Constructive Uncertainty in Public Law

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Abstract—Uncertainty exists when there is no single right answer to a question of law or fact, or to a question of the application of the law to the facts of a case. English public law has not sat well with this principle of uncertainty. That has at least been the orthodox position, expressed by both scholars and judges. In response, this article sets out a conception of constructive uncertainty, which posits that uncertainty might not simply exist, but indeed serve useful purposes. Three purposes are discussed: (i) *cautioning* constitutional actors in their relations with one another; (ii) *contextualising* the law to fit particular circumstances; and (iii) *cognising* constitutional actors of their institutional limits. Taken together, it is argued that constructive uncertainty can be systematically conceptualised using the three-fold model proposed. This is not a defence of uncertainty *tout court*. Rather, given recent judicial shifts toward certainty and bright-line rules, this article explores how uncertainty is present in, and can contribute to, public law. In turn, through a more systematic appreciation of the functions it may play, it is hoped

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that uncertainty can begin to be appreciated as a lens through which public law may be viewed.

I. Introduction

English public law has traditionally not sat well with uncertainty. As the House of Commons Political and Constitutional Reform Committee has noted, one of the main objections against the United Kingdom (UK)'s uncodified constitution comes from fears that '[t]he sprawling mass of common law, Act of Parliament and European treaty obligations, surrounded by a number of important but sometimes uncertain unwritten conventions is impenetrable to most people'.[1]

There have also been fears of uncertainties created by particular judicial approaches to interpretation. Commenting on the Human Rights Act 1998, for instance, Lord Sales warned that

> [s]ection 3 necessarily creates a significant degree of uncertainty about the meaning of legislative provisions, since the particular words may not reflect their ordinary meaning. That has a significant impact on the stability of the meaning of legislative provisions and can cause tension with rule of law values concerning the accessibility, ease of interpretation and predictability of application of such provisions.[2]

It was in this context that Lord Sales criticised *Re G*,[3] which permitted the use of the section 3 power even when the European Court on Human Rights determines that a statute has

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[1] Political and Constitutional Reform Select Committee, Second Report of Session 2014-2015, *A New Magna Carta?*, HC 463.
[2] Lord Sales, 'The Developing Jurisprudence of the Supreme Court on Convention Rights' [2024] PL 444, 448-449.
[3] Re G (A Child) (Adoption: Unmarried Couples) [2008] UKHL 38; [2009] 1 AC 173.

complied with its obligation under the European Convention on Human Rights (ECHR). In fact, it was precisely because of concerns that *Re G* would, *inter alia*, 'undermine legal certainty' that it was flatly 'disapproved' by Lord Reed in *Elan-Cane*.[4]

In a similar vein, due to fears that the principle of legality would result in a 'radical interpretive surgery', Lord Sales recently denied its use 'in the absence of a relevant established fundamental right or legal principle'.[5] In doing so, there was a clear preference for 'inapposite categorical distinctions' between rights- and non-rights-based cases over the need to 'grapple with the subtle questions of normative ordering'.[6]

At the same time, courts have recognised 'a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public'.[7] As Christopher Forsyth would have it, '[c]ertainty in the law is a goal not a guarantee'.[8]

The above account evinces a view that uncertainty is to be avoided and, where possible, discarded in public law. This article, however, seeks to situate itself from the opposite starting point. Indeed, what is equally apparent beyond simply that

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[4] R (fElan-Cane) v Secretary of State for the Home Department [2021] UKSC 56 [108] (Lord Reed).
[5] R (The Spitalfields Historic Building Trust) v London Borough of Tower Hamlets [2025] UKSC 11 [72] (Lord Sales).
[6] Mark Elliott, 'Administrative Law Doctrine and Constitutional Principle in the Supreme Court' (2025) 84 CLJ 229.
[7] R (Nadarajah and Abdi) v Secretary of State for the Home Department [2005] EWCA Civ 1363 [68] (Laws LJ).
[8] Christopher Forsyth, 'Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66 CLJ 325, 335.

uncertainty is often met with suspicion seems to be that it pervades public law. I hence consider a less explored view: might uncertainty play a useful role in public law?[9] In other words, might what I intend to brand as 'constructive uncertainty' exist? If it does, what ends does it serve?

I will argue that constructive uncertainty does exist and has taken hold, often in very familiar areas of public law. To do so, section II first begins by sketching out what I understand as 'uncertainty'. Sections III, IV and V then distil a range of examples under three key headings. The sections respectively explore how uncertainty aids in (i) *cautioning* different branches of Government, promoting institutional comity; (ii) *contextualising* the law to fit particular circumstances; and (iii) *cognising* constitutional actors of the limits of their competence, which encourages intelligible, expertise-based decision-making. Section VI concludes.

Why does uncertainty merit such an analysis? Two points may be made. The first relates, as noted above, to its relative abundance in public law. Yet the role *un*certainty plays remains under-theorised. This is not to say that the value of uncertainty has never been recognised. As will be observed below, the value of uncertainty is inherent in public law, although frequently only implicitly recognised in isolated instances. The novelty this article

[9] I am not, of course, the first to explore the role of uncertainty in the law. Timothy Endicott, *Vagueness in Law* (OUP 2000), for example, has observed that 'indeterminacy' is an unavoidable feature of both the linguistic and non-linguistic aspects of the law. By exploring 'uncertainty' – which, as I explain below, shares great similarities to Endicott's understanding of 'indeterminacy' – specifically in the public law context, I hope to complement these previous studies in shedding more light on the functions the concept may serve.

seeks to provide, therefore, is to *integrate* analyses of these sources and purposes of uncertainty.

There is also a broader purpose of urgency. Recently, there has been an (at least partial) judicial shift towards a preference for certainty and consistency[10] and an appetite for 'bright lines and categories'.[11] This should prompt us to consider how uncertainty features in public law, and ultimately whether it serves any useful purposes.

