

ADMINISTRATIVE “DETERMINATIONS OF LAW” AND THE LIMITS OF LEGAL PLURALISM AFTER VAVILOV

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As the doctrine of judicial review has matured, Canadian courts have become increasingly attuned to the role that administrative agencies play in maintaining the rule of law. The courts have recognized that in order for administrative agencies to function effectively, they must have some freedom to interpret their statutes. Accommodation of nonjudicial interpretations of law, however, has limits. While the courts have often addressed jurisdictional limits in Diceyan terms, they have also addressed the structural limitations that flow from the nature of delegated discretion. These limitations make it impossible for administrative agencies to make determinations of law as courts do. Most agencies do not have the power to create binding policy or otherwise resolve ambiguities in their enabling statute. Rule of law concerns may arise from the resulting uncertainty as much as from questions of vires. Administrative agencies are unable to settle constitutional questions, questions of central importance to the legal system, or jurisdictional disputes between agencies. Settling ambiguity in existing law is a function that only the courts can perform. Nonetheless, the legitimacy of law-making by nonjudicial institutions within their limits has long been recognized in the common law world. This article describes the development of legal pluralism regarding the sources of law in Canadian jurisprudence. The article then examines the extent to which Vavilov’s new framework for reasonableness review articulates how nonjudicial decision-makers might manifest the rule of law within a “culture of justification.”

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I. INTRODUCTION

It was once perfectly respectable, in Canada and elsewhere, to consider the exercise of statutory discretion to be a realm where common law legal principles had no place. Justice Cartwright, writing in dissent in *Roncarelli v. Duplessis*,¹ took the view that the matter at

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¹ [1959] SCR 121 [*Roncarelli*].

issue — the revocation of a liquor licence — was intended by the legislature to be solely within the “unfettered discretion of the commission.”² As there were no standards of decision-making imposed by the statute, the Quebec Liquor Commission was intended to be “a law unto itself.”³ The cancellation was “authorized by law,”⁴ regardless of whether it was arbitrary, unfair, unreasonable, or done for an improper purpose. In Justice Cartwright’s view, the Supreme Court had no business inserting its own common law standards into a decision of this nature, no matter how much it might abhor the legislated vacuum.⁵ The majority of the Supreme Court did not share his view. Justice Rand’s concept of the law distinguished lawful authority from the arbitrary exercise of power or “untrammelled ‘discretion.’”⁶ The law of judicial review has developed this idea. Our courts no longer restrict their remedial jurisdiction based on a narrow reading of the availability of certiorari.⁷ Current doctrine applies common law standards of good faith,⁸ fairness,⁹ reasonableness,¹⁰ and compliance with the *Canadian Charter of Rights and Freedoms*.¹¹ Our courts now presume deference to determinations of law by administrative decision-makers.¹² It is no longer an open question whether administrative decisions are outside the legal order: on the contrary, they help to create that order.

Yet, while our courts are open to nonjudicial sources of the law, the roles of judges and administrative decision-makers are not equal. The Canadian Constitution gives the judicial branch a supervisory role. The doctrine of judicial review also recognizes limitations to administrative determinations of law. A “determination of law” made by an administrative agency is of a different nature than a determination of law made by a judge. Judges in the common law system create binding precedents. Civil law judges also develop jurisprudence that acquires authoritative weight. Administrative decision-makers, however, do not create precedents that bind themselves.¹³ Their decisions therefore lack generality. Most administrative decision-makers cannot be bound by policy or precedent. They must take the scope of their discretion as legislated. Each determination of law by an administrative decision-maker is made *de novo* with respect to the range of possible determinations. While decision-makers strive for consistency, their interpretations of the law do not alter the scope of discretion granted by the enabling legislation. It is therefore impossible for an administrative decision-maker to make a “determination of law” as a judge might. The jurisprudence of standard of review has acknowledged this fact.

² *Ibid* at 167.

³ *Ibid* at 168, citing *Re Ashby*, [1934] 3 DLR 565 (Ont CA) at 568, in turn citing DM Gordon, “‘Administrative’ Tribunals and the Courts” (1933) 49:1 Law Q Rev 94 at 108: “A judicial tribunal looks for some law to guide it; an ‘administrative’ tribunal, within its province, is a law unto itself”; *Leeds Corporation v Ryder*, [1907] AC 420 (HL (Eng)); *The Shell Company of Australia, Limited v The Federal Commissioner of Taxation (Australia)*, [1930] UKPC 97.

⁴ *Roncarelli*, *ibid* at 169.

⁵ Or, indeed, if the Supreme Court did not abhor it. See Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011) at 23–30, 40, 171–74.

⁶ *Roncarelli*, *supra* note 1 at 140.

⁷ *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311.

⁸ *Roncarelli*, *supra* note 1.

⁹ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

¹⁰ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov].

¹¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter]; *Doré v Barreau du Québec*, 2012 SCC 12 [Doré]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.

¹² *Vavilov*, *supra* note 10.

¹³ Though some administrative appeal bodies may bind the tribunal appealed from.

Respecting the democratic mandates of the many administrative bodies chosen to exercise discretion within their realms has required a pluralist approach to analysis of these bodies’ determinations of law. Our courts strive to respect the fact that “decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist.”¹⁴ At the same time, the courts have recognized limits to pluralism regarding sources of law and forms of legal reasoning. In the most recent evolution of the law of standard of review,¹⁵ the exceptions to the presumption of deference provided by the majority of the Supreme Court make room for those cases where the courts must step in to preserve the rule of law by doing what administrative decision-making bodies cannot. In this article, I describe the argument for recognizing the roles that nonjudicial bodies have played in our legal system, and examine our courts’ treatment of decisions by those bodies. I discuss the status and limitations of administrative determinations of law. I then consider the extent to which *Vavilov*’s rule of law exceptions to reasonableness review, and the prescribed framework for review, effectively address the limitations of administrative lawmaking.

II. THE NEED FOR DEFERENCE ON QUESTIONS OF LAW

[A] viable concept of law does not inevitably entail, either in logical or constitutional terms, that legal rules be ultimately administered in the ordinary courts.¹⁶

Democracy requires that courts respect the decisions of agencies created by legislation to deal with particular areas of public law. Our constitutional order would not function as a democracy if the judicial branch controlled the administration of every statute. The courts would not function either. Decision-making authority must be shared for practical reasons as well as constitutional ones. The resources of the courts must be preserved to allow access to justice in family, criminal, and civil matters. Delegated decision-making by the executive is necessary as not all cases can be anticipated by legislation and regulation. It was recognized long before the rise of the modern administrative state that it was necessary to delegate discretionary authority to deal with the particularities of individual cases. Around 350 BCE, Aristotle wrote:

[S]ome things can, and other things cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule. For matters of detail about which men deliberate cannot be included in legislation.¹⁷

Further, the modern complexity of the law often requires delegated discretion to be exercised by experts, supported within specialist institutions. Labour law disputes, for example, have been primarily settled through arbitrators and labour boards with “plenary

¹⁴ *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 13 [*Newfoundland Nurses*].

¹⁵ *Vavilov*, *supra* note 10.

¹⁶ Paul C Weiler, “The ‘Slippery Slope’ of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-1970” (1971) 9:1 *Osgoode Hall LJ* 1 at 18.

¹⁷ Aristotle, *The Politics and The Constitution of Athens*, ed by Stephen Everson (Cambridge, UK: Cambridge University Press, 1996) at 89.

independent authority,”¹⁸ for more than 60 years.¹⁹ Labour law is an area in which judicial intervention has been particularly fraught.²⁰ Lengthy labour disputes can be extremely costly to all involved or affected. Judicial review in Canada of labour decisions has sometimes involved heavy-handed intervention showing little respect for interpretations of the law developed through the application of expertise by labour boards and arbitrators. For some time, the courts showed no hesitation in overturning a decision on the premise that an agency had “failed to deal with the question remitted to it,”²¹ or “by asking itself the wrong question, ... stepped outside its jurisdiction.”²² The result was a series of decisions that were subsequently reversed by legislation.²³

Judicial intervention in labour board and arbitration decisions attracted a weight of opinion among jurists that the courts were indulging in “arid legalism,”²⁴ a “comforting conceptualism”²⁵ that “flouted” legislatively expressed policy,²⁶ substituting formalistic judicial analysis for decisions reached by democratically chosen experts. It is therefore not surprising that it was labour law that produced the first significant turn toward judicial deference to administrative determinations of law. In 1979, Justice Dickson (as he then was), in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*,²⁷ cautioned that:

The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.²⁸

This decision did not, however, expel the concept of jurisdictional error from the doctrine of judicial review. Notably, in 1984, the Supreme Court revived the concept as a form of “patent unreasonableness” when it overturned an order of the Canada Labour Board that parties submit a dispute to arbitration.²⁹

¹⁸ HW Arthurs et al, *Labour Law and Industrial Relations in Canada*, 3rd ed (Scarborough: Butterworths Canada, 1988) at 57.

¹⁹ See Bora Laskin, “Certiorari to Labour Boards: The Apparent Futility of Privative Clauses” (1952) 30:10 Can Bar Rev 986 at 986 [Laskin, “Certiorari”]; Bora Laskin, “Recent Labour Legislation in Canada” (1944) 22:9 Can Bar Rev 776 at 782; *John East Iron Works Ltd v United Steel Workers of America*, Local 3493, [1948] 1 DLR 652 (Sask CA); *The Labour Relations Board of Saskatchewan v John East Iron Works Limited*, [1948] UKPC 75 [John East PC].

²⁰ See e.g. David J Mullan, “Labour Law and Administrative Law: Still the Tail that Wags the Dog?” (2005) 12 CLELJ 213 at 215; HW Arthurs, “Protection Against Judicial Review” (1983) 43:2 R du B 277 at 278; Brian Langille & Benjamin Oliphant, “From Rand to Rothstein: Labour Law, Fundamental Values and the Judicial Role” (2016) 74 SCLR 251 at 251.

²¹ *Metropolitan Life Insurance Company v International Union of Operating Engineers, Local 796*, [1970] SCR 425 at 435 [Metropolitan Life Insurance].

²² *Ibid.*

²³ See e.g. *ibid.*; *Port Arthur Shipbuilding Co v Arthurs* (1968), [1969] SCR 85. See Weiler, *supra* note 16 at 31.

²⁴ George W Adams, “Grievance Arbitration and Judicial Review in North America” (1971) 9:3 Osgoode Hall LJ 443 at 508.

²⁵ Laskin, “Certiorari,” *supra* note 19 at 994.

²⁶ *Ibid.* at 987.

²⁷ [1979] 2 SCR 227 [New Brunswick Liquor].

²⁸ *Ibid.* at 233.

²⁹ *Syndicat des employés de production du Québec et de l’acadie v Canada Labour Relations Board*, [1984] 2 SCR 412 at 420. For comment, see Brian A Langille, “Judicial Review, Judicial Revisionism and Judicial Responsibility” (1986) 17:1/2 RGD 169.

Nonetheless, following *New Brunswick Liquor*, the courts began to develop a subtler and more deferential doctrine of judicial review, turning away from a narrow Diceyan view of the law as being determinable only by “the ordinary Courts of the land.”³⁰ In 1990, in *National Corn Growers Assn. v. Canada (Import Tribunal)*,³¹ Justice Wilson upheld a decision of the Canadian Import Tribunal and applied the “patent unreasonableness” standard from *New Brunswick Liquor*.³² Justice Wilson explicitly framed the Supreme Court’s deferential approach as a turn away from a Diceyan view of the law as a domain exclusively ruled by judges.³³ The deferential turn recognized the variety of decision-makers and institutions that made contributions to the law. Through the development of the pragmatic and functional approach, with its emphasis on respect for the expertise of the decision-maker,³⁴ to the first attempt to simplify the jurisprudence of standards of review in *Dunsmuir v. New Brunswick*,³⁵ which acknowledged that “courts do not have a monopoly on deciding all questions of law,”³⁶ the growth of deference involved legal pluralism in the form of openness to a variety of sources of law and forms of reasoning that might support an interpretation. The courts increasingly respected the intent of legislators as to who should answer a given interpretive question.³⁷

The Supreme Court’s latest “recalibration”³⁸ of standard of review analysis in *Vavilov*³⁹ continues to recognize the legal role of statutory delegates. Deference by way of review on a reasonableness standard is now to be presumed without analysis of the expertise of the decision-maker, but from “the *very fact* that the legislature has chosen to delegate authority.”⁴⁰ At the same time, the rule of law has assumed a newly explicit role as an element of the exceptions to the presumption of deference.⁴¹ The new test for choosing the standard of review, stated in a nutshell, is that the legislature’s chosen decision-maker will be given deference unless the rule of law precludes it,⁴² or there is a different legislated standard, which itself must be “within the limits imposed by the rule of law.”⁴³

³⁰ AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (Indianapolis: Liberty Classics, 1982) at 110 [Dicey, *Introduction*].

³¹ [1990] 2 SCR 1324 [*National Corn Growers*].

³² Or, to be technically accurate, dismissing an appeal from a judgment of the Federal Court of Appeal dismissing applications for judicial review of a decision of Canadian Import Tribunal.

³³ *National Corn Growers*, *supra* note 31 at 1332–35.

³⁴ See e.g. *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1088 [*Bibeault*]; *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at 751 [*Southam*].

³⁵ 2008 SCC 9 [*Dunsmuir*].

³⁶ *Ibid* at para 30, citing Thomas Cromwell, “Appellate Review: Policy and Pragmatism” in 2006 *Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1 at V-12. Also cited in *Doré*, *supra* note 11 at para 30; *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para 30 [*Wilson*]; *Vavilov*, *supra* note 10 at para 241.

³⁷ See e.g. *Pasiechnyk v Saskatchewan (Workers’ Compensation Board)*, [1997] 2 SCR 890 at para 18 [*Pasiechnyk*], per Sopinka J, cited in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 26 [*Pushpanathan*]; *Bibeault*, *supra* note 34 at 1087.

³⁸ *Vavilov*, *supra* note 10 at para 143. The word is apparently intended as dignified understatement, as in the next sentence, the majority refers to their reasons as setting out a “holistic revision” of standard of review analysis.

³⁹ *Ibid*.

⁴⁰ *Ibid* at para 30 [emphasis in original].

⁴¹ Rather than, as in *Dunsmuir*, *supra* note 35 at para 27, as a foundational principle in tension with democratic choice.

