expertise of Administrative Tribunals

The first form of administrative expertise is what we might refer to as ‘natural’ expertise. An administrative tribunal possesses natural expertise if it is composed of individuals with an inherent knowledge of the sort of subjects addressed by a statutory regime. A tribunal that adjudicates breaches of environmental laws, for instance, may be composed of well-regarded scientists that have an extensive education and experience in the field of ecology. The presence of these scientists, one may presume, ensures that when the tribunal interprets the meaning of particular laws that are designed to protect the environment, it will have a more adequate understanding of how a certain interpretation will foster the legislative objective of protecting the environment than a superior court.

Administrative tribunals may therefore possess a natural expertise over superior courts about how best to determine certain legal issues. This comparative expertise will exist when decision-makers on the tribunal are selected on the basis of their education, background, training, or other sorts of features that will give them the requisite knowledge base to deal with the unique sorts of matters they will face. This form of expertise exists only when a tribunal possesses a *specialized* knowledge that is necessary adequately to handle the sorts of issues in play. Superior court judges are legal *generalists*. They will tend to have a good grasp of how particular interpretations of law will affect the legal system as a whole, but will not tend to have unique knowledge about how a specialized statutory program can best achieve its objectives. Judges (typically) are not trained as ecologists, for instance. They will therefore lack at least some of the knowledge necessary adequately to interpret environmental protection laws.

(B) The ‘Acquired’ Expertise of Administrative Tribunals

Administrative expertise may also be ‘acquired’ through constant handling of similar sorts of issues. When a tribunal consists of members that are appointed to permanent, or at least lengthy, tenures, those members will almost certainly develop a familiarity with the subject matter they are appointed to adjudicate. Acquired expertise is demonstrated with tradespersons who learn their trade through on the job experience. A tradesperson that has been working at his or her trade for several years, even if not formally educated in the trade or not possessing any unique knowledge based entering the trade, will learn how the trade works and through time begin to master it. The same sort of reasoning can provide grounds for tribunal expertise. Even if tribunal members possess no special training or backgrounds that makes them likely to possess expertise relative to a superior court, a tribunal that consists of members that have enjoyed, and likely will continue to enjoy, lengthy tenures can be presumed to have developed a good deal of familiarity with a particular statutory regime. Its members therefore may be much more likely than a superior court to understand how a certain interpretation or application of law will further legislative objectives.

2. *Functional Reasons for Administrative Authority*

A second platform for an administrative tribunal's authority over superior courts is derived from how an administrative tribunal functions. While expertise-based reasons focus on the possibility of administrative tribunal actors possessing a superior knowledge base to superior court judges, function-based reasons stem from a tribunal's procedures and structures. Superior courts often follow very different processes and have a very different structure from those of administrative tribunals. When these divergent administrative procedures and structures allow a tribunal to be better placed to achieve legislative objectives, there are grounds for administrative authority and judicial deference.

(A) Procedural Reasons for Administrative Authority

Superior courts are tied to particular ways of proceeding. While these procedures of the superior courts may, perhaps, be apposite for the adjudication of legal matters between two disputing parties, it is not at all clear why court procedures will be beneficial for complex statutory interpretation in a specific area of legal regulation. For instance, superior courts are required to adhere to the adversarial (rather than the inquisitorial) system of adjudication. The limitation of such a system, however, is that it likely prevents a multitude of parties that may be affected by a decision from having their concerns adequately raised. Administrative tribunals that have procedures in place that enable them to play a more investigative role are therefore more apt for making decisions involving polycentric questions. When the interpretation of a particular legal provision will have significant ripple effects beyond the confines of a particular dispute between parties, an inquisitorial method of adjudication has significant advantages. As Fuller notes, as a general rule, the more likely it is that the determination of a legal matter will have polycentric effects, the less appropriate adversarial adjudication is for the resolution of that matter.³¹⁴

The nature of certain legal matters will therefore dictate which sorts of procedures are best-suited for their resolution. Superior courts ought always to be aware of their procedural limitations. When administrative tribunals possess procedures that are more adept at arriving at the best outcomes, this provides a significant reason to believe that their decisions are authoritative over those of a superior court.

(B) Structural / Coordination-Based Reasons for Administrative Authority

As noted in my earlier analysis of Raz's theory, an important reason to believe that another agent possesses authority over us is if they can better coordinate solutions to common problems. Sometimes we are not as well-placed as another individual to institute our determination of how best to achieve some

³¹⁴ Lon Fuller, 'The Forms and Limits of Adjudication', 398

end; others are often better able effectively to implement their solution than we can. In such circumstances, we may secure a more desirable outcome by adopting and supporting the other person's solution than trying to implement our own. This sort of reasoning can provide relevant grounds for administrative authority over the superior courts.

Administrative tribunals are embedded within a statutory framework that presumes that they will make certain sorts of decisions. Legislatures construct their scheme for administrative regulation with the assumption that these tribunals will be able to make the sorts of decisions that they are intended to make. Further, administrative tribunals are typically a component part of a larger administrative regime that investigates, enforces, and develops a specific area of legal regulation. These considerations suggest that administrative tribunals may be better able to implement their decisions in a particular regulatory environment than a superior court. Even if superior courts may be more apt decision-makers over a certain legal matter, either as a result of their superior expertise or their procedural and structural advantages, it may nevertheless be unwise for the courts to try to implement their preferred solutions.

D. Proper Limitations on Administrative Authority

An administrative tribunal's authority is grounded in a claim that administrative agents are either more knowledgeable or are functionally better suited to making certain sorts of decisions. Judicial recognition of either of these reasons provides grounds for judicial deference. *A superior court ought to defer to an administrative tribunal when it is more likely that, by adhering to its decisions, the superior courts will better secure institutional objectives.* This administrative authority and correct correlative posture of judicial deference, however, is always premised on two key considerations.