II. Defining Uncertainty

Let me begin by clarifying what I understand as 'uncertainty'. In adopting the term, I have in mind the notion of 'indeterminacy'. What is indeterminacy? For Timothy Endicott, 'the law is indeterminate when there is no single right answer to a question of law, or to a question of the application of the law to the facts of a case'.[12]

While I adopt a similar notion of indeterminacy, I will broaden Endicott's definition slightly. Public law is not merely concerned with the content of the law. There is, additionally, a keen element sounding in the *political* constitution, which is

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[10] Lewis Graham, 'Has the UK Supreme Court Become More Restrained in Public Law Cases?' (2024) 87 MLR 1073, 1107-1108.
[11] Mark Elliott, 'Taking the Constitution Seriously: A Response to Lord Sales' (*Public Law for Everyone*, 7 December 2025) <https://publiclawforeveryone.com/2025/12/07/taking-the-constitution-seriously-a-response-to-lord-sales/> accessed 31 December 2025.
[12] Endicott, *Vagueness in Law* (n 9) 2. A similar understanding of legal indeterminacy was put forth in Ken Kress, 'Legal Indeterminacy' (1989) 77 California Law Review 283, 287.

founded on political methods of accountability.[13] What occurs *in fact* outside courts (for example, between Members of Parliament and the executive in Parliament), and not merely what sounds *in law*, is therefore important. Only considering *legal* indeterminacy may therefore be insufficient for the particular context adopted in this article.

Therefore, for the purposes of the discussion here, I will take there to be uncertainty—or indeterminacy—when there is no single right answer to a question of law *or fact*, or to a question of the application of the law to the facts of a case. This definition is broader and, I hope, more fit for purpose in the particular public law context considered here.

III. Caution

We are now ready to consider a first sense in which uncertainty might be considered constructive. As I will suggest, uncertainty exists in the relationships and interactions between different branches of Government. In turn, uncertainty *cautions* each branch as no one branch is encouraged to test the unknown limits and predispositions of another branch. This is constructive because it promotes comity.

It is helpful to make these arguments by layering three propositions. First, the importance of inter-institutional comity is canvassed. Second, it is argued that comity rests on constitutional balance, where no one branch of Government can unilaterally

[13] See Se-Shauna Wheatle, 'Collaborative Constitutional Authority' in Matthew Flinders and Chris Monaghan (eds), *Questions of Accountability: Prerogatives, Power and Politics* (Hart Publishing 2023) for a distinction between political and legal constitutionalism.

trump another. Third, I show how it is with uncertainty—and the corresponding sense of caution it imposes on each branch of Government—that the constitutional balance is sustained.

A. Constitutional Comity and Constitutional Balance

Inter-institutional comity exists where each branch of Government respects the others.[14] On this view, each branch provides *leeway* for the other branches while *mutually supporting* their decisions, either through implementing their substantive decisions or by interpreting their decisions in line with the other branch's underlying objectives.[15] Such comity, I argue, is not only a *necessary* part of the constitution, but also a *desirable* characteristic.

First, comity is valuable because it is necessary, given the interdependence between each branch of Government. Parliament, for example, is dependent on the courts to give meaning to general rules and to resolve indeterminacies, while fitting legislative provisions into general legal principles.[16] Meanwhile, courts depend on Parliament and the executive to provide the funding and structure required for the judiciary to operate effectively.[17] A culture where each branch provides leeway and mutual support to each other is therefore crucial since different branches are not kept in separate compartments.

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[14] Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 22.
[15] Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 236.
[16] Kavanagh, 'The Constitutional Separation of Powers' (n 15) 235.
[17] Aileen Kavanagh, *The Collaborative Constitution* (CUP 2023) 100.

Second, comity is desirable. Consider the protection of rights. The legislature enjoys the democratic legitimacy to balance rights and policy considerations outside the confines of legal doctrine. By contrast, courts are not democratically accountable but can better represent minority interests. Comity is therefore valuable to make the most of the relative strengths of different branches of Governments.[18]

If comity is desirable, how is it achieved and sustained? This is less controversial: there is broad agreement that comity is achieved only when it is not possible for any one branch of Government to unilaterally trump over another. In other words, it is *constitutional balance* that sustains comity. Indeed, as Luc Tremblay puts it, comity is achieved only when no one branch can 'impose by *fiat* where the dialogue should lead, and no hierarchy must confer in advance on one or more of the participants the authority to settle the disagreements.[19] Likewise, Aileen Kavanagh[20] observes the need for a 'heterarchical—rather than hierarchical—nature of the relationship between the branches [of Government]'.[21]

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[18] Stephen Gardbaum, The Commonwealth Model of Constitutionalism: Theory and Practice (CUP 2013). See also Alison Young, Democratic Dialogue and the Constitution (OUP 2017) 148-152.

[19] Luc Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law 617, 632.

[20] It should be noted that Kavanagh and Tremblay in fact propose two competing visions of the constitution. While Tremblay champions a so called 'dialogue-based' model of the constitution, Kavanagh advances a view of a 'collaborative constitution'. On this disagreement, see generally Kavanagh, *The Collaborative Constitution* (n 17). Despite this wider disagreement, the fact that they both converge on the importance of constitutional balance demonstrates the broad support the view adopted here has received.

[21] Kavanagh, The Collaborative Constitution (n 17) 102.

B. The Role of Uncertainty

Constitutional comity, therefore, is desirable and constitutional balance is required for comity. However, what allows us to secure constitutional balance—namely, the idea that different branches interact in a spirit of 'mutual accommodation'?[22] My third proposition is to suggest that a crucial puzzle piece here lies in constructive uncertainty. This claim can be made in two parts.