⁴² *Vavilov*, *supra* note 10 at para 23.

⁴³ *Ibid* at para 35.

Further, statutory appeals from administrative decisions will no longer be conducted on a deferential standard by default.⁴⁴ Rather, unless another standard is specified, they will be conducted according to the standard in *Housen v. Nikolaisen*⁴⁵ that is applied to civil appeals generally. Questions of law are reviewed on a correctness standard under *Housen*, as “the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations,”⁴⁶ and as “[r]eviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.”⁴⁷ These are rule of law concerns. Binding generality of application is something that the statutory decision-maker cannot provide (see Parts IV.B and IV.C below). There is, therefore, a compelling argument for a doctrinal presumption, in the absence of a clear indication to the contrary, that legislators would not intend to compromise the ability of the courts to settle ambiguity in the law on statutory appeals.

The majority in *Vavilov* acknowledges the necessity of deference as a matter of practicality, as a matter of ensuring the subtleties of interpretation developed through the experience of experts are not lost in the abstractions of legal doctrine, and as a matter of respect for the democratic principle. While exceptions to the presumption of reasonableness operate where “the rule of law requires consistency and for which a final and determinate answer is necessary,”⁴⁸ the presumption of deference to administrative decision-makers promotes legal pluralism within the rule of law.

III. LEGAL PLURALISM IN CANADIAN ADMINISTRATIVE LAW

[D]eference 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.⁴⁹

Legal pluralism is the coexistence of more than one legal hierarchy within a society.⁵⁰ Canada does not have a pluralistic legal system in the strict sense of there being separate

⁴⁴ *Ibid* at para 37. This is a significant change in the law. See e.g. *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722 (applying curial deference to a decision of the Canadian Radio-Television and Telecommunications Commission); *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 [*Pezim*] (applying deference to a statutory appeal under the *Securities Act*, SBC 1985, c 83); *Southam, supra* note 34 (inventing the “reasonableness simpliciter” standard and applying it to a statutory appeal under the *Competition Act*, RSC 1985, c C-34); *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] (holding that the common law on standards of review is not ousted by the statutory right of appeal in (then) section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, s 18.1).

⁴⁵ 2002 SCC 33 [*Housen*]; *Vavilov, ibid* at para 37.

⁴⁶ *Housen, ibid* at para 9.

⁴⁷ *Ibid* citing The Honourable RP Kerans in *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994) at 5.

⁴⁸ *Vavilov, supra* note 10 at para 53.

⁴⁹ *Dunsmuir, supra* note 35 at para 49.

⁵⁰ Brian Tamanaha states the definition of legal pluralism as “a multiplicity of legal orders that exists in every social arena”: Brian Z Tamanaha “Law and Society” in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory*, 2nd ed (Oxford: Wiley-Blackwell, 2010) 368 at 376, citing Sally Engle Merry, “Legal Pluralism” (1988) 22:5 *Law & Soc’y Rev* 869. Harry Arthurs describes legal pluralism as the idea that “the state has no monopoly on the making of law or its implementation”: Harry Arthurs, “Labour Law and Transnational Law: The Fate of Legal Fields & the Trajectory of Legal Scholarship” (2018) 3:2 *U Bologna L Rev* 232 at 240.

domains outside the jurisdiction of the superior courts.⁵¹ There are rules within voluntary associations that are nonjusticiable, and there are places where the law relinquishes much control: jury deliberations, mediations, alternative dispute resolution systems, court diversion programs, and so on. There are acts of government that lie outside the courts’ “limited”⁵² and “narrow”⁵³ power of review of exercise of the Crown prerogative. But when matters can be brought to a court or a tribunal, there is one hierarchy. Legal pluralism is nonetheless found in administrative jurisprudence in the weaker forms of openness to a variety of sources of law and modes of reasoning that may support a legal decision.⁵⁴ Pluralist recognition of a variety of sources of law has been contrasted⁵⁵ with A.V. Dicey’s unitary vision of the English state in which all law-making authority is held by Parliament and all authority to interpret the law is held by the courts.⁵⁶ Our courts have recognized that law-making and interpretation in the administrative realm are “shared enterprises”⁵⁷ involving many agencies. Nonjuristic forms of legal reasoning are to be accommodated:

Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case.... The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.⁵⁸

When Justice McLachlin (as she then was) argued that “administrative tribunals have an integral role to play in the maintenance of our legal order,”⁵⁹ she was advocating pluralism regarding the sources of law. She was speaking of the Supreme Court’s openness to interpretations of law made by labour boards, human rights tribunals, assessment review panels, or other administrative agencies, having status as law that the courts will respect on review. She was also expressing the courts’ understanding that administrative agencies are not lawless zones until their decisions are reviewed and approved by the judicial branch. Rather, the law manifests itself through these agencies daily, through thousands of decisions, without intervention by the legal branch. Justice McLachlin’s paper, originally delivered to a conference of administrative adjudicators, has been cited approvingly in numerous judgments,⁶⁰ confirming the judicial branch’s recognition of the great deal of law that exists

⁵¹ For a competing view, see Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30:3 *Sydney L Rev* 375.

⁵² *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 37.

⁵³ *Ibid* at para 38.

⁵⁴ The Canadian philosopher of law Michael Giudice makes a useful distinction between “pluralists about the sources or types of law” and “pluralists about the concept of law itself”: Michael Giudice, *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (Cheltenham: Edward Elgar, 2015) at 32 [emphasis in original].

⁵⁵ See e.g. PP Craig, “Dicey: Unitary, Self-Correcting Democracy and Public Law” (1990) 106 *Law Q Rev* 105.

⁵⁶ Dicey, *Introduction*, *supra* note 30 at 3. See Paul Craig, *Administrative Law*, 6th ed (London, UK: Sweet & Maxwell, 2008) at 29–32.

⁵⁷ Kevin M Stack, “Overcoming Dicey in Administrative Law” (2018) 68:2 *UTLJ* 293 at 310, cited in concurring opinion *Vavilov*, *supra* note 10 at paras 211, 253.

⁵⁸ *Vavilov*, *ibid* at para 119. Though it remains the case that “the usual principles of statutory interpretation apply” (*ibid* at para 120).

⁵⁹ The Honourable Madam Justice Beverley McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (Paper delivered at the 3rd Annual Education Conference, British Columbia Council of Administrative Tribunals, Vancouver, 1 November 1998), (1998–99) 12 *Can J Admin L & Prac* 171 at 173.

⁶⁰ Including *Toronto (City) v CUPE*, *Local 79*, 2003 SCC 63 at para 130 [*CUPE Local 79*]; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 94 [*Alliance Pipeline*]; *Lalonde v Ontario (Commission de restructuration des services de santé)* (2001), 208 DLR (4th) 577 (Ont CA) at para 183.

outside courtrooms. It is cited in *Vavilov* in support of the proposition that “courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect.”⁶¹

The advocacy of legal pluralism as such in Canada was begun by academics, but not as a dispute within academic legal theory. Professor Harry Arthurs has advocated legal pluralism in the form of greater independence from judicial oversight for administrative tribunals (especially labour boards). In a 1979 paper that was cited by Justice Wilson in *National Corn Growers*,⁶² Arthurs defended the legitimacy of delegated discretion against skepticism founded in Dicey’s view that it was contrary to the rule of law.⁶³ Such skepticism had recently found expression in the McRuer Report.⁶⁴

In 1964, James McRuer, then Chief Justice of Ontario, was chosen to chair an inquiry into civil rights following objections to a bill proposing to expand police powers.⁶⁵ In the first volume of his report, published in 1968, he recommended greater judicial control of executive discretion,⁶⁶ on explicitly Diceyan rule of law grounds.⁶⁷ McRuer’s inquiry addressed matters of procedural fairness and restraints on delegated powers that we now take for granted, such as notice and a chance of a hearing before seizure of property or an adverse finding by a tribunal.⁶⁸ He proposed greater judicial oversight,⁶⁹ on the grounds that “[t]he most secure safeguard for the civil right of the individual to have his rights determined according to the Rule of Law lies in the independence of review by the courts.”⁷⁰ McRuer’s recommendations were generally well-received⁷¹ and led to legislation including the Ontario *Statutory Powers Procedure Act*,⁷² which first came into force in 1972.⁷³

Arthurs, however, sounded a note of caution against the increasing control and judicialization⁷⁴ of statutory decision-makers, especially on Diceyan grounds.⁷⁵ In his view, judicial control of executive bodies is the least effective way of ensuring compliance with

⁶¹ *Vavilov*, *supra* note 10 at para 14. See also Paul Daly, “Deference on Questions of Law” (2011) 74:5 Mod L Rev 694; Paul Daly, “Section 96: Striking a Balance between Legal Centralism and Legal Pluralism” in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 84 at 102 [Daly, “Balance”].

⁶² HW Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17:1 Osgoode Hall LJ 1 [Arthurs, “Rethinking Administrative Law”], cited in *National Corn Growers*, *supra* note 31 at 1332.

⁶³ Dicey, *Introduction*, *supra* note 30; AV Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, 3rd ed (New Brunswick, NJ: Transaction Books, 1981).

⁶⁴ Ontario, *Royal Commission Inquiry into Civil Rights: Report Number One* (Toronto: Queen’s Printer, 1968) [McRuer Report].

⁶⁵ Patrick Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: University of Toronto Press, 1994) at 298–301.

⁶⁶ McRuer Report, *supra* note 64 at 56–59.

⁶⁷ *Ibid* at 77, under the heading “Impartiality as a Requirement Before a Valid Decision can be Made.”

⁶⁸ Ontario, *Royal Commission Inquiry into Civil Rights: Report Number Three* (Toronto: Queen’s Printer, 1971) at 1747–48, 1878–84.

⁶⁹ McRuer Report, *supra* note 64 at 5, 83, 136–47, 206–23, 238–77, 302–15.

⁷⁰ *Ibid* at 279.

⁷¹ In John Willis’ view, the report was treated “as if it were the Ten Commandments, engraved on tablets of stone and brought down by Moses himself from Mount Sinai”; John Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18:3 UTLJ 351 at 351.

⁷² *Statutory Powers Procedure Act*, RSO 1990, c S.22.

⁷³ Ronald G Atkey, “The Statutory Powers Procedure Act, 1971” (1972) 10:1 Osgoode Hall LJ 155 at 155.

⁷⁴ Arthurs, “Rethinking Administrative Law,” *supra* note 62 at 23–26.

⁷⁵ *Ibid* at 2–20.

the rule of law,⁷⁶ a concept which in any case Arthurs considers vague and easily manipulable.⁷⁷ Specialized decision-makers, he suggests, would function more effectively if they were independent of judicial control: “it is the administration which is the chosen instrument of public policy, not the courts; the full range of practical benefits to be derived from that choice is most likely to be secured if the administration is permitted to solve problems according to its distinctive norms, rather than those of the courts.”⁷⁸ Arthurs marshalled historical support for this view and directed his research toward demonstrating the overlooked institutions in, as he put it, the English tradition of legal pluralism.⁷⁹ In *Without the Law*,⁸⁰ published in 1985, he examined the abolition in nineteenth century England of special local courts that had existed since medieval times. These included manor courts, stannary courts,⁸¹ local discretionary courts such as courts of request,⁸² and forest courts,⁸³ all of which were presided over by some type of lay judge exercising a limited personal or territorial jurisdiction.⁸⁴ In Arthurs’ account, these tribunals had a large degree of independence⁸⁵ until the courts were simplified and unified by reforms including the *County Courts’ Act, 1846*.⁸⁶ Even after that date, there was considerable de facto independence, whereby “the legal centralist paradigm prevailed in the heavens, while pluralism flourished below.”⁸⁷ Moreover, “local justice tended to be communal justice.”⁸⁸ Arthurs also identified a form of legal pluralism in the use of voluntary commercial arbitrations,⁸⁹ which could exclude review by the courts by contractual agreement until 1856.⁹⁰ In the rise of administrative tribunals, Arthurs saw a “new model of pluralism”⁹¹ that retained aspects of the older communal traditions.⁹²

⁷⁶ *Ibid* at 25.

⁷⁷ *Ibid*, especially at 3-8.

⁷⁸ *Ibid* at 33.

⁷⁹ HW Arthurs, “Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law” (1980) 30:3 UTLJ 225 at 226–29.

⁸⁰ HW Arthurs, *‘Without the Law’: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) [Arthurs, *Without the Law*].

⁸¹ Local courts governing mining rights. *Ibid* at 20.

⁸² Local ad hoc civil tribunals. *Ibid* at 25–26.

⁸³ As Arthurs notes, forest law had local Swanimote tribunals, but was under royal jurisdiction until formally abolished in 1971 (*ibid* at 23). Forest courts do not, therefore, provide a strong model of pluralist local authority: “the forest has its own laws [*leges*] based, it is said, not on the common law of the realm [*commune regni ius*], but on the arbitrary decree of the king”: Richard fitzNigel, *Dialogue of the Exchequer*, c 1179, cited in John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London, UK: Addison Wesley Longman, 1996) at 18–19.

⁸⁴ Theodore Plucknett describes seigniorial or manor courts, presided over by the landowning lord of the manor, as having evolved from the communal hundred courts of villas and manors. Manor courts came to include courts leet, baron, and customary. The Crown maintained its local power through county courts (except those few which became palatine, mostly exempted from royal jurisdiction). County courts were often attended in the thirteenth and fourteenth centuries by itinerant justices sent by the Crown, sometimes holding broad civil, criminal, and administrative jurisdiction known as the General Eyre, sometimes with lesser commissions. By the twelfth century, a matter pending in a seigniorial court could be moved to a county court by “tolt,” or from the county court to the Court of Common Pleas by a writ of “pone.” A judgment of a county court could also be examined by the Court of Common Pleas by obtaining a writ: Theodore FT Plucknett, *A Concise History of the Common Law*, 5th ed (Indianapolis: Liberty Fund, 2010) at 3–100.

⁸⁵ Arthurs, *Without the Law*, *supra* note 80 at 26.

⁸⁶ *Ibid* at 40-44; *County Courts Act, 1846* (UK), 9 & 10 Vict, c 95.

⁸⁷ Arthurs, *Without the Law*, *ibid* at 78.

⁸⁸ *Ibid* at 32.

⁸⁹ *Ibid* at 50-88.

