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I. INTRODUCTION

The Supreme Court's decisions in the companion cases of *Canada (Minister of Citizenship and Immigration) v Vavilov*[1] and *Bell Canada v Canada (Attorney General)*[2] were intended to settle longstanding controversies in Canada's law of judicial review.[3] According to many observers, this settlement rests on an amalgam of different theories; it is a pragmatic compromise between judges who are intractably divided on the basics of administrative law.[4]

That said, in our view one feature of *Vavilov* is a principled improvement over its predecessors: namely, its rejection of some of the key tenets of a school of administrative law thought that

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1 2019 SCC 65 [*Vavilov*].

2 2019 SCC 66 [*Bell Canada*].

3 See *Vavilov*, *supra* note 1 at paras 4–11.

4 See Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) Ottawa Faculty of Law Working Paper No 2020-09, at 32 online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3519681>; Leonid Sirota, "Re-Built on Sand: Canadian Administrative Law after *Vavilov*" (2020) 31 Public L Rev 117. See also Kate Glover Berger, "The Missing Constitutionalism of *Canada v Vavilov*" (2021) 34 JL & Soc Pol'y 68.

Jeffrey Pojanowski calls "administrative supremacy".[5] While the term may appear a vague expression of disapproval, we follow Pojanowski in using it to refer to a spectrum of specific ideas endorsed by a generally identifiable group of thinkers over time. As we presently explain, the phrase "administrative supremacy" is descriptive. We do indeed disapprove of the ideas to which it refers, but we do not seek to trade on the negative connotations it might evoke and will instead endeavour to persuade the reader to share this sentiment.

Administrative supremacy involves "an unapologetic embrace of the administrative state"[6] where the role of courts is limited "to checking patently unreasonable exercises of power by the administrative actors who are the core of modern governance."[7] This view is sanguine about administrative power: it "sees the administrative state as a natural, salutary outgrowth of modern governance."[8] While there are real differences in the jurisprudential commitments of thinkers who may be labelled administrative supremacists, they are united by a shared belief in the interlocking nature of legal and policy questions and a certain trust in the administration to resolve these questions[9]—a trust earned either by commitment to certain ideological aims, or a comparative epistemic advantage in doing so.

This article explains why, insofar as it rejects this view, *Vavilov* is a step forward for Canadian administrative law. We argue that administrative supremacy rests on a distorted view of the constitutional principles that are designed to control administrative power: the separation of powers, the Rule of Law, and democracy. *Vavilov*, while imperfect, presents an opportunity to re-evaluate the proper relationship between these important principles and the administrative state.

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5 See Jeffrey A Pojanowski, "Neoclassical Administrative Law" (2019) 133:3 Harv L Rev 853 at 861 *et seq*. Pojanowski, writing specifically in the US context, describes the work of Adrian Vermeule, Gillian Metzger, and Jon Michaels.

6 *Ibid* at 861.

7 *Ibid*.

8 *Ibid*.

9 *Ibid* at 867.

In Part II, we describe administrative supremacy and the way it has manifested itself in the Supreme Court's jurisprudence. Administrative supremacy is a broad school of thought, but its adherents share distinctive views of the role and function of the administrative state and its relationship to fundamental legal principles. For them, courts should generally defer to decisions made by these actors, in consideration of their expertise and democratic pedigree. On the administrative supremacist account, the very choice by legislatures to empower these presumptively expert decision makers should necessarily limit the role of judicial review. As we show, administrative supremacy is justified by particular views on three issues: (1) expertise and the separation of powers, (2) the Rule of Law, and (3) democracy. These views run through a number of modern-day Canadian cases.

In Part III, we outline the problems with administrative supremacy's views on expertise and the separation of powers, the Rule of Law, and democracy. In each case, administrative supremacists arguably redefine constitutional values in order to bolster the credentials of administrative action. While some of these redefinitions rely on techniques that might encourage better administrative decision making (say, opportunities for participation), they do not offer standalone justifications for a supremacist posture.

Finally, in Part IV, we outline how *Vavilov* has partially accepted these critiques of administrative supremacy. While the acceptance is just that—partial—*Vavilov* is a significant step that redirects key aspects of the law of judicial review away from the status quo ante of administrative supremacy. *Vavilov* sets a higher standard for administrative government, one that is consonant with the important role that administrative decision making plays in the modern state.

A short note before beginning: A rejection of administrative supremacy does not necessarily entail a rejection of the administrative state, though it may suggest significant reforms. While the authors are united in rejecting administrative supremacy, it is important to note that this rejection does not require agreement on all other aspects of how administrative law should work. Indeed, we disagree on (among other things) the

normative desirability of deference on questions of law at all and the role of the administrative state in Canada.[10] But one can believe in some deference, justified appropriately, without accepting administrative supremacy's broader arguments. Hence, we agree that *Vavilov*, by approximating an orthodox interpretation of constitutional principles, improves the administrative state's compliance with the law for the benefit of those subject to its regulation.

II. ADMINISTRATIVE SUPREMACY IN CANADA

In this section, we first present the academic theory of administrative supremacy. Although there is rich and flourishing administrative supremacist literature in the United States, which influences the Canadian adherents of this school of thought, it is on the Canadians that we focus. We then outline how administrative supremacy influenced the Supreme Court's case law, particularly in a line of cases stretching from *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation*[11] to the *Vavilov* concurrence.

A. ADMINISTRATIVE SUPREMACY: THEORY

1. AN OVERVIEW

Admittedly, describing a vast school of thought like administrative supremacy is difficult. As we shall see, different categories of thinkers can plausibly fall under this heading. While we acknowledge the differences between the views of the scholars we discuss below, some degree of nuance is bound to be lost in a survey of developing scholarship spanning 80 years, if it is to be manageable within the scope of an article, long as this one is. At the same time, there are important common threads that unite these scholars, which in our view justify our presentation of them as engaged in a shared, albeit evolving, intellectual

10 For this reason, we are unable to take up a reviewer's suggestion that we define or label our own position.

11 1979 CanLII 23 (SCC) [*CUPE*].

endeavour. We begin with Pojanowski's general description of administrative supremacy, before turning to the specific themes that unite different thinkers under the "administrative supremacy" banner.

Canadian lawyers are familiar with the twin principles whose interaction organizes the law of judicial review: legislative intent and the Rule of Law. For example, because of legislative intent—discerned in the mere act of delegation to administrative actors—courts presumptively apply a deferential standard of reasonableness.[12] But this presumption can be rebutted where the Rule of Law requires it; for example, "constitutional questions" demand correctness review.[13]

For the administrative supremacists, this division of labour between legislative intent and the Rule of Law gives too much power to courts. They would narrow the Rule of Law's ambit, putting emphasis on the "authority of the legislature to delegate its lawmaking power to administrative agencies".[14] It is this act of delegation—and its embodiment of a considered choice to grant power to expert agencies—that is the centrepiece of the administrative supremacist model: it "grounds the administrative state".[15] Accordingly, the Rule of Law does not have much work to do, because "most interesting questions of legal interpretation are inextricable from legislative policy choices"[16] and so are amenable to resolution by policy experts. Courts, then, only police "the borders of rationality."[17]

As described by Pojanowski, administrative supremacists generally have a consistent approach to problems in administrative law. On questions of law, they advocate "deference across the board to agency interpretations of statutes and

12 See *Vavilov*, *supra* note 1 at para 23.

13 *Ibid* at para 53, but see 68–69, below, for a discussion of judicial review of discretionary administrative decisions engaging constitutional rights.

14 Pojanowski, *supra* note 5 at 869.

15 *Ibid*.

16 *Ibid*.

17 *Ibid*.

regulations."[18] Legal norms, to the extent they are even relevant under an administrative supremacist model, do not serve to constrain administrative power; rather, they enable decision makers to "balance those norms' worth against other policy goals."[19] On substantive review of policy (as opposed to legal) questions, a supremacist court would eschew rigorous judicial scrutiny and adopt a "thin rationality review".[20] And when it comes to procedure, "the administrative supremacist would give agencies wide leeway in choosing how to make law and policy."[21]

While Pojanowski writes in the American context, his description is useful for Canadian observers. Successive generations of leading Canadian administrative lawyers have embraced the premises of the administrative supremacist view of the separation of powers, the Rule of Law, and democracy. In truth, the administrative supremacist position can be mapped on a spectrum, with the thinkers in the category accepting, to greater or lesser extents, the core tenets of the category. For the so-called "functionalist" school of thought, best represented by New Deal era scholars like Willis, Corry, Kennedy and, later, Arthurs,[22] the basic question posed by modern social problems is simple: "how shall the powers of government be divided up?"[23]

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18 *Ibid* at 861.

19 *Ibid*.

20 Jacob Gersen & Adrian Vermeule, "Thin Rationality Review" 114:8 Mich L Rev 1355 at 1358.

21 Pojanowski, *supra* note 5 at 863.

22 The literature is vast: see e.g. John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935–1936) 1:1 UTLJ 53 [Willis, "Three Approaches"]; Harry Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 Osgoode Hall LJ 1 [Arthurs, "Dicey Business"]; James A Corry, "Administrative Law in Canada" (1933) Proceedings of the Canadian Political Science Association 190; WPM Kennedy, "Aspects of Administrative Law in Canada" (1934) 46:1 Jurid Rev 203; R Blake Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930–1941" (2000) 9 Dal J Legal Stud 36.

23 Willis, "Three Approaches", *supra* note 22 at 75. In recent work, Paul Daly outlines some characteristics of functionalism, particularly its interaction with *Vavilov*. See Paul Daly, "The Autonomy of Administration" (2023) 73 UTLJ (Supplement Issue 2) 202 [Daly, "Autonomy"].

This was a pertinent question for the time, given that governments were now being asked to "[c]are [for] the sick, the poor, the aged, and the infirm".[24] For these scholars, "parliament and courts were ill-suited to implementing [the] new government programs" of the age,[25] and instead, a division of powers that prioritizes the expertise of administrative actors was justified. For the functionalists, the democratic choice to embed power in expert agencies should be respected, with the Rule of Law acting only as an anachronistic impediment serving to render administration ineffective.[26] As Daly argues, "[t]he foundations of Canadian administrative law were functionalist, established in an era where the progressive concern was with overly intrusive judicial review of labour relations experts".[27] As we describe below, these foundations remained solid until *Vavilov*.

In later years, democratic defenses of the administrative state arose that were quite different from the functionalist arguments of the New Deal era. Scholars in this camp, like Dyzenhaus, Cartier, and Macdonald,[28] and, in the United States, Jerry Mashaw,[29] focus on the administrative state's democratic possibilities. Nonetheless, like the functionalists, some of these scholars justified the administrative state because of its

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24 Kennedy, *supra* note 22 at 221.

25 Brown, *supra* note 22 at 55.

26 See Arthurs, "Dicey Business", *supra* note 22 at 22; see also David Dyzenhaus, "The Logic of the Rule of Law: Lessons from Willis" (2005) 55:3 UTLJ 691 at 702 [Dyzenhaus, "Lessons"].

27 Daly, "Autonomy", *supra* note 23 at 27.

28 See e.g. notably David Dyzenhaus "The Politics of Deference: Judicial Review and Democracy," in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 279 [Dyzenhaus, "Politics"]; Genevieve Cartier, "Administrative Discretion as Dialogue: A Response to John Willis (or: from Theology to Secularization)" (2005) 55:3 UTLJ 629; Roderick A Macdonald, "Call-Centre Government: For the Rule of Law, Press #" (2005) 55:3 UTLJ 449.

29 See Jerry L Mashaw, "Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State" (2001) 70:1 Ford L Rev 17.

purported ideals,[30] though in different moments they were more forthright about its potential pitfalls.[31] Accordingly, and rather than justifying administrative government solely on the basis of expertise, these theorists suggest that the legitimacy of the administrative state depends on its ability to justify its actions to affected parties.[32] On this account, an ethic of justification builds a "dialogue" between the affected party and the decision maker.[33] For this reason, developing a "culture of justification"[34] in the administrative state will encourage decision makers to account for their decisions to the affected parties as dignity-bearing individuals who benefit from a universe of legal protections.[35]

In our view, both schools, while different in important ways, subscribe to versions of administrative supremacy, to a greater or lesser extent. Some of the scholars we characterize as administrative supremacists would dispute this classification. The functionalists hew closer to the extreme end of the spectrum, eschewing the Rule of Law almost completely and giving priority to the exigencies of administrative action. The democratic theorists use the devices of reasons, procedure, and participation instead to legitimize administrative power. But, notably, they still advocate for a strong rule of deference based on the distinctive contribution offered by administrative decision makers that

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30 See e.g. Dyzenhaus, "Politics", *supra* note 28 (arguing that "the administrative state . . . was put in place in order to follow through on the promise of substantive equality before the law, once formal equality had been by and large achieved by legal subjects" at 306).