Scope Limitations

First, reasons of administrative authority (whether based on expertise or function) apply only within a particular *scope*. That an administrative tribunal possesses greater expertise or is better placed to determine certain matters does not imply that it will be authoritative over all matters. Reasons of authority are always bounded – operating properly only within fixed and limited realms. An important task for the courts (as well as legislators and administrators) is to sort out exactly how wide the scope of administrative authority ought to be. For instance, the tribunal assigned to adjudicate environmental disputes, staffed by individuals possessing expertise in ecology, will be unlikely to have authority over superior courts on issues that do not touch on the environment. Deference is only counseled when there are appropriate second-order reasons of authority to believe that adherence to another's decision is more likely to help one arrive at the

best conclusion. If a matter is beyond the scope of a tribunal's legitimate authority relative to a superior court, there are no grounds for judicial deference.

Detracting Reasons

Second, judicial deference is only appropriate if there are no pertinent reasons present that may weaken a tribunal's claim to authority. An administrative tribunal's authority, relative to a superior court, is premised on its expertise, structure, or procedures providing second-order exclusionary reasons for judicial deference. The presence of these second-order reasons creates a presumption that, by adopting the tribunal's particular interpretation or application of the law, rather than making to make its own decision, the superior courts are more likely to arrive at a better decision for securing institutional objectives. This presumption, however, is defeated if there are reasons to think that the second-order reasons that would ordinarily make a tribunal's decision authoritative are defeated. Demonstrating, for instance, that a tribunal was likely biased, insufficiently informed, or failed to follow certain procedures that are essential to its possession of authority, provide countervailing reasons to those of authority that justify superior courts setting aside a decision and embarking on their own analysis.³¹⁵ I term these sorts of considerations '*detracting reasons*'. Detracting reasons call into question whether the second-order exclusionary reasons that provide the basis for a deferential judicial posture exist in a particular circumstance. The presence of detracting reasons undermines a tribunal's ability to claim that its decision ought to be treated as authoritative by a reviewing court.

Detracting reasons erode our confidence in our second-order exclusionary reasons; they challenge our faith in the ability of a potential authority actually to function as an authority. As a simple example, assume I know that my friend Jane is an excellent driver; in fact, she is a much better driver than I am. Jane, however, forgot to wear her glasses today and I know she has a serious loss of vision that, without the glasses, makes it very difficult for her to drive. While I would generally ask Jane to drive whenever possible, I know that asking her to drive today would be a mistake. Although Jane might possess more driving skill than I do, her failure to wear her glasses undermines my confidence in her ability to drive better than me.

Similarly, reviewing courts ought to acknowledge that a tribunal possesses authority with regard to a particular issue only if there are no conditions present that defeat its authority. Assume, for example, that a reviewing court identifies

³¹⁵ The analysis of detracting reasons provided in this section is incomplete and will be an important basis for future work. All I want to establish here is simply relevance of these sorts of reasons for administrative review. I am, unfortunately, unable at this point fully to enumerate the plethora of reasons that may function as detracting reasons. I will confine myself simply to explaining their nature and giving a few examples of the sorts of reasons that I have in mind.

that there is a close adverse connection between a few administrative tribunal members and a particular individual that is having her legal matter determined by the tribunal. While a reviewing court may recognize that the tribunal is more expert and better situated to handle the issue, nevertheless the outcome arrived at by the tribunal is difficult to trust as being authoritative. The presence of a probable bias amongst the tribunal members against the effected individual calls into question how much its assessment should be trusted.

Establishing that detracting reasons are present in a particular case, however, ought not necessarily to lead to the conclusion that an administrative tribunal's decision lacks authority and is undeserving of deference. If the detracting reasons are relatively trivial, they may be insufficient to show that a tribunal's decision lacks authority. In addition, the detracting reasons may only relate to certain aspects of a tribunal's decision instead of the whole of the decision. Reviewing courts need to determine the extent to which the presence of detracting reasons ought to weigh against reasons that would otherwise be persuasive second-order exclusionary reasons counseling deference; they need to be convinced that the presence of detracting reasons makes it more likely that a superior court will arrive at a better decision than the administrative tribunal.

E. (Non-Deferential) Reasons for Restraint

In Part II – 4, I made a critical distinction between specific reasons of *deference* and reasons of *restraint* more generally. Deference-based reasons involve an implicit claim that another agent's determination of a matter can provide second-order exclusionary reasons for us to act. With such determinations, we recognize that the agent better resolves how to act in order to secure our particular dependent first-order reasons. The agent is therefore treated as an authority that provides us with an important service, enabling us to resolve how to act better than we could have done independently of the authority.

Restraint-based reasons are *any* reasons to act on the basis of another's judgment rather than our own. While restraint-based reasons include second-order exclusionary reasons of deference, they also include first-order reasons for acting on another's judgment. We can treat another's judgment of how to act as providing either first-order or second-order exclusionary reasons for action. It is only when the latter sorts of reasons are present that we have grounds for their authority and a correlated proper posture of deference. While another's judgment may not always properly service our dependent reasons for action, it may sometimes be advisable for us to act differently than we otherwise would have and adopt another's judgment. If serious negative consequences are likely to ensue if we do not act in conformity with another's determination, there are grounds to restrain ourselves from acting as we otherwise might.

While judicial restraint may be based on virtually an unlimited number of reasons, there are two that are most prominent: preventing the proliferation of

judicial review and achieving harmonious government between legislatures, administrative tribunals, and courts.

1. *Preventing the Proliferation of Administrative Review*

Even if an administrative tribunal is less expert and less functionally apt to arrive at a good decision than a superior court, curial intervention may nevertheless be unadvisable because it will set a precedent that will cause a proliferation of administrative review applications. Our current system of review is plagued by a growing number of applications for judicial review of administrative decision-making. Superior courts in all provinces can barely handle their current caseload and as legislatures create more administrative frameworks to cover novel regulatory issues, this caseload is likely only to expand. This suggests that superior courts have good reason to be careful about how freely they exercise their review powers. There are many, what Kavanagh calls ‘prudential’ reasons for why our courts ought not to be puritanical about the imposition of judicial decisions. When courts use their (legitimate) authority to interfere with a tribunal’s decisions, they establish grounds for future claimants with similar issues. Unless courts are prepared to make use of what Dworkin refers to as ‘checkerboard’ legal principles,³¹⁶ it will be difficult to prevent an increase in review litigation.