⁹⁰ *Scott v Avery* (1856), 10 ER 1121 (HL (Eng)), confirmed by *Czarnikow v Roth, Schmidt and Co.*, [1922] 2 KB 478 (CA).

⁹¹ Arthurs, *Without the Law*, *supra* note 80 at 34.

⁹² *Ibid*.

What can be taken from the existence of local tribunals before the centralization of the court system in England? Certainly, it shows that nonjudicial dispute resolution is not an unprecedented innovation of the modern administrative state. It may remind us that law is not only, as in Arthurs' description of Dicey's view, "what lawyers and judges do."⁹³ Does it suggest we should cast off the courts' grip and revive "an older communal pluralism"?⁹⁴ The accounts of other legal historians do not unanimously support this assessment.

Harold Berman's description of the quick and informal processes of the English commercial courts⁹⁵ is consistent with Arthurs' picture of the long tradition of functional nonjudicial tribunals. From medieval times, town mayors had jurisdiction over traders' disputes under the *Statute of the Staple* of 1353.⁹⁶ Courts of the staple and admiralty courts provided justice "while the merchants' feet were still dusty" and "from tide to tide."⁹⁷ Professional lawyers were generally excluded and "technical legal argumentation was frowned upon."⁹⁸ These efficiencies, however, must have come at some cost to the principle of *audi alteram partem*. What is a "technical" argument? Our laws do not normally include "technicality" provisions. The law is the law. Nonmutual collateral issue estoppel, for example, might be considered "technical legal argumentation," but it is recognized so that a party does not unfairly have to argue a matter a second time. Would fairness always result when the statute of a merchant guild precluded submissions on the basis that "it is not meet to dispute on the subtleties of the law"?⁹⁹

The degree of independence enjoyed by the local tribunals Arthurs discusses is put into question by the legal historian Theodore Plucknett, who describes the Crown dominating local county courts through itinerant justices who would appear with royal commissions, and through the Court of Common Pleas, which had superior jurisdiction.¹⁰⁰ In Plucknett's account, the fact that there was no coordinated system of local courts until 1846 was a "specific consequence of the dominance of Westminster."¹⁰¹

It is useful to remember, also, that the medieval origins of local justice included honorial and seignorial courts run by privileged¹⁰² local lords holding jurisdiction of "sake and soke,"¹⁰³ allowing them to hold court, compel tenants to attend, and collect fines. This could include the privilege of infangthief,¹⁰⁴ that is, the right to summarily execute a person caught in the act of theft.¹⁰⁵ Trial by ordeal was also used to some extent in England until it was

⁹³ Arthurs, *Without the Law*, *supra* note 80 at 5.

⁹⁴ *Ibid* at 191.

⁹⁵ Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983) at 333–56.

⁹⁶ *Ibid* at 347; *Statute of the Staple of 1353* (UK), 27 Edward III, c 241.

⁹⁷ Berman, *ibid* at 347.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ Plucknett, *supra* note 84 at 105.

¹⁰¹ *Ibid*.

¹⁰² I use the word in its narrow Hohfeldian sense of having no legal duty not to do a particular thing: Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, ed by Walter Wheeler Cook (New Haven: Yale University Press, 1919) at 14–21.

¹⁰³ Sometimes rendered as "sack and sock" or "sac and soc": Plucknett, *supra* note 84 at 96; Hudson, *supra* note 83 at 43–45, 62, 70; Sir John Baker, *An Introduction to English Legal History*, 5th ed (Oxford: Oxford University Press, 2019) at 11–12; JA Gilles, *The Anglo-Saxon Chronicle* (London, UK: G Bell and Sons, 1914) at 80.

¹⁰⁴ Sometimes written as "infangenetheof." Baker, *ibid* at 543.

¹⁰⁵ Hudson, *supra* note 83 at 43, 44, 165, 182, 231.

forbidden in 1215.¹⁰⁶ It is not surprising, then, that not all legal historians have shared Arthurs’ assessment of the benign influence of the older decentralized tribunals. Chantal Stebbings has described challenges in addressing a “lack of coherence” and “inherent individual weaknesses” of modern British tribunals that she attributes to origins in “the historico-legal context of the statutory administrative tribunal as an institution in the nineteenth century.”¹⁰⁷ She argues that “[t]he diversity of form and process among modern tribunals undermines modern government’s aim to arrive at a coherent structure for the delivery of administrative justice.”¹⁰⁸ In her view, the older tribunals did not, as in Arthurs’ account, pass on valuable communal values to the tribunals created in the reforms of the early Victorian period; rather, new institutions had to be created owing to the “various inadequacies of those bodies to take on novel and challenging functions.”¹⁰⁹ In fact, “the very qualities of tribunals that distinguished them and made them so well suited to their particular tasks rendered them vulnerable to error, ignorance, mismanagement and slackness.”¹¹⁰

Nonetheless, Stebbings notes an opposition in late nineteenth century to England to the judicialization and centralization of administrative authorities that chimes with Arthurs’ pluralism. She writes that “[t]he English did not want centralised state intervention or the machinery that went with it.”¹¹¹ She cites a comment in *The Times* from 1893:

In all regions of life the area of freedom is being contracted. Everywhere appears an inclination to take out of people’s hands the management of their own affairs. Everywhere the realm of the inspector and the commissioner and the *ex officio* tyrant of the vestry is widening.¹¹²

There is not necessarily a contradiction here. People might reasonably prefer an inefficient, local, pluralistic system to an efficient, centralized, and judicially supervised one. The evidence is at best mixed, however, as to whether there was ever was in fact a “communal forum of dispute resolution, within a tradition of humane values, informal processes, and indigenous customs”¹¹³ that was objectively better than a centralized court system.

In Canada, though we have a centralized and judicially supervised system, the courts have endeavoured to preserve within the doctrine of judicial review a respect for the local and specialized elements of administrative decision-making. *Dunsmuir* affirmed the necessity of

¹⁰⁶ By decree of the Fourth Lateran Council: Margaret H Kerr, Richard D Forsyth & Michael J Plyley, “Cold Water and Hot Iron: Trial by Ordeal in England” (1992) 22:4 *J Interdisciplinary History* 573 at 573. Though this coincides with the year of the *Magna Carta*, the Church’s stated grounds for withdrawing from the practice were theological — a miracle was supposed to be a free act of God, but trial by ordeal required that God intervene with a fresh miracle each time. Routine miracles are reserved for the sacraments: Danny Danziger & John Gillingham, *1215: The Year of Magna Carta* (London, UK: Holder & Stoughton, 2003) at 196; *Magna Carta* (UK), 1215, 49 John.

¹⁰⁷ Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge, UK: Cambridge University Press, 2006) at 3.

¹⁰⁸ *Ibid* at 2.

¹⁰⁹ *Ibid* at 73.

¹¹⁰ *Ibid* at 229.

¹¹¹ *Ibid* at 75.

¹¹² “The Growth of Officialism,” *The Times* (5 April 1893) 3, cited in Stebbings, *supra* note 107 at 75.

¹¹³ HW Arthurs, “‘Without the Law’: Courts of Local and Special Jurisdiction in Nineteenth Century England” (1984) 5:3 *J Leg Hist* 130 at 136.

deference as respect for the specialized decision-maker,¹¹⁴ and entrenched the “Canadian courts’ well-established respect for institutional pluralism”¹¹⁵ that began with *New Brunswick Liquor*. *Vavilov*’s presumption of deference may continue to strengthen this respect, or its more rigorous reasonableness review and rule of law exceptions to deference may erode it.¹¹⁶

The concurring justices in *Vavilov* see the majority’s judgment as a regression. They write that the majority “unjustifiably ignores the specialized expertise of administrative decision-makers,”¹¹⁷ and reassign “to the courts the starring role Dicey ordained a century ago.”¹¹⁸ They would support a more generous scope for legal pluralism in the form of “unfamiliar language or modes of reasoning.”¹¹⁹ What they advocate may go beyond the majority’s legal pluralism regarding the *sources* of law, and perhaps into what Michael Giudice refers to as pluralism concerning “the concept of law itself.”¹²⁰ I argue below that the majority’s revision of the law recognizes constitutional and structural limits to legal pluralism, while allowing judicial review to be as deferential as possible. Their doctrine leaves space for pluralism. But, as Paul Daly has argued:

[L]egal space does not mean a legal black hole ... courts retain an important role, not just in policing the boundaries of interpretive and institutional pluralism but also in ensuring that what goes on inside the legal space is consistent with fundamental legal values.¹²¹

IV. THE FUNCTION OF THE JUDICIAL BRANCH IN A PLURALISTIC LEGAL SYSTEM

If you don’t respect yourself
Ain’t nobody gonna give a good cahoot.¹²²

The courts’ power to review the legality of decisions by administrative agencies (other than on *Charter* grounds¹²³) is entrenched in the constitution in the preamble and section 96 of the *Constitution Act, 1867*.¹²⁴ The preamble describes Canada as being united “with a Constitution similar in Principle to that of the United Kingdom.”¹²⁵ Section 96 states: “[t]he Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province.”¹²⁶ It has been noted that the protection of the courts’ review power is not

¹¹⁴ *Dunsmuir*, *supra* note 35 at para 48, citing David Dyzenhaus “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997), 279 at 286 [Dyzenhaus, “Politics of Deference”].

¹¹⁵ Daly, “Balance,” *supra* note 61 at 101.

¹¹⁶ To date, deference is secure but the standard of justification has risen, see e.g. *Farrier v Canada (Attorney General)*, 2020 FCA 25; *Romania v Boros*, 2020 ONCA 216.

¹¹⁷ *Vavilov*, *supra* note 10 at para 230.

¹¹⁸ *Ibid* at para 229.

¹¹⁹ *Ibid* at para 297.

¹²⁰ Giudice, *supra* note 54 at 32 [emphasis omitted].

¹²¹ Daly, “Balance,” *supra* note 61 at 85.

¹²² “Staple Singers ‘Respect Yourself’” (sound recording) Universal Music Canada Inc, CAN 1036289 (14 February 2006) registered.

¹²³ The power to review laws and acts of the state for breach of the *Charter* is of course provided in sections 24(1) and 52(1) of the *Charter*, *supra* note 11.

¹²⁴ (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

¹²⁵ *Ibid* at Preamble.

¹²⁶ *Ibid*, s 96.

immediately evident on the face of these provisions.¹²⁷ The argument for a robust reading of section 96, however, is compelling. There would be no reason for a constitutional requirement that superior court judges be federally appointed if the role of a judge were not distinct from that of any provincial delegated authority. Therefore, there must be some powers that judges have that cannot be held by non-judges. If a province could set up its own body to perform the same functions as a superior court judge, staffed by political appointees with any kind of qualification that a legislature might choose, judicial functions would no longer be independent. The position “superior court judge” would no longer have any special meaning. Not just the independence of the judiciary, but the very *existence* of the judicial branch, would be threatened. It could be completely subsumed by various agencies of the executive branch. Further, the functions specific to the judicial branch must include the power to supervise the executive. An executive agency cannot be given the power to define its own jurisdiction. Otherwise, the judicial branch would become irrelevant, and agencies would be able to declare the extent of their own powers, with no independent check on the legality of their actions.

The constitutional protection of the judicial branch’s review power was not settled¹²⁸ until the 1981 decision of Chief Justice Laskin in *Crevier v. A.G. (Quebec)*.¹²⁹ Before moving to the bench, Laskin himself had noted that the courts’ power of review was not protected by any constitutional principle that had explicitly been recognized by the Supreme Court.¹³⁰ As the Chief Justice, he held in 1978 that it is *ultra vires* for the provinces to transfer to a statutory tribunal “part of the inherent supervisory authority that was vested in the Superior Court at the time of Confederation.”¹³¹ The courts’ inherent jurisdiction to conduct judicial review had been established long before.¹³² It was not until *Crevier*, however, that the *exclusion* by statute of the courts’ review power was determined by the Supreme Court to be unconstitutional:

[W]here a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court.¹³³

¹²⁷ See e.g. John Willis, “Section 96 of the British North America Act” (1940) *Can Bar Rev* 18:7 517 at 519.

¹²⁸ See e.g. PW Hogg, “Is Judicial Review of Administrative Action Guaranteed by the British North America Act?” (1976) 54:4 *Can Bar Rev* 716. It had been argued, however, that sections 96–100 imply that questions of law must be reviewable by the courts: JN Lyon, Case Comment on *Metropolitan Life Insurance Company v International Union of Operating Engineers, Local 796*, (1971) 49:2 *Can Bar Rev* 365.

¹²⁹ [1981] 2 SCR 220 [*Crevier*].

¹³⁰ Laskin, “Certiorari,” *supra* note 19 at 989–90.

¹³¹ *Attorney General of Quebec v Farrah*, [1978] 2 SCR 638 at 656.

¹³² A superior court has “inherent jurisdiction to supervise the proceedings of an inferior Court”: *Rex v Nat Bell Liquors Ltd* (1922), 65 DLR 1 (PC) at 17; “[Sections 96, 99, and 100] are three principal pillars in the temple of justice, and they are not to be undermined. Is then the Municipal Board of Ontario a Superior Court, or a tribunal analogous thereto? If it is, inasmuch as the Act of 1932 which sets it up observes none of the provisions of the sections above referred to, it must be invalidly constituted”: *Toronto v York Tp*, [1938] 1 DLR 593 (PC) at 594–95; “[A] Superior Court is invested with the power and duty of seeing that ... a tribunal ... does not act without jurisdiction”: in *re Ontario Labour Relations Board: Toronto Newspaper Guild, Local 87, American Newspaper Guild v Globe Printing Company*, [1953] 2 SCR 18 at 23 [*Globe Printing*].

¹³³ *Crevier*, *supra* note 129 at 234.

The finding was based on the premise that the power to determine jurisdiction is intrinsic to the superior courts: “I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.”¹³⁴ The principles of the independence of the judiciary and the rule of law have been held to be implicit in the preamble to the *Constitution Act, 1867*.¹³⁵ The rule of law is also explicitly affirmed in the preamble to the *Constitution Act, 1982*.¹³⁶ However, while these principles and section 96 protect the power of the superior courts to conduct a review, they do not necessarily protect the right of a person to be granted one. Outside the *Charter*, judicial review is constitutionally protected as a discretionary power of the courts rather than as a positive individual right.¹³⁷ When and how judicial review is to be conducted is a matter that the courts have addressed through doctrine.