31 *Cf ibid* at 306 and Dyzenhaus, "Lessons", *supra* note 26 at 703, stating that:

> We are all now more than familiar with the experience of legislatures delegating powers to public officials to dismantle the achievements of the welfare state, and we are also familiar with legislatures delegating authority to administrative officials to implement statutory bills of rights, a phenomenon not easily captured by a dichotomy between public welfare and private right

32 See Dyzenhaus, "Politics", *supra* note 28 at 286.

33 Cartier, *supra* note 28 at 631.

34 Etienne Mureinik, "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10:1 SAJHR 31 at 32 [Mureinik, "Bridge"].

35 See e.g. David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17:1 Rev Const Stud 87 at 108 [Dyzenhaus, "Dignity"].

sidelines courts, finding common ground with functionalists. Dyzenhaus, for one, sees much to learn from the functionalists: they show us that the administrative state is legitimate, and that constitutional theory must accommodate administrative power, so that it articulates "a role for public officials to interpret not only their specialized mandates but also the way in which fundamental values are best understood in their particular contexts."[36] The culture of justification exists to draw out a space for expert contributions to the meaning of law.

On this account, both the functionalists and the democracy theorists—from different perspectives—adopt an administrative supremacist posture. It is useful to explore the administrative supremacist argument in three distinct areas: (1) expertise and the separation of powers; (2) the Rule of Law; and (3) democracy.

2. The Fourth Branch: Expertise and Separation of Powers

From the functionalists to their contemporary heirs, administrative supremacists are impatient of the traditional separation of powers and argue instead that the administrative state is the best institution through which to pursue policy aims. Matthew Lewans's view is representative: he claims that "we cannot hope to address [complex social] issues intelligently without harnessing the experience, expertise, and efficiency the modern administrative state provides."[37] For one thing, the administration increases the state's regulatory capacity because it can deploy expertise that political actors and courts lack and engage in more, and quicker, as well as better, regulation than other institutions. For another, administrative supremacists tend to believe that the administrative state will be better aligned with their policy preferences. Accordingly, the administrative state's freedom of action in making and implementing policy is paramount, and any concerns about the separation of powers are misplaced.

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36 Dyzenhaus, "Lessons", *supra* note 26 at 714.

37 Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart, 2016) at 187 [Lewans, *Deference*].

We may return to Lewans for a statement of the argument for administrative supremacy based on regulatory capacity. Indeed, this statement is so clear that it is worth quoting at some length:

> While a legislative assembly might be able to forge sufficient consensus on broadly worded objectives as a platform for future action, it might reasonably conclude that interpretive disputes regarding those objectives outstrip the capacity of the legislative process; it might conclude that these disputes are better resolved by experts or officials with theoretical or experiential knowledge regarding a particular question of policy or principle; or it might conclude that the administrative process provides a more accessible or contextually sensitive process for resolving interpretive disputes about the law.[38]

It is only left to point out that "interpretive disputes"[39] about generally worded objectives are no more and no less than disagreements about what is to actually be done; what policies will accomplish the agreed-upon general aims.

Now, the administrative state's expertise is a common argument for preferring it to other institutions as the vehicle for policy implementation. So, for example, Willis asserted that:

> The regulation of a monopoly involves the weighing of economic interests too nice for the consideration of a committee of parliament and quite foreign to the purview of the courts . . . . A body of persons, who understand the nature of the problem involved and are equipped to offer solutions, has to be organized . . .[40]

And the regulation of monopoly is far from the only issue to which administrative expertise is, on this view, the unavoidable solution. Dyzenhaus describes Willis's trust in "expertise located in government" as a "cult",[41] but it and its concomitant belief that judges, by contrast, "are ill-equipped or unwilling to interpret legislation sympathetically or knowledgeably" are, in truth, the

38 *Ibid* at 199.

39 *Ibid*.

40 Willis, "Three Approaches", *supra* note 22 at 58.

41 Dyzenhaus, "Lessons", *supra* note 26 at 704.

central tenets of a widespread faith.[42] Even when administrative supremacists acknowledge the limits of expertise—as, for example, Harry Arthurs candidly did, recognizing that "especially in hierarchically-organized, high-volume tribunal systems, this presumption [of administrative expertise] is strained"[43]—they are still skeptical of the role of courts in checking applications of administrative expertise.[44]

Indeed, administrative supremacists often claim that the complexity of the issues facing contemporary polities would defeat legislative or judicial attempts to deal with them, and they typically do not even contemplate leaving them to be addressed by the spontaneous actions of individuals and voluntary associations in the market, the charitable sector, or elsewhere. These issues typically include the regulation of specific industries, the management of relationships between employers and employees, immigration, and the administration of social programmes. On one view, known as administrative constitutionalism, they even include human rights, including those protected by the constitution.[45] By contrast, administrative supremacists see the courts as a menace to good administration,[46] and "[t]he decision to commit matters to an

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42 Arthurs, "Dicey Business", *supra* note 22 (claiming "substantial support" for this proposition at 30).

43 *Ibid* at 35.

44 See *ibid* (stating that "[a] true comparison of like with like . . . would measure judges against this elite of tribunal members" at 36).

45 See Matthew Lewans, "Administrative Constitutionalism and the Unity of Public Law" (2018) 55:2 Osgoode Hall L J 515 [Lewans, "Administrative Constitutionalism"]; Rosalie Silberman Abella & Teagan Markin, "Thinking about Administrative Law in Canada: From Doctrine to Principle" in Simon Mount & Max Harris, eds, *The Promise of Law: Essays Marking the Retirement of Dame Sian Elias as Chief Justice of New Zealand* (LexisNexis, 2019) 271 (stating that "administrative bodies have the authority and expertise to interpret and apply . . . legal constraints" that are "supplied by the *Charter*" at 299).

46 See Arthurs, "Dicey Business", *supra* note 22 ("it is by no means clear that even the minimal role assigned to a reviewing court on the basis of its special legal skills can be undertaken without serious detriment to the functioning of the tribunal itself" at 41). See also Macdonald, *supra* note 28

administrative tribunal . . . suggests . . . a determination [by the legislature] that judges should not be involved", perhaps "against the background of unhappy experience with judicial handling of those matters",[47] but not necessarily so.

Administrative supremacists also note that the administrative state can regulate more extensively or more flexibly (in the sense of changing the rules quickly and frequently if necessary to adapt to circumstances). Thus, Macdonald claims that:

> Public administration faces equivocal situations far more often than those who seek right answers at all costs think. After all, to be engaged in developing and administering policy is to confront some of the most confusing, complex, and political questions of social living.[48]

The administration should, accordingly, be left to deal with this complexity, without overbearing judicial surveillance. Arthurs cautions, moreover, that "[t]here are simply more matters to be decided than an inelastic supply of judges could cope with, and those matters involve so many issues other than legal rights that judicial talent would be misspent in trying to resolve them."[49]

In addition to their expertise and capability, administrative supremacists count on the sympathies of the decision makers whom they wish to empower for their preferred policies. This line of thought began early on in the development of administrative supremacy, with a strong suspicion of judges as incorrigibly individualistic or conservative. Thus, Willis denounces Lord Shaw's dissent in *R v Halliday*[50] as grounded in an obsolete and obtuse "reverence for the liberty of the subject."[51] In case readers do not recall, this is a case where the

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(arguing that "the biggest impediment to accountable decision making . . . is that front-line public servants are so terrorized by a formal logic of legalism that they are disinclined to exercise discretionary judgement when they know they should" at 483).

47 Arthurs, "Dicey Business", *supra* note 22 at 39.

48 Macdonald, *supra* note 28 at 481.

49 Arthurs, "Dicey Business", *supra* note 22 at 36.

50 [1917] UKHL 1.

51 Willis, "Three Approaches", *supra* note 22 at 60.

House of Lords held that a statutory grant of power "to issue regulations for securing the public safety and the defence of the realm"[52] was sufficient to authorize the indefinite detention, based on no more than ministerial say-so, of persons of "hostile origins or associations".[53]

Harry Arthurs similarly condemns "common law judges" for "shar[ing] Dicey's antipathy to 'collectivism' and his mistrust of administrative adjudication"[54] and for "believ[ing] that since they ultimately exist to provide justice, 'injustice' is more likely to result from administrative action than their own."[55] More recently, Lewans has condemned both judges who "routinely flouted administrative decisions" and scholars who approved of their doing so. The latter, he writes, were motivated by their "deep suspicions regarding the expansion of the franchise, democratic decision-making, and the redistribution of wealth."[56]

The administrators' putative embrace of the aims of the regulatory programs they implement is sometimes presented as a form or aspect of their expertise. On this view, expertise is not always scientific or technical, but instead "[i]t resides in the politics of the policy domain itself" and consists in "the ability to marry experience (knowledge of the field), logic (knowledge of legal process), and intuition (judgement) with an understanding of the policy goals set out in an agency's legislative mandate".[57]

However, and moving along the spectrum of administrative supremacy, more recent administrative supremacists have signalled at least some concern about whether they can truly count on the administrative state's support. This is but one example of differences that might exist among administrative supremacists—though the difference is one of degree. Macdonald cautions that "[g]ood governance depends on public servants genuinely accepting the policy goals imposed by an

52 *Defence of the Realm Consolidation Act 1914* (UK), 5 & 6 Geo V, c 8, s 1(1).

53 *Defence of the Realm (Consolidation) Regulations* (UK), SR & O 1914 at 14B.

54 Arthurs, "Dicey Business", *supra* note 22 at 20.

55 *Ibid* at 34.

56 Lewans, *Deference*, *supra* note 37 at 200.

57 Macdonald, *supra* note 28 at 482–83.

agency's organic legislation."[58] While Macdonald seems to share the administrative supremacists' characteristic trust that administrators will implement their own understanding of these policy goals in good faith, there is at least an unstated implication about the possibility that they might not do so. David Dyzenhaus makes this preoccupation explicit, carving out an exception to his general call for judicial deference to administrators for those cases where the latter fail to advance certain substantive aims.[59]

But while, for most of its adherents, administrative supremacy goes hand-in-hand with progressive and egalitarian politics,[60] it need not serve progressive ends.[61] More accurately, its embrace reflects, in John Willis's words, "the fulfilment of a social philosophy which sets public welfare above private rights",[62] whatever "public welfare" is deemed to consist of. In this sense,

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58 *Ibid* at 483.

59 See Dyzenhaus, "Politics", *supra* note 28 at 306.

60 See e.g. Macdonald, *supra* note 28 (criticizing an excessive focus on the Rule of Law, which "occludes one of the central purposes of public governance—namely, the pursuit of redistributive justice through state action" at 486); Dyzenhaus, "Politics", *supra* note 28 at 306.

61 See e.g. John Willis, "Canadian Administrative Law in Retrospect" (1974) 24:3 UTLJ 225 [Willis, "Retrospect"] (denouncing "currently fashionable cults" liable to "damage . . . effective government if . . . allowed to infiltrate too deeply into the procedural part of administrative law", which include such things as "claims by prisoners in penitentiaries . . . to a formal 'right to be heard'", as well as what we now call access to information and environmentalist claims at 229). See also John Willis, "Administrative Law in Canada" (1961) 39:2 Can Bar Rev 251 (referring to "the sweating immigrant" challenging a deportation decision, possibly reached on account of his or her "political colour" at 258). Such arguments have not recently been made in Canada, but nothing in administrative supremacist thinking precludes them. See Adrian Vermeule, "Bureaucracy and Mystery" (22 March 2019), online (blog): <mirrorofjustice.blogs.com/mirrorofjustice/2019/03/bureaucracy-and-mystery-.html> ("the administrative state could be put to beneficial use to promote religion" including "by directly and affirmatively promoting religious values").

62 Willis, "Three Approaches", *supra* note 22 at 59. See also Dyzenhaus, "Lessons", *supra* note 26 (noting that Willis later reconciled to judicial review—once he concluded "that lawyers and judges were genuinely prepared to balance the needs of effective government against the lawyerly urge to protect individual rights at all costs" at 693).

administrative supremacists of different stripes find agreement on the necessary ideological orientation of the administrative state.

Whatever the reason or the combination of reasons they see for empowering the administrative state, administrative supremacists urge us to recognize the limitations and ultimate irrelevance of the separation of powers in the modern world. Early administrative supremacist views, such as those of Willis, that hold—in Macdonald's summary—"that public agencies were omnicompetent . . . and that there was little to be gained from puzzling about the optimal, or even appropriate, allocation of tasks to different governance institutions"[63] may seem crude. Yet some contemporary writers have not left them far behind. Consider, for example, that Justice Rosalie Abella (extrajudicially) and Teagan Markin urge an approach to administrative law that:

> Instead of assigning exclusive zones of jurisdiction to the courts, legislatures, and administrative bodies . . . is premised on the idea that different institutions may make decisions on behalf of the community as long as they comply with certain procedural and substantive principles.[64]

While this statement is perhaps less categorical than Willis's position, it demonstrates a skepticism about the separation of powers in the achievement of administrative aims.

That said, contemporary administrative supremacists reason somewhat differently from their forebears. The latter argued that, in Willis's words, "lawyers' values" and "civil servants' values"[65] were simply too distant from each other, so that judicial review could never truly respect administrative action. In a sense, they embraced separation of powers in a radical form, while rejecting the checking and balancing device that is judicial

63 Macdonald, *supra* note 28 at 455, n 15.

64 Abella & Markin, *supra* note 45 at 298.

65 John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18:4 UTLJ 351.

review.[66] Later administrative supremacists, on the contrary, claim that "entirely too much" has been made "of the distinction between 'lawyers' values' and 'civil servants' values'",[67] and indeed that lawyers and civil servants are "partners in the ongoing project of interpreting and implementing constitutional values that enjoy widespread public support".[68] That being so, while a measure of judicial review may be appropriate, its role is not to secure either the separation of powers strictly speaking, nor to serve as a check or balance, but simply to improve the realization of purposes shared by both the courts and the administrative state as partners in the elucidation of the law.