One way of proceeding is for the superior courts to identify that while a superior court may possess authority over a matter, it will only exercise that authority if a matter is of *significance* to a party or individual. A major aspect of contemporary judicial review is that the more important the matter, the more a court will be willing to intervene.³¹⁷ Superior courts, given the current backlog of cases, may therefore be well-advised simply to uphold the relatively inconsequential decisions of administrative tribunals that lack legitimate authority over them in order to ensure that they will be readily available quickly to remedy issues of greater importance. Refusing to interfere with an administrative tribunal that makes decisions about small by-law infractions, for instance, will enable the superior courts to be more readily available to review more significant matters such as immigration hearings or massive penalties and license revocations imposed by securities commissions.

2. *Harmonious Governance*

A second important restraint-based reason is to ensure a flourishing relationship exists between the superior courts, legislatures, and administrative tribunals. Excessive judicial interference with legislative and administrative decision-making may sow the seeds of discord, leading to a situation in which there is hostility between different government institutions. Superior courts ought

³¹⁶ Ronald Dworkin, *Law's Empire*, 178-186

³¹⁷ See *Baker*, at par. 25.

to therefore exercise their powers to interfere cautiously, showing an attitude of respect at all times to the decisions reached by other decision-makers. It may even be the case that, as with the situation we considered with our friend Bob earlier,³¹⁸ that sometimes treating another's decision that lacks the necessary features of authority as though it possessed it may be beneficial to preserving a good relationship. While adopting such a decision may lead to a sub-optimal outcome with respect to the actual issue under review, it may nevertheless create positive outcomes independent of the case at hand.

Problems with Restraint-Based Reasons

Non-deferential restraint-based reasons, of course, need to be exercised cautiously. Generally, these sorts of reasons must function clandestinely to be effective; judges 'pretend' that another actor possesses legitimate authority over them while concurrently being well aware that they do not. A significant limitation of these sorts of reasons therefore is that they cannot be overtly addressed in judicial decisions. Telling a litigant, for instance, that they must accept an administrative decision because their issue does not raise important enough interests or because curial interference will raise the ire of the legislative branch, is obviously going to be unfulfilling for a party with a legitimate claim. Further, particularly when reasons of harmonious governance are in play, admitting that a tribunal lacks authority relative to a superior court but nevertheless will be treated as authoritative is self-defeating. This would be akin to telling our friend Bob that while he's an idiot, we will nevertheless pretend his judgment is authoritative in order to help maintain our friendship with him. The generally necessary clandestine nature of non-deferential restraint-based reasons means that superior courts ought to be weary of their overuse; however, in certain limited circumstances it is clear that they may provide persuasive reasons for curial non-interference with administrative decision-making.

F. Administrative Authority and the Rule of Law

There are two central government objectives that judicial review is designed to advance: protecting the rule of law and upholding democracy. Canadian superior courts recognize that they must ensure the reasonableness, procedural fairness, and legality of administrative procedures. They also identify that they have an important duty to uphold democracy and respect democratic processes. In Part III – 3, I challenged the basic view that the persons and processes of the superior courts are necessarily better suited to secure rule of law objectives on both formal and substantive conceptions of the principle. While it is true that the courts do have a constitutional duty to uphold the rule of law, they

³¹⁸ See Part II – 4

must be aware that their interference with administrative tribunal decisions may undermine the rule of law.

Courts must pay careful attention to the reasons why administrative tribunals may be better authorities for determining how to secure the rule of law in particular circumstances. When administrative tribunals are better able to facilitate the attainment of the rule of law, or are more expert in understanding its requirements in a specific area than the superior courts, judicial deference is advisable – barring the existence of competing considerations. *Rule of law objectives provide important positive first-order reasons for judicial interference with administrative tribunal applications and interpretations of law.* The presence of these reasons, again, does not mean that judicial interference is always counseled on rule of law grounds. If courts are less likely to secure the rule of law through their interference rather than with their acquiescence, deference to the administrative decision is the wise policy.

This, of course, comes with important provisos. First, the rule of law is but one important objective of judicial review. Administrative authority may be limited in scope. It is possible, for instance, that while an administrative tribunal's decisions may be authoritative relative to the courts for achieving the rule of law, their decisions may not be authoritative, for instance, for securing democratic objectives.

In addition, on most prevalent conceptions of the rule of law – whether formal or substantive – the principle usually consists in a series of different requirements. For instance, on Fuller's conception of the rule of law, it would be insufficient for the rule of law for only one of the eight desiderata to be achieved. If a system is to conform to the principle, all eight aspects must be upheld to a tolerable extent. The upshot is that an administrative actor may well be more authoritative for preserving one (or more) of the desiderata of the rule of law without being authoritative over all of them. Assume that a tribunal interprets certain statutory provisions in its particular context in a manner that is inconsistent with how other governmental actors interpret the provisions in other contexts - and it has warned possible litigants that it will do so in its future decisions. Now imagine that an individual complains that the tribunal's decision was contrary to the rule of law because it relied on an interpretation of law that is at variance with how that law is interpreted by other institutional actors. The court faces an interesting rule of law dilemma. The tribunal decision is authoritative for preserving rule of law concerns of predictability. In the context, the tribunal has made it clear through public notice what grounds will apply for future decisions. Yet at the same time the rule of law objective of ensuring a non-contradictory legal system is undermined by the administrative tribunal's particular interpretation of the law. The tribunal's decision is therefore more likely to secure certain aspects of the rule of law while at the same time undermining other aspects. Curial deference will simultaneously both achieve and hinder the rule of law.

This situation brings back into play once again the importance of scope limitations. Administrative authority, even with respect to a single cluster of objectives (such as the rule of law), is always bounded. Superior courts must acknowledge that the rule of law, on almost every definition, consists of many aspects and that administrative authority may pertain only to certain aspects of the rule of law and not to others. Thus, courts may find themselves needing to balance divergent rule of law elements in order to determine if curial interference is counseled. The *significance* of different aspects of the rule of law will need to be balanced by the courts, in addition to an account of how a particular tribunal can secure these particular aspects better or worse than the courts. Determining which aspects of the rule of law are more or less important and in what contexts is far beyond the scope of my project, but this nevertheless is a critical task facing the courts in both the present and the future of administrative law.