First, if it is uncertainty that secures constitutional balance, we must begin by establishing that uncertainty *exists* in the relationships between different branches. Consider the relationship between the courts and Parliament, an area where Michael Foley has contended that the 'constitution's silences [have] become far more comprehensible than its substantive elements'.[23] While the traditional Diceyan narrative that '[p]arliamentary sovereignty is a fundamental principle of the UK constitution' is still repeated,[24] it has also been suggested that the 'pure and absolute' conception of parliamentary sovereignty is 'out of place in the modern United Kingdom'.[25] This raises the *possibility* that fundamental constitutional values *might* serve as hard constraints on Parliament's legislative authority. Yet there is no definitively right answer, given the uncertainty as to how deep these fundamental constitutional values run. To attempt to answer this question would be to 'stare into a constitutional

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[22] Kavanagh, The Collaborative Constitution (n 17) 102.
[23] Michael Foley, *The Silence of Constitutions* (Routledge 1989) 92.
[24] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [43].
[25] *R (Jackson) v Attorney-General* [2005] UKHL56, [2006] 1 AC 262 [102] (Lord Steyn).

abyss'.[26] Uncertainty hence conditions the relationship between Parliament and the judiciary.[27]

Uncertainty also exists between Parliament and the executive. Ministers depend on backbenchers to ensure a majority in the House of Commons. Backbenchers have also become increasingly independent, and have regularly challenged the Government.[28] The Opposition also proposes amendments to legislation. Even if few are sincere attempts at policy change, these amendments 'signal' to groups outside Parliament and may be part of 'gameplay' to embarrass the Government.[29] Furthermore, the House of Lords supply an additional layer of scrutiny in a multi-party environment. Defeat in the House of Lords entails great political cost because it forces a difficult choice between presenting a controversial policy in the House of Commons or abandoning it wholesale.[30] All this is to say that before a Bill is introduced in Parliament, the executive can never be sure as to how other parliamentary players might react. Uncertainty arises because there is no way to definitively know how a Bill might be received. Hence, any calculation of the potential for political backlash can at best only be an approximation.

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[26] Mark Elliott, 'Parliament Sovereignty in a Changing Constitutional Landscape' in Jeffery Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019).
[27] Elliott, 'Parliament Sovereignty in a Changing Constitutional Landscape' (n 26).
[28] Meg Russell and Daniel Gover, Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law (OUP 2017) 273-279.
[29] Russell and Gover, *Legislation at Westminster* (n 28) 273-279.
[30] Meg Russell and Philip Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence' (2016) 29 Governance 121.

The second part of the claim can now be made: it is these uncertainties inherent in the relationships between the different branches of Government that sustain the constitutional balance. Consider again the courts and Parliament. In the face of uncertainty, both institutions are caught in a necessary tension where neither is inclined to risk bruising confrontation pursuing an outcome that cannot be known. Courts, of course, have in the past declared that '[p]arliamentary sovereignty is no longer, if it ever was, absolute'.[31] Such assertions, however, remain broadly 'academic'.[32]

Recent ouster clause cases, in fact, disclose quite a contrasting inclination. Bold claims were laid in *Privacy International* that 'binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court'.[33] However, it is clear that courts have since become uncertain, and ultimately apprehensive, of the impacts such dicta might produce. Lord Reed has expressed concern that parliamentarians might start to 'frame provisions conferring discretionary powers in language which is as wide as possible, so as to stymie judicial review'.[34] Inherent in Lord Reed's comments are clearly worries that Parliament might respond to the courts in a hostile manner. How such a response might be framed, and how

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[31] R *(Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 [104] (Lord Hope). See also [102] (Lord Steyn) and [159] (Lady Hale).
[32] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [50] (Lord Hope).
[33] R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22; [2020] AC 481 [144] (Lord Carnwath).
[34] Lord Reed of Allermuir, 'Trust in the Courts in an Age of Populism', 12 June 2025, available at <https://supremecourt.uk/uploads/speech_lord_reed_13062025_88f834d8f5.pdf> assessed 24 December 2025.

strongly Parliament might retaliate, however, ultimately remains a black box. In light of such worries, it appears that courts have retreated. Instead, it is now asserted that 'legislation enacted by the Crown with the consent of both Houses of Parliament is supreme'.[35] In a clear sign of having been cautioned, courts have made it clear that 'effect must be given to Parliament's will expressed in legislation'.[36]

This development shares great similarities with the ouster clause Parliament attempted to pass through clause 11 of the Asylum and Immigration (Treatment of Claimants etc) Bill. This ouster clause was one that went further than that in *Anisminic*,[37] and which could potentially avoid the interpretative solution used there.[38] The courts issued warnings of serious judicial consequences if Parliament pressed on with clause 11. Lord Woolf went so far to forecast that abolishing judicial review of asylum and immigration decisions, if implemented, might be 'so inconsistent with the spirit of mutual respect between the different arms of Government that it could be the catalyst for a campaign for a written constitution'.[39] So tight was the relationship between immigration, asylum and human rights that Lord Woolf argued that '[t]he response of the Government and the House of Lords to the chorus of criticism of clause 11 will produce the answer to the question of whether our freedoms can

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[35] *R (Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin) [52] (Saini J). See also *R (LA (Albania)) v Upper Tribunal* [2024] 1 WLR 1673 [36] (Dingemans LJ).
[36] *R (Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin) [52] (Saini J).
[37] Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 1 All ER 208.
[38] Elliott, 'Parliament Sovereignty in a Changing Constitutional Landscape' (n 26).
[39] Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) 63 Cambridge Law Journal 317, 329.

be left in their hands under an unwritten constitution'.[40] Again, however, it was clear that Parliament was uncertain as to how courts might respond to the Bill. In turn, just as the courts retreated from their hard-edged attitude towards ouster clauses following Parliament's warnings, politicians voluntarily withdrew the clause.[41] Taken together, one might therefore gather that uncertainty plays a constructive role in evincing the form of 'mutual respect, restraint and co-operation' that is so essential to 'our ability to cope without a written constitution'.[42]

What of the executive and Parliament? At first glance, there may be an inclination to buy into narratives that Parliament is 'much of the time, either peripheral or totally irrelevant',[43] caught in a 'fusion'[44] with the executive branch,[45] breeding an 'elective dictatorship'.[46] Uncertainties arising out of a potential backbench rebellion and the political costs of the Opposition's and House of Lords' parliamentary scrutiny as canvassed above, however, show that this is far from true. Instead, what has been observed empirically is a great sensitivity to 'anticipated reactions', wherein the executive pre-empts pushback and attempts to avoid it.[47] Ministers actively court parliamentarians' support, offering concessions and compromises to avoid conflict. Uncertainty therefore aids in 'generating fear',[48] pushing the