3. THE RULE OF LAW

Administrative supremacists are united in rejecting a particular conception of the Rule of Law, which they associate with A.V. Dicey. In a nutshell, this is the view that common law courts have the monopoly on or at least a privileged ability to engage in legal interpretation, such that law is what the courts say it is. The supremacists' rebuttal to this view has changed: while early functionalists such as Willis and to a lesser extent Arthurs were impatient of any Rule of Law talk, contemporary scholars such as Dyzenhaus and Lewans embrace it. In doing so, they offer their own interpretation of what the Rule of Law is and requires, emphasizing the importance of a "culture of justification." Throughout, however, administrative supremacists are suspicious of the judiciary's entitlement "to say what the law is",[69] and especially what statutes mean.

Early administrative supremacists dismiss the idea of the Rule of Law as little more than a partisan trope. In the United Kingdom, Jennings insisted it was a subjective normative ideal or

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66 See John Willis, "To the Editor" (1951) 29:5 Can Bar Rev 580 [Willis, "To the Editor"] (judicial review "is the power to interfere with the normal functioning of a government system of which . . . [courts] are the least important arm" at 585).

67 Macdonald, *supra* note 28 at 452.

68 Lewans, "Administrative Constitutionalism", *supra* note 45 at 517–18.

69 *Marbury v Madison*, 5 US (1 Cranch) 137 at 177 (1803).

a collection of "notions which are essentially imprecise".[70] For Willis, it was only an exalted label for "a prejudice against clothing public authorities with large powers".[71] Similarly, Arthurs saw it as "a legal-cultural artifact" whose "emotive and symbolic significance" is one "to which, on any objective assessment of its intellectual merits, it is not entitled."[72] For Macdonald, "Dicey's rule of law" is a sort of "outsourced call centre"[73] imposing its abstract rationality on the living, breathing specifics of the administration.

For these scholars, the Rule of Law, in any case, is not the solution to whatever problems might exist with the administration. Willis insists that "most people are too poor to pay a lawyer to invoke ultra vires: litigation is an expensive luxury."[74] Arthurs points out that "it is by no means inevitable that in any given instance of judicial intervention the individual benefitted actually was treated illegally or, for that matter, that deserving individuals were not denied relief."[75] Macdonald, for his part, stresses that while "[t]he rule of law approach aims at correcting mistakes that speak to the scope of authority as defined by a legislative delegation . . . most unfairness in public administration operates within a legislative mandate".[76] It must "be recast as formal failure" to "appeal to the lawyers' fetish",[77] or go unredressed.

Beginning with Arthurs, however, a different critique emerges too: one that, instead of rejecting the Rule of Law outright, insists that its conventional understandings, especially Dicey's, are misconceived. Arthurs argues that Dicey was wrong to emphasize the role of common law courts as guardians of legality

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70 Sir W Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1959) at 60.

71 Willis, "Three Approaches", *supra* note 22 at 54.

72 Arthurs, "Dicey Business", *supra* note 22 at 5.

73 Macdonald, *supra* note 28 at 469.

74 Willis, "To the Editor", *supra* note 66 at 584.

75 Arthurs, "Dicey Business", *supra* note 22 at 41.

76 Macdonald, *supra* note 28 at 485.

77 *Ibid*.

because "law emanates from many sources, including judges who do not sit in, and are not part of the hierarchy of, the superior courts".[78] Later administrative supremacists took up this idea. In Abella and Markin's words, "both administrative decision-makers and the courts have the authority to consider and apply law; and neither is subservient to the other."[79] While this is a less radical position than the one adopted by the functionalists, here, again, we see a commitment to administrative supremacy, the idea that a doctrine of deference must treat the administrative state as a bona fide "constitutional participant".[80]

A related argument is that "it is in the nature of much legislation that it should be framed in language which is capable of sustaining more than one meaning".[81] Indeed, Dyzenhaus has suggested that courts should refrain from independent inquiry into the meaning of legislation.[82] The interpretations preferred by judges, even for the sake of their consistency with the common law background, have no claim to pre-eminence. On the contrary, judges ought to recognize their "limited role" and leave "ample opportunity for the growth of distinctive legal systems whose norms, procedures and personnel will often not resemble those of the general legal system",[83] although there is some question as just how distinctive these "legal systems" should really be.[84] Summing up these arguments, one might say that in the

78 Arthurs, "Dicey Business", *supra* note 22 at 14. See also Macdonald, *supra* note 29 ("[b]ureaucracies build up governing principles and commitments that are as real, permanent, and legal as those of the courts" at 483).

79 Abella & Markin, *supra* note 45 at 272.

80 *Ibid* at 298. See also Daly, "Autonomy", *supra* note 23 at 221.

81 Arthurs, "Dicey Business", *supra* note 22 at 19. See also Dyzenhaus, "Dignity," *supra* note 35 ("statutory guidance can never be total, and is sometimes left deliberately vague" at 102).

82 See Dyzenhaus, "Dignity", *supra* note 35 (courts should not be "looking for a fact about legislative intent . . . about the meaning of a particular statutory provision" at 109).

83 Arthurs, "Dicey Business", *supra* note 22 at 42.

84 See Dyzenhaus, "Lessons", *supra* note 26 at 710.

administrative supremacists' view, the law is not the seamless web of the common lawyers' imagination but a patchwork quilt.

More recent administrative supremacist scholars go further in embracing the Rule of Law as a value but seek to justify a rule of judicial deference that purportedly enhances it. Characteristic of this position is David Dyzenhaus. He argues that administrative decisions are only authoritative when they are "interpretable as consistent not only with the actual terms of the statutory mandate, but also with the principles of the rule of law",[85] and indeed that legislation cannot be rightly interpreted in isolation from the requirements of the Rule of Law.[86] Lewans adds a measure of clarity about what the Rule of Law requires of the administrative state, both in terms of general values such as "concern and respect for subjects"[87] and more specific

> procedural and substantive constraints on the manner in which administrative authority is exercised . . . [J]udicial review serves to uphold the rule of law by ensuring that administrative officials respond to evidence and arguments tendered by subjects, and render decisions which are transparent, intelligible, and legally justifiable.[88]

Despite this acceptance of the Rule of Law, contemporary administrative supremacists still strongly urge the importance of judicial deference to administrative decision makers on the basis of their presumed expertise, apparent efficiency, or distinctive contribution to the law.[89] For Abella and Markin, "[d]eference is part of—and enhances—the rule of law. . . . [W]e have emerged from Dicey's Den into Deference's Daylight."[90] In a more sophisticated account, Lewans writes that, in light of "reasonable disagreement about what the law requires", judges must not be

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85 Dyzenhaus, "Dignity", *supra* note 35 at 102. See also Lewans, *Deference*, *supra* note 37 at 208.

86 See Dyzenhaus, "Dignity", *supra* note 35 at 105.

87 Lewans, *Deference*, *supra* note 37 at 208.

88 *Ibid* at 210.

89 See *ibid* ("the principle of legality . . . does not provide either subjects or judges with a plenary licence to engage in correctness review" at 210).

90 Abella & Markin, *supra* note 45 at 272.

"asserting a monopoly over legal interpretation".[91] For Dyzenhaus, judges who ignore privative clauses to interfere with administrative decisions are just as objectionable as officials hiding behind such clauses to become a law unto themselves,[92] and officials must retain the ability "to develop and adapt the law to changing circumstances."[93] On these accounts, judicial review that—at least sometimes—reserves the final word to the courts would be inappropriate.

This means that the requirements of legality are *solely* satisfied by (and indeed best translated as) a "culture of justification" in which the administrative state can—within broad limits, sometimes transcending its enabling statute—interpret the law in accordance with its own expertise and values, so long as it explains its decisions. The explanation, given in (preferably actual, but perhaps sometimes hypothetical) reasons for decision, ensures:

> [T]hat the individual subject to the decision can know that, among other things, his dignity as an individual, his equal status before the law, has been respected, not only because the official has made the decision free from bias and bad faith but also because the decision has been based on considerations appropriate to the particular statutory regime.[94]

The focus, however, is squarely on the broad principles involved, rather than on the exact conformity of administrative action with the text of enabling laws. Indeed, Moshe Cohen-Eliya and Iddo Porat write the culture of justification requires a "turn from legal interpretation to public reason oriented justification",[95] or at least "interpretation with an emphasis on

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91 Lewans, *Deference*, *supra* note 37 at 211.

92 See Dyzenhaus, "Dignity," *supra* note 35 at 99.

93 *Ibid* at 102.

94 Dyzenhaus, "Lessons", *supra* note 26 at 714. See also Moshe Cohen-Eliya & Iddo Porat, "Proportionality and Justification" (2014) 64:3 UTLJ 458 ("giving reasons for your actions reflects an attitude of respect to those who are affected by them" at 467).

95 Cohen-Eliya & Porat, *supra* note 94 at 465, citing Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of

principles and values rather than on text, since text . . . can be conceived as a barrier to a requirement for justification, as it might limit the set of possible rights and interests that can initiate a process of justification."[96]

What unites the earlier rejection of the Rule of Law and its later reinterpretation is the belief that judges have no special contribution to make to the interpretation of laws, or at least of those laws that have been designated for administrative implementation. Willis supports the ouster of the courts' supervisory jurisdiction over the administration "based on the theory that haphazard interference by a court armed with a defective technique of statutory interpretation is not likely to further the social purpose of the statute."[97] Even when they came to accept a measure of judicial supervision of the administration, administrative supremacists remained skeptical about judges' abilities to adopt a suitable approach to statutory interpretation, for the reasons canvassed in the previous section.

The most that can be hoped for, according to administrative supremacists, is judicial self-restraint. Although accepting that a residual space must be left for judicial review, Arthurs urges that, because "the words of the empowering statute are necessarily . . . interwoven with its policy," courts should not override a tribunal's interpretation of its empowering statute except where they are such "that no rational tribunal, acting in good faith, could possibly" have reached them.[98] This is a clear (and presumably not an accidental) echo of *Wednesbury* unreasonableness[99]—but for questions of law, declared to be

Rights-Based Proportionality Review" (2010) 4:2 L & Ethics Human Rights 141 at 143.

96 Cohen-Eliya & Porat, *supra* note 94 at 463. The Supreme Court has referred to this article—but not these specific passages—approvingly. See *Vavilov*, *supra* note 1 at para 14.

97 Willis, "Three Approaches", *supra* note 22 at 55.

98 Arthurs, "Dicey Business", *supra* note 22 at 40.

99 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947), [1948] KB 223, [1947] EWCA Civ 1 [*Wednesbury* cited to KB] ("if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere" at 230).

indistinguishable from questions of policy. Contemporary administrative supremacists might not go quite this far; they are content to adopt the more moderate language of reasonableness *tout court*.[100] But they are adamant that correctness review is to be avoided, because "even when the interest" asserted by an application for judicial review "is a fundamental one, and so deserving of the most intense scrutiny imaginable, the issue remains whether the official justified the conclusion and not what the judge would have concluded in the absence of the official's reasons."[101] In a culture of justification, courts have no "monopoly on the interpretation of the law."[102] Interpretation is a matter of justification, which can be offered by any official for any question, including those considered most significant. As we will note, while the culture of justification may be a useful way to encourage accountability in the administrative state, its extension to fundamental interests and any question arising in the ken of the administrator is a feature of administrative supremacy.

4. DEMOCRACY

Administrative supremacists similarly appeal to their own conception of democracy. For them, one of the major features of the administrative state is its democratic legitimacy—either because it has been conferred power by a legislature, or because it engages in a democratic dialogue with affected parties through the devices of participation and reasons-giving. While there is a tension between these justifications, administrative supremacists rely upon both to support their notion of deference.

As noted above, earlier functionalists and later administrative supremacists differed in their jurisprudential commitments, and this is certainly true as it pertains to questions of democracy. For

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100 See Lewans, *Deference*, *supra* note 37. Lewans states that "administrative officials . . . [must] render decisions which are transparent, intelligible, and legally justifiable", echoing the Supreme Court's definition of reasonableness review in *Dunsmuir* (*ibid* at 210). See *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

101 Dyzenhaus, "Dignity", *supra* note 35 at 113.

102 *Ibid* at 114.

functionalists, the legislative choice to delegate should be respected by the judiciary, which they see as closely aligned with an inherently conservative common law. Willis, for example, thought that much followed from the fact that legislatures themselves delegated power to those "best fitted to exercise . . . discretion."[103] In his view, the legislative selection of these people to exercise delegated power showed "confidence in the ability of the men selected to do their job faithfully and according to law."[104] Arthurs similarly lamented the judicial resistance to privative clauses that purported to reserve final decisions to administrative decision makers. Attacking the Supreme Court's decision in *Crevier v AG (Quebec)*,[105] which carved out a constitutional guarantee of judicial review, he argued that courts can subordinate "the carefully-considered wishes of a democratically-elected legislature to the hegemony asserted by judges and lawyers over the law, its interpretation and its administration."[106] Dyzenhaus encapsulates the functionalist view well when he says that the modern

> [L]eftwing critics of judicial review . . . argue that the common law camouflages the work of a judicial elite intent on upholding an anti-egalitarian private order in the face of democratic, egalitarian legislation. They maintain that, if there is any coherence to the common law vision of law, it comes not from the law itself but from the anti-democratic ideology of judges.[107]

For other administrative supremacists, the democratic argument is rather more sophisticated. For them, the functionalists were pure instrumentalists for whom there was nothing distinctly valuable about regulation *through law*.[108] In describing Willis, for example, Dyzenhaus accused him of an

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103 Willis, "Three Approaches", *supra* note 22 at 75.