G. *Procedural Fairness*

A serious source of confusion that ought to be addressed with respect to some of the rule of law concerns is the precise way that considerations of ‘procedural fairness’ fit into Canada’s scheme of administrative review. Canadian courts have been unclear as to how procedural review is supposed to function in relation to substantive review. Our jurisprudence suggests there is a distinction to be made between procedural and substantive review. A superior court may inquire either into whether an administrative tribunal’s decision followed procedures that were appropriate or whether the ultimate decision arrived at by the tribunal was correct or reasonable, depending on what standard of review is considered appropriate.

A central question Canadian courts need to address is *why* procedural fairness is considered to be an independent ground for review from substantive review. My suggestion is that there are three basic reasons in Canadian case law for why courts ought to engage in procedural review: (1) to ensure that an administrative decision is *authoritative*; (2) to make administrative actors conform to their *statutory requirements*; and (3) to uphold the *legal rights* of individuals affected by administrative decisions. Of these, only the third sorts are distinct reasons for procedural review. The first sorts of reasons ought not to be separated from the substance of administrative decisions and the second is indistinguishable from *ultra vires* issues in jurisdictional review. Rights-based reasons for procedural fairness, however, are derived from the judicial role in preserving the rule of law and do create a limited independent ground for procedural administrative review. I want quickly to examine the differences between these sorts of matters traditionally grouped under the simple heading of ‘procedural fairness’ in order to demonstrate that these distinct grounds ought to be treated differently by courts and addressed in different ways.

1. *Procedural Review, Authority, and Detracting Reasons*

The first sort of reason why a reviewing court may be concerned about administrative procedures is because they are integral to an administrative agency's possession of legitimate authority. *A failure by administrative tribunals to follow appropriate procedures undermines the confidence of the superior courts that an attitude of deference is appropriate.* Deference is only warranted if the courts believe that by adopting a tribunal's determination, rather than engaging in their own analysis, a better decision will be made. Superior courts tend to think that the substance of a decision is likely to be sound because it was based on the decision-maker following reliable procedures that, in the circumstances, make them trust another's judgment. Generally, when we trust in another agent's procedures, we do so because we believe that they are likely to lead to good decisions. A failure to follow these appropriate procedures, as noted above, provides detracting reasons that undermine administrative authority which undermine the authority that another would otherwise possess over us.

2. *Statutory Requirements of Tribunals*

While administrative tribunals often have a certain degree of discretion and control over their procedures, there are almost always certain explicit legislatively mandated requirements that they must follow. First, legislatures usually establish a series of necessary procedures in an administrative tribunal's empowering statute. Administrative actors are obligated to follow *all* the specified requirements set out in their empowering statute. Second, most jurisdictions in Canada have passed more general administrative procedures acts.³¹⁹ These provide blanket procedural requirements for all administrative actors. Unless an administrative tribunal's empowering statute *explicitly* exempts the tribunal from the general statutory procedures act, all the requirements of the act must be followed. When these statutory requirements are not followed, administrative tribunals act beyond the scope of their appropriate powers – that is, they act *ultra vires*. Legislatures design tribunals to operate in a particular way. Since all powers of an administrative tribunal must be derived from statute (they do not possess any inherent jurisdiction like a superior court), they must conform to statutes in order to make decisions that are legally valid.

Procedural violations may therefore raise the same sort of jurisdictional issues as would be present if a tribunal acted without an explicit grant of power. Notably, these sorts of violations are very different in nature than procedural violations that undermine the legitimate authority of an administrative tribunal with respect to horizontally shared tasks with superior courts. A failure to follow statutorily mandated procedures leads to a loss of the legal power that a tribunal

³¹⁹ Such as Ontario's *Statutory Powers Procedure Act* or Alberta's *Administrative Procedures Act* and Alberta's *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3

might otherwise possess to make a particular determination. It strips the tribunal of its jurisdiction, leaving its resulting decision null and void.³²⁰

3. *The Legal Rights of Affected Individuals*

A final ground for procedural fairness is considerations of the legal rights of individuals. The common law and the Canadian constitution, especially the *Charter*, provide important grounds for the courts to review tribunal decisions for procedural fairness. In this case, what procedural fairness means is that a tribunal has denied an individual certain rights that they were obligated to uphold according to established legal requirements beyond those mandated by the legislature. An administrative failure in this regard, like a failure to follow the procedures mandated in enabling statutes and other legislated procedures, would be similar to an *ultra vires* act, although with different consequences than a true jurisdictional error. Tribunals, like all other governmental actors, may not violate the legal rights of individuals, and when they do, it is within the proper jurisdiction of the superior courts to ensure that these rights are upheld and that a sufficient remedy is provided.³²¹

A jurisprudential differentiation of these reasons for procedural fairness would be of enormous value moving forward. Courts ought to clarify whether a failure to follow a certain procedure is problematic because it: (1) undercuts a tribunal's authority, (2) violates legislative will, or (3) denies a legal right to the individual. The effect of a confirmed violation in each circumstance ought to lead to different outcomes. If procedural fairness violations undercut administrative authority by functioning as detracting reasons, they may be mitigated by other features of the administrative tribunal that still gives a reviewing court reason to trust that the decision reached is authoritative over it. A clear failure to conform to a statutorily mandated procedural requirement, on the other hand, removes the issue of legitimate authority from consideration. The procedural violation is a

³²⁰ This analysis assumes, for the sake of simplicity, that there is a clear violation of a statutory provision that is not subject to interpretation. An outright and obvious violation of a procedural requirement will lead to a nullification of a tribunal's decision. Nevertheless, there is often a good deal of uncertainty about what statutory procedural requirements may necessitate in particular cases. For instance, if a statute requires a tribunal to grant a 'fair hearing', a good deal of interpretive flexibility exists. In order to determine if a tribunal has lost its jurisdiction by failing to grant a fair hearing a superior court will have to decipher the meaning of the provision – and it may be the case that a tribunal will have a better understanding of what is required for a fair hearing, in the circumstances than a court. Curial deference even to administrative interpretations of its own procedural requirements may therefore be appropriate at times.