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[40] Lord Woolf, 'The Rule of Law and a Change in the Constitution' (n 39) 329.
[41] Elliott, 'Parliament Sovereignty in a Changing Constitutional Landscape' (n 26).
[42] Lord Woolf, 'The Rule of Law and a Change in the Constitution' (n 39) 329.
[43] Anthony King and Ivor Crewe, *The Blunders of Our Governments* (Oneworld 2013).
[44] Walter Bagehot, *The English Constitution* (Chapman & Hall 1867) 12.
[45] Lord Hailsham, *The Dilemma of Democracy* (Collins 1978) chap 20.
[46] Lord Hailsham, *The Dilemma of Democracy* (n 45).
[47] Russell and Gover, *Legislation at Westminster* (n 28) 268-269.
[48] Russell and Gover, *Legislation at Westminster* (n 28) 268-269.

executive to think through Parliament's potential responses to bills prior to their introduction, which in turn tempers legislative ambitions. Constitutional balance hence emerges in a relationship built on the executive's efforts to accommodate Parliament's wishes, knowing that it cannot have the last word without risking substantial reputational risks, parliamentary time, and political capital.

Inherent in both sets of relationships is therefore a sense of uncertainty that cautions constitutional actors, and which fosters a culture of compromise and comity. Parliament is cautioned from legislating in gross infringements of constitutional values. It is also cautioned to seek out, accommodate and compromise with the views of the executive. Meanwhile, courts are cautioned from running roughshod over Parliament's enactments. Each branch pays heed to another, not knowing, and not having the appetite to test, the ultimately unknown limits and predispositions of other branches. By preventing such testing, uncertainty stabilises constitutional relations: conflicts that neither side can predict are conflicts both sides avoid. In turn, a sense of comity is fostered. This is constructive, not least because it bolsters a strong foundation of constitutional stability while making the most of the 'institutional and perspectival diversity'[49] that comes with 'a plurality of governing institutions'.[50]

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[49] Eoin Carolan, 'Leaving Behind the Commonwealth Model of Rights Review: Ireland as an Example of Collaborative Constitutionalism' in John Bell and Marie-Luce Paris (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar 2016) 118.

[50] Andrew Sabl, Ruling Passions: Political Offices and Democratic Ethics (Princeton University Press 2002) 2.

Before moving on, one matter must be clarified. Nothing here is meant to imply that uncertainty is the *only* factor contributing to a culture of comity. Constitutional conventions, for example, also help to resolve disputes between different branches.[51] Yet the value of conventions lie in the *certainty* they bring. Being stable and slow to change, conventions allow different branches to *know* what the rules of the constitutions are, making compliance more likely.[52] Such certainty, however, does not displace the role of uncertainty. Constitutional conventions 'operate successfully only if they are accepted by people',[53] which necessarily presupposes a *pre-existing* inclination to work in comity. Of course, this will not always be the case. The executive has, for example, found occasion to declare 'how offensive it is, once again, to have a ruling by a court that flies in the face of common sense'.[54] Uncertainty is therefore essential, through its cautioning function, in supplying an incentive to act in comity where this inclination is weaker.

IV. Contextualisation

A first source of uncertainty, then, is that which arises out of inter-institutional interactions between different branches of Government. This section considers a second source of

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[51] Peter Morton, 'Conventions of the British constitution' (1991-1992) 15 Holdsworth Law Review 114, 163. See also David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change – A Festschrift for Vernon Bogdanor* (Hart Publishing 2013) 94.
[52] Adam Perry, *The Conventional Constitution* (OUP 2025) 205-206.
[53] David Feldman, *Key Ideas in Constitutional Law* (Hart Publishing 2025) 144.
[54] HC Deb 16 February 2011, col 955. This comment was made by the Prime Minister in the aftermath of *R (F and Thompson) v Home Secretary* [2010] UKSC 17, where the Sex Offenders Register was found in breach of the right to respect for private life.

uncertainty which emerges from the *particularities* of the case at hand. As will be argued, it is by *engaging with*, rather than avoiding, uncertainty that courts are able to *contextualise* particular doctrines to specific circumstances encountered.

To illustrate these claims, I utilise the example of procedural review to undertake a three-part analysis. First, I set out how uncertainty arises as a result of procedural review's response to the particularities of a case. Second, it is argued that the resulting uncertainty invites judicial discretion. Third, two ways in which this discretionary approach necessitated by uncertainty can be seen as constructive are suggested.

A. The Development of Procedural Fairness

Today, it is clear that requirements of fair procedures 'are not engraved on tablets of stone'.[55] This has, however, not always been the case. Indeed, for some time, there existed a technical distinction between 'judicial' and 'administrative' functions, with the courts only able to impose principles of natural justice, as had then been known, on 'judicial' proceedings. [56] It was only in *Ridge v Baldwin* that these rigid labels became abandoned.[57]

In the place of bright-line distinctions, a 'strong form of contextualisation' eventually grew out, with judges paying

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[55] *Lloyd v McMahon* [1987] AC 625. See also *R (Pathan) v Secretary of State for the Home Department* [2020] UKSC 41 [55] (Lady Arden) and *R (HAM) v London Borough of Brent* [2022] EWHC 1924 (Admin) [13] (Swift J).
[56] R v Electricity Commissioners, ex parte London Electricity Joint Committee [1924] 1 KB 171 (CA) at 185. See also R v Legislative Committee of the Church Assembly, ex parte Haynes-Smith [1928] 1 KB 411 (KB) and Nakkuda Ali v Jayaratne [1951] AC 55 (PC).
[57] [1964] AC 40 (HL).