104 *Ibid* at 79.

105 1981 CanLII 30 (SCC).

106 Harry W Arthurs, "Protection Against Judicial Review" (1983) 43:2 R du B 277 at 282.

107 David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14:1 SAJHR 11 at 12 [Dyzenhaus, "Mureinik"].

108 See e.g. Dyzenhaus, "Lessons", *supra* note 26 at 695.

"uncompromising utilitarianism"[109] that was based on a "cult . . . of expertise."[110] Something more substantive was required to justify administrative action—not merely administrative adherence to legislative intent.[111] Dyzenhaus argues that a culture of justification "requires at the least that opportunities for participation be built into legal institutions."[112] For example, Mureinik, on whose work Dyzenhaus drew, "strongly supported the notice-and-comment procedure, developed in the United States".[113] The purpose of these procedures was to create, to the extent possible, a democratic forum for the resolution of legal or policy problems (the two being indistinguishable on the administrative supremacist view). Procedures based on the principles of "participation" and "accountability" would act as "different institutional ways of articulating the basic principle of democracy."[114]

The account of democracy offered by Dyzenhaus is thicker than that offered by the functionalists, again representing a different position on the spectrum of administrative supremacy. It rests on the principles of participation and accountability.[115] Participation would counsel a notice and comment procedure, a broader right to a hearing, and protections against capture of the process.[116] Accountability would translate "into an aspiration towards institutions which foster the justification of government decisions."[117] The aspiration of justification "translates into a demand for review for unreasonableness"[118] by "a review body

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109 *Ibid* at 704.

110 *Ibid* at 705.

111 See e.g. Dyzenhaus, "Dignity", *supra* note 35 at 110.

112 Dyzenhaus, "Mureinik", *supra* note 107 at 34.

113 *Ibid* at 35; Etienne Mureinik, "Reconsidering Review: Participation and Accountability" (1993) Acta Juridica 35 at 38–39 [Mureinik, "Reconsidering Review"].

114 Dyzenhaus, "Mureinik", *supra* note 107 at 35.

115 See Mureinik, "Reconsidering Review", *supra* note 113.

116 *Ibid* at 39.

117 *Ibid* at 40.

118 *Ibid*.

independent of the official or agency."[119] The common thread between the functionalists and their administrative supremacist heirs lies in their treatment of legislatures as of secondary importance in governance, except insofar as they delegate power to the administrative state. Legislatures neither determine policy nor constrain the administrative state to any significant degree. As with the Rule of Law, modern administrative supremacists relocate democracy into the administrative state, whereas their predecessors were content heavily to discount it, if not altogether to abandon it.

B. Administrative Supremacy from *CUPE* to *Vavilov*

Administrative supremacy has found a home in Canadian law. From *CUPE*, through the pragmatic and functional era, and post-*Dunsmuir*, aspects of the theory have influenced the law of judicial review in Canada. We focus here on three sets of cases: (1) *CUPE* and the pragmatic and functional era, (2) the *Dunsmuir* era, and (3) the *Vavilov* concurrence. They all echo the three themes of administrative supremacy: (1) expertise and the separation of powers, (2) the Rule of Law, and (3) democracy.

1. From *CUPE* to the "Pragmatic and Functional Analysis"

Prior to *CUPE*, in which the modern law of judicial review was shaped, courts fastened onto the distinction between "jurisdictional questions" attracting *de novo* review and all other legal questions that, generally speaking, were beyond review entirely.[120] In one sense, this can be described as a form of "administrative supremacy," in which "so long as an administrative authority has acted within its statutory

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119 Dyzenhaus, "Mureinik", *supra* note 107 at 35.

120 There are several texts which discuss this era of Canadian administrative law, which largely mirrored British law. See Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: UBC Press, 2023) at ch 2 [Daly, *Culture of Justification*]. See also Peter Hogg, "The Supreme Court of Canada and Administrative Law, 1949–1971" (1973) 11:2 Osgoode Hall LJ 187.

jurisdiction a court will not interfere with its decision."[121] However, by designating certain issues of law or even fact as jurisdictional, the courts were able to evade the strictures of this framework.[122] In any case, this approach to judicial review was overtaken by *CUPE*, which more closely approximates the administrative supremacist position outlined by Pojanowski.

CUPE is often regarded as a watershed moment for administrative law in Canada.[123] Abella and Karakatsanis JJ, concurring in *Vavilov*, captured its importance:

> Forty years ago, in [*CUPE*], this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions within their mandates. Building on this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles.[124]

If anything, this description of *CUPE* understates matters by misrepresenting a binding instruction as a mere recommendation. Be that as it may, Abella and Karakatsanis JJ are right to highlight *CUPE*'s centrality to (pre-*Vavilov*) Canadian administrative law.

CUPE is the earliest and most prominent example of administrative supremacy in a Canadian judicial decision. The Supreme Court severely restricted the role of courts in policing the boundaries of administrative power. Specifically, on

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121 We thank Paul Daly for raising this point. Gerald E Le Dain, "The Twilight of Judicial Control in the Province of Quebec?" (1952) 1:1 McGill LJ 1 at 5; Daly, *Culture of Justification*, *supra* note 120 at 44. See also *Farrell v Workmen's Compensation Board*, 1961 CanLII 46 at 51 (SCC).

122 See *CUPE*, *supra* note 11 at 233; Daly, *Culture of Justification*, *supra* note 120 at 44–46.

123 However, there were precursors. See *Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses' Association*, 1973 CanLII 91 at 389 (SCC), Dickson J.

124 *Vavilov*, *supra* note 1 at para 198.

questions of law, courts should only ask themselves whether a particular legal interpretation is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation".[125] This standard of review would later become the most deferential one in Canada's judicial review framework.

The reasons for this doctrinal shift reflect the organizing principles of administrative supremacy—a fusion between the democratic choice embodied in an administrative scheme and the expertise of the particular decision maker. For the *CUPE* Court, the existence of a privative clause was a legislative signal—akin to delegation—that "labour matters be promptly and finally decided by the Board."[126] Indeed, "[n]ot only has the Legislature confided certain decisions to an administrative board, but to a separate and distinct Public Service Labour Relations Board."[127] This very fact of delegation justified a deferential posture on judicial review. But, perhaps more importantly, the *CUPE* decision sounded strongly in expertise. What justified deference was not only the decision maker's democratic credentials but also its "[c]onsiderable sensitivity and unique expertise" that made it well-suited to give meaning to the terms of the legislation.[128]

In typical administrative supremacist fashion, the legislative direction encapsulated in a privative clause reflected certain presumptions about administrative decision making, particularly in the labour relations context:

> The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour

125 *CUPE*, *supra* note 11 at 237.

126 *Ibid* at 235.

127 *Ibid* at 236.

128 *Ibid*.

> relations sense acquired from accumulated experience in the area.[129]

Motivated by the particular "social philosophy" embodied in the labour relations legislation,[130] the Court adopted an approach that gave the decision maker a wide margin of appreciation on a legal question because of the expertise recognized in a legislative privative clause. The policy goals of the legislature in this case dovetail with administrative supremacist arguments about the courts' formalist hostility to equitable labour relations legislation.[131] To support these policy goals, the Court used particular conceptions of the principles of democracy and expertise to create a standard of patent unreasonableness.

This same marriage between democracy—construed at this point as nothing more than legislative delegation and insulation in a privative clause—and expertise dominated in the so-called "pragmatic and functional" era.[132] In this time period, while legislative intent was said to remain the "polar star" of the standard of review analysis,[133] the general idea of expertise began to outshine it—a crude mechanism for respecting legislative intent took on a life of its own. In *Southam*, for example, the Court said that expertise "is the most important of the factors that a court must consider in settling on a standard of review."[134] There, the particularized expertise of the Competition Tribunal was involved in deciding a technical issue of economics, which was central to the case. Thus, we see the administrative

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129 *Ibid* at 235–36.

130 Willis, "Three Approaches", *supra* note 22 at 59.

131 See Finn Makela, "The Surprising Formalist: Justice Gonthier's Contribution to Labour Law" in Michel Morin et al, eds, *Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier* (Toronto: LexisNexis, 2012) 173 at 177.

132 This era was characterized by several cases. See e.g. *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 (SCC) [*Southam*]; *Pezim v British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC); *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19.

133 *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149.

134 *Southam*, *supra* note 132 at para 50.

supremacist posture: in the administrative ken, questions of law are necessarily wrapped up in technical policy choices, most amenable to resolution by experts.

2. THE *DUNSMUIR* ERA

For its part, *Dunsmuir* rests on a more sophisticated account of administrative supremacy, despite its professed embrace of the Rule of Law. This endorsement is, in any event, consistent with the posture of contemporary administrative supremacists such as Dyzenhaus, on whose work *Dunsmuir* draws both implicitly and explicitly. Under the *Dunsmuir* model, "deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law."[135] The Court endorses Dyzenhaus's famous claim that what judicial review requires is "not submission but a respectful attention to the reasons offered or which could be offered in the support of a decision".[136] While expertise played an important role in this analysis,[137] the hallmark of the original *Dunsmuir* project was a focus on the reasons, which must display "justification, transparency and intelligibility".[138] In this way, *Dunsmuir* started with a form of administrative supremacy that was informed by a thicker conception of democracy than that involved in earlier cases. But two aspects of the *Dunsmuir* framework soon unravelled.

First, the Supreme Court created a virtually irrebuttable presumption of deference on questions of statutory interpretation.[139] This meant that, on many questions—even

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135 *Dunsmuir*, *supra* note 100 at para 48.

136 Dyzenhaus, "Politics", *supra* note 28 at 286.

137 See e.g. *Dunsmuir, supra* note 100 at para 49:

> In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system

138 *Ibid* at para 47.

139 See e.g. *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34. There was at least a kernel of this presumption recognized in *Dunsmuir*, *supra* note 100 at para 54. See also

when expertise was not clearly engaged—deference would be presumed.[140]

Secondly, *Dunsmuir's* promise of a more substantively democratic form of administrative supremacy was never realized on its own terms. This was because the Supreme Court largely abandoned *Dunsmuir*'s requirement of responsive reasons. In *Newfoundland Nurses*,[141] while again purporting to endorse Dyzenhaus's work, the Court held that it would not regard the adequacy of administrative reasons as a "stand-alone basis for quashing a decision".[142] Instead, a reviewing court should feel free to "supplement" reasons "before it seeks to subvert them."[143] This instruction meant that failure to adequately respond to the concerns of affected individuals in the reasons—what Dyzenhaus called "the vulnerability principle"—would not be fatal to a decision.[144] This seems a far cry from the vision of democracy embedded in the "culture of justification". And yet this form of deferential review was justified in *Newfoundland Nurses* as consistent with the approach first heralded in *CUPE*.[145]

It is true that the Supreme Court's post-*Dunsmuir* cases reflected a sometimes-equivocal commitment to judicial deference. One constant criticism of cases in this era pertained to the problem of "disguised correctness review"—*de novo* review in the cloak of deference.[146] But this does not change that there

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Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2018 SCC 31 at para 46. As we will show, this presumption hardened as the years went on into something substantively different from what was envisioned in *Dunsmuir*.

140 See generally *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*Edmonton East*] (holding that "expertise is something that inheres in a tribunal itself as an institution" at para 33).

141 *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*].

142 *Ibid* at para 14.

143 *Ibid* at para 12, citing Dyzenhaus, "Politics" *supra* note 28 at 304.

144 Dyzenhaus, "Lessons", *supra* note 26 at 707.

145 See *Newfoundland Nurses*, *supra* note 141 at para 13.

146 See e.g. David Mullan, "The True Legacy of *Dunsmuir*—Disguised Correctness Review?" in Paul Daly and Leonid Sirota, eds, *Canadian Journal*

was a theoretical and rhetorical commitment to a particular conception of deference in the *Dunsmuir* era. This conception of deference set up the dispute in *Vavilov.*

3. THE *VAVILOV* CONCURRENCE

Abella and Karakatasanis JJ's concurring opinion in *Vavilov* is the most recent and, we hope, final example of administrative supremacy in Canadian law. Defending the line of cases originating with *CUPE* and decrying the majority's approach for "revers[ing] course" on the development of Canadian administrative law and "taking it back to the formalistic judge-centred approach this Court has spent decades dismantling," Abella and Karakatsanis JJ took pains to justify the supremacist position.[147] They formulated two arguments for deference to administrative actors:

> One based on the legislature's express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise . . .[148]

These twin justifications were first "fused" by *CUPE*,[149] where expertise was seen as inextricably connected to legislative intent.[150] The result was the creation of a "pluralist conception of the rule of law," which recognizes both the legislative choice to construct an administrative state and the reasons for which the legislature chose to create that state in the first place.[151]

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of Administrative Law and Practice Special Issue: A Decade of Dunsmuir (Toronto: Carswell, 2018) 107 at 107.

147 *Vavilov*, *supra* note 1 at para 199.