³²¹ There is, however, a possibility that a *statutory* denial of a procedure to a litigant may exist. Legislatures may believe that a certain procedural right, embedded in the common law is inapt for the functioning of a particular tribunal. Provided that the procedure denied is purely common law in origin (rather than constitutional), administrative actors would be under no legal duty to ensure that the procedure is followed.

jurisdictional violation and necessitates that a decision be tossed out, either to be determined anew by the tribunal or to be decided by the reviewing court, provided of course that the reviewing court itself has jurisdiction. Denying a litigant their legal or constitutional rights, finally, generally gives a large range of remedial discretion to the reviewing court. The court must ensure that the rights of the litigant are upheld or else give good cause for why the rights are legitimately violated in the particular case (for instance, with a Section 1 analysis in a *Charter* rights case). These breaches can be remedied in a number of different ways – ranging from simple declaratory relief whereby a court simply notes that the administrative tribunal acted wrongly but without directing it to take any concrete steps, to outright nullification of the decision reached and prohibiting the tribunal from rehearing the matter, to more intermediate forms of relief such as granting damages to an aggrieved party or requiring the tribunal to reexamine certain aspects of its decision.

H. Accounting for Tribunal Reasons when Courts Possess Superior Authority

I should also note how my analysis of deference and authority is relevant to how superior courts handle the reasons for a decision provided by administrative actors. Even if an administrative tribunal does not possess authority over a court, it would be foolish for the court nevertheless completely to ignore the sorts of reasons proffered by the tribunal for its decision. This is true for three major reasons. First, by looking to the reasons that a tribunal relied upon, courts may be able to save themselves extra time and resources. A tribunal may have put a vigorous, good faith effort into its decision, carefully addressing, to the best of its ability, a number of key issues. The reasons present in a tribunal decision may therefore offer courts a good deal of help in arriving at their decision. Paying attention to these reasons makes it more likely that a court will arrive at a better decision itself.

Second, by addressing an administrative tribunal's reasons for a particular interpretation of the law and then explaining why they agree or disagree with it, superior courts provide an important pedagogical service. They inform both the tribunal whose decision is immediately under review, as well as others that may be affected by possible judicial review in the future, what will be regarded as appropriate or inappropriate reasons. By making clear why a tribunal decision is flawed or why it succeeds, superior courts are likely both to improve the quality of administrative reasoning and to prevent the proliferation of judicial review applications.

Finally, addressing the sorts of reasons proffered by an administrative tribunal for a decision, as noted in Kavanagh's theory, is important for maintaining amicable relations between divergent institutional actors. If superior courts completely ignore the reasons of administrative tribunals over whom they possess greater authority and a vertical task priority, they fail to show an

important form of respect for the work done by other institutional actors in the meta-institution of government. By completely ignoring the reasons of a tribunal, a court shows a lack of respect for the tribunal, the legislative body that established it, and perhaps even executive actors (such as cabinet ministers) that appointed tribunal members. Even if superior courts must ultimately reject the reasons of a tribunal for a particular decision, they must nevertheless recognize the effort that the tribunal put into arriving at it.

In review proceedings in which the superior courts possess both vertical superiority and legitimate authority over administrative interpretations of law, significant attention must always be paid to the reasons of a tribunal. However, this is not because courts must determine whether the reasoning of a tribunal leads to a fully justified decision as, for instance, is the case on Dyzenhaus' deference as respect model. On my analysis, courts ought to pay attention to the reasons of administrative tribunals over whom they possess authority simply because it will lead to positive consequences. Addressing and respecting the reasoning process of administrative tribunals is likely to improve the quality of judicial and administrative decisions, reduce the likelihood of future similar judicial review proceedings, and helps to establish a healthy relationship between divergent institutional actors.

The fact that superior courts can significantly benefit from the reasons of an administrative tribunal also provides important grounds, in addition to the rights of affected litigants to have an explanation, for requiring the provision of reasons. The duty for administrative actors to give reasons may therefore be grounded not merely in issues of procedural fairness but also in concerns about making better inter-institutional decisions.

I. Privative Clauses, Judicial Deference, and Judicial Restraint

The second major objective of administrative review, beyond preserving the rule of law, is to preserve democratic governance. Canadian courts recognize that they are charged with ensuring the rule of 'the people' rather than the rule of a particular individuals or interest groups. On Dicey's traditional model, the superior courts preserve the democratic will by upholding the intent of the legislature in legal interpretation. By ensuring that other branches of government (including administrative, executive, and adjudicative actors) behave according to laws established by the popularly elected and accountable legislature, the superior courts play an essential role in guaranteeing democratic governance.

The challenge to this simplistic picture of the curial role in administrative review is the legislative enactment of a privative clause that prevents courts from interfering with the administrative process. If a legislature clearly wishes the courts to stay out, and has said so in unequivocal language in its enactments, Dicey's traditional model is forced to concede that a reviewing court acts democratically illegitimately if it ignores the privative clause. While in Canada it

may be constitutionally prohibited by s. 96 fully to remove the review powers of a court,³²² a failure to abide by the spirit of a privative clause by the superior courts is anti-democratic.

As I argued in Part III – 4, however, superior courts are often well-suited to achieve participatory, substantive, and even reflective democratic objectives. The question we must always ask is: when are courts more apt to secure these democratic objectives than the legislatures? The arguments I provided earlier, however tentative, suggest that there may be circumstances in which the superior courts would be democratically unjustified in abiding by a privative clause. For instance, when a privative clause prevents the superior courts from getting a secretive tribunal publically to disclose its decision-making processes and reasons for decisions, it functions contrary to democracy. Citizens are not given the ability to assess what their government is doing or why it is doing it and hence they cannot make informed ballot box decisions. Acting *contrary* to a privative clause, in this case, would advance rather than undermine democratic objectives.