attention to the 'minute detail of myriad decision-making procedures'.[58] Such contextualisation is inevitably tied to increased uncertainty: if it is the particular facts of a case that determines what the content of fairness requires, it becomes difficult to conclusively declare *ex ante* what 'fair procedure' entails in a particular case. Moreover, even if there are *ex ante* principles, *ex post* rules might emerge in the course of adjudication, influencing a decision.[59]

For example, the fact that the Parole Board is a 'judicial body independent of the Secretary of State and the prisons management organisation' while the Category A Review Team and the Deputy Director of Custody-High Security are 'officials of the Secretary of State carrying out the management functions in relations to prisons' may mean that different procedures are required vis-à-vis each of the decision-maker.[60]

Furthermore, with the growth of legislation, procedural requirements in many areas of public administration today are animated by specific legislative schemes and procedural codes which can greatly vary.[61] Procedural review is in turn an area

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[58] Carol Harlow and Richard Rawlings, 'Proceduralism and Automation: Challenges to the Values of Administrative Law' in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (OUP 2020) 286.

[59] An example of this would be the extension of the duty to give reasons in *Kent* and *Oakley*, as discussed below.

[60] R (Hassett) v Secretary of State for Justice [2017] 1 WLR 4750 [51] (Sales LJ).

[61] Paul Craig, 'Perspectives on Process: Common Law, Statutory and Political' [2010] PL 275. The Guide to Drafting Tribunal Rules issued in 2003, for example, contained 110 rules dealing in such excruciating detail with aspects like the start of proceedings and the action to be taken by the applicant, tribunal, respondent and additional parties, expert evidence and the tribunal's power to seek expert evidence, and detailed rules related to the hearing itself.

where 'judges [are] navigating, evaluating and commenting on, whole thickets of legislatively sanctioned administrative procedure'.[62] Depending on the legislative background, courts are beginning from considerably different 'starting-points'.[63]

The upside, then, is that formalism no longer constrains procedural review. Rather, a confluence of contextual factors leave an *ex ante* question mark on what fairness inherently requires. Indeed, the label of 'fair procedure' remains an incomplete vessel in itself, filled only when particular facts present themselves, with competing considerations weighed up and a fact-sensitive analysis applied.

B. Uncertainty and Discretion

In turn, *Ridge* and the developments it heralded have seen courts adopting Trevor Allan's advice to 'confront the conditions of uncertainty…as they bear on the individual's case'.[64] In doing so, uncertainty necessitates a significant degree of judicial discretion to give tangible shape to what is otherwise an amorphous concept of fairness.

That such discretion is desirable, however, is not uncontroversial, not least because it departs from Lord Bingham's advice that '[q]uestions of legal right and liability should ordinary be resolved by the application of the law and not the exercise of discretion'.[65] Quite the opposite, the 'ordinary' way through

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[62] Harlow and Rawlings, 'Proceduralism and Automation' (n 58) 286.
[63] Joanna Bell, *Anatomy of Administrative Law* (Hart Publishing 2020) 103.
[64] Trevor Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 OJLS 497, 501.
[65] Lord Bingham, *The Rule of Law* (Allen Lane 2012).

which procedural review will be conducted today is through particular application of judicial discretion. The question for us is therefore what senses such uncertainty—and the resulting discretionary approach it prompts—may be considered constructive. Two in particular will now be suggested.

The first sense concerns the way in which uncertainty invites a form of contextualisation that benefits the *specific* case at hand. Public law cases oftentimes present themselves as 'something of a ragbag'.[66] In turn, responding to such cases require a degree of flexibility so that we avoid fitting contortions into a 'procrustean bed'.[67] Where circumstances demand that a decision be taken as a matter of urgency, for example, requiring a time-consuming, participative procedure for fairness will be ill-suited.[68]

Moreover, in other cases, a propensity to eviscerate uncertainty can threaten fundamental rights. This can be seen in the line of cases concerning the issue of whether a fact-specific proportionality assessment must be undertaken when convicting an individual for offences that might infringe articles 10 and 11 of the ECHR. While *Ziegler*[69] held that a proportionality

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[66] Joanna Bell, 'The Resurgence of Standing in Judicial Review' (2024) 44 OJLS 313, 339.

[67] Robert Thomas, '*Ridge v Baldwin*: Executive and Judicial Approaches to Administrative Law Before and During the Quartet Years' in T.T. Arvind, Richard Kirkham, Daithi Mac Sithigh and Lindsay Stirton (eds), *Executive Decision-Making and the Courts: Revisiting the Origins of Modern Judicial Review* (Hart Publishing 2021) 51-57.

[68] R (Bourgass) v Secretary of State for Justice [2015] UKSC 54.

[69] Director of Public Prosecutions v Ziegler [2021] UKSC 23.

assessment must be made in relation to the particulars of each case at hand, it has since been held that

> it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights.[70]

Rather, an offence can be 'intrinsically proportionate' simply as a result of the ingredients of the offence.[71] As has been argued, this development appears to be driven by an inclination to purge uncertainty.[72] However, as Richard Martin rightly criticises, by constructing a '*de facto* ouster' on the review of criminal convictions that attract human rights considerations, there is now a 'lacuna in accountability for rights interferences in the criminal process'.[73] This is because there is now less scope to do justice to particular circumstances of an individual as the individual facts of a case becomes irrelevant.

A second sense in which uncertainty adds constructive value comes in terms of its broader *general* contribution to

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[70] Director of Public Prosecutions v Cuciurean [67]. This holding in Cuicurean has been affirmed in Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32 [42].

[71] AG's Ref No 1 of 2022 [42].

[72] Richard Martin, 'Convicting Peaceful Protestors: Proportionality's Place at Criminal Trial' (2024) 44 OJLS 342, 364.