148 *Ibid* at para 212

149 *Ibid* at para 234.

150 *Ibid* at para 235.

151 *Ibid* at para 241.

III. ADMINISTRATIVE SUPREMACY IS WRONG

We have argued that administrative supremacists, whatever the differences among them, share common views on three fundamental constitutional principles: (1) the separation of powers, (2) the Rule of Law, and (3) democracy. Administrative supremacists interpret each of these principles to insulate administrative action from strict review, even on questions related to the Constitution. We do not share this perspective. To explain why, in this section, we set out our own understanding of the separation of powers and its relationship to expertise, the Rule of Law, and democracy, as well as our reasons for thinking the administrative supremacist interpretation of these principles defective.

In doing so, we do not regard it as our task to articulate these principles in such a manner as to support and legitimate the administrative state. Dyzenhaus insists that:

> The administrative state is not only a phenomenon that has to be fitted into our constitutional order because it is here to stay. It is also legitimate, and so a test of the adequacy of any constitutional theory is whether the theory recognizes this fact.[152]

Lewans applies a similar approach to the practice of judicial review, insisting that it must treat "administrative institutions . . . not [as] incorrigible threats to the rule of law, which must be brought to heel by a judiciary with unique access to constitutional truths, but partners in the quest to determine the meaning of constitutional principles".[153] In our opinion, however, the "adequacy" of a constitutional theory does not and cannot depend on its capacity to reach a stipulated outcome.[154]

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[152] Dyzenhaus, "Lessons", *supra* note 26 at 714. See also Arthurs, "Dicey Business", *supra* note 22 ("[a] theory that stigmatizes twenty, fifty, a hundred years of legislation . . . is, to say the least, open to criticism" at 11).

[153] Lewans, "Administrative Constitutionalism", *supra* note 45 at 526.

[154] *Cf* Lawrence B Solum, "Outcome Reasons and Process Reasons in Normative Constitutional Theory", (forthcoming in 2024) U Pa L Rev at 2.

We note that, contrary to what may have been the case in the past,[155] in recent decades most administrative supremacists have written about constitutional principles as if they have a stable, true meaning. They do not accept, for example, Jennings's view that the Rule of Law is nothing more than a label for subjective or partisan affectations.[156] We think it appropriate, therefore, to proceed on this assumption, which we share with them, and explore our substantive disagreement about these principles. Indeed, we find that in many cases, these constitutional principles—far from being anachronisms—have much relevance to real problems in many current administrative contexts. And if it appears that key constitutional principles, rightly understood, do not support administrative supremacy, they should not be modified to accommodate it. Rather, it is administrative supremacy that ought to be discarded.

A. The Fourth Branch and Separation of Powers

Administrative supremacists, as we have seen, find the orthodox vision of the constitution as embodying a tripartite separation of powers wanting. While it is occasionally framed as descriptive,[157] the administrative supremacist objection to the separation of powers is essentially normative. Separating powers and insisting that laws be made by the legislature, interpreted by the courts, and only given effect by the executive is a poor way of developing and implementing policy. Instead, the administration ought to be given broad policy-making and interpretive powers (there being, in any event, no real distinction between the two), in view of its expertise and capacity for flexible, responsive regulation, as well as of the substantive values it is likely to promote.

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155 See e.g. Arthurs, "Dicey Business", *supra* note 22 (condemning "[a] theory that seems to assume that legal principles should determine social reality, rather than reflect it" at 11).

156 See Jennings, *supra* note 70.

157 See Willis, "To the Editor", *supra* note 66 ("[t]he legal theory is that Canada is governed by Parliament; in fact Canada is governed by the Cabinet with the consent of the House of Commons and, to a very minor degree, of the Senate" at 581).

Before addressing the administrative supremacist arguments in detail, a brief reminder of the reasons for valuing the separation of powers will be useful. For this, we draw on Jeremy Waldron's illuminating work.[158] Although directed primarily at the *Constitution of the United States*, much of it is applicable to Canada's Westminster-type constitutional framework.[159] Indeed, as Waldron argues, separation of powers is "an important principle of the body of theory we call constitutionalism",[160] and as such necessarily relevant to Canada as a constitutional state,[161] as one of those "standards of political evaluation" that "are compelling for us, even when the compulsion is not legal."[162]

Apposite to Westminster-type systems, Waldron claims that we must avoid a false equivalence

> [B]etween (i) a sovereign who just blurs the distinction between the powers that he has because, in crude and simple terms, they are all his, and (ii) a sovereign who unites all power in his person but nevertheless articulates the powers in his exercise of them.[163]

Even if we accept the premise that such systems are by convention ruled by an executive-and-legislative hybrid concentrated in the cabinet,[164] it still matters that this ruler and its agents "articulate" their various powers. That is to say, they must "distinguish between the various phases of power or the

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158 See Jeremy Waldron, "Separation of Powers in Thought and Practice" (2013) 54:2 Boston College L Rev 433 [Waldron, "Separation of Powers"].

159 See Honourable Russell Brown, "Les Conférences Chevrette-Marx: Vers une théorie canadienne de la séparation des pouvoirs" (Montreal: Éditions Thémis, 2023) for a recent discussion of the separation of powers in Canada.

160 Waldron, "Separation of Powers", *supra* note 158 at 435–36.

161 See *Reference re Secession of Quebec*, 1998 CanLII 793 at para 72 (SCC) [*Secession Reference*].

162 Waldron, "Separation of Powers", *supra* note 158 at 438.

163 *Ibid* at 449.

164 In reality, this is surely an oversimplification; for a discussion of the separation between the executive and Parliament in the United Kingdom's constitution, see e.g. *R (SC) v Secretary of State for Work and Pensions*, [2021] UKSC 26 at para 166.

various functions that one and the same person or institution is exercising."[165] This is because "each of the phases into which the principle [of separation of powers] divides the exercise of power, is important in itself, and raises issues of distinct institutional concern."[166]

Or, to use a different related metaphor suggested by Matthew Palmer, speaking from the perspective of a Westminster-type constitutional system (New Zealand's):

> [T[he normative constitutional health of any government is improved by the different branches of government which exercise public power thinking and speaking in different languages. We want institutions thinking both abstractly about the formulation of general policy and legal principles and contextually about how those principles apply, and should apply, to the messy reality of specific facts of particular cases. Each perspective checks the other.[167]

The question remains, then, whether the administrative supremacists are right to deny the need for this "articulation" of power in the name of regulatory success. In our view they are not. Before we explain why, we want to reassure the readers: accepting the importance of a more orthodox conception of the separation of powers does not require them to abandon whatever regulatory ambitions they may harbour. As Waldron argues, it "is not necessarily a way of limiting government, in the sense of curbing its action".[168] Rather than limiting power in an absolute sense, the separation of powers serves "to channel it . . . and, through the channeling, to open up the decision making for access" and contestation.[169] The channeling of power through distinct institutions makes it more transparent and facilitates its authorization and control by law. It also ensures that rules are not enacted without sufficient democratic support. But it need

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165 Waldron, "Separation of Powers", *supra* note 158 at 450.

166 *Ibid* at 456.

167 Honourable Matthew Palmer, "Constitutional Dialogue and the Rule of Law" (2017) 47:2 HKLJ 505 at 523.

168 Waldron, "Separation of Powers", *supra* note 158 at 457.

169 *Ibid*.

not make any particular outcome—provided that it has been properly authorized and reached by an appropriate procedure, supported by the requisite consensus—impossible.

Of course, the sort of channeling required by the separation of powers does reduce the speed with which regulation can be enacted and amended. Yet the speed and flexibility that administrative supremacists so prize are not unmitigated goods. This is partly for reasons that have to do with the principle of the Rule of Law,[170] which we discuss in the following section. Partly, however, this is because the lack of access and contestation when an unarticulated "power is just exercised in a lashing-out kind of way"[171] will result in regulation that is likely to be not only more restrictive than it needs to be but also less effective, possibly even at achieving its own objectives and especially at reconciling them with other priorities that the community may value.

This brings us to the issue of expertise, which is central to the administrative supremacist case for abandoning the separation of powers. The key point is that the administrative supremacists' presumption of expertise goes hand in hand with a lack of interrogation of whether expertise exists in particular administrative contexts. At the high point of the Supreme Court's embrace of expertise, in *Edmonton East*, the Court's majority rejected the pertinence of an inquiry into the actual expertise a tribunal might possess.[172] Meanwhile, what it means to be "an expert" has remained an open question. As Laverne Jacobs and Thomas Kuttner have observed, little work has been done to pinpoint exactly what the concept of expertise means, and:

> There is a similar vagueness in relation to our knowledge of tribunal expertise as a concrete reality: how expertise is identified in tribunal members or is relied upon in the

170 See *ibid* at 458–59.

171 *Ibid* at 449.

172 See *Edmonton East*, *supra* note 140 at para 33.

> decision-making process are questions that remain largely unexplored.[173]

Ideally, the empirical claim that justifies a legal presumption should be verified by observable facts. And yet with expertise, it simply never was.

Moreover, in some cases at least, the invocation of expertise can serve as a euphemism for the state's claims to a right to oppress disempowered citizens. This, Lisa Kerr has argued, is what happened when prisoners sought to assert constitutional rights against the policies of prison authorities: "the language of limited judicial capacity and lack of expertise", she writes, may seem "tactful", but it "covertly resurrects the civilly dead prisoner."[174] And while Kerr may be right that the "Foucauldian power/knowledge imbalance" between the prisoner and the prison administration "is *more* extreme than in other contexts of judicial review of government action",[175] other areas are not immune from such issues. Foreign affairs and national security come to mind,[176] as does immigration.[177]

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173 Laverne A Jacobs & Thomas S Kuttner, "The Expert Tribunal" in Laverne A Jacobs & Justice Anne L Mactavish, eds, *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice (2001-2007)* (Montreal: Éditions Thémis, 2008) at 69. See also Beth Bilson, "The Expertise of Labour Arbitrators" (2005) 12:1 CLELJ 33.

174 Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43 at 49.

175 *Ibid* at 48 [emphasis added].

176 See *Canada (Prime Minister) v Khadr*, 2010 SCC 3 (referring to "the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests" at para 39).

177 For instance, compare Kerr, *supra* note 174 ("for the bulk of prison history, courts refused entirely to adjudicate internal prison conditions" at 49) and Paul Daly, "Novak Djokovic and the Value of Administrative Law" (15 January 2022), online (blog): <administrativelawmatters.com/blog/2022/01/15/novak-djokovic-and-the-value-of-administrative-law/> ("[i]mmigration has traditionally been a prerogative of the executive, an island of unregulated discretion in the legal system"). See also Robert Thomas, *Administrative Law in Action: Immigration Administration* (Oxford: Hart Publishing, 2022).

Another area where claims of administrative expertise risk standing in the way of the protection of individuals is "administrative constitutionalism"—the autonomous application of constitutional rules by administrative decision makers subject only to loose judicial supervision. While we shall argue below that the *Vavilov* majority has squarely rejected much of the administrative supremacist thought we have described here, that majority's opinion carved out the decisions enshrining administrative constitutionalism from its otherwise sweeping scope. Yet it is important to note that "administrative constitutionalism" is of a piece with administrative supremacist views on the separation of powers and the purportedly expert administrative state more broadly.[178] In deference to sometimes counterfactual claims of expertise,[179] it results in constitutionally protected rights giving way to the convenience or preferences of administrative authorities,[180] sometimes without even a meaningful explanation.[181]

We note that, as this article was being edited, the Supreme Court rendered two decisions on the manner in which courts review administrative decisions under the *Charter.* These decisions do not sit well together, perhaps because the project of deference to administrative interpretations of constitutional law is misconceived. Nonetheless, both can be read to support a broader roll-back of the Supreme Court's administrative supremacist commitments. In *CSFTNO*, the Supreme Court purported to uphold the principle of judicial deference to administrative applications of rights and values.[182] This was not

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178 See Mark Mancini, "The Conceptual Gap Between *Doré* and *Vavilov*" (2020) 43:2 Dal LJ 793; Léonid Sirota, "Unholy Trinity: The Failure of Administrative Constitutionalism in Canada" (2020) 2:1 J Commonwealth L 1 [Sirota, "Unholy Trinity"].

179 See Sirota, "Unholy Trinity", *supra* note 178 at 23–26 on the discrepancy between the claims and the reality of alleged expertise in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

180 See Sirota, "Unholy Trinity", *supra* note 178 at 29–38.

181 See *ibid* at 27–28.

182 *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*CSFTNO*].

justified at all, beyond a bald assertion that there is "no reason to depart from [the reasonableness] standard of review".[183] Moreover, the Court's application of the reasonableness standard is so intrusive as to raise, once more, a strong suspicion that is really a smokescreen for disguised correctness review. In our view, then, *CSFTNO* does not amount to a refutation of our argument. If *CSFTNO* can be justified at all, it is only as an attempt to ensure that state actors consider the *Charter.* What's more, the Supreme Court's recent decision in *York Region* throws significant doubt on the vitality of *CSFTNO*.[184] In this case, the majority insisted that whether *Charter* rights are engaged on the facts is reviewable on a correctness standard. Rehearsing arguments that view the courts as a bulwark against unconstitutional administrative action, Rowe J held that that:

> The determination of constitutionality calls on the court to exercise its unique role as the interpreter and guardian of the Constitution. Courts must provide the last word on the issue because the delimitation of the scope of constitutional guarantees that Canadians enjoy cannot vary "depending on how the state has chosen to delegate and wield its power". [185]

Be that as it may, though, even in those cases where the administrative decision maker would bring genuine expertise to bear on an issue, this expertise is not a direct substitute for the articulated exercise of power; no more than, as Waldron points out, for democratic authorization.[186] Neither expertise nor democratic legitimacy are replacements for the kind of dialogue among institutions with different skills and perspectives, described by Palmer. They are not enough, for example, "to balance executive claims and concerns against those of liberty . .