The interesting predicament of Canadian s. 96 jurisprudence, particularly post-*Crevier*, is that there is no clarity about how a privative clause is to be treated by the superior courts. While it is clear that a privative clause can never function as a complete bar to judicial review, it is unclear what sort of issues it can remove from curial oversight. My suggestion is that privative clauses ought to be interpreted as legislative signals that particular administrative actors are thought to possess authority relative to the courts for determining particular matters. Consequently, judicial interference will undermine the ability of that administrative agent to exercise their authority, and thus judicial deference is necessary. *Privative clauses, when legitimate, therefore ought to be heeded by the courts not because it necessarily would be undemocratic to ignore them, but rather because government objectives will better be secured if courts remain out of the decisions.*

The legislative presumption that the superior courts will necessarily lack authority relative to the administrative actors is, of course, questionable. In particular, over-inclusive privative clauses that are designed to protect all aspects of an administrative decision will almost certainly fail. There are scope limitations for the authority administrative actors possess relative to the superior courts and privative clauses must account for these. Privative clauses must be custom tailored by legislatures so as to protect only the appropriate realms of

³²² While S. 96 is only essentially an appointing power, complex jurisprudence related to the separation of powers and the role of the superior courts in Canada's constitutional structure have extrapolated this provision to mean much more than its surface suggests. In particular, see the important Canadian cases: *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704, *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252. Also see T.A. Cromwell's 'Aspects of Constitutional Judicial Review in Canada' 46 *Supreme Court Law Review* (1995).

administrative authority or, consequently, risk limits to the privative clause being read in by reviewing courts. On my model, the interpretation of privative clauses is therefore captured within the analysis of deference and authority rather than within discussions of democracy and the rule of law.

Kavanagh's concerns about inter-institutional comity are also clearly relevant here. While courts may have the power to circumvent privative clauses and read them down pursuant to s. 96, they also need to recognize that to do so may come at a cost to their relationship with the legislative and administrative branches. Even if legislatures are wrong in asserting that an administrative actor possesses authority over a superior court, courts ought not completely ignore a legislative provision. In reading down a privative clause, courts need to explicate where curial authority begins and ends relative to administration and they must do so in a way that recognizes the legitimate legislative concerns that gave rise to the privative clause.

In addition, courts must assess the environment in which they act. If they are faced with a hostile legislature, administration, or even public that will take great offense even to legitimate judicial tinkering with a privative clause, the courts may have important restraint-based reasons to acquiesce. Sometimes courts must simply struggle through a terrible movie in order to ensure that their friendship remains strong with other branches.

J. Reexamining the Standards of Review

In light of all of the above, I think we have adequate grounds to believe that the Canadian standard of review analysis in administrative law would be greatly improved if reviewing courts forced litigants to develop arguments about whether a tribunal possesses authority, whether there are detracting reasons present in a particular case, and whether there may be confounding (non-deference-based) reasons for why judicial restraint would be wise. Canada's contemporary two standards of review, reasonableness and correctness, are both confusing and seem to miss the very point of judicial deference. As I argued both in Parts I and II, it is incredibly difficult to establish any general criteria for what would make a particular decision 'reasonable' that would differentiate it from a 'correct' decision. The current standard of review analysis differentiates the correctness standard from the reasonableness standard according to the rather unhelpful test of whether the decision is one at which the reviewing judge would have arrived. A correct decision is one that a judge ultimately would have come to, a reasonable decision is one that is (sufficiently) justifiable, but nevertheless differs from what a reviewing judge would have determined. This leads to a strange situation in which a judge, in order to apply the reasonableness standard, must concede that the administrative decision is incorrect but nevertheless not so wrong as to warrant curial interference; the tribunal's decision is both reasonable and wrong.

Yet what seems to be animating the approach of Canadian courts to administrative review, post-*New Brunswick Liquor*, is an awareness that sometimes and over certain subject matters, tribunal interpretations of the law are likely to be better than those that a court could provide. Wilson's comments in *Corn Growers* continues to resonate with reviewing courts - "[c]ourts... may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work..."³²³ Quoting Evans, Wilson further acknowledged that: "[o]ne of the most important developments in contemporary public law in Canada has been a growing acceptance by the courts of the idea that statutory provisions often do not yield a single, uniquely correct interpretation."³²⁴ Given that there may be a number of possible interpretations that adequately fit a statutory context, it is unclear why a court's assessment must always be regarded as the correct one. An administrative tribunal that is more familiar with a particular regulatory scheme than a court may be in a much better position to interpret the applicable statute. If this is true, it is difficult to understand the reason why a court would refer to an administrative interpretation that varies from the court's view as 'reasonable' or even 'justified' but also possibly 'incorrect'. The choice between reasonableness review and correctness review distorts the appropriate attitude of judicial deference and presumes an archaic approach to legal interpretation in which only those interpretations reached by judges can be regarded as 'correct'.

The current standards of review, I suggest, therefore ought to be set aside and a new approach instituted. Canadian law requires probative standards for judicial review that are better justified by the concept of authority that is the animating spirit behind the doctrine of judicial deference. Assuming that a court possesses vertical priority over a horizontally shared task of the interpretation and application of law, its primary concern in administrative review is simply whether there are sufficient reasons of authority to uphold an administrative tribunal's decision. If there are sufficient reasons to support a claim to administrative authority, it need not embark on a reexamination of the tribunal's decision; otherwise, the decision should be examined. *The issue in administrative review therefore is not whether a tribunal's decision is reasonable or correct, but whether a reviewing court has sufficient reason to believe that judicial acquiescence ultimately will lead to a better outcome.*

My proposal is that Canadian courts replace the contemporary standards of correctness and reasonableness with standards of 'administrative authority' and 'curial authority'. When an administrative tribunal possesses greater authority than the reviewing court over a particular matter of legal interpretation that is horizontally shared, the court ought not to call the administrative decision into question – unless, of course, there are sufficient detracting reasons that undermine the grounds for the tribunal's authority. If, however, an administrative tribunal

³²³ *Corn Growers*, 1336

³²⁴ *Ibid*

does not possess greater authority than the court, the court ought to reexamine the matter for itself, unless there are pertinent restraint-based reasons suggesting why curial involvement may still be inappropriate.