Though the law of judicial review has developed deference and space for legal pluralism, “[i]n some circumstances, courts must intervene even in the face of Parliamentary language forbidding intervention.”¹³⁸ The majority in *Vavilov*, while reaffirming that “because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely,” also remained committed to the principle that “respect for ... institutional design choices made by the legislature requires ... a posture of restraint on review.”¹³⁹ The extent of the restraint required is a point of difference between the majority and the concurring opinion in *Vavilov*. Where a standard of review is specified in legislation, that standard is to be respected “within the limits imposed by the rule of law.”¹⁴⁰ Here, the majority acknowledges a constitutional limit to legal pluralism. The judicial branch has a constitutionally prescribed role as the ultimate interpreters of the law. The courts cannot entrench deference in doctrine to the point that this role is entirely delegated to other parts of government.

The majority and concurring justices in *Vavilov* differ as to where this constitutional limit lies. On statutory appeals, the majority would give effect to legislators’ intent by applying the normal appellate standard unless another is specified. Determinations of law would therefore normally be assessed on a correctness standard. The concurring justices would keep “the ball in the legislatures’ court to modify the standards of review if they wish.”¹⁴¹ The ball,

¹³⁴ *Ibid* at 237.

¹³⁵ Independence of the judiciary: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at paras 82–83, 106–107, 311–12; Rule of law: *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 748–49. It has also been observed that the preamble implies that superior court judges have a review power, based on the English model in WR Lederman, “The Independence of the Judiciary” (1956) 34:7 Can Bar Rev 769 at 805:

[T]he clear implication is that superior-court judges participate in the original distribution of governmental powers effected by the first principles of the English constitution. Again this development is not merely fortuitous. The reason of substance already mentioned respecting the infallibility of the records of the central royal courts applies here also — that at some point there must be an end to disputation on the interpretation and application of statute law or common law (whether public or private). Hence the constitution necessarily designates certain officials or tribunals to speak the last word on these matters, and for the most part, in England, the superior courts have been so designated.

¹³⁶ “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law”: *Constitution Act, 1982*, preamble, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

¹³⁷ See Julius H Grey, “Section 96 to 100: A Defense” (1985) 1 Admin LJ 3 at 11.

¹³⁸ *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at para 51.

¹³⁹ *Vavilov*, *supra* note 10 at para 24.

¹⁴⁰ *Ibid* at para 35.

¹⁴¹ *Ibid* at para 282.

however, has been in that court since 1994 (when the common law retroactively reversed the legislators’ presumed intent).¹⁴² Legislators have rarely specified a correctness standard of review.¹⁴³ There is little incentive for them to do so.¹⁴⁴ The legislative and executive branches are closely intertwined in Canada. How often will the executive insist on closer supervision where the common law does not require it?¹⁴⁵ It might be argued that this weighs in favour of presuming a deferential standard is intended. On the other hand, if a more forgiving standard of review is intended, perhaps it should be explicitly stated. The question is complicated by the fact that where legislation *has* specified a standard, that standard has sometimes been drawn from the shifting terminology of the law of judicial review. When the law changes, the specified standard loses its meaning and can no longer be given effect in the same way.¹⁴⁶ Legislators cannot unilaterally fix the standard of review for the same reason that there cannot be an absolute privative clause. Respecting legislative intent as to the standard of review to the extent that the rule of law permits is as deferential as it is possible for the judicial branch to be. The courts will always remain at “the apex of the interpretive hierarchy,”¹⁴⁷ however, as the constitution puts them there.

A. THE GROWTH AND RECALIBRATION OF DEFERENCE

Superior courts in the common law world have always assumed a jurisdiction to review, within limits, the work of inferior tribunals.... The declared basis of judicial intervention seems to me to be incontrovertible, namely, that an administrative tribunal or agency cannot, by an erroneous interpretation of its statute, confer upon itself a jurisdiction which it otherwise would not have.¹⁴⁸

In the *Regina v. Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board* case in 1963, the Ontario Court of Appeal held that the Ontario Labour Relations Board had no power to determine whether the Food Terminal Board was a Crown Agency as it had not

¹⁴² *Pezim*, *supra* note 44.

¹⁴³ Though there are examples. The Supreme Court applied a correctness standard to appeal of “a question of law ... appealable as of right as if ‘it were a judgment of the Federal Court’ with the proviso that leave is required for appeals on questions of fact” as per the statutory provision in the *Competition Tribunal Act*, RSC 1985, c 19, 2nd Supp, s 13(1): *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 36, Abella J, dissenting.

¹⁴⁴ “When the executive controls the legislature, Parliament *will* confer the types of delegated power the executive wants on the terms (broad, discretionary, vague) it wants”: Mary Liston, “The Most Opaque Branch? The (Un)accountable Growth of Executive Power in Modern Canadian Government” in Albert, Daly & MacDonnell, *supra* note 61, 19 at 55 [emphasis in original].

¹⁴⁵ Consider, for example, the remarks of Jason Kenney, then Minister of Citizenship, Immigration, and Multiculturalism, expressing frustration with judicial review of immigration decisions: The Honourable Jason Kenney, Address (Delivered at the Faculty of Law, University of Western Ontario, 11 February 2011) [unpublished], online: <www.canada.ca/en/immigration-refugees-citizenship/news/archives/speeches-2011/jason-kenney-minister-event-faculty-law-university-western-ontario.html>.

¹⁴⁶ See e.g. *Abbey v Ontario (Community and Social Services)*, 2018 ONSC 1899 at para 22:

The reasonableness standard is consistent with the strong privative clause in s. 45.8 of the *Code* that states ‘a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside’ on judicial review ‘unless the decision is patently unreasonable.’ While a review court no longer looks at patent unreasonableness, this private clause still provides support for the reasonableness standard of review.

¹⁴⁷ Dyzenhaus, “Politics of Deference,” *supra* note 114 at 305; Paul Daly, “The Struggle for Deference in Canada” in Hanna Wilburg & Mark Elliott, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Oxford: Hart, 2015) 297 at 297.

¹⁴⁸ JFW Weatherill, “Labour Relations Boards and the Courts” (1966) 21:1 *Relations Industrielles/Industrial Relations* 58 at 59–60, citing *Associated Medical Services Incorporated v Ontario Labour Relations Board*, [1962] 35 OR 1093 (CA), aff’d *Jarvis v Associated Medical Services Inc.*, [1964] SCR 497.

been given power to determine “a pure question of law.”¹⁴⁹ Whether it *could* be given that power was an open question. In 1948, the Privy Council had held that the Labour Relations Board of Saskatchewan was validly constituted and did not have the powers of a section 96 court.¹⁵⁰ In doing so, however, the Privy Council stated:

Nor do [their Lordships] doubt ... that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also.¹⁵¹

As J.N. Lyon perceived,¹⁵² this strongly implies that the constitutionality of an administrative tribunal’s power to decide questions of law is only saved when their determinations combine policy considerations with legal ones.

It is perhaps understandable that before the constitutional basis for administrative determinations of law was authoritatively recognized, judicial review tended to focus on the question of jurisdiction. Cases that are sometimes cited as models of arbitrary and high-handed judicial intervention¹⁵³ took their model of jurisdictional review from the 1969 decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission*.¹⁵⁴ *Anisminic* concerned a decision of the British Foreign Compensation Commission. *Anisminic Ltd.* was an English company that operated a mining operation in Egypt. Their assets had been seized by the Egyptian government following the invasion of Egypt by Israel, the UK, and France in 1956 (the Suez Crisis). After the conflict, *Anisminic* sold its business to the Egyptian government for a low price, reserving its rights to the claims to compensation it would have under the Egyptian Compensation Fund established by the British Government. However, the Foreign Compensation Commission’s enabling Act contained a provision precluding compensation to the sellers for assets lost by a company that they no longer owned. The Act also contained a provision (a privative, finality, or ouster clause) that “[t]he determination by the Commission of any application ... shall not be called into question in any court of law.”¹⁵⁵

Anisminic is a case of hard facts creating dubious law. The terms of the Commission’s enabling statute were clear, but its decision nonetheless seems unjust. Could the Commission not have found that the very asset of the company that was relevant to the company’s claim — that is, the right to compensation — had not in fact been sold, and that compensation could be awarded on that basis? The House of Lords, however, was of the view that the

¹⁴⁹ [1963] 2 OR 91 at 93.

¹⁵⁰ *John East PC*, *supra* note 19.

¹⁵¹ *Ibid.*, per Lord Simonds at 680.

¹⁵² Lyon, *supra* note 128 at 369.

¹⁵³ See e.g. *Metropolitan Life Insurance*, *supra* note 21; *Executors of Woodward Estate v Minister of Finance*, [1973] SCR 120; *Globe Printing*, *supra* note 132.

¹⁵⁴ [1968] UKHL 6 [*Anisminic*].

¹⁵⁵ *Foreign Compensation Act, 1950* (UK), 14 Geo VI, c 12, s 4(4), as it appeared on 17 December 1968, cited in *ibid* at 148.

privative clause, and respect for British parliamentary supremacy, did not allow the decision to be questioned. The company argued that:

When a tribunal misconstrues the very statute which confers jurisdiction on it, the question arises whether that renders the decision a nullity.... The respondents rely on [the privative clause], but such enactments do not bite on nullities, where there is no determination and therefore nothing on which the subsection can operate.¹⁵⁶

A majority of the House of Lords agreed¹⁵⁷ that the Commission had asked itself the wrong question and thereby made a jurisdictional error, allowing the House of Lords to intervene. This was taken up in Canadian law to support the rule that if an agency, by “asking itself the wrong question” had “stepped outside its jurisdiction,” its decision could be overturned as *ultra vires*.¹⁵⁸

The logic of *Anisminic* is sound. Where an agency acts without lawful authority, there is no finding in law to be protected by a privative clause. Where its “determination” has no legal basis, it has not made an error to be reversed, but has failed to act by the terms of its empowering statute. By this perfectly sound logic, an agency cannot make an error of law. It either makes an order in accordance with its enabling statute, or it makes no determination at all. A “determination of law” with no legal basis is a nullity. The doctrine of “jurisdictional error” in *Anisminic* is problematic not because it conceals a fallacy, but because it is sound.¹⁵⁹

The problem with the logic of “jurisdictional error” is not that it is wrong, but that on its own, it is useless. It is for this reason that the concurring justices in *Vavilov* dismissed the majority’s statement that “[r]easonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have”¹⁶⁰ as being merely true.¹⁶¹ The legality of a decision is always an issue on judicial review of determinations of law, and, as it has often been acknowledged, the concept knows no useful definition or boundaries.¹⁶² Any error of law may be considered jurisdictional, or a “true question of *vires*.”¹⁶³ The doctrine of judicial review has to deal with how a court should treat an agency’s interpretation of the law,¹⁶⁴ what scope of interpretations should be considered within the intention of the legislator, and how the agency’s reasoning should inform the

¹⁵⁶ *Anisminic*, *ibid* at 153.

¹⁵⁷ *Ibid* per Lord Reid at 175, Lord Pearce at 201, and Lord Wilberforce at 221.

¹⁵⁸ *Metropolitan Life Insurance*, *supra* note 21 at 435.

¹⁵⁹ The concept of jurisdiction has been described in the UK in Bernard Schwartz & HWR Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Oxford: Clarendon Press, 1972) at 210 as:

[T]he root principle of British administrative law. If an act is within the powers granted, it is valid.

If it is outside them, it is void. No statute is needed to establish this. It is inherent in the constitutional position of the courts. A void act is commonly said to be *ultra vires* or without jurisdiction. In this context ‘jurisdiction’ merely means legal authority or power.

¹⁶⁰ *Vavilov*, *supra* note 10 at para 109.

¹⁶¹ *Ibid* at para 285: “[A]n unhelpful truism that risks reintroducing the tortured concept of ‘jurisdictional error’ by another name.”

¹⁶² See e.g. *Globe Printing*, *supra* note 132; *Pearlman v Keepers and Governors of Harrow School*, [1978] EWCA Civ 5 [*Pearlman*]; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 38 [*Matson*].

¹⁶³ *Matson*, *ibid* at paras 31–41.

¹⁶⁴ See Langille, *supra* note 29 at 203–14.

analysis of the court. This is why the “jurisdiction test” is described in *Dunsmuir* as “formalistic,” “artificial,” and “easily ... manipulated,”¹⁶⁵ rather than as simply wrong. Every disputed interpretation of an enabling statute puts jurisdiction in issue. The majority in *Vavilov* consigned the category of “true questions of jurisdiction or *vires*”¹⁶⁶ to the Canadian common law’s oubliette not because the argument is fallacious, but because it is undiscerning.

When Chief Justice Dickson refined the Supreme Court’s judicial review jurisprudence in *New Brunswick Liquor*,¹⁶⁷ he recast the approach to the issue of jurisdiction as “[d]id the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it?”¹⁶⁸ and “was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation?”¹⁶⁹ Through the development of the pragmatic and functional analysis, the way of asking the jurisdictional question evolved further:

The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask: “[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?”¹⁷⁰

This was still, however, a way of asking whether an agency’s interpretation lay within the scope intended by its empowering legislation.

Dunsmuir’s attempt to simplify judicial review maintained correctness review for “true questions of jurisdiction or *vires*.”¹⁷¹ In cases after *Dunsmuir*, deference to administrative agencies’ determinations of law expanded. *Dunsmuir* held that “[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have a particular familiarity.”¹⁷² In *Alberta (Information and Privacy Commission) v. Alberta Teachers’ Association*¹⁷³ and *Alliance Pipeline*,¹⁷⁴ this became an explicit presumption which applied in all cases outside *Dunsmuir*’s exceptions. Then, a reviewing court was permitted to “look to the record for the purpose of assessing the reasonableness of the outcome,”¹⁷⁵ to assess the decision in light of reasons that *could* have been given.¹⁷⁶ The presumption of expertise and deference to interpretations of home statutes was extended from tribunals to other delegated decision-makers.¹⁷⁷ It was also held that while deference was grounded in a tribunal’s expertise,¹⁷⁸ “expertise is something that inheres in

¹⁶⁵ *Dunsmuir*, *supra* note 35 at para 43.

¹⁶⁶ *Vavilov*, *supra* note 10 at paras 65–68.

¹⁶⁷ *New Brunswick Liquor*, *supra* note 27.