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[183] *Ibid* at para 60. See also Leonid Sirota, "#LOLNothingMatters" (12 December 2023), online (blog): <doubleaspect.blog/2023/12/13/lolnothingmatters/> (discussing the failure of *CSFTNO* to engage with criticism of the approach it purports to endorse).

[184] *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 [*York Region*].

[185] *Ibid* at para 64 [citations omitted].

[186] See Waldron, "Separation of Powers", *supra* note 158 at 459.

. *according to law*,"[187] which is the distinctive judicial contribution to governance. They are not only insufficient to support, but in all likelihood inimical to, the specifically legislative endeavour "to maintain the focus at [the] general level" instead of resolving concrete disputes.[188]

Something much more akin to an orthodox conception of the separation of powers than the expert-factotum fourth branch favoured by administrative supremacists is thus essential to maintain a system of governance that is both effective and respectful of those subject to it. It also, not incidentally, helps uphold the requirements of the Rule of Law. It is to this principle that we now turn.

B. THE RULE OF LAW

The Rule of Law is a complex concept.[189] Legal theorists have suggested that it has a variety of formal,[190] procedural,[191] and substantive[192] aspects, by no means all of which are relevant here. Some are widely agreed upon, while others are controversial. Before explaining our understanding of the Rule of Law's bearing on administrative supremacy, we make two preliminary points, which we hope will not meet with much opposition.

First, as a constitutional principle and normative ideal, the Rule of Law can be invoked to criticize (whether or not it could

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187 *Ibid* at 462 [emphasis in original].

188 *Ibid* at 461.

189 See e.g. Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (New York: Cambridge University Press, 2004); Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010); Léonid Sirota, "A Citizen's Guide to the Rule of Law" in Peter L Biro, ed, *Constitutional Democracy under Stress: A Time for Heroic Citizenship* (Oakville: Mosaic Press, 2020).

190 See Lon L Fuller, *The Morality of Law: Revised Edition*, (New Haven: Yale University Press, 1969); Joseph Raz, "The Rule of Law and Its Virtue" in *The Authority of Law* (Oxford: Oxford University Press, 1979).

191 See Raz, *supra* note 190; Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in James E Fleming, ed, *Getting to the Rule of Law: Nomos L* (New York: New York University Press, 2011) [Waldron, "Procedure"].

192 See Bingham, *supra* note 189.

also be relied on to challenge or read down) legislation.[193] It is no more "peculiar" to argue "that a law passed by a sovereign parliament does not conform to the Rule of Law,"[194] and is to that extent defective, than to argue that a law passed by a democratically elected legislature undermines democracy because, for example, it disenfranchises some voters or undermines the integrity of the institutions that supervise elections.

Second, thinking about the Rule of Law has developed a great deal since Dicey's 19th century attempt to explicate this principle. In particular, it is worth noting that, while they condemn certain modes of exercise of public power, Rule of Law theorists have made a point of arguing that it poses no absolute bar to an active government engaged in redistribution or social reform.[195] Without dismissing Dicey's work, we think that it would be a mistake to make him either the bogeyman or the lynchpin of a discussion of the Rule of Law and administrative law in the 21st century.

The aspect of contemporary Rule of Law theory that is of particular importance when considering the plausibility of administrative supremacy is the emphasis on predictability. It is captured, for example, in Hayek's definition of the Rule of Law as the idea "that government in all its actions is bound by rules . . . which make it possible to foresee how the authority will use its coercive powers in given circumstances".[196] The ability to do so is a prerequisite for a legal system that respects human dignity,[197] and thus neither a trivial nor a narrowly partisan concern.

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193 For the proposition that it cannot strike down legislation, see, most recently *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 57 [*City of Toronto*]. But see *Vavilov*, *supra* note 1 (explaining that there are situations "where giving effect to . . . [legislative] intent is precluded by the rule of law" at para 23). *City of Toronto* does not overrule or even address this passage.

194 Arthurs, "Dicey Business", *supra* note 22 at 10.

195 See FA Hayek, *The Road to Serfdom* (Milton Park: Routledge, 2001) at 124–25; Jeremy Waldron, "Legislation and the Rule of Law", (2007) 1:1 Legisprudence 91.

196 Hayek, *supra* note 195 at 75.

197 See Raz, *supra* note 190 (respecting human dignity "entails treating humans as persons capable of planning and plotting their future" at 221).

The requirement of legal predictability, in turn, implicates such ideas as the need for general, publicly accessible, and relatively stable rules; the idea of "congruence"[198] between the law as enacted and the law as applied; as well as the application of law by independent courts. It stands to reason that understanding one's legal environment and foreseeing the legal consequences of contemplated actions is impossible if the rules that govern these actions are either not available to be understood or subject to unpredictable or instantaneous change. And the difficulty is still very considerable if the rules applied by an administrative agency, albeit accessible, are so different from those applicable in the rest of the legal system that they are difficult to understand for those unfamiliar with this specific agency's work.[199] Similarly, if rules, although ostensibly public and stable, need not be applied in accordance with their public and stable meaning, predicting their application becomes difficult or indeed impossible. Judicial independence, for its part, is closely related to the need to ensure congruence. As Raz explains:

> [I]t is futile to guide one's action on the basis of the law if . . . the courts will not apply the law and will act for some other reasons. . . . [T]he litigants can be guided by law only if the judges apply the law correctly. . . . The rules concerning the independence of the judiciary . . . are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law.[200]

The tenets of administrative supremacy are at odds with these foundational requirements of the Rule of Law. As we have seen, administrative supremacists often reject, to a greater or lesser extent, the values of generality and consistency of the legal rules and, arguably, procedural frameworks individuals encounter; for them, each statute creating an administrative regime thereby

198 Fuller, *supra* note 190 at 81 *et seq*.

199 See Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Ga L Rev 1 at 32 *et seq* on the idea and value of "systematicity" in law. See also Jeremy Waldron, ""Transcendental Nonsense' and System in the Law" (2000) 100:1 Colum L Rev 16.

200 Raz, *supra* note 190 at 217.

creates its own universe with its peculiar rules and logic. The courts, they urge, must avoid imposing their own notions, and instead favour "letting 1,000 rule of law flowers bloom",[201] in Cristie Ford's words.

Moreover, administrative supremacists, even when they ostensibly embrace the Rule of Law, do not truly mean for the administrative state to be bound by pre-existing rules. To the extent that they need rules at all, Macdonald acknowledges, "bureaucracies . . . prefer comparatively fewer, comparatively more flexible and purpose-oriented rules."[202] Indeed, administrative supremacists tend to regard the promulgation of binding *ex ante* rules as an impossibility, since legislation has no definitive meaning and administrative decision makers themselves *generate* law, rather than being *subject to* it. Similarly, they deny the value or even the possibility of adjudication not guided by "some other reasons," namely policy-based ones. Hence for them it matters little that law will be applied by tribunals lacking independence, subject at most to deferential review by independent courts.

Contemporary administrative supremacists have moved to what may appear a less extreme position, even a compromise one. They accept that law—both the statutes that empower agencies and general legal principles, including the Rule of Law itself (as they understand it)—is binding on the administrative state, although they still urge restraint in the enforcement of this law. But this is not enough to ensure the sort of legal predictability that the Rule of Law demands. Absent a broad grant of delegated authority, which might justify some deference, it is not enough that administrative decisions be merely "*interpretable* as consistent" with the law, let alone "as reasonable understandings of . . . [the agency's] legal mandate."[203] Such formulations fall well short of the requirement of

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201 Cristie Ford, "*Vavilov*, Rule of Law Pluralism, and What Really Matters (Cristie Ford)" (27 April 2020), online (blog): <administrativelaw matters.com/blog/2020/04/27/vavilov-rule-of-law-pluralism-and-what -really-matters-cristie-ford/>.

202 Macdonald, *supra* note 28 at 479.

203 Dyzenhaus, "Dignity", *supra* note 35 at 102–03 [emphasis added].

congruence between the law as announced to those whom it binds and law as applied by state agents given this responsibility.

One must of course take the point—which after all is at least as old as Aristotle—that general rules laid down in advance can never provide full guidance for all cases to which they might be applicable. But it does not follow that one should accept, as Dyzenhaus appears to, that being able to expect decisions that "bear a rational relationship to the purposes of the statute" is an equal substitute for being able to "predict the exact content of the decision."[204] An *ex post* explanation for a decision does not compensate for inability to predict a decision ahead of its being made, and plan one's life accordingly, least of all when the statute in question was "flexible" and "purpose-oriented" to begin with. And one must not fall into the trap of thinking that, because statutory guidance can be imperfect and sometimes seriously so, there can be no right answers to questions of statutory interpretation.

Moreover, decision making in administrative settings is no final substitute for definitive resolution by legally trained, independent, and impartial judges. The reason is not that there is something mystical about common law courts. Incentives are no mystery. Judges, unlike officials, are not only appointed for the purpose of applying the law rather than achieving policy goals but freed from the necessity to pursue policy goals to remain in office. Indeed, Dyzenhaus effectively recognizes as much when he calls on judges to enforce the law against attempts to roll back the administrative state which might be pursued by decision makers devoted to that political agenda.[205] The Rule of Law demands no less, indeed. But it makes the same demand in the face of any political programme, be it pro- or antiregulatory. And while one might, in principle, imagine a tribunal having all the attributes of an independent court,[206] the reality is that Canadian

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204 *Ibid* at 102.

205 See Dyzenhaus, "Politics", *supra* note 28 at 306 and the text accompanying note 59.

206 *Cf* the discussion of French administrative law in The Right Honourable Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn, 1929)

administrative tribunals do not come close to this theoretical construct. Their independence is not constitutionally protected,[207] and even a system whereby a tribunal is subject to a political purge by each incoming government raises no constitutional difficulty.[208]

Before leaving the subject of the Rule of Law, let us finally address the concern that many individuals simply lack the resources to undertake judicial reviews of decisions affecting them. It is surely, and regrettably, true although, in light of the number of decisions issued each year involving unsuccessful applicants for refugee status, prisoners, and other disadvantaged members of society, it should also not be exaggerated. But the more substantive answer to this concern was given long ago by Lord Hewart, who pointed out that "[t]he real triumph of Courts of law is when the universal knowledge of their existence, and universal faith in their justice, reduce to a minimum the number of those who are willing so to behave as to expose themselves to their jurisdiction."[209] This may be a somewhat optimistic view when it comes to administrative decision makers, who may indeed be willing to persist in the kind of behaviour that exposes them to judicial review more than a private citizen, since they are not the ones bearing the expense. But, assuming that judicial reversals make at least some difference to administrative decision making, it should be enough for a fraction of those affected by administrative unlawfulness to challenge it successfully for others to benefit, including those who lack the resources to bring such challenges.

(which points out that that system developed into one that "may aptly be described as a special branch of the law for the determination of questions of a particular kind, and the tribunal as a quasi-judicial tribunal for administering that special branch of law" at 37–42. However, the tribunal in question, the *Conseil d'État*, is not independent in anything like the sense judicial independence has in Canada).

207 See *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52.

208 See *Saskatchewan Federation of Labour v Government of Saskatchewan*, 2013 SKCA 61.

209 Hewart, *supra* note 206 at 155.

C. Democracy

Recall that the democratic arguments advanced by administrative supremacists trade on two different conceptions of democracy. In our view, there are problems with both. Demanding judicial deference to administrative decision makers based on the mere fact of delegation by a legislature assumes that the legislature actually intended such deference. And, even on the more substantive conception of democracy advanced by theorists like Dyzenhaus, the story is complex: by accident or design, not all agencies are democratic in the relevant way.

Democracy can have a range of meanings,[210] as indeed the differences among administrative supremacists on this point suggest. But it ought to be uncontroversial that, whatever else is required for a genuine or well-functioning democracy, democracy involves the right of (virtually) all citizens to participate in the formation of electoral majorities able "to pursue policies responsive to the[ir] particular concerns and interests"[211] through the enactment of appropriate legislation, subject to relevant constitutional constraints. It is important to keep this in mind, because the way in which democracy is invoked by administrative supremacists tends to leave this core meaning behind.

The older administrative supremacist approach to democracy, as we have seen, holds that delegation of power to an administrator necessarily entails judicial deference to that administrator's decisions, in recognition of the expert contributions that these decision makers can make to the content of the law. Indeed, administrative supremacists have never fully repudiated this view: on the contrary, it is illustrated by the majority opinion in *Edmonton East* (perhaps the high point of *Dunsmuir*-era administrative supremacism) and repeated, again, by Abella and Karakatsanis JJ in *Vavilov*.[212]

The suggestion that, when legislatures delegate power, they always expect courts to take a hands-off approach to reviewing

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210 See e.g. *City of Toronto*, *supra* note 193 at para 59.