K. Legislative and Administrative Responsibility

My analysis, while directed towards the superior courts and appellate courts developing appropriate principles for administrative review, nevertheless has important implications for legislative actors. Identifying administrative authority as the lynchpin of judicial deference allows legislatures certain guidelines for how to construct administrative tribunals. By requiring the appointment of specialists in certain areas to a tribunal and granting them both incentives and protections for continuing service on the tribunal, legislatures establish expertise-based reasons of authority that will command judicial deference. In addition, by structuring a tribunal and its processes in a way that is well-suited to achieve the legislative objectives behind a statutory regime, the legislature further ensures that administrative regimes will be given judicial deference. To guarantee that tribunal interpretations of law will receive judicial deference over horizontally shared tasks, legislatures need to establish tribunals that are well-suited to achieve their objectives. Thus, *issues of institutional design are not simply a concern of the courts but must also be a concern of the legislatures and of administrative tribunals themselves.*

A system of administrative review premised on questions of authority and deference provides a meaningful opportunity for inter-institutional *dialogue* between the courts, legislatures, and administrative tribunals. Administrative review jurisprudence, centered upon authority and deference, will identify the sorts of considerations that legislatures ought to take into account to prevent judicial interference with tribunal decisions. By recognizing the reasons that courts treat as appropriate grounds for administrative authority, legislatures can adjust the composition and structure of administrative tribunals to ensure that they will possess authority relative to superior courts. In addition, administrative tribunals that have flexibility with respect to their personnel and procedures can arrange their institution in such a way as to secure and maintain their authority over the superior courts. By instituting appropriate measures, these tribunals can ensure that they are sufficiently knowledgeable and well-placed to decide matters within the scope of their delegated powers.

L. Overcoming Objections

I suspect few will dispute my claim that Canadian administrative review jurisprudence suffers from a serious lack of coherence. The pragmatic and functional analysis, first developed in *Puspanathan* and continued through to

Dunsmuir and beyond, does little more than provide a series of (inclusive) factors for reviewing courts to consider. Reviewing courts are left with an unclear task, being given little more than a series of key issues to watch out for while having no unified theory of how the disparate issues fit together. The consequence of this is an exceedingly high degree of unpredictability for judicial review applicants and respondents, with many not even being sure what they must demonstrate to the courts in order to be successful.

The purpose of my analysis is to unify administrative review around the correlative concepts of deference and authority, thus making the key task for litigants in review proceedings the advancement of grounds for and against administrative authority over the interpretation of the meaning of certain legal provisions. *Respondents* in judicial review proceedings have the basic task of showing both that an administrative tribunal possesses the constitutional and statutory jurisdiction to determine the matter in question, and further that the decisions reached within that jurisdiction are supported by authoritative reasons that demand curial deference. By showing this, respondents make a case for judicial non-interference with an administrative decision. The task for *applicants* is to demonstrate that a superior court has jurisdiction to review a matter and then one or more of the following: that an administrative tribunal lacked the jurisdiction to hear a matter, that a superior court is better placed or more expert to make a particular decision than a tribunal, or that an administrative tribunal's authority was compromised by the presence of detracting reasons. By showing any of the above, applicants provide grounds for judicial interference with a tribunal's decision.

In closing, I now want to address two important objections that may be raised to the basic framework that I have proposed herein.

Excessive Complexity

Likely the most important objection to my analysis is that it adds unnecessary complexity into an area of law that is already fraught with difficulty. As stated throughout, my goal is to restore a modicum of clarity to judicial review, yet it is unclear why I believe my analysis has done this. Administrative review is already intricate enough and adding a theoretical model centered on a contentious and difficult analysis of authority is likely simply to exasperate an already critical illness. If my theory were to have uptake in our system, the argument might go, the courts would be overwhelmed trying to sort out the contours of authority in simple judicial review proceedings. If professional philosophers are still unable to determine the meaning of authority and how it relates to deference, why do we think courts are likely to meet with success?

In response to an objection of this sort, I must admit that the nature of authority and the contours of a theory of authority are likely to be difficult to work out. Establishing how and when one institutional actor is in authority over another

is a problem that has received inadequate treatment in academic discourse. Further, there is still a good deal of disagreement as to what the proper conception of authority is – even if a general consensus seems to be emerging in favor of Raz's. While I think the clarifications and distinctions made within this work help to reduce some of the confusions about the role of authority in institutional settings, I must concede that my analysis is only a start and there is a great deal left to be sorted out. There are three reasons, however, why I think, even if my analysis will lead to incredible complexity, it is still to be preferred to the current approach.

First, my analysis allows reviewing courts to address head-on the sorts of considerations that are lurking behind their decisions anyway. Since *New Brunswick Liquor*, Canadian courts have recognized that there are circumstances in which other institutional actors may be able better to interpret the meaning of law than a court. If this is the case, there seems to be a latent appeal to authority in place from the start. A critical problem with Canada's current standard of review analysis is that it simply brackets the question, assuming that we can somehow move forward without ever needing to analyze the fundamental concept (authority) that lies at the heart of administrative review in the modern state. The lack of coherence in Canadian administrative review jurisprudence, as I hope I have shown throughout, is intimately related to a failure of the courts to articulate the animating philosophical conception of authority lying behind their understanding of judicial due deference. An analysis of authority therefore cannot be avoided and we do better to confront this rather than ignore it.

Second, while indisputably complex, my analysis reduces the standard of review analysis component of administrative review down to a single issue: are there sufficient grounds to believe that an administrative tribunal possesses authority over a reviewing court with respect to the issue under review? Instead of a convoluted inclusive list of factors, my analysis makes clear both to respondents and litigants their task in administrative review. Their arguments must focus on giving a reviewing court the necessary authoritative reasons and detracting reasons counseling either deference or interference. While in certain contexts it may be extremely difficult to assess who possesses greater authority, at least litigants know what they are expected to argue before the reviewing court.