[73] Martin, 'Convicting Peaceful Protestors: Proportionality's Place at Criminal Trial' (n 72), 364.

procedural review. Consider the duty to give reasons, a duty which emerges only when particular exceptional circumstances present themselves.[74] Curiously, such exceptional circumstances have traditionally been, as Joanna Bell observes, confined to cases involving particularised decision-making,[75] in response to claims that procedural review ought to be driven by dignitarian concerns.[76]

Outside this traditional class of cases, however, there is less clarity. In *Kent*[77] and *Oakley*,[78] for example, the courts dealt with judicial review challenges to a local planning authority's grant of planning permission for the development of land. As was accepted, both cases ushered in significant uncertainty. In the Court of Appeal in *Kent*, it was admitted that this was 'an unusual case',[79] just as the Court of Appeal in *Oakley* accepted that the facts featured 'a number of distinct features'.[80] Despite these initial observations, it was held that planning authorities must give reasons if it authorised developments that would 'harm…an Area

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[74] R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 564.

[75] Joanna Bell, '*Kent* and *Oakley*: A Re-examination of the Common Law Duty to Give Reasons for Grants of Planning Permission and Beyond' (2017) 22 Judicial Review 105. See for example *R v Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310 (concerning an *individual's* criminal injuries compensation), *R (Awale) v Secretary of State for Justice* [2024] EWHC 2322 (Admin) (concerning an *individual's* circumstances of detention) and *R v Ministry of Defence ex parte Murray* [1998] COD 134 (concerning an *individual's* sentence).

[76] Allan, 'Procedural Fairness and the Duty of Respect' (n 64).

[77] R (Campaign to Protect Rural England, Kent) v Dover District Council [2016] EWCA Civ 936. See also Dover District Council v CPRE Kent [2017] UKSC 79.

[78] Oakley v South Cambridgeshire District Council [2017] EWCA Civ 71.

[79] *Kent* (n 77) [32] (Laws LJ).

[80] *Oakley* (n 78) [56] (Elias LJ).

of Outstanding Natural Beauty'.[81] Significantly, as the court considered the particularities of the case, it carved out a new 'normative trigger', based not on dignity but the broader national planning policy. Considerations that the administrative decision was 'not consistent with the local development plan and involves development in the Green Belt' were therefore squarely taken into account.[82]

It was, in other words, by applying a discretionary approach prompted by the underlying uncertainty that the courts expanded the normative trigger for reason-giving. This is a positive development, given that fundamental public interests and considerations like broader national planning policies equally justify a more extensive range of fair procedures.[83] Seen in this light, uncertainty prevents the stagnation of the law.

C. Two Criticisms

A critique might argue that the developments in *Kent* and *Oakley* in fact undermines uncertainty's constructive role. After all, the expansion of normative triggers for reason-giving has made it *more* certain when a duty to give reason arises, especially in non-particularised decision-making. This criticism can be met in two ways. First, it is unclear that *Kent* and *Oakley* have removed all hints of uncertainty. How far, for example, would courts go in

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[81] *Kent* (n 77) [21] (Laws LJ). When *Kent* was further appealed to the Supreme Court, it was held that the Environmental Impact Assessment Regulations themselves were sufficient to impose a duty to give reasons. However, if necessary, the circumstances of *Kent* would also have given rise to a common law duty to give reasons. See *Dover District Council* (n 77) [56]-[60].

[82] *Oakley* (n 78) [56] (Elias LJ).

[83] Bell, '*Kent* and *Oakley*' (n 75).

further recognising a duty to give reasons beyond cases involving particularised decisions? What might come under the umbrella of fundamental public interests and considerations? Recognising that such uncertainty continues to exist is to be alive to the reality that the duty to give reasons is a doctrine neither fully defined nor developed. Furthermore, even if *Kent* and *Oakley* have added greater certainty to the contours of the duty to give reason, one ought not to lose sight of the importance of uncertainty in the *process* of shedding light on the purpose and scope of the duty.

A different criticism would likely come from the fear that uncertainty diminishes consistency, which poses a threat to the rule of law. This seemed to drive Lord Bingham's advice to limit judicial discretion.[84] However, neither of the above two senses of constructiveness advocates for an ever-increasing dose of uncertainty. It is also not true that the doctrines described above have become a purely contextual, unruly area of law. In procedural review, both procedural codes and a consistent pattern of applying the common law have added much structure,[85] even while space is left for discretion. This is similar to how legislatures commonly 'establish general rules but then leave it to courts (or delegate to administrative bodies) to determine how the open-textured standards or pre-defined exceptions are to apply in a given case'. [86]Furthermore, it is not clear that increased uncertainty inevitably threatens the rule of law. Consider the developments since *Ziegler*. While the class of 'intrinsically proportionate' offences adds certainty to the

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[84] See above Lord Bingham, *The Rule of Law* (n 65).

[85] Bell, Anatomy of Administrative Law (n 63) 112-128.

[86] Martin, 'Convicting Peaceful Protestors: Proportionality's Place at Criminal Trial' (n 72) 364.

proportionality inquiry, does it not also throw up questions of how consistently the jurisprudence of the European Court on Human Rights is applied? If Strasbourg has time and again emphasised that a proportionality assessment must be made 'having regard to the facts and circumstances prevailing in the specific case before it',[87] it is perhaps the more uncertain, fact-specific approach championed in *Ziegler* that would allow the rule of law ideal of consistency with the European case law to be realised.[88]

V. Cognisance

A third source of constructive uncertainty arises as a result of the institutional and epistemic limits of a particular branch of Government. Such uncertainty is constructive because it *cognises* decision-makers of the constraints they face, which in turn fosters a more intelligible approach that encourages expertise-based decision-making. To illustrate these claims, I focus on the courts, considering their application of expertise-based deference and treatment of section 31(2A) of the Senior Courts Act 1981 (SCA).

A. Uncertainty and Expertise-Based Deference

Talk of restraint would likely first call to mind the concept of deference, which makes this a most natural starting point. My focus here is on the court's exercise of expertise-based

[87] Sunday Times v the United Kingdom (1979) 2 EHRR 245 [65].