¹⁶⁸ *Ibid* at 237.

¹⁶⁹ *Ibid*.

¹⁷⁰ *Pushpanathan*, *supra* note 37 at para 26 [citations omitted], citing *Pasiechnyk*, *supra* note 37 at para 18; see also *Bibeault*, *supra* note 34 at 1087.

¹⁷¹ *Dunsmuir*, *supra* note 35 at para 59.

¹⁷² *Ibid* at para 54 [citations omitted].

¹⁷³ 2011 SCC 61 at para 39.

¹⁷⁴ *Alliance Pipeline*, *supra* note 60 at paras 28, 37.

¹⁷⁵ *Newfoundland Nurses*, *supra* note 14 at para 15.

¹⁷⁶ *Ibid* at para 12.

¹⁷⁷ *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [Agraira].

¹⁷⁸ *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 33 [Edmonton East].

a tribunal itself as an institution.”¹⁷⁹ Expertise could be imputed, even on questions of law, by the fact of delegation, in the absence of a privative clause, for statutory appeals as well as judicial review.¹⁸⁰ In the result, all determinations of law by administrative decision-makers, with rare¹⁸¹ and narrow¹⁸² exceptions, were given deference on the premise that no matter what the interpretive issue, legislators had intended the delegate to decide the question.¹⁸³ Of course, the assumption that any ambiguity in a statute was intended by the legislator—and that the legislator also decided who should resolve that ambiguity—is a doctrinal fiction. In some cases, ambiguity may be deliberate, where statutes have been drafted “with ‘purposeful ambiguity’ in order to permit adaptation to future, unknown circumstances.”¹⁸⁴ Many ambiguities in statutes, however, are unintentional. As Justice Scalia, of the Supreme Court of the United States, reflected:

[T]o tell the truth, the quest for the “genuine” legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn’t think about the matter at all.¹⁸⁵

Between *New Brunswick Liquor* and the law prior to *Vavilov*, the law of judicial review had moved from deference to determinations of law up to the limit of those not “rationally supported by the relevant legislation,”¹⁸⁶ through the pragmatic and functional analysis wherein the central question was *whether* the interpretive question was intended to be answered by the agency,¹⁸⁷ to, with rare exceptions, agencies being presumed to have inherent expertise to resolve *any* ambiguity they might encounter in that law. The doctrine of judicial review had developed something approaching a common law privative clause for agencies’ determinations of law.¹⁸⁸

Excessive deference compromises the rule of law in at least two ways. Firstly, deference to an agency’s interpretation is question begging. It presumes one resolution of the very question in issue as a premise of the analysis. A deferential analysis of an interpretation borrows legitimacy that weighs in its favour before the analysis, as to whether the interpretation was intended or within the ambit of institutional expertise, is complete. This compromise of rational scrutiny is intentional — it is what a presumption *means*. A likely consequence of reviewing agencies’ interpretations of their enabling laws according to something other than the established rules of statutory construction, however, is that courts will sometimes endorse uses of the law that were not intended by legislators. The doctrinal presumption will sometimes be the deciding factor in allowing an agency’s novel

¹⁷⁹ *Ibid.*

¹⁸⁰ See Justice Rothstein’s comment on *Pezim* in *Khosa*, *supra* note 44 at para 87.

¹⁸¹ *Edmonton East*, *supra* note 178 at para 26; *Commission scolaire de Laval v Syndicat de l’enseignement de la région de Laval*, 2016 SCC 8 at para 34 [*Laval*].

¹⁸² *Laval*, *ibid.*

¹⁸³ *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 32–33.

¹⁸⁴ *Vavilov*, *supra* note 10 at para 309, citing Felix Frankfurter, “Some Reflections on the Reading of Statutes” (1947) 47:2 Colum L Rev 527 at 528.

¹⁸⁵ The Honorable Antonin Scalia, “Judicial Deference to Administrative Interpretations of Law” (1990) 10:2 J National Assoc Administrative L Judges 118 at 124–25 [emphasis in original].

¹⁸⁶ *New Brunswick Liquor*, *supra* note 27 at 237.

¹⁸⁷ *Pushpanathan*, *supra* note 37 at para 26, citing *Pasiechnyk*, *supra* note 37 at para 18.

¹⁸⁸ This result is paradoxical in that the courts in the UK observe the doctrine of parliamentary supremacy but, via the reasoning in *Anisminic*, *supra* note 154, preserve a wide discretion to review determinations of law, while Canada’s Constitution is the ultimate law but the courts have developed a doctrine of deference on review.

interpretation of its powers. Neither democracy nor the rule of law is served where laws are written by a legal presumption.

Secondly, where there are ambiguities in legislation that are unintended, or that have been shown to produce inconsistent or unpredictable results, administrative agencies will never be able to definitively resolve them. Administrative agencies do not create binding precedent, and otherwise have a duty not to fetter the scope of the discretion that is delegated to them. Deference therefore perpetuates some inconsistency and uncertainty in the law. Only the courts can provide a “singular, determinate and final answer”¹⁸⁹ on matters of statutory interpretation. Reasonableness review leaves things unsettled, as a finding that one interpretation is reasonable does not preclude others. I will examine this second point in the next two sections.

B. CAN AN AGENCY THAT DOES NOT CREATE BINDING PRECEDENT DETERMINE QUESTIONS OF LAW?

Administrative agencies are not bound by *stare decisis*.¹⁹⁰ That is, they are not bound by their own agency’s previous decisions¹⁹¹ via “horizontal *stare decisis*.”¹⁹² An agency’s decisions “do not create precedents for anyone, including the agency.”¹⁹³ Though courts may defer to agencies’ decisions on judicial review, agencies do not defer to themselves.

Stare decisis is a doctrine of repose.¹⁹⁴ an abbreviation of a Latin maxim urging us not to disturb the rest of things that stand decided.¹⁹⁵ By design, administrative agencies prefer flexibility to repose, or finality. Flexibility flows from “a legal pluralistic view of the administrative process”¹⁹⁶ which allows decision-makers to be “masters in their own house,”¹⁹⁷ not rigidly held to judicial standards of consistency, and able to change their positions with changing circumstances.¹⁹⁸ “Tribunals may take into account their previous decisions, but should not regard those decisions as binding precedent. The doctrine of *stare*

¹⁸⁹ *Vavilov*, *supra* note 10 at para 32.

¹⁹⁰ *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at paras 78–79 [*Irving Pulp*]; *Weber v Ontario Hydro*, [1995] 2 SCR 929 at para 14; *Domtar Inc v Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at 791–99; *Iwa v Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282 at 333.

¹⁹¹ *Altus Group Limited v Calgary (City)*, 2015 ABCA 86 at para 16 [*Altus*], citing *Irving Pulp*, *ibid* at para 6; *Halifax Employers Association v International Longshoremen’s Association*, 2004 NSCA 101 at para 82.

¹⁹² This is sometimes referred to, more euphoniously, as a form of comity. I will use “horizontal *stare decisis*” as it is now the more common term. See e.g. Michelle Biddulph, “Rethinking the Ramifications of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law” (2018) 56:1 *Alta L Rev* 119; The Honourable Justice Malcolm Rowe & Leanna Katz, “A Practical Guide to *Stare Decisis*” (2020) 41 *Windsor Rev Legal Soc Issues* 1 at ch 6.2 “The Role of Precedent in Agency Decision-Making (*Stare Decisis*)”.

¹⁹³ Robert W Macaulay, James LH Sprague & Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters, 2019), ch 6.2.

¹⁹⁴ Others being *res judicata* (avoiding relitigation of the same issue between the same parties) and collateral estoppel (preventing relitigation of a matter decided for at least one party): Larry Alexander, “Precedent” in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, 2nd ed (Oxford: Wiley-Blackwell, 2010) 493 at 493.

¹⁹⁵ Henry Campbell Black, *Black’s Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 4th ed (St. Paul, Minn: West, 1968) sub verbo “*stare decisis et non quia movere*.”

¹⁹⁶ Paul Daly, “The Principle of *Stare Decisis* in Canadian Administrative Law” (2015) 49:3 *RJTUM* 757 at 768 [Daly, “*Stare Decisis*”].

¹⁹⁷ *Ibid*, citing *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 568–69.

¹⁹⁸ Daly, *ibid* at 771.

decisis should not be applied because tribunals should be flexible to adapt to new situations and changing times.”¹⁹⁹

Administrative law in Canada is consistent in also favouring flexibility over rigid application of other doctrines of finality such as estoppel,²⁰⁰ *functus officio*,²⁰¹ and abuse of process.²⁰²

[I]n the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case.²⁰³

The precedential effect of rulings from higher courts is modified by review on a reasonableness standard.²⁰⁴ The decisions of reviewing courts bind administrative decision-makers by “vertical” *stare decisis*,²⁰⁵ and inferior tribunals must follow the direction of superior courts.²⁰⁶ At the same time, administrative tribunals are permitted flexibility in the application of the common law.²⁰⁷ In applying a binding decision of a superior court, administrative decision-makers are held to a reasonableness standard:

[W]hen a decision is reviewed on the reasonableness standard, deference must be shown to decisions made by an administrative tribunal as to whether a precedent is binding or can be distinguished. The reviewing court must not decide whether a precedent applies or not. Rather, we must determine whether the reasons given by the administrative tribunal in order to apply or disregard the precedent were reasonable.²⁰⁸

Further, where a decision of a reviewing court has itself been decided on a reasonableness standard, the precedent does not necessarily exclude other interpretations: “even where an appellate court has found one interpretation to be reasonable, that decision will not necessarily bind a future administrative tribunal considering the legislation afresh.”²⁰⁹

The fact that administrative agencies do not create precedents that they themselves must follow is consistent with their function; with the exception of the minority of agencies that have the power to create binding substantive regulations or policy, they are not intended to create the law, but to make particular, bespoke decisions in applying legislation. As a result, administrative determinations of law do not have the same generality of application as determinations by courts. Some, including Dicey, have argued that this compromises equality

¹⁹⁹ Sara Blake, *Administrative Law in Canada*, 6th ed (Markham: LexisNexis Canada, 2017) at para 3.13.
²⁰⁰ *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 [*Nor-Man*]; *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at paras 60–75 [*Figliola*].

²⁰¹ *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 862; *Zutter v British Columbia (Council of Human Rights)* (1993), 82 BCLR (2d) 240 (SC).

²⁰² *CUPE Local 79*, *supra* note 60.

²⁰³ *Figliola*, *supra* note 200 at para 65.

²⁰⁴ Daly, “*Stare Decisis*,” *supra* note 196 at 772–73; Biddulph, *supra* note 192 at 128–32.

²⁰⁵ *Régie des rentes du Québec v Canada Bread Company Ltd*, 2013 SCC 46 at para 46.

²⁰⁶ *Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53 [*Superior Propane*].

²⁰⁷ *Nor-Man*, *supra* note 200 at para 65.

²⁰⁸ *Céré v Canada (AG)*, 2019 FC 221 at para 41. Reasons must now also provide an explanation for a departure from binding precedent on an issue: *Vavilov*, *supra* note 10 at para 112. See e.g. *Canada (Public Safety and Emergency Preparedness) v Taino*, 2020 FC 427 at para 80.

²⁰⁹ *Altus*, *supra* note 191 at para 17.

before the law.²¹⁰ As administrative “determinations of law” lack generality, their status is unlike determinations issued by courts. As Justice Rothstein noted in *Khosa*, “almost all rule of law theories include a requirement that each person in the political community be subject to or guided by the same general law.”²¹¹ Justice Rothstein cited Dicey,²¹² Joseph Raz,²¹³ and Lon Fuller.²¹⁴ He might also have cited Aristotle,²¹⁵ Thomas Hobbes,²¹⁶ John Locke,²¹⁷ John Austin,²¹⁸ Walter Bagehot,²¹⁹ H.L.A. Hart,²²⁰ or F.A. Hayek.²²¹ When a court interprets the law, its rulings have general application. Generality of application is central to what “law” normally means to the judicial branch, especially to appeal courts, whose functions include resolving inconsistencies in interpretation.²²² Determinations of law by administrative decision-makers do not have this status.

The point is not, however, that administrative determinations of law are not really law, and should be given no weight. The Supreme Court has held that the rule of law does not require generality of all laws.²²³ When Justice Rothstein noted that the major jurists have taken

²¹⁰ “In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit”: Dicey, *Introduction*, *supra* note 30 at 114. See discussion in Arthurs, “Rethinking Administrative Law,” *supra* note 62 at 26–33. *Khosa*, *supra* note 44 at para 90.

²¹¹ Dicey, *Introduction*, *supra* note 30 at 114.

²¹² Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 215–17.

²¹³ Lon L Fuller, *The Morality of Law: Revised Edition* (New Haven: Yale University Press, 1969) at 81–91.

²¹⁴ “[T]he decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on definite cases brought before them”: Aristotle, *Rhetoric*, translated by W Rhys Roberts (London, UK: Oxford University Press, 1924) at 1.

²¹⁵ Hobbes stated that it encouraged peace for the sovereign “to make some common Rules for all men, and to declare them publicly, by which every man may know what may be called *his*, what *another’s*”: Thomas Hobbes, *De Cive: The English Version entitled in the first edition Philisophicall Rudiments Concerning Government and Society*, ed by Howard Warrender (Oxford: Oxford University Press, 1983) at 95 [emphasis in original].

²¹⁶ “And so whoever has the Legislative or Supreme Power of any Common-wealth, is bound to govern by establish’d standing Laws, promulgated and known to the People, and not by Extemporary Decrees”: John Locke, *Two Treatises of Government*, 2nd ed by Peter Laslett (Cambridge, UK: Cambridge University Press, 1967) at 265.

²¹⁷ John Austin considered laws to be general commands: “where [a command] obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually*, a command is occasional or particular”: John Austin, *The Province of Jurisprudence Determined*, ed by Wilfrid E Rumble, (Cambridge, UK: Cambridge University Press, 1995) at 25 [emphasis in original].

²¹⁸ “A law is a general command applicable to many cases”: Walter Bagehot, *The English Constitution* (London, UK: Chapman and Hall, 1867) at 169.