211 *Secession Reference*, *supra* note 161 at para 66.

212 See *Vavilov*, *supra* note 1 at paras 231, 253.

the delegates' decisions may have some intuitive appeal, including because it seems at first glance consistent with the core meaning of democracy outlined above. But on further reflection the reasons for it are not obvious. The mere fact of delegation does not logically or necessarily speak to the intensity of review to be applied by a court.

The relationship between legislative delegation and the role of a reviewing court may plausibly be conceived in any number of other ways. It may be thought, for instance, that:

> It would lead to an absurd situation if a tribunal, having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled . . . to extend that area by misconstruing the limits of its mandate to inquire and decide as set out in the Act of Parliament.[213]

Alternatively, one might endorse a rule of deference that does not flow *automatically* from the fact of delegation and does not require the same leap in logic. Thus, as we further explain below, *Vavilov*, while endorsing a meaningful presumption in favour of deferential review, allows it to be rebutted in specific instances—including in cases where legislative intent points to a different standard of review. The recognition of these derogations from the presumption reflects a more sophisticated understanding of the role and limits of legislative delegation of power than the administrative supremacists' insistence on automatic deference.

By contrast, the administrative supremacist approach ignores these preferences as expressed in specific statutes. Instead, it substitutes a general and irrebuttable presumption that is entirely the product of a judicial (and academic) vision of what legislation ought to say.[214]

As we have also seen, the other version of the administrative supremacist conception of democracy is a thicker one that

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[213] *Anisminic v Foreign Compensation Commission* (1968), [1969] 2 AC 147 at 194, [1968] UKHL 6.

[214] For *Dunsmuir*-era examples of such judicial stipulation, see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at paras 72–74, Abella J, dissenting.

focuses on the principles of "participation" and "accountability".[215] Their implementation is supposed to foster a culture of justification or a dialogue with those affected by administrative power. Central to this dialogic understanding is the device of reasons-giving.

We agree that participation and accountability are principles worth pursuing in the law of judicial review.[216] Relatedly, we also agree that reasons and opportunities to be heard, where offered, serve important functions. As it pertains to the individuals affected by an administrative action, both an opportunity to be heard and an entitlement to be given reasons are important from a "dignitarian" perspective, treating those subject to the decision maker's authority as having "a point of view" and a "personality" and, accordingly, "as beings capable of explaining themselves."[217] Reasons help to explain whether a decision tracks the interests of those affected by administrative action,[218] and reduce the risk of arbitrary treatment of important individual concerns.[219] When a decision fails to attend to the interests of those it affects or is arbitrary, reasons help facilitate contestation of government action by allowing the individuals concerned to understand the bases on which they can challenge it. As it pertains to administrators, there is emerging evidence that a reasons requirement "discourages [administrators] from 'going through

215 Dyzenhaus, "Mureinik", *supra* note 107 at 35.

216 But not at any cost: see Leonid Sirota, "How Much Justice Can You Afford?" (23 April 2023), Double Aspect, online (blog): <doubleaspect.blog/2020/04/23/how-much-justice-can-you-afford/>.

217 Waldron, "Procedure", *supra* note 191 at 16.

218 See e.g. Henry Richardson, *Democratic Autonomy* (Oxford: Oxford University Press, 2003) at 7–9.

219 This is a theme explored in the literature on civic republicanism. See Phillip Pettit, "Freedom as Antipower" (1996) 106 Ethics 576. The administrative law literature and cases also reinforce this point. See Janina Boughey, "The Culture of Justification in Administrative Law: Rationales and Consequences" (2021) 54:2 UBC L Rev 403 at 417–18. See also *Vavilov*, *supra* note 1 at paras 79–81.

the motions,'"[220] leading to better decisions overall. Finally, a more participatory administrative process can meaningfully improve the practical effectiveness of judicial review.[221] If those affected by administrative power have the opportunity to contribute to a developing record, and those submissions must be taken into account in administrative reasons, courts can be confident that a decision is not "immunize[d]" from review by boilerplate reasons that hide its actual basis.[222]

All of these reasons show that participation and accountability mechanisms are useful techniques to foster non-arbitrariness in administrative decision making. Regardless, they are not sufficient on all questions that arise in the ambit of an administrative decision maker. Even taken on its own terms, the democratic case for administrative supremacy fails because reasons, process, and even internal accountability mechanisms cannot protect against arbitrary administrative power in its manifold manifestations. Courts need to play a complementary, meaningful role in reducing the gap between administrative practice and the law. Even more fundamentally, this case relies on an unpersuasive redefinition of democracy.

One need not look far for demonstrations of the insufficiency of participation and accountability mechanisms to, on their own, legitimate administrative action. The deficiency of parliamentary scrutiny of regulations at the federal level has been documented.[223] Consider the recently enacted *Online Streaming*

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[220] Boughey, *supra* note 219 at 418. See also Edward H Stiglitz, "Empty Reasons?" (14 July 2023), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3988401>.

[221] See Boughey, *supra* note 219 (noting that one of the core purposes of reasons-giving is to "facilitate judicial review or other oversight mechanisms" at 417).

[222] See e.g. *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 103.

[223] See Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41: 2 Dal LJ 519 (comparing the scrutiny of regulations process in Canada with the more robust scrutiny offered in the UK at 569). We thank a reviewer for pointing out the relative deficiency of regulatory scrutiny at the provincial level, and we regret that space prevents us from exploring this further.

Act.[224] This statute creates a new category of "online undertakings" that could be subject to regulations that mandate them to prioritize or feature Canadian content.[225] The definition of "online undertakings" is sweeping, but the *Online Streaming Act* empowers the Canadian Radio-Television and Telecommunications Commission (CRTC) to create regulations that will exclude potential targets from the scope of its application.[226] Accordingly, the CRTC issued several "Notices of Consultation" on various aspects of the law that it was asked to implement.[227] Given the significance of questions left unanswered by the statutory text, these consultations are, in a real sense, where the substance of the *Online Streaming Act*'s regime will be fleshed out.

While we make no comment here on the substance of the policies embodied in or enabled by this legislation, the CRTC's approach to it illustrates two key flaws with the administrative supremacist conception of democracy. First, the administrative process is not an adequate substitute for democratic legislation. Instead of Parliament making contested policy choices, the key decisions are left to an administrative agency. Instead of these choices reflecting the preferences of millions of voters, they take into account, at best, the views of a few hundred participants in a consultation process, who are highly unlikely to be representative of the electorate on any dimension that matters.

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224 SC 2023, c 8.

225 *Broadcasting Act*, SC 1991, c 11, s 9.

226 *Ibid*, s 4.1(2)(b). See also Michael Geist, "The Senate Should Stick To Its Guns on Bill C-11", (11 April 2023) *The Globe and Mail*, online (newspaper): <theglobeandmail.com/opinion/article-the-senate-should-stick-to-its-guns-on-bill-c-11/>. It is true that the Minister of Heritage has proposed a directive that instructs the CRTC not to regulate such content. See Canada Gazette, Part I, Volume 157, Number 23, "Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)" (10 June 2023), online (newspaper): <canadagazette.gc.ca/rp-pr/p1/2023/2023-06-10/html/reg1-eng.html>. However, nothing stops a future government from repealing this direction, or instituting a new direction to the contrary. And as noted above, the terms of law themselves arguably permit user regulation.

227 See e.g. Broadcasting Notice of Consultation, CRTC 2023-138; 2023-139; 2023-140.

Instead of these choices then being subject to electoral accountability, imperfect as it often is, any arbitrariness in these decisions may go unaddressed by elected officials. In fact, they may have an incentive to pawn responsibility for these contested choices on the CRTC, avoiding political accountability altogether.

Second, even on its own terms the process was only a simulacrum of participation. As Michael Geist argues, the time limits for the various consultations were extremely tight.[228] The result was that, far from being a process that incorporated ordinary Canadians, "only the well-established groups familiar with Commission practices [would] participate."[229] This worry was only exacerbated by the CRTC's declaration that consultations on registration of online streaming services—which could apply to users—were "industry focused", ignoring the potential implications for smaller players and users.[230] The reality of the administrative state, even in agencies often held up as exemplary, does not live up to administrative supremacists' expectations.

The CRTC example also raises the prospect that the participatory process becomes the instrument that turns administrative power away from its intended purpose as a result of "capture". This is the idea that "regulation is acquired by the industry and is designed and operated primarily for its benefit."[231] While this statement belies the many nuances and evidentiary considerations involved in determining whether capture exists in real administrative contexts, no one should deny that it is a worry. Yet, its very existence undermines the argument that participatory procedures—on their own—can legitimate

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228 See Michael Geist, "Ready, Fire, Aim: Eleven Thoughts on the CRTC's Bill C-11 Consultations" (18 May 2023), online (blog): <michaelgeist.ca/2023/05/ready-fire-aim-eleven-thoughts-on-the-crtcs-bill-c-11-consultations/>.

229 *Ibid*.

230 See Canadian Radio-television and Telecommunications Commission, *Broadcasting—Secretary General Letter Addressed to the Distribution List*, (Ottawa: CRTC, 2023) online: <crtc.gc.ca/eng/archive/2023/lb230609.htm>.

231 George J Stigler, "The Theory of Economic Regulation" (1971) 2 Bell J Econ & Mgmt Sci 3 at 3.

administrative power. The American experience with the *Administrative Procedure Act* shows that such worries are not unfounded.[232]

Centrally for our purposes, the chances that capture can occur undermine even the most "democratic" of agencies. As these agencies open up the potential for input through consultations, better-resourced parties may well be able to take advantage of privileged access and contacts. This is, in part, because—in contrast to the core meaning of democracy as a system open to broad and equal citizen participation—it is only narrow special interests that are given privileged access to the decision-making process. The paradox—that as opportunities for participation and accountability through notice-and-comment and consultation increase, so does the potential for capture—highlights concerns about the democratic argument for administrative supremacy.

Nothing here should be taken to diminish the importance of procedural and participatory safeguards created by administrative actors themselves or by legislatures, where they exist.[233] As we have pointed out, they can help to foster better decision making, understood as decision making that is closer to ideals of respect for human dignity and non-arbitrariness. On their own, though, they are not enough. This conclusion suggests that a forum for independent resolution and checking of administrative action is necessary to discipline it, no matter the theory of democracy that is marshalled to legitimate that action.

In this sense, we reject administrative supremacy. While we accept the usefulness of devices that facilitate participation and

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[232] One "creative" way in which sophisticated parties can capture agencies is through overloading participatory processes with information, submissions, and evidence, affecting "the ability of some groups to continue to participate in the process and ultimately [causing] thinly financed groups to exit for lack of resources": Wendy Wagner, "Administrative Law, Filter Failure, and Information Capture" (2011) 41:8 ELR 10732 at 10733–38.

[233] It is hardly necessary to say that those administrative tribunals whose role is more adjudicative than policy making, such as the Immigration and Refugee Board, cannot be defended by pointing to their participatory features. But the same is also true of any number of provincial agencies that lack notice-and-comment procedures.

accountability, we do not think they are sufficient to legitimize all forms of administrative action, particularly in cases where the questions at stake engage the special role of the courts under the Rule of Law. Failure to recognize the insufficiency of these techniques in all cases is a function of the fundamental redefinition of democracy advanced by administrative supremacists.

IV. *VAVILOV* REJECTS ADMINISTRATIVE SUPREMACY

As we have pointed out, the redefinition of constitutional principles by Canadian administrative supremacists reached its pinnacle in the post-*Dunsmuir* case law. Yet in *Vavilov*, the Supreme Court self-consciously saw an opportunity to reconsider these cases.[234] The result, a "sweeping and comprehensive" re-evaluation of the way courts review administrative action in Canada,[235] goes some way towards dismantling their administrative supremacist architecture.[236] While its own theoretical commitments are ambiguous, *Vavilov* rejects three key aspects of the administrative supremacist argument. It renounces expertise as an all-encompassing justification for deference, and hence the supremacist view of the separation of powers. It attaches considerable importance to an orthodox conception of the Rule of Law. And it embraces an understanding of democracy focused on legislative intent, towards which the culture of justification, now given a more limited role, is oriented. We consider each of these developments in turn.

Under *Vavilov*, the choice of a standard of review remains subject to the presumption of reasonableness, but the justification for that presumption has now changed. Importantly, the basis of this presumption is the legislative choice to delegate

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[234] See *Minister of Citizenship and Immigration v Alexander Vavilov*, 2018 CanLII 40807 (SCC), leave to appeal to SCC granted.

[235] *Portnov v Canada (Attorney General)*, 2021 FCA 171 at para 25.

[236] *Cf* Honourable David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's LJ 27.

power to an administrative actor,[237] which is consistent with an orthodox conception of democracy and does not rely on the supremacist view of the administrative state as an expert fourth branch of government. The Supreme Court has jettisoned the concept of presumptive expertise, which previously supported the presumption of reasonableness review, observing that if "administrative decision makers are understood to possess specialized expertise on all questions that come before them" then it becomes difficult to know when the justification underlying the reasonableness standard is triggered.[238] The Court accepts that it is inappropriate to assume expertise regardless of whether an administrative decision maker possesses it in a given case.