[88] See also Lord Mance, 'Should the Law be Certain?', 11 October 2011, available at <https://supremecourt.uk/uploads/speech_111011_342362219c.pdf> accessed 31 December 2025 [28] for a similar argument.

deference.[89] The effect of such deference is for courts to attach significant weight to the executive decision-maker's opinion on grounds that the executive's judgement is 'worthy of respect', given its 'superior claims or qualities'.[90] While the value of a doctrine of deference is not universally embraced,[91] I will accept as my starting point that a doctrine of expertise-based deference is desirable not only because it aids in purchasing the propriety of substantive judicial review,[92] but also because it guides courts towards tapping on the epistemic ability of the most suitable branch of government.[93]

Where uncertainty contributes to this debate is when one asks a further question: when does a decision-maker *know*, or at least *foresee*, that another's claim will be superior? This is an important question. Without understanding how the courts might be alerted to the possibility of needing to exercise expertise-based deference, there will be difficulties not only in tracking whether its application is appropriate but also in answering the prior question of when expertise-based deference might come into play.

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[89] For those interested in exploring other forms of deference like democracy-based deference, see generally Mark Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Anne Scully-Hill and Michael Ramsden (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010).
[90] Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2009) 187.
[91] See eg Trevor Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 CLJ 671.
[92] Mark Elliott, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017).
[93] Alison Young, 'In Defence of Due Deference' (2009) 72 MLR 554.

A potential answer is that expertise-based deference is triggered when engaging with issues that call for expertise.[94] This answer, however, only begs a further question: when would we know that we are dealing with such expertise-based questions? I suggest that the primary litmus test is the *acknowledgement of one's uncertainty*.[95] In other words, it is when one recognises their fallibility in being unsure of what the correct assessment should be that one becomes *cognisant* that they are dealing with a question requiring an expertise they lack. Consider an analogy. We often defer to doctors on medical matters, but there are equally times when we can self-medicate without professional advice. Where do we draw the line? The answer advanced here is that we will know to seek out medical advice when we *recognise that we are uncertain of how we should treat ourselves*. We will unlikely go to the hospital over a common flu, but a complex heart disease will most likely prompt the need to find a heart specialist. Uncertainty therefore *cognises* us as to what we are unsure of, which leads us to seek out another expert who can offer a better answer.[96]

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[94] Elliott, 'Proportionality and Deference' (n 89) 272.

[95] As with above, in making this suggestion, I do not intend to make the broader claim that uncertainty is the *only* trigger for such expertise-based deference, merely that it is an important one. As Kavanagh has noted, deference may be shown even when a decision-maker does not recognise that another judgment is superior because of a particular expertise. See Kavanagh, 'Deference or Defiance' (n 90) 188.

[96] I should note that I do not mean that this cognisance will *always* lead us to defer to another expert. Uncertainty merely *signals* to the need to *inquire into* whether there is a need for deference. In some cases, this inquiry might yield a response that deference is not called for, notwithstanding the court's uncertainty. This will be the case, for example, in cases where the courts find that a decision-maker *refuses* to exercise its expertise. See for example *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420, where Baroness Hale (at [37]) made clear that 'the views of the local authority are bound to carry less weight where the local authority has made no attempt to

This analogy plays out in the case law. In *Shvidler*, it was recognised that 'the Government has access to relevant experts and a wide range of information, some of which may be secret'.[97] Hence, in assessing proportionality-based challenges to sanctions imposed under the Russia (Sanctions) (EU Exit) Regulations 2019, expertise-based deference strongly tempered the court's judgment in allowing the executive wide scope to contain Russia's invasion of Ukraine.

Likewise, *U3* concerned challenges to the approach with which the Special Immigration Appeals Commission (SIAC) should take in citizenship and refusal of leave appeals.[98] Delivering the unanimous opinion of the court, Lord Reed highlighted that the Secretary of State acts with the benefit of 'expert advice, including advice from the Security Service'.[99] Such expertise would unlikely be possessed even by 'persons formerly involved in intelligence work' such as some members of the SIAC, still less the courts, given that they 'have no close or current involvement'.[100] Hence, the Supreme Court exercised deference and held that 'public safety should be primarily the responsibility of the Government'.[101]

Seen in this light, uncertainty is constructive because it cognises decision-makers of their own limits, which then calls forth a consideration of whether a more restrained approach

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address the question' of whether sex shop owners' right to sell pornographic material should be restricted in the interests of the wider community.

[97] Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs [2025] UKSC 30 [129] (Lord Sales and Lady Rose).

[98] U3 v Secretary of State for the Home Department [2025] UKSC 19.

[99] *U3* (n 98) [66] (Lord Reed).

[100] *U3* (n 98) [66] (Lord Reed).

[101] *U3* (n 98) [67] (Lord Reed).

ought to be adopted. In doing so, courts are better cognised as to when giving weight to a decision-maker's expertise could assist in producing a more intelligible answer.

A clarification is warranted here. Up to now, my analysis appears to assume that deference on grounds of institutional expertise is an appropriate judicial response in cases where courts are cognisant of a significant degree of uncertainty on their own part, relative to the decision-maker's expertise. However, as Mark Elliott has cautioned, adopting (or at least ascribing particularly significant weight to) the decision-maker's expert view is neither the only possible nor an uncontroversial response.[102] Another response, says Elliott, might see 'the court taking steps to equip itself better to evaluate arguments' before making a decision.[103] Such concerns, however, should not encumber the present analysis because I do not argue that deference is *the* required—or desired—approach. Rather, I merely claim that where courts lack a certain expertise, a more tailored approach would be required. While I have considered the issue through the lens of deference, given the tendency of the courts to adopt this approach, a desire for another approach does little to alter my argument. Whatever the preferred method, the cognisance function remains the same: it signals to courts that it ought to restrain from straightforwardly making a decision without considering modulating its response in some way or form, given its lack of expertise.

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[102] Elliott, 'Proportionality and Deference' (n 89) 274.
[103] Elliott, 'Proportionality and Deference' (n 89) 274.