²¹⁹ HLA Hart took the central model of law to be general rules or directions not addressed to particular individuals or requiring a particular act to be done. Hart also acknowledged the need for particular commands, as “exceptional or ... ancillary accompaniments” of general laws: HLA Hart, *The Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012) at 21. Timothy Endicott finds two modes of generality which, in Hart’s account, law in its normal meaning must necessarily have, including rules regulating the community that are general as to person, conduct, place, etc., and legal institutions with rules of change and adjudication that are general in the same ways: Timothy Endicott, “The Generality of Law” in Luis Duarte D’Almeida, James Edwards & Andrea Dolcetti, eds, *Reading HLA Hart’s The Concept of Law* (Oxford, Hart, 2013) 14 at 17–24.

²²⁰ FA Hayek, *The Constitution of Liberty*, (Chicago: University of Chicago Press, 1960) at 149:

The nature of these abstract rules that we call “laws” in the strict sense is best shown by contrasting them with specific and particular commands. If we take the word “command” in its widest sense, the general rules governing human conduct might indeed also be regarded as commands. Laws and commands differ in the same way from statements of fact and therefore belong to the same logical category. But a general rule that everybody obeys, unlike a command proper, does not necessarily presuppose a person who has issued it. It also differs from a command by its generality and abstractness.

²²¹ Pearlman, *supra* note 162.

²²² *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at 39–40.

generality to be a defining aspect of law, it was not to suggest that administrative determinations of law are not real law. Rather, it was to point out how a deferential standard of review compromises the courts’ function of ensuring the universality of the law. A finding that an agency’s interpretation of a general law is reasonable does not necessarily preclude different findings on the same point by the same agency, and, “[d]ivergent applications of legal rules undermine the integrity of the rule of law.”²²⁴ Where the rule of law requires a matter to be decided so as to avoid unpredictability, incoherence, or inconsistency, it is only a court that can do so definitively, and then only by applying a correctness standard.

The lack of stare decisis limits administrative agencies’ participation in law-making. Stare decisis in the common law courts is the means of ensuring “consistency, certainty, predictability, and sound judicial administration.”²²⁵ The doctrine is (falsely) said to be “as old as the common law itself.”²²⁶ It is “at the core of our legal philosophy,”²²⁷ a “central pillar,”²²⁸ and “essential to law.”²²⁹ It is “the normal rule and is itself one of the ‘basic tenets’ of our legal system (thus an element of ‘fundamental justice’).”²³⁰ Courts follow precedent rather than “foment judicial anarchy.”²³¹ Without adherence to precedent, “the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important.”²³²

While the concurring justices in *Vavilov* stressed the importance of stare decisis,²³³ they did not suggest that the lack of it in the administrative world weighs in favour of greater judicial intervention. This is not necessarily inconsistent. The fact that agencies need not follow their own precedents will inevitably limit the courts’ accommodation of legal pluralism in the administrative realm, but it does not completely jettison administrative determinations of law from the realm of respectable legality. The general law is provided by the underlying statute. Administrative decisions are observances, applications, or manifestations of that general law. Individual administrative decisions are more in the nature of orders than of general laws. They are the necessary particularities that are “exceptional or are ancillary accompaniments”²³⁴ to general laws. Their limited, rather than general, effect could even be said to weigh in favour of deference (though it is no comfort to the party affected by an administrative ruling).

While stare decisis is essential to our current common law system, the coherence of the legal system does not require it to constrain every decision, at every level of adjudication. Stare decisis is largely irrelevant to findings of fact. Juries are instructed on the law, but do not apply precedent in the same way that judges do when making findings of mixed fact and

²²⁴ *Khosa*, *supra* note 44 at para 90.

²²⁵ *McNaughton Automotive Ltd v Co-operators General Insurance Co* (2005), 255 DLR (4th) 633 (Ont CA) at para 119.

²²⁶ *R v MPS*, 2013 BCSC 1953 at para 14. This is false, unless by a narrow definition of “common law” it is made true by definition (see below).

²²⁷ *Ibid.*

²²⁸ *R v Mankow* (1959), 28 WWR (Alta CA) at 439.

²²⁹ *R v Arcand*, 2010 ABCA 363 at para 183.

²³⁰ *Canada (Minister of Citizenship and Immigration) v Fast*, 2001 FCA 373 at para 2.

²³¹ *Regina v Rybansky, Jones, Veldhuis and Neto* (1982), 36 OR (2d) 22 (H Ct J) at 25.

²³² *Woods Manufacturing Company Limited v The King*, [1951] SCR 504 at 515.

²³³ *Vavilov*, *supra* note 10 at para 281.

²³⁴ *Hart*, *supra* note 220 at 21.

law. Arbitrations and mediations function without *stare decisis*. It is not absolute in any of our courts.²³⁵

It should be remembered, also, that the systematic application of *stare decisis* is a relatively modern innovation in the history of the common law.²³⁶ The common law is generally considered to date from the end of the twelfth century.²³⁷ It began as the custom of the King's courts.²³⁸ Henry de Bracton's works of the thirteenth century are credited as the first systemic use of cases to develop jurisprudence.²³⁹ Few lawyers had access to the plea rolls from which he collected his materials.²⁴⁰ The law remained mostly oral.²⁴¹ The beginnings of the doctrine of *stare decisis*²⁴² in English law have been placed in the sixteenth and seventeenth centuries,²⁴³ or as late as the eighteenth.²⁴⁴ Whichever is correct, the *practice* of creating and using widely available precedents must have begun later. Though some use of precedent was part of the common law by the sixteenth century,²⁴⁵ most decisions could not themselves become effective precedents until cases were reported and law reports were readily available to judges and lawyers.²⁴⁶ There were no standardized or quasi-official law reports in England until the nineteenth century.²⁴⁷ The nineteenth century is also the earliest that the doctrine of *stare decisis* is said to have taken its modern form, the *locus classicus*

²³⁵ *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44. For a critical discussion, see Dwight Newman, "The State of *Stare Decisis* and the Rule of Law" in Joanna Baron & Maxime St-Hilaire, eds, *Attacks on the Rule of Law From Within* (Toronto: LexisNexis Canada, 2019) 107.

²³⁶ Rupert Cross, *Precedent in English Law* (Oxford: Clarendon Press, 1961) at 17–18: "The English doctrine of precedent was not always as strict as it is today.... [T]he hierarchy of courts and the judicial functions of the House of Lords did not assume their present form until after 1850."

²³⁷ That is, from the reforms of Henry II: Harry Potter, *Law, Liberty and the Constitution: A Brief History of the Common Law* (Woodbridge: Boydell Press, 2015) at 62–68; Plucknett, *supra* note 84 at 16–19; RC Van Caenegem, *The Birth of the English Common Law*, 2nd ed (Cambridge, UK: Cambridge University Press, 1988) at 29; Anika C Stucky, "Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent" (2006) 59:2 Okla L Rev 403 at 410.

²³⁸ Plucknett, *ibid* at 342.

²³⁹ *Ibid* at 258–66, 342–45. Though there were earlier treatises (for example, GDG Hall, ed, *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, ed by GDG Hall (London, UK: Thomas Nelson and Sons, 1965) probably written in 1187 and 1189; Baker, *supra* note 103 at 17; Plucknett, *supra* note 84 at 256) the written common law based on cases began as Bracton's law. Bracton's choices were idiosyncratic, sometimes preferring outdated or overruled cases. He would sometimes "put the clock back and restore the court's custom as it used to be in its best period" (*ibid* at 344). Further, he was trained in civil law and drew concepts from Roman jurisprudence to form a "precise technical vocabulary, infinitely more subtle than the language of the plea rolls": George E Woodbine, ed, *Bracton on the Laws and Customs of England*, translated by Samuel E Thorne, vol 1 (Cambridge, Mass: Harvard University Press, 1968) at xxxiii.

²⁴⁰ Plucknett, *ibid* at 342–44.

²⁴¹ *Ibid* at 401–402.

²⁴² Some aspects of Roman law are plausibly considered precursors to *stare decisis*: WF Kuzenski, "Stare Decisis" (1922) 6:2 Marq L Rev 65 at 66; William J Shroder, "The Doctrine of Stare Decisis — Its Application to Decisions Involving Constitutional Interpretation" (1904) 58 Central LJ 23 at 24. It overstates the matter, however, to refer to *stare decisis* as an "ancient doctrine." See e.g. Herman Oliphant, "A Return to Stare Decisis" (1928) 6:5 American L School Rev 215 at 216, 217, 219.

²⁴³ Plucknett, *supra* note 84 at 348.

²⁴⁴ Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge, UK: Cambridge University Press, 2008) at 25; Rowe & Katz, *supra* note 192 at 6.

²⁴⁵ Baker, *supra* note 103 at 199, 209–10.

²⁴⁶ See Rowe & Katz, *supra* note 192 at 6.

²⁴⁷ Plucknett, *supra* note 84 at 350. Year Books and Abridgements existed from the thirteenth century onward, but they did not systematically report cases to be used as precedents. Year Books were often journalistic collections of recent cases, court discussions, and gossip. Abridgements were usually uneven and incomplete notebooks prepared by students of the law (*ibid* at 274). The first printed Abridgement, known as Statham, was pressed in about 1490 or 1495 (*ibid* at 274). The works of Coke became available to some in the seventeenth century (*ibid* at 281–84), followed by Blackstone's *Commentaries* in the eighteenth (*ibid* at 286–87); William Blackstone, *Commentaries on the Laws of England* (Buffalo: William S Hein & Co, 1992, originally published Oxford: Clarendon Press, 1992).

being considered the decision of *Mirehouse v. Rennell*.²⁴⁸ To disqualify as “law,” all decisions made outside a robust practice of stare decisis would therefore exclude most of the history of the common law.²⁴⁹

Civil law systems, including Canada’s civil law system in Quebec, do not make the same use of precedent in private law matters as our common law courts.²⁵⁰ The failure of most civil law systems to descend into anarchy demonstrates that there can be law without stare decisis. The civil law system makes other systematic use of precedent to ensure consistency.²⁵¹ Administrative agencies also have a duty of consistency.²⁵² Administrative determinations function as law within a system of underlying legislation and supervision by the courts. Their lack of generality does not, in itself, compromise the coherence of the legal system, as they are cabined within a system that does maintain the general law.

When Canada eliminated appeals to the Privy Council,²⁵³ our Supreme Court did not suddenly consider decisions of the formerly superior court²⁵⁴ invalid because they were no longer binding.²⁵⁵ Cases of the Privy Council retained the status that our Supreme Court chose to give them.²⁵⁶ Cases from other common law jurisdictions may also be persuasive though they are not binding.²⁵⁷ In a similar way, the Supreme Court can stipulate how interpretations of law by administrative agencies are to be treated by the courts. Though those agencies do not directly develop the system of customary law curated by the common law courts, they still participate in that system, drawing on its concepts in their determinations which may in turn be adopted by the courts into the common law.²⁵⁸

²⁴⁸ (1833), 1 Cl&F 527 (HL UK); Baker, *supra* note 103 at 210.

²⁴⁹ Strictly speaking, it would eliminate all decisions. The first decision made could not count as law as it could not have been founded on precedent, and all subsequent decisions would fall by the same logic.

²⁵⁰ See Alison Harvison Young, “Stare Decisis — Quebec Court of Appeal — Authority v Persuasiveness: *Lefebvre c. Commission des affaires sociales*,” Case Comment, (1993) 72:1 Can Bar Rev 91 at 97–101.

²⁵¹ W Friedmann, “Stare Decisis at Common Law and under the Civil Code of Quebec” (1953) 31:7 Can Bar Rev 723; Mary Garvey Algero, “The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation” (2005) 65:2 La L Rev 775 at 787. Vavilov, *supra* note 10. See also *Canada (Attorney General) v Bri-Chem Supply Ltd*, 2016 FCA 257 at para 44; *Altus*, *supra* note 191 at para 31.

²⁵² Appeals from our Supreme Court to the Privy Council were eliminated in 1933 for criminal matters and in 1949 for all other matters: William S Livingston, “Abolition of Appeals from Canadian Courts to the Privy Council” (1950) 64:1 Harv L Rev 104 at 107, 109.

²⁵³ Formally speaking, the Privy Council was not a court but a body advising the Crown in Council on appeals to the prerogative: *ibid* at 104.

²⁵⁴ *Ibid* at 111. See Andrew Joanes, “Stare Decisis in the Supreme Court of Canada” (1958) 36:2 Can Bar Rev 175 at 194–95. The first case in which the Supreme Court of Canada overruled a Privy Council precedent was *Fleming v Atkinson*, [1959] SCR 513. Though it did so obliquely, with language suggesting distinguishing facts: Mark R MacGuigan, “Precedent and Policy in the Supreme Court” (1967) 45:4 Can Bar Rev 627 at 633–34, 644–46. Chief Justice Laskin stated in *Capital Cities Comm Inc v CRTC*, [1978] 2 SCR 141 at 161 that “this Court is not bound by judgments of the Privy Council any more than it is bound by its own judgments.”

²⁵⁵ In debating the *Supreme Court Act* amendment of 1949, which eliminated appeals to the Privy Council, Parliament had rejected a provision that would retain judgments of the Privy Council as binding: MacGuigan, *ibid* at 633–34; *Supreme Court Act*, RSC 1985, c S-26.

²⁵⁶ *President and Fellows of Harvard College v Canada (Commissioner of Patents)*, [2000] 4 FC 528 (CA) at para 69.

²⁵⁷ For example, the factors defining “employment relationship” by the British Columbia Human Rights Tribunal in *Crane v BC (Ministry of Health Services) and others*, 2005 BCHRT 361 are often cited (though sometimes varied) by the superior courts. See e.g. *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937 v Taan Forest Limited Partnership*, 2018 BCCA 322. The definitions of “hatred” and “contempt” for the purposes of federal hate speech legislation developed by the Supreme Court drew on the definition in the decision of the Canadian Human Rights Tribunal: *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 927–28; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 55.

A greater potential compromise of the rule of law lies not in the *fact* that administrative agencies are not bound to follow their own precedents, but in the *reason* they do not. Administrative agencies are not only *permitted* not to treat their earlier decisions as binding, they *must* not do so. They must always consider the full range of alternatives within their delegated authority.²⁵⁹ An administrative agency cannot consider itself bound by its previous decisions because its “discretion ... would be eventually obliterated if it was bound to be exercised in a particular fashion in particular circumstances just because it had been so exercised in such a fashion on another occasion.”²⁶⁰ Agencies have a duty to exercise the full scope of their discretion, and, except in rare cases where they have an explicit power to make binding policy, they may not fetter their discretion through policy, guidelines, or precedent. In the next section, I will examine the extent of this duty and what it implies for the role of the courts in maintaining the rule of law.