The displacement of expertise as a justification for deference is best seen in the Supreme Court's change of heart on statutory rights of appeal. Prior to *Vavilov*, the Supreme Court held that "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"[239] even in the face of a right of appeal. *Edmonton East* confirmed this proposition in the *Dunsmuir* era, holding that expertise "is something that inheres in a tribunal itself as an institution"[240] and categorically supports the application of the reasonableness standard.[241] Now, however, the position has changed. The "categorical" holding that rights of appeal invite the application of the appellate standards[242] recognizes that conceptual assumptions motivated by the administrative supremacist mode of thinking cannot displace a contrary signal contained in a legislative text.

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237 See *Vavilov*, *supra* note 1 at para 30.

238 *Ibid* at para 28.

239 *Pezim v British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 at 591 (SCC).

240 *Edmonton East*, *supra* note 140 at para 33.

241 See *ibid* at para 28.

242 *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 27.

To be sure, expertise remains a potentially significant factor in the application of the reasonableness standard, and in this sense the echo of administrative supremacy can still be heard after *Vavilov*.[243] As the Supreme Court most recently explained in *Mason*, administrators can sometimes apply their expertise as a means of "elaborating the content of the schemes that they administer."[244] Nonetheless, even accepting this, it is no longer assumed that all administrators contribute in all cases to the content of their enabling legislation. The administrative state is no longer seen as beyond judicial comprehension and supervision. It is accountable to the judiciary, consistently with the demands of the separation of powers and the judiciary's role of checking executive power by enforcing the legislative mandate.

This brings us to *Vavilov*'s embrace of a much more conventional account of the Rule of Law than that favoured by administrative supremacists. The Rule of Law plays a double role in *Vavilov*'s framework. First, it is explicitly a factor in the standard of review analysis. Second, Rule of Law considerations also bear on the application of the reasonableness standard of review.

Vavilov requires courts to adopt a correctness standard of review where the Rule of Law is implicated, particularly when a question of constitutional validity is raised, there is a general question of law of central importance to the legal system as a whole, or there is a dispute engaging the jurisdictional boundaries between two or more tribunals.[245] While the themes underlying this aspect of the Court's vision of the Rule of Law are various, scholars have identified two:[246] a need to ensure systemic consistency in the application of certain legal principles in certain situations and a need to protect "the unique role of the

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243 See *ibid* at para 31.

244 *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 70.

245 See *Vavilov*, *supra* note 1 at para 53. See also *York Region*, *supra* note 184 at para 64.

246 See Robert Hamilton & Howard Kislowicz, "The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What is the Impact of *Vavilov*?" (2021) 59:1 Alta L Rev 41 at 55.

judiciary in interpreting the Constitution."[247] This is contrary to the role of courts envisioned by administrative supremacists, who, as noted above, consider courts and administrators as partners in specifying the content of the law.[248] Administrative constitutionalists extend this to the Constitution, inviting administrative decision makers to shape and experiment with constitutional norms.[249] *CSFTNO* notwithstanding, *Vavilov* dissolves this partnership insofar as it reserves to the courts the responsibility for monitoring the jurisdictional lines between different decision makers because this "fosters predictability, finality and certainty in the law":[250] values associated with an orthodox conception of the Rule of Law. *Vavilov* further holds that "[t]he constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard"[251] by superior courts.

The Supreme Court re-affirmed this conception of the role of the courts in the *Court of Quebec Reference*, where it stated that the "task of interpreting, applying and stating the law falls *primarily* to the judiciary".[252] This is even more apposite on questions of constitutional law: the superior courts are best suited to resolve "disputes over the division of powers between the provinces and the federal government" and to ensure "that government actions do not conflict with the fundamental rights of citizens."[253] This full-throated endorsement of the role of the

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247 *Vavilov*, *supra* note 1 at para 53. See also *York Region*, *supra* note 184 at para 64.

248 See Abella & Markin, *supra* note 45.

249 See Blake Emerson, "Executive (Administrative State)" (13 November, 2022) online: <papers.ssrn.com/sol3/papers.cfm? abstract_id=3990368> (where the author describes three models of constitutional "decision-making" by administrators: (1) implementing existing constitutional norms; (2) generating new constitutional norms; (3) displacing existing constitutional norms at 2).

250 *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at para 7.

251 *Vavilov*, *supra* note 1 at para 56.

252 *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27 at para 46 [*Court of Quebec Reference*] [emphasis added].

253 *Ibid* at para 49.

judicial branch in monitoring government actions—a role outlined in *Vavilov*—has potentially wide-ranging impacts on how courts review administrative decisions implicating constitutional rights.[254] While administrators, like provincial courts, may "play an important role in safeguarding the rule of law", this role is subordinate to the status of the judiciary.[255]

But *Vavilov*'s endorsement of the orthodox conception of the Rule of Law at the expense of the administrative supremacist one is not limited to its standard of review analysis. Important Rule of Law principles apply on reasonableness review, because, even when a decision maker is entitled to judicial deference, "[e]lements of the legal . . . context of a decision operate as constraints . . . in the exercise of its delegated powers."[256] These tend to ensure that administrative decision making is more predictable and aligned with the law than it would have been required to be before *Vavilov*. Above all:

> That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted [or as articulated by the courts] . . .[257]

On the contrary, they are required to follow the basic principles of statutory interpretation, and "cannot adopt an interpretation [they know] to be inferior—albeit plausible—merely because the interpretation in question appears to be available and is expedient."[258]

To be sure, these statements are qualified in various ways. Thus, since reasonableness review obviously contemplates deference, there is room for error,[259] and administrators need not

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254 See e.g. Sirota, "Unholy Trinity", *supra* note 178 at 5.

255 *Court of Quebec Reference*, *supra* note 252 at para 52.

256 *Vavilov*, *supra* note 1 at para 105.

257 *Ibid* at paras 108, 112.

258 *Ibid* at para 121.

259 See *ibid* (concluding that it would be "improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep" at para 100).

conduct a "formalistic statutory interpretation exercise in every case."[260] Courts are also cautioned that an administrator's application of the normal principles of statutory interpretation "may look quite different from that of a court."[261] Quite how much daylight will be tolerated between judicial and administrative ways of interpreting law is one of the questions *Vavilov* left unanswered.

The question, then, is what aspects of *Vavilov*'s guidance will be followed: those that tend to foster the predictability and law-boundedness of administrative decision making, or those that emphasize administrative flexibility? If the former, this will amount to a rejection of the administrative supremacist view that the interpretation and application of the law by each decision maker can and ought to follow its own distinctive logic which general legal principles articulated by courts must not be allowed to override. The Supreme Court's reasons in *Mason* are an indication that it is prepared to insist on administrative decision makers engaging in thorough statutory interpretation exercises not meaningfully different from those that would be expected from courts.[262]

Last but not least, *Vavilov* implicitly adopts a more plausible understanding of democracy than either of those favoured by administrative supremacists. *Vavilov* puts legislative intent front and centre; as already mentioned, it is the legislative choice to delegate that justifies the presumption that judicial review will be deferential. However, this does not harken back to the uncompromising position of early administrative supremacists who effectively held that delegation is the only legislative choice that mattered. *Vavilov* accepts that, alongside the Rule of Law principle, a legislated standard of review,[263] statutory right of

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260 *Ibid* at para 119.

261 *Ibid*.

262 See Mark Mancini, "Issue #108: October 1, 2023", *Sunday Evening Administrative Review* (1 October 2023) online (audio file): <sear.substack.com/p/issue-108-october-1-2023>. See also Leonid Sirota, "It's Nonsense But It Works" (28 September 2023) online (blog): <doubleaspect.blog/2023/09/28/its-nonsense-but-it-works/>.

263 See *Vavilov*, *supra* note 1 at para 34.

appeal,[264] or scheme of concurrent jurisdiction[265] rebut the presumption by demonstrating that the legislature intended judicial involvement in the administration of the statutory scheme.

Meanwhile, the Supreme Court's endorsement and definition of a culture of justification in administrative decision making constitutes a further step away from administrative supremacy. As we noted above, it is true that some contemporary administrative supremacists rely on the notion of a "culture of justification" in order to legitimate administrative action as a democratic matter. However, the Court's approach to the culture of justification—particularly on matters of legal interpretation—shows the limits of the concept in Canadian law. An administrative decision maker must "properly justif[y] its interpretation of the statute in light of the surrounding context"[266] and it must do so with reference to the ordinary principles of statutory interpretation which, as we noted above, it is now expected to apply. In a particularly important passage, the Court leaves open the possibility that "[i]t will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting."[267] This not only sets up a rampart against overly creative experimentation or subversion of existing legal materials but also ensures that "the exercise of public power [is] justified, intelligible and transparent, not in the abstract, but to the individuals subject to it"[268] and with reference to the legal framework that governs them and is available to them. It is worth repeating that two of the thinkers we identified above—Moshe Cohen-Eliya and Iddo Porat—embraced the culture of justification in a fundamentally different way: they saw the text of statutes as potentially frustrating justification, since

264 See *ibid* at para 36.

265 See *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at paras 27–28.

266 *Vavilov*, *supra* note 1 at para 110.

267 *Ibid*.

268 *Ibid* at para 95.

justification can transcend statutes and appeal to broader values. *Vavilov* puts a hard stop to this sort of justification.

This focus on reasons is in part designed to ensure that administrative decisions are not immunized from effective and robust review under the reasonableness standard. A notable example of what this means from post-*Vavilov* case law is *Alexion Pharmaceuticals*.[269] There, the administrator's adoption of boilerplate reasoning essentially led the Court to conclude that it misconstrued its legal mandate, and therefore adopted an unreasonable interpretation of the statute.[270]

Of course, there are caveats. *Vavilov* does not require all administrative decisions to be supported by extensive or, in some cases, any reasons. It allows that:

> Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge . . . Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons.[271]

In this way, something of the administrative supremacist notion that justification need not be connected to the general legal framework intelligible to those subject to administrative decision making and to courts survives. But *Vavilov* has pared its significance down considerably, as cases like *Alexion Pharmaceuticals* demonstrate.

More generally, *Vavilov* still begins with a strong presumption of reasonableness review. Its move towards more orthodox conceptions of the separation of powers, the Rule of Law, democracy, and justification of public power is nested within a deferential template that permits some deviation from the ideal interpretations of the law rendered by courts. While the sort of review it demands is arguably more stringent than what preceded it, it is still deferential in ways that may appeal to some administrative supremacists. Yet, at the same time, it would be a

269 See *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157.

270 See *ibid* (speaking of the Board's "conclusory" analysis at para 43).

271 *Vavilov*, *supra* note 1 at para 92.

mistake to underestimate the significance of the ways in which *Vavilov* departs, both doctrinally and theoretically, from administrative supremacist orthodoxy.

V. CONCLUSION

We have argued that *Vavilov* represents a decisive—though not complete—step away from administrative supremacy, which previously characterized Canada's administrative law jurisprudence. Because this theory involved unwarranted and unattractive redefinition of core constitutional principles, its abandonment, even if incomplete, is a meaningful improvement.

We began by outlining the theory of administrative supremacy as it pertains to three crucial constitutional principles: the separation of powers, the Rule of Law, and democracy. Administrative supremacists—the older functionalists and their contemporary heirs alike—conceive of the separation of powers as a formalist atavism that can stymie expert regulatory decisions. Embedded in their notion of "expertise" is an additional substantive judgment about the sympathies of contemporary administrative agencies—as Willis argued in his discussion of *Halliday*. On the Rule of Law, administrative supremacists have modified their views, though they still remain skeptical of the orthodox definition of the principle. Older administrative supremacists like Willis and Arthurs dismissed the Rule of Law as a mere partisan trope. Newer ones like Dyzenhaus recognize the Rule of Law but reject the courts' pre-eminence in interpreting law and setting the boundaries of administrative action: on this account, administrators and courts are equal partners in defining the law. Finally, administrative supremacists redefine the traditional principle of democracy. Modern supremacists suggest that mechanisms of participation and accountability can make the administrative state a site of democratic contestation, such that the law enacted by elected legislatures is no more than a loose constraint on administrative action.

In our view, and for good reasons, *Vavilov* rejects or scales back key tenets of administrative supremacist thinking. It does away with expertise as a presumptive reason for deference, and

reasserts, at least in part, the distinctive roles of the legislature, the executive, and the judiciary in the exercise of government power. Based on an orthodox definition of the Rule of Law, it reserves an exclusive role for courts when it is required to promote values like consistency and stability in the law, and when a question is presented—like a constitutional question—that engages the unique role of courts in Canada's constitutional order. And while the *Vavilov* Court does pick up on a conceptual interest of administrative supremacists—the culture of justification—it erects meaningful limits on it and suggests that a primary focus of its "reasons first" approach is to ensure administrative compliance with the law, notably by facilitating judicial review.[272]

Thus, administrative supremacy's virtually unchallenged reign in Canadian law, which lasted from *CUPE* to the post-*Dunsmuir* case law, and took its last encore in Abella and Karakatsanis JJ's *Vavilov* concurrence, has come to a long-overdue end. Its hallmark, the concept of deference, still exists in the new, post-supremacist epoch. But it is now circumscribed, rebuttable, and limited by a meaningful role for courts in policing administrative action. The administrative state cannot count on supine compliance motivated by a blind trust in its superior wisdom or ideological agreement. Citizens subject to its direction will find themselves in a more predictable regulatory environment. Legislative authority is restored, and the administrators are required to explain their compliance with it. All this is for the better.

[272] *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 26.