B. Treatment of Section 31(2A) of the SCA

Uncertainty's cognisance function is therefore essential to facilitate expertise-based decision-making. I wish to further explore why this recognition is critical through a case study offered by section 31(2A) of the SCA. This provision dictates that relief *must* be denied 'if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred'.[104]

Viewed through the lens of uncertainty's cognisance function, section 31(2A) is far from desirable. The provision imposes a *compulsory* duty for courts to 'recreate a world that never was'.[105] Considering such hypotheticals necessarily lead courts to assess the merits of a decision, given that courts must imagine what decision-makers might do. However, courts are not well-placed to undertake merits-based assessments.[106] Furthermore, courts must consider causation,[107] an undertaking they have traditionally resisted from given that the law is 'strewn with examples of open and shut cases which, somehow, were not'.[108] A first point, therefore, is the potential risks that come with ignoring uncertainty's cognisance function. To the extent that

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[104] Senior Courts Act 1981, s 31(2A). There is an exception built into this provision, which specifies that relief will still be granted if 'reasons of exceptional public interest' are found.
[105] R (Associated Society of Locomotive Engineers and Firemen) v Secretary of State for Business and Trade [2023] EWHC 1781 (Admin) [199] (Linden J).
[106] Lisa Lawton, 'Section 31(2A) of the Senior Courts Act 1981 in the Courts' [2025] PL 239.
[107] Paul Craig, UK, EU and Global Administrative Law: Foundations and Challenges (CUP 2015) 159-162.
[108] *John v Rees* [1970] CH 345, 402.

uncertainty might be helpful in cognising courts of their institutional and epistemic limits, and hence play a role in encouraging intelligible, expertise-based decision-making, section 31(2A) artificially imposes a duty that runs contrary to that constructive function.

The upshot, then, is the way uncertainty's cognisance function continues to play a significant role in shaping the judicial approach. Indeed, while courts have accepted that it 'must consider section 31(2A) of its own initiative',[109] it is curious *how* the 'no difference' analysis has been undertaken. As the courts have made clear, they will only be prepared to 'act on the evidence it has or on reasonable inferences from it'.[110] This greatly reduces the need to speculate and confines courts to acting only in areas where they have can make intelligible assessments.

Cooper makes this point clear.[111] This case concerned the unlawful granting of a planning permission. In refusing to apply section 31(2A), the court observed that the decision-maker had placed 'significant weight' on the need for further gypsy and traveller sites. Therefore, a final determination on the lawfulness of the planning permission would depend on 'what additional weight (if any) she [the decision-maker] would have accorded to the limited harm that the proposed developments would cause in light of those policy considerations'.[112] However, because the available evidence did not allow the court to determine the weight

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[109] *R (Cooper) v Ashford BC* [2016] EWHC 1525 (Admin); [2016] PTSR 1455 [107] (John Howell QC).
[110] Cooper (n 109) [107] (John Howell QC). See also R (Bradbury) v Awdurdod Parc Cenedlaethol Bannau Brycheiniog (Brecon Beacons National Park Authority) [2025] EWCA Civ 489 [71] (Lewis LJ).
[111] *Cooper* (n 109).
[112] *Cooper* (n 109) [106] (John Howell QC).

the decision-maker would have placed on the countervailing considerations, it was hesitant to override its sense of uncertainty and ascribe what *it* thought *may* have been the weight the decision-maker *could* have assigned. Therefore, section 31(2A) did not apply.[113] Crucially, the court did not have the appetite to look beyond the material before it.

Taken together, section 31(2A) reveals two important takeaways. The first, as noted above, is the risks inherent in ignoring—or attempting to usurp—one's cognisance of its limited expertise in the face of uncertainty. The second takeaway relates to the resilience of the cognisance function, which is seen through the court's continued commitment to it. Where legislative amendments appear to push courts towards acting even when they are uncertain, courts have found means to continue to pay heed to their sense of uncertainty and limit the extent with which they have to make ambiguous conjectures, even while remaining true to their statutory duty. Uncertainty's cognisance function, in turn, reveals itself as firmly lodged within the court's jurisprudence.

VI. Conclusion

This article has sought to establish constructive uncertainty's place in the public lawyer's toolbox. It proposed that constructive uncertainty might not simply exist in the content of legal rules, but more fundamentally within the relationships between different branches of Government, and in the way a particular branch understands its own institutional limits.

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[113] *Cooper* (n 109) [109] (John Howell QC).

It is hence hoped that the present study alerts us to the recognition that constructive uncertainty already permeates across public law. Such uncertainties do not simply exist as isolated instances which stand alone, but may be systematically conceptualised, as demonstrated, using the three-fold model proposed. This is, of course, not to suggest an exhaustive list of purposes constructive uncertainty serves, but rather to propose a starting point on which further purposes of constructive uncertainty might be built upon. In turn, uncertainty can begin to be meaningfully utilised—and not merely trenchantly dismissed—as a lens through which we view the constitution and its operation.

In closing, I wish to raise some questions for the future. As I have said, nothing in this paper advocates for an unrestrained application of uncertainty. An undue insistence on uncertainty will be disastrous. Significant uncertainty in institutional relationships between different branches of Government, for example, can well lead to constitutional paralysis, wherein it becomes unclear how one branch can work with another. Similarly, undue uncertainty introduced by a commitment to contextualism may well create a chaotic Tennysonian wilderness of single instances. That said, uncertainty has the potential to sit alongside instruments that promote certainty. Constitutional conventions, as shown above, add a significant degree of certainty into how different branches relate to one another. Structure injected by procedural codes and a common pattern of applying the common law also contribute certainty, even while uncertainty is inherent in the fact-based approach to procedural review. Uncertainty, in turn, may be a matter of degree. Therefore, while I have sought here to make a case for *why* we might embrace

uncertainty in public law, the question of *how much* remains unclear. More specifically, how much constructive uncertainty does the law require, and past what point would its constructiveness evaporate? What factors might influence the appropriate degree of uncertainty we ought to tolerate in relation to each of the functions uncertainty serves? These are interesting questions in themselves and perhaps ever more relevant given a clearer appreciation of uncertainty's inherent constructiveness.