C. AGENCIES CANNOT PERMANENTLY RESOLVE AMBIGUITY IN THEIR ENABLING STATUTES

*ubi jus est vagum ibi misera servitus.*²⁶¹

(It is a wretched state of slavery which subsists where the law is vague or uncertain.²⁶²)

An agency has a duty to consider whether and how to exercise the discretion it has been granted.²⁶³ Discretion cannot be declined,²⁶⁴ narrowed, or otherwise fettered by the rote application of policy,²⁶⁵ guidelines, or precedent.²⁶⁶

Binding policy may only be created where there is the “clearest statutory direction”²⁶⁷ to do so. In such cases, the scope of discretion will have been narrowed through a legitimate legislated authority. Otherwise, though policy may be considered in the exercise of discretion, an administrative decision-maker always has a duty to consider the particular facts of the case.²⁶⁸ Policy, training, and templates may be used to encourage consistency, but they must “not operate to fetter decision making.”²⁶⁹ The decision-maker’s discretion “is given by the Statute and the formulation and adoption of general policy guidelines cannot confine

²⁵⁹ Macaulay, Sprague & Sossin, *supra* note 193 at ch 6.3.

²⁶⁰ *Kalmakoff v Keys No 303 (Rural Municipality)* (1995), 138 Sask R 250 (QB) at para 43 [*Kalmakoff*].
²⁶¹ WHP Clement, *The Law of the Canadian Constitution*, (Toronto: Carswell, 1892) at 130; Blackstone, *supra* note 247 at 403; Sir Anthony Mildmay’s Case (1605) 6 Co Rep 40a, 42a; Edw Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts*, (London, UK: M Flether, 1644) Cap XLIX at 245.

²⁶² Black, *supra* note 195, sub verbo “*misera est servitus, ubi jus est vagum aut incertum*” at 1151.

²⁶³ *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs*, [2014] UKSC 44, per Lord Sumption at para 83: “A statutory discretionary power carries with it a duty to exercise the discretion one way or the other and in doing so to take account of all relevant matters having regard to its scope”; *Roncarelli*, *supra* note 1 at 157: “The Commission cannot abdicate its own functions and powers”; *Regina v Lewisham London Borough Council, ex parte P*, [1991] 1 WLR 308 (QBD UK); *Zinerman v Burch* (1990), 110 S Ct 975 at 994 (US); Timothy Endicott, *Administrative Law*, 3rd ed (Oxford: Oxford University Press, 2015) at 277.

²⁶⁴ *Attaran v Canada (Minister of Foreign Affairs)*, 2011 FCA 182 at paras 38–45; *Vasquez Pacheco v Canada (Minister of Employment & Immigration)*, 1990 CanLII 8004 (FCA).

²⁶⁵ *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 [*Maple Lodge Farms*]; *Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanhasamy*].

²⁶⁶ Donald JM Brown & The Honourable John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters Canada, 2019) at 12:4421; *Koopman v Ostergaard* (1995), 12 BCLR (3d) 154 (SC) at paras 51–53.

²⁶⁷ *Imisfil Township v Vespra Township*, [1981] 2 SCR 145 at 173.

²⁶⁸ *Kanhasamy, supra* note 265 at para 32; *Brown v Driver Control Board (Alta)* (1992), 123 AR 32 (QB).
²⁶⁹ *Vavilov, supra* note 10 at para 130.

it.”²⁷⁰ A decision in which discretion has been fettered by the application of policy is considered either automatically invalid²⁷¹ or intrinsically substantively unreasonable.²⁷²

Neither can discretion be narrowed by precedent. Where an agency believes itself to be obligated by precedent to take a decision, it will be considered to have failed to exercise its discretion.²⁷³ Though an agency may look to policy and precedent for guiding principles, it “must not fetter its hands and fail, because a guide has been declared, to give the fullest hearing and consideration to the whole of the problem before it.”²⁷⁴ Agencies, therefore, “are not only at liberty not to treat their earlier decisions as precedent, they are positively obliged not to do so.”²⁷⁵

Where agencies are given statutory discretion to apply their expertise, they cannot narrow the scope of their discretion through the application of horizontal stare decisis. A duty to follow precedent would be fundamentally at odds with the exercise of discretion. Decision-makers must remain free to act “according to their consciences and opinions.”²⁷⁶ Therefore, an agency “is unfettered by the common law other than common law principles applicable generally to administrative tribunals.”²⁷⁷

Agencies do not fetter their discretion by creating an expectation of a certain result through representation or past practice. Legitimate expectations may give rise to procedural rights, but cannot affect substantive outcomes.²⁷⁸

The rule against fettering discretion through the use of precedent is not a local quirk of Canadian administrative law. The UK courts recognize the principle that a public body may not fetter its discretion by adopting a rigid policy²⁷⁹ or by application of precedent:

[I]t would not be open to a tribunal charged by statute with a duty to decide each case as a matter of discretion, to inhibit itself from going fully into the facts.²⁸⁰

²⁷⁰ *Maple Lodge Farms*, *supra* note 265 at 6. See also *Kanthasamy*, *supra* note 265 at para 32; *BC College of Optics Inc v The College of Opticians of BC*, 2014 BCSC 1853 at paras 19–31; *Halfway River First Nation v BC*, 1999 BCCA 470 at para 62; *Yhap v Canada (Minister of Employment and Immigration)*, [1990] 1 FC 722 (TD) at paras 34–35.

²⁷¹ *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para 62.

²⁷² *Canadian Association of Refugee Lawyers v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1126 at para 57; *Canada (MNR) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 73; *Vavilov*, *supra* note 10 at paras 108, 130.

²⁷³ *Ma v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1245 at para 16; *Ergen v British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 643 at para 34; *Bell Canada v Canada (AG)*, 2011 FC 1120 at para 88 [Bell]; *Currie v British Columbia (Workers' Compensation Board)*, 2011 BCCA 445 at para 41; *Canada (Minister of Employment and Immigration) v Jawhari*, [1992] FCJ No 1140 (QL) (TD); *Attorney-General v E*, [2000] 3 NZLR 257 (CA) at para 43 [E].

²⁷⁴ *Re Hopedale Developments Ltd and Town of Oakville*, [1965] 1 OR 259 (CA) at 263.

²⁷⁵ Macaulay, Sprague & Sossin, *supra* note 193, ch 6.3, cited in *Bell*, *supra* note 273 at para 88.

²⁷⁶ *Tremblay v Quebec (Commission des affaires sociales)*, [1992] 1 SCR 952 at 971.

²⁷⁷ *Kalmakoff*, *supra* note 260 at para 41. These principles include that tribunals must follow interpretations of the law by a higher court: *ibid* at para 40; *Superior Propane*, *supra* note 206 at para 54.

²⁷⁸ *Agraira*, *supra* note 177 at para 97; *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525.

²⁷⁹ *British Oxygen Co Ltd v Minister of Technology*, [1970] UKHL 4.

²⁸⁰ *Merchandise Transport Ltd v British Transport Commission and Others*, [1961] 3 WLR 1358 (CA (Eng)) at 1377.

Anyone charged with authority to exercise a statutory discretion must not “shut [his] ears to the application.”²⁸¹ The delegate must “address his mind to the question”²⁸² and “must be open to persuasion”²⁸³ that the facts may support an exception to any existing policy, and must not “[fail] to exercise ... any discretion by reason of the fetter ... imposed upon its exercise in acting solely in accordance with ... stated policy.”²⁸⁴ In Australia²⁸⁵ and New Zealand,²⁸⁶ as in Canada, concern for consistency must not function to fetter discretion.

It follows from the rule against fettering and the duty to exercise discretion that where there is ambiguity in the grant of discretion, agencies are unable to permanently resolve it. While there may be, de facto, established interpretations on many points at any given tribunal as a matter of practice, they remain practice, not law. Administrative agencies are structurally incapable of making “determinations of law” that finally resolve any ambiguity or create a general rule. While some ambiguity in the general law is necessary to allow expert decision-makers a degree of discretion, there will be cases where persistent ambiguity in the law allows an intolerable degree of uncertainty, inconsistency, and inequity among results.

As noted by the concurring justices in *Vavilov*,²⁸⁷ uncertainty in the law past a certain point may preclude reliance and prevent those subject to it from ordering their affairs. The idea of a predictable “sphere of liberty” defined by law within which citizens may plan their actions without arbitrary interference is an element of the rule of law that has been articulated by theorists as diverse as John Rawls:

A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men’s liberties.²⁸⁸

²⁸¹ *R v Port of London Authority Ex parte Kynoch Limited*, [1919] 1 KB 176 (CA (Eng)) at 183.

²⁸² *H Lavender and Son Ltd v Minister of Housing and Local Government* (1969), [1970] 1 WLR 1231 (QBD UK) at 1239.

²⁸³ *Ibid* at 1240.

²⁸⁴ *Ibid* at 1241.

²⁸⁵ “The Minister must decide each of the cases ... on its merits. His discretion cannot be so truncated by a policy as to preclude consideration of the merits of specified classes of cases.” *Aksu v Minister for Immigration and Multicultural Affairs*, [2001] FCA 514 at para 12 (Austl), citing *Drake and Minister for Immigration and Ethnic Affairs*, [1979] AATA 179; *Nevistic v Minister for Immigration and Ethnic Affairs*, [1981] FCA 41 (Austl): a delegate must ensure its decision is made on the facts before it and not a rote application of policy.

²⁸⁶ “[A] tribunal must not wrongly pursue consistency at the expense of the merits of individual cases”: *R v Flintshire County Council, County Licensing (Stage Plays) Committee, Ex parte Barrett*, [1957] 1 QB 350 at 368, cited in *Whiting v Archer*, [1964] NZLR 742 (SC) at 746 and *Commissioner of Police v Andrews*, [2015] NZHC 745 at para 65. A decision-maker cannot “close his mind to the ... evidence or argument purely on the basis that it might have fallen outside the guidelines prescribed in the Departmental manual”: *Chiu v Minister of Immigration*, [1994] 2 NZLR 541 (CA) at 550.

²⁸⁷ *Supra* note 10 at para 270.

²⁸⁸ John Rawls, *A Theory of Justice*, revised ed (Oxford: Oxford University Press, 1999) at 207.

and Hayek:

Being made impersonal and dependent upon general, abstract rules, whose effect on particular individuals cannot be foreseen at the time they are laid down, even the coercive acts of government become data on which the individual can base his own plans. Coercion according to known rules, which is generally the result of circumstances in which the person to be coerced has placed himself, then becomes an instrument assisting the individuals in the pursuit of their own ends and not a means to be used for the ends of others.²⁸⁹

Arbitrariness arising from ambiguity may create inconsistency and unpredictability to an extent that compromises the rule of law. When this occurs, only a revision of the legislation or a ruling by a court can definitively resolve the ambiguity. Any important matters of interpretation that need to be settled, such as persistent uncertainties in the law, constitutional questions, questions of jurisdictional boundaries between agencies, or general questions of law of central importance to the legal system, can *only* be settled by a court.

Unlike administrative decision-makers, judges have a duty to *aim* at universality through interpretations of law having general application. Whether they always achieve this is a separate question. Courts do not always succeed in resolving ambiguities. Courts may be inconsistent, and areas of the law may remain in flux (perhaps nowhere more so than in the law of judicial review itself²⁹⁰). Settling the law in accordance with coherent general principles nonetheless remains central to their purpose. In hockey, most plays end in chaos and frustration. The players spend most of their time *not* scoring goals. Scoring goals nonetheless remains the aim of the activity. The point of the activity for a court conducting statutory interpretation is to resolve ambiguity so that the law is the same for everyone. This is not the case for administrative decision-makers, who must observe the scope of the discretion they are given.

V. CONCLUSION:

VAVILOV AND THE LIMITS OF LEGAL PLURALISM

[A] reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it.²⁹¹

In *Vavilov*, the majority established a presumption of deference on judicial review while reserving rule of law exceptions. This revision of the law might provide administrative tribunals room to function while preserving channels through which the courts may settle ambiguities and inconsistencies through correctness review when necessary. The amici curiae in the case,²⁹² as well as other parties and interveners,²⁹³ had advocated a specific exception to deference to allow the courts to address inconsistency or “persistent discord that

²⁸⁹ Hayek, *supra* note 221 at 72.

²⁹⁰ As many have noted; see e.g. Allan C Hutchinson, *Law, Life, and Lore: It's Too Late to Stop Now* (Cambridge, UK: Cambridge University Press, 2018) at 140–47.

²⁹¹ *Vavilov*, *supra* note 10 at para 32.

²⁹² *Ibid* (Factum of the *Amici Curiae* at paras 85–94, online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/37748/FM260_Amici-Curiae_Daniel-Jutras-Audrey-Boctor.pdf>).

²⁹³ See *ibid* (Oral Argument, Respondent at 1:30.33 to 1:58.19, online: (video): <www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=37748&id=2018%2f2018-12-05--37896-37897-37748&date=2018-12-05>).

renders the law unintelligible.”²⁹⁴ While the majority did not hold that evidence of inconsistency will automatically trigger correctness review, they prescribed a “more robust form of reasonableness review”²⁹⁵ to provide consistency where the rule of law requires it. Deference need not stretch to allow ambiguity to be resolved by administrative decision-makers, as that is not a function they can perform.

In the concurring reasons in *Vavilov*, two of the justices who have most favoured deference²⁹⁶ argue that the majority’s rule of law exceptions to deference will be *too* robust, prove too flexible in application,²⁹⁷ and mark a reversion from a “pluralistic conception of the rule of law”²⁹⁸ back to a pre-*New Brunswick Liquor*, court-centric one. Some in the majority’s coalition have elsewhere supported less deferential positions.²⁹⁹ Might a presumption of deference have been traded for a more robust reasonableness review that would provide a foundation to revisit matters such as deference to the balancing of *Charter* values,³⁰⁰ and to review legal interpretations more strictly? The majority invokes the rule of law as a limit to deference³⁰¹ without delimiting the concept in any detail.³⁰² Without more substance, the “rule of law” could act, as did the concept of “jurisdiction,” as a ready, adaptable justification for intervention, rather than as a doctrinal guide for it.³⁰³

The rule of law might be that of Justice Cartwright in *Roncarelli*, requiring only explicit laws to be enforced while permitting unfettered discretion where the written law is silent. On the other hand, it might be that of Justice Rand, involving equality before the law and distinguishing lawful authority from the mere use of power. Though the majority does not elaborate on the concept in their decision, their conception of the rule of law is clearly a modern, Randian one. Their “more robust”³⁰⁴ framework articulates rule of law limits to legal pluralism in the form of standards of justification. The very idea of justification precludes Justice Cartwright’s tolerance of an agency acting as a law unto itself. The details of the framework for reasonableness review provide further substance to the concept of the rule of law as a limit to deference.