Finally, my analysis allows a unified foundation upon which we can base future developments in administrative review jurisprudence. By making authority the key concept in administrative review, Canadian courts can acknowledge a single animating principle that can be fine-tuned through future decisions. I trust, as Lord Mansfield once famously noted, that "the common law [will] work itself pure."³²⁵ By being grounded in a core principle, important details, over time, can be expanded upon, clarified, and simplified. When there is a clear sense of what we are trying to aim at, it is much easier to work out how to get there. A lack of a

³²⁵ *Omychund v. Barker* (1745) 26 ER 15, 33

central core principle for judicial review, however, makes it very difficult for the common law to develop. Fishing in the dark, as demonstrated throughout the history of administrative law, is an ineffective way of moving forward. The theory that I have proposed herein, while incomplete, at least gives clear direction-posts for judicial energies. It shows what courts ought to be aiming to accomplish, even if it does not fully settle how to do this.

Rule of Law Concerns

A further serious objection to my analysis might be that it seriously impairs the judicial role in upholding the rule of law. Theorists such as Dyzenhaus and Allan insist that anything less than a complete reexamination of the grounds for an administrative decision by a reviewing court would make the judiciary derelict in their constitutional duty. My claim is that sometimes judges ought not to engage in a complete reexamination of an issue in review settings because to do so would lead to decisions that are less likely to procure institutional objectives. If administrative tribunals are more apt to arrive at good decisions than the courts, a complete reexamination of the issue by the courts is, at best, a waste of judicial effort and, at worst, leads to inappropriate judicial interference that subsequently destroys legitimate legislative and administrative efforts to secure important government objectives. So how do I respond to the argument that a regime of administrative review founded on the correlative concepts of deference and authority will lead judges to be derelict in their duty?

First, I can point to the fact that, at least sometimes, a policy of deference is recommended precisely because curial interference will undermine the rule of law itself. As I have argued above, superior courts are not always the best venues for upholding the rule of law. If there are other institutional agents that can better achieve rule of law objectives and if curial reexamination of either some or all of their decisions will compromise this, deference is advisable on rule of law grounds alone. I find no reason why Dyzenhaus or Allan ought to resist this conclusion. If the primary purpose of judicial review is to ensure that government decision-making is fully justified and if for some reason and with respect to some issues the superior courts' interference with a decision will undermine this objective, the courts ought not to engage in a complete reexamination.

What Dyzenhaus and Allan may dispute is whether a complete curial reexamination of an administrative decision will *ever* undermine the rule of law. Such an argument, however, is very difficult to maintain. While there are strong reasons to think that courts are beneficial in many cases for preserving the rule of law on most standard conceptions of the concept of the rule of law, we must not romanticize the courts. Institutional drawbacks, particularly those associated with the enormous costs to litigants in finances and time, give the superior courts warts that detract from their princely appearance. If the goal of the rule of law is to ensure the public justification of government decision-making and if superior

court interference (or the threat of it) will prevent aggrieved parties from raising legitimate worries, they ought to be extremely hesitant when interfering in administrative processes that can rectify these curial weaknesses.

This response to the challenge, however, can only go so far. My critic may grant that, while there may be a legitimate reason for the courts to neglect a complete reexamination of an administrative decision if to do so will serve the rule of law, deference ought not to be heeded in any other respects. Judicial review must still function to reexamine all aspects of administrative decisions, provided that by doing so the rule of law is not undermined. Thus, judicial deference is *only* appropriate to uphold the rule of law; otherwise, superior courts must always reexamine all aspects of a matter.

My answer to this ultimately must end in an assertion - *the rule of law is neither the sole value that judges must preserve in judicial review, nor is it always the most important and therefore it must be cautiously balanced against competing institutional considerations*. Judges are component actors in a larger institutional scheme that seeks to secure a number of important objectives. The rule of law is but one of these. Our courts must therefore be alert to how the exercise of their review powers will affect the procurement of other institutional objectives. Judicial recognition of the unique abilities of other institutional actors, particularly administrative tribunals exercising statutory powers to interpret and apply law, to secure diverse institutional objectives is essential for the flourishing of a modern system of complex legal regulation.

Administrative tribunals are created to secure legislative objectives that, sometimes, will compete with certain rule of law objectives. A tribunal that regulates some aspect of industry, for instance, is likely to be concerned about how a particular interpretation of law will lead to greater industrial efficiency in a way that superior courts will not. Pursuit of this objective in legal interpretation may come at a cost to the rule of law. In order to achieve industrial efficiency, for instance, individuals may find tribunals making interpretations of law that markedly break from previous ones, thus undermining their expectations. A superior court reviewing such a tribunal decision will likely recognize that it is much better placed than the tribunal to determine whether the decision conformed with the rule of law. But the reviewing court is likely also to recognize that the tribunal possesses greater competence for interpreting how to secure industrial efficiency.

It would be a huge mistake for superior courts slavishly to make the rule of law the only relevant principle in legal interpretation. Even when they may possess greater institutional authority over another actor with respect to how to procure the rule of law, judges must nevertheless identify the importance of an administrative tribunal's expertise (if any) for securing non-rule of law objectives. Our courts must also recognize whether they are the best institutional actors for determining how ultimately to balance competing objectives. Here too we see the importance of authority and deference. Superior courts, when faced with a

problem of competing institutional objectives must be aware of how other institutional actors may have resolved the balance. How did the administrative tribunal balance the rule of law against economic efficiency? More importantly, how did the legislator that established the tribunal foresee the balance? There are limits to the institutional competency of superior courts for balancing competing institutional objectives and a policy of deferring to other institutional actors, when their competency is comparatively lacking, is essential if our system of governance is to flourish.

If my assertion is correct that the rule of law is a competing institutional objective that ought not necessarily be elevated above all others, our courts need to develop an account of when they are better equipped and worse equipped than other institutions for determining when other objectives ought to outweigh rule of law objectives. Yet again, this must involve the courts determining their proper placement in the deference and authority relationship. If there are other institutional actors that are better at the job, and no detracting reasons present, deference must be the right judicial posture.

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