²⁹⁴ Factum of the *Amici Curiae*, *supra* note 292 at para 11.

²⁹⁵ *Vavilov*, *supra* note 10 at para 72.

²⁹⁶ Justices Abella and Karakatsanis favoured deference in cases including *Matson*, *supra* note 162; *Edmonton East*, *supra* note 178; *Wilson*, *supra* note 36.

²⁹⁷ *Vavilov*, *supra* note 10 at para 239.

²⁹⁸ *Ibid* at para 241.

²⁹⁹ See e.g. *West Fraser Mills Ltd v British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22; *Edmonton East*, *supra* note 178; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33.

³⁰⁰ See Jamie Chai Yun Liew, “The Good, the Bad, and the Ugly: A Preliminary Assessment of Whether the *Vavilov* Framework Adequately Addresses Concerns of Marginalized Communities” (2020) University of Ottawa Faculty of Law Working Paper No. 2020-08 at 6–7, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3522597>. Lower courts to date have not revisited this issue in light of *Vavilov*, *supra* note 10: *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at paras 20–30.

³⁰¹ *Vavilov*, *supra* note 10 at paras 2, 10, 17, 23, 32, 35, 53, 58, 62–64, 69–70.

³⁰² For an account of the Supreme Court’s previous discussions of the rule of law, see Jack Watson, “You Don’t Know What You’ve Got ‘Til It’s Gone: The Rule of Law in Canada—Part II” (2015) 52:4 *Alta L Rev* 949.

³⁰³ Courts have, to date, interpreted the correctness categories narrowly. See e.g. *Bank of Montreal v Li*, 2020 FCA 22 at paras 26–28; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 27.

³⁰⁴ *Vavilov*, *supra* note 10 at para 72.

As the majority in *Vavilov* notes,³⁰⁵ prior jurisprudence of deference provided little guidance as to how reasonableness review should be conducted.³⁰⁶ *Dunsmuir* described reasonableness as:

[C]oncerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.³⁰⁷

But what sort of justification is necessary? How transparent, and intelligible to whom? Without more, “reasonableness” provides no more guidance than does the “reasonable person” standard of care in tort; that is, the standard that prevails where the law itself provides no standard.³⁰⁸ Or worse, it could mean many things. Justice Stratas observed that “[t]he reasonableness standard of review means entirely different things in different cases, but we know not why.”³⁰⁹ Though lower courts had proposed some “badges of unreasonableness,”³¹⁰ something more is required to make reasonableness review coherent.

Where “[l]aw-making and legal interpretation are shared enterprises in the administrative state,”³¹¹ judicial review will necessarily deal with the standards by which officials justify their acts. David Dyzenhaus has described the difference between subjects and citizens as the ability to “require an accounting for acts of public power.”³¹² As “[t]he courts’ special role is as an ultimate enforcement mechanism for such justification,”³¹³ judicial review, deferential or not, will necessarily involve examining the sufficiency of justification. The minimum standard of justification that the rule of law will tolerate will provide the most deferential standard of review. Justification must at least show, to give Dicey his due, that citizens are “ruled by law and not by caprice.”³¹⁴ In his view, “wherever there is discretion there is room for arbitrariness.... [D]iscretionary authority on the part of government must mean insecurity for legal freedom on the part of its subjects.”³¹⁵

³⁰⁵ *Ibid* at para 73.

³⁰⁶ See also Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge, UK: Cambridge University Press, 2012) at 141–42 [Daly, *Theory of Deference*]; Paul Daly, “The Scope and Meaning of Reasonableness Review” (2015) 52:4 *Alta L Rev* 799 at 800; The Honourable Justice David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016) 42:1 *Queen’s LJ* 27 at 35–38.

³⁰⁷ *Dunsmuir*, *supra* note 35 at para 47.

³⁰⁸ See John Gardner, “Reasonable Person Standard” in Hugh LaFollette, ed, *The International Encyclopedia of Ethics*, 2nd ed (Chichester: Wiley-Blackwell, 2020), online: <onlinelibrary.wiley.com/doi/pdf/10.1002/9781444367072.wbiee920>.

³⁰⁹ Stratas, *supra* note 306 at 35.

³¹⁰ *Delios v Canada (AG)*, 2015 FCA 117 at para 27; *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 100.

³¹¹ Stack, *supra* note 57 at 310.

³¹² Dyzenhaus, “Politics of Deference,” *supra* note 114 at 305.

³¹³ *Ibid*.

³¹⁴ Dicey *Introduction*, *supra* note 30 at 111.

³¹⁵ *Ibid* at 110.

Rejection of arbitrariness has been the ostinato rhythm of advocates of the rule of law,³¹⁶ from Lord Hewart³¹⁷ to Carleton Allen,³¹⁸ to G.W. Keeton,³¹⁹ to Hayek,³²⁰ to McRuer,³²¹ to Tom Bingham.³²² The principle is fundamental to our constitutional order.³²³ Though many doubt discretion itself must lead to arbitrariness, no one defends arbitrary state action as such.³²⁴ Mary Liston has argued that:

If the rule of law has a core of meaning in legal theory, it is the principle of legality. The import of the principle of legality for the rule of law is that it conveys the basic intuition that law should always authorize the use of public power and constrain the risk of the arbitrary use of public power.³²⁵

Several Canadian jurists have proposed markers of non-arbitrary state action. Evan Fox-Decent has described an “internal morality” to the rule of law that “requires the decision-maker to engage in a number of comparative and inferential justificatory practices.”³²⁶ He argues that the rule of law requires “establishing a general framework of justification which compels recognition of all the important considerations and provides some guidance as to the relative weight legality demands of them.”³²⁷ This framework will require that the decision-maker “consider seriously the views and arguments of the affected individual,”³²⁸ and “show an alert and attentive regard for fundamental values that inform the legal context in which the decision is made.”³²⁹

³¹⁶ For an argument that rejection of arbitrariness is necessary but not sufficient to preserve the rule of law, see Ryan Alford, “The Origins of Hostility to the Rule of Law in Canadian Academia: A History of Administrativism and Anti-Historicity” in Baron & St-Hilaire, *supra* note 235, 47.

³¹⁷ “The exercise of arbitrary power is neither law nor justice, administrative or at all”: Rt Hon Lord Hewart of Bury, *The New Despotism* (London, UK: Ernest Benn, 1929) at 44.

³¹⁸ “[A] discretion which is demonstrably groundless, or exercised in ignorance or at random is not, in the eyes of the law discretion at all, but mere caprice”: Carleton Kemp Allen, *Law and Orders: An Inquiry Into The Nature And Scope of Delegated Legislation And Executive Powers In England* (London, UK: Stevens & Sons, 1947) at 72–73.

³¹⁹ “[I]f [legal review of executive action] is prejudged by the requirements of policy, then it simply supplies cover for the arbitrary execution of Departmental policy, and we have once again passed from a constitutional to an absolute regime”: GW Keeton, *The Passing of Parliament* (London, UK: Ernest Benn, 1952) at 89.

³²⁰ “[W]here coercion is not avoidable, it is deprived of its most harmful effects by being confined to limited and foreseeable duties, or at least made independent of the arbitrary will of another person”: Hayek, *supra* note 221 at 72.

³²¹ James C McRuer, “The Judicial System: Its Independence Essential to Free Government” (1947) 33:11 ABA J 1087 at 1088: “The inherent power born in the human race to resist arbitrary injustice found expression in two revolutions, the second of which resulted in the Magna Charta of the British judicial system — the Settlement Act.”

³²² Tom Bingham, *The Rule of Law* (London, UK: Allen Lane, 2010) at 50: “[An entitlement to a benefit] should be governed by law, not by the arbitrary whim of an official.”

³²³ *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 748.

³²⁴ Though W Ivor Jennings comes close: “The word ‘arbitrary’ has acquired a sinister connotation; it implies not merely a power which may be exercised or not at the will of the possessor, but a power which is likely to be abused. All powers can be abused, whether they are derived from the ‘regular law’ or not”: W Ivor Jennings, *The Law and the Constitution* (London, UK: University of London Press, 1933) at 254. Harry Arthurs expressed some scepticism regarding the use of the term, noting: “[i]n contemporary usage, ‘arbitrariness’ is the pejorative equivalent of discretion, while ‘policy’ is its more benign characterization”: Arthurs, “Rethinking Administrative Law,” *supra* note 62 at 23.

³²⁵ Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 77 at 80.

³²⁶ Evan Fox-Decent, “The Internal Morality of Administration: The Form and Structure of Reasonableness” in David Dyzenhaus, ed, *The Unity of Public Law* (Portland: Hart, 2004) 143 at 150.

³²⁷ *Ibid* at 156.

³²⁸ *Ibid* at 159.

³²⁹ *Ibid* at 160.

Matthew Lewans has developed a theory of deference based on authority, legitimacy, and legality, which requires of decision-makers reasonable justification, congruence between declared rules and action, and respect for persons affected by decisions.³³⁰

Dyzenhaus has argued that “[t]he deferential stance accepts the legitimacy of the administrative state, but requires of its officials that they demonstrate their understanding of the distinction between power and legal authority,”³³¹ and that therefore judges “should defer only if the officials do a reasonable job of justifying their interpretation of the law.”³³² That is to say, “adequate reasons should be treated as a pre-condition to deference.”³³³ From this it follows that the primary focus on judicial review should be the reasons given by the decision-maker, who is expected to demonstrate justification for any decision through cogent reasons respecting the dignity of the affected party.³³⁴

Daly has suggested “*indicia* of unreasonableness”³³⁵ should include the absence of any “flaws or fallacies that undermine the integrity of the legal system,”³³⁶ such as disproportionality, irrationality, or inconsistency.³³⁷ Daly’s *indicia* are drawn together from case law that is “(almost) resolutely opaque”³³⁸ in the attempt to present a synoptic view of accepted criteria.

I would not presume to assess the extent to which the guiding principles for reasonableness review set out by the majority in *Vavilov* accord with those described by these scholars, especially as they are cited more by the concurring justices in *Vavilov* than by the majority. Clearly, though, some of the same ideas are put to work in the majority’s guidelines for performing reasonableness review.

Vavilov’s framework “puts ... reasons first.”³³⁹ The majority describes two categories of flaws that might be considered *indicia* of unreasonableness: failures of “rationality internal to the reasoning process”³⁴⁰ and failure to observe “factual and legal constraints.”³⁴¹ Where reasons are required, a decision “must ... be justified, by way of those reasons, by the decision maker to those to whom the decision applies.”³⁴² The perspective of the party “over whom authority is being exercised” is “[c]entral to the necessity of adequate justification.”³⁴³

³³⁰ Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart, 2016) at 184–222.

³³¹ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, UK: Cambridge University Press, 2006) at 144.

³³² *Ibid* at 147.

³³³ Paul Daly, “2020 Vision: Dunsmuir 2.0” (23 December 2019), online: <www.administrativelawmatters.com/blog/2019/12/23/2020-vision-dunsmuir-2-0/#_ftn19>.

³³⁴ David Dyzenhaus, “Dignity in Administrative Law: Judicial Deference in a Culture of Justification” (2012) 17:1 *Rev Const Stud* 87; Dyzenhaus, “Politics of Deference,” *supra* note 114 at 279.

³³⁵ Daly, *Theory of Deference*, *supra* note 306 at 143–65; Paul Daly, “Unreasonable Interpretations of Law” in *Judicial Deference to Administrative Tribunals in Canada: Its History and Future*, The Honourable Joseph T Robertson, Peter A Gall & Paul Daly, eds (Markham: LexisNexis Canada, 2014) 233 at 261–64 [Daly, “Unreasonable Interpretations”].

³³⁶ Daly, “Unreasonable Interpretations,” *ibid* at 261.

³³⁷ *Ibid*.

³³⁸ Daly, *Theory of Deference*, *supra* note 306 at 143.

³³⁹ *Vavilov*, *supra* note 10 at para 84.

³⁴⁰ *Ibid* at para 101.

³⁴¹ *Ibid*.

³⁴² *Ibid* at para 86 [emphasis omitted].

³⁴³ *Ibid* at para 133.

To this extent, identifying reasonableness also identifies what gives decisions legitimacy, and makes them likely to be accepted by those whom they affect.³⁴⁴

The framework for reasonableness review provided by the majority in *Vavilov* marks the boundaries of judicial tolerance of legal pluralism. The exceptions to the presumption of a reasonableness standard allow the courts to keep a grip on those things administrative agencies are not structured to address: constitutional questions,³⁴⁵ questions of central importance to the legal system as a whole,³⁴⁶ and questions of jurisdictional boundaries between agencies.³⁴⁷ In the area of inconsistent “determinations of law,” however, the Supreme Court may not have staked its territory clearly enough. The majority recognized that the rule of law can be compromised in the absence of a “singular, determinate and final answer.”³⁴⁸ Administrative decision-makers can never provide a “determination of law” in the sense that the courts use that phrase. They cannot provide a “final answer” to any question of legal interpretation. We expect the law to be the same for everyone. Though the majority requires decision-makers to be “concerned with the general consistency”³⁴⁹ of decisions, it is impossible for ambiguities in the law to be resolved by a decision-maker who also has a duty to respect the scope of his or her discretion. It should always be possible for a party who requires resolution of a legal question to ask a court to make the determination.

³⁴⁴ See Tom R Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990) for an argument that people obey the law when they view it as legitimate, rather than because of coercion.

³⁴⁵ *Vavilov*, *supra* note 10 at paras 55–57.

³⁴⁶ *Ibid* at paras 58–62.

³⁴⁷ *Ibid* at paras 63–64.

³⁴⁸ *Ibid* at para 32.

³⁴⁹ *Ibid* at para 129.