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WHAT'S THE PROBLEM WITH SUBSTANTIVE REVIEW?

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In *Canada (Minister of Citizenship and Immigration) v Vavilov*, the Supreme Court of Canada endeavoured to reformulate the law of substantive review of administrative decisions. This was familiar territory for the Court. Over the last four decades, the Court has revised the doctrinal framework for substantive review on numerous occasions, with limited success in promoting stability in the law. Early academic responses to *Vavilov* considered whether the new doctrinal framework would endure. This paper focuses on a prior question: What is the problem with substantive review? It argues that contrary to the Court's longstanding position, the foundations of the law of substantive review are neither clear nor stable. Rather, substantive review doctrine is built upon two heavily contested principles capable of being conceptualized in different ways. The jurisprudence features multiple competing conceptions of those principles, producing tensions which create instability in the law. This suggests that to solve the problem, a coherent theory of substantive review that either resolves or prevents these tensions is necessary.

Dans la décision *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, la Cour suprême du Canada se trouvait en terrain familier quand elle s'est donnée comme objectif de revoir l'approche du droit du contrôle de fond des décisions administratives. En effet, au cours des quatre dernières décennies, le plus au haut tribunal a révisé le cadre doctrinal du contrôle de fond à de nombreuses reprises, avec un succès limité dans le maintien de la stabilité du droit. Les premières réflexions académiques suscitées par l'arrêt *Vavilov* ont cherché à déterminer si le nouveau cadre doctrinal pourrait perdurer. Autrement, le présent article se concentre sur une question préalable : à l'origine, existe-il un problème avec le contrôle de fond ? Le texte qui suit soutient que, contrairement à la position de longue date de la Cour, les fondements du droit soutenant le contrôle de fond ne sont ni clairs ni stables. La doctrine du contrôle de fond d'une décision administrative repose plutôt sur deux principes fortement contestés, pouvant être conceptualisés de plusieurs façons. La jurisprudence présente de multiples conceptions divergentes de ces principes ce qui produit des tensions menant à de l'instabilité dans le droit. Cette réalité suggère que, pour résoudre le problème, une théorie cohérente du contrôle de fond résolvant ou prévenant ces tensions est nécessaire.

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Introduction

The law of substantive review is the problem child in the Canadian public law family. It is built around a particularly "vexed question":[1] to what extent should courts review the merits of public administrative decisions?[2] Canadian courts have relied upon a familiar formula to respond to this question since 1979.[3] It involves a two-step process. First, the reviewing court identifies the appropriate standard of review, ranging from a stringent correctness standard to some type of deferential reasonableness standard. Second, the reviewing court applies that standard to the decision before it. If the decision withstands scrutiny under the applicable standard of review, then it is upheld. If not, it is quashed and usually remitted back to the original decision-maker for reconsideration.

Despite stability at this level of generality, the law of substantive review has been characterized by unrest. The Supreme Court of Canada has undertaken a major overhaul of the applicable doctrine about once every decade since 1979, and has revised it more subtly on numerous other occasions.[4] Most recently, in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[5] the Court took the unprecedented step of announcing in advance that it planned to reconsider the law. On top of hearing the submissions of the parties, the Court appointed two *amici curiae* and granted leave to 27 interveners to help it with that task. The promise of *Vavilov*

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1 Mark Elliott and Hanna Wilberg, "Introduction" in Mark Elliott & Hanna Wilberg, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart, 2015) 1 at 3.

2 In Canada, courts distinguish between procedural and substantive review of administrative decisions. Procedural review involves the review of how an administrator arrived at their decision, while substantive review involves the review of the reasoning and outcome of the decision. The categorical distinction between these two spheres is contested (see David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 53:3 UTLJ 193 at 195–96).

3 *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*, 1979 CanLII 23 at 233–37 (SCC) [*CUPE*].

4 See e.g. *ibid*; *UES, Local 298 v Bibeault*, 1988 CanLII 30 at paras 120–26 (SCC); *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 at paras 28, 30, 58 (SCC); *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 at paras 27–34 (SCC) [*Pushpanathan*]; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 at paras 54–56 (SCC) [*Baker*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 34 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 30, 34; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 11–16 [*Newfoundland Nurses*]; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 20–23; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–142 [*Vavilov*].

5 *Supra* note 4 at paras 16–142.

was that it would provide an enduring framework for substantive review that courts, public administrators, lawyers, and—most importantly—people whose rights, privileges, and interests are impacted by administrative decisions could rely upon.

Early responses to *Vavilov* evaluated the judgment with a view to making predictions about whether it will live up to that promise.[6] This paper focuses on a prior question: What is the problem with substantive review? That is, what causes the unrest that has long characterized this area of law? This emphasis is motivated by the thought that unrest in the law of substantive review is a symptom of a deeper problem. Unless we have a clear account of that problem, we cannot hope to be in a position to evaluate proposed solutions effectively.

Lawyers, judges, and academics have framed the problem with substantive review in a range of ways. Some point to descriptive features of the modern administrative state, arguing that the problem is the variable nature of administrative contexts.[7] As Justice LeBel put it in *Blencoe v. British Columbia (Human Rights Commission)*, "[N]ot all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows!"[8] Those who see this as the problem with substantive review argue that doctrines that can accommodate this level of variability are bound to be unstable. The pull toward categorical rules that can provide judges clear guidance on how they should deal with substantive review cases is in tension with the need for flexibility and context sensitivity in substantive review analysis.

If this is the complete cause of the problem, it appears that we are at an impasse. The most pressing problems of modern government in a globalized world—including climate change, national security, and immigration—cannot be adequately addressed only or even primarily by general

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6 See e.g. Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33:2 Can J Admin L & Prac 111 at 112, 115, 143–44 [Daly, "The *Vavilov* Framework"].

7 Lorne Sossin argues that there is an "inherent tension… between coherent judicial principle and diverse context and settings for administrative law practice in Canada" (see e.g. Lorne Sossin, "The Complexity of Coherence: Justice LeBel's Administrative Law" (2015) 70 SCLR 145 at 146–47). See also Beverley McLachlin, "Administrative Law is Not for Sissies: Finding a Path Through the Thicket" (2016) 29:2 Can J Admin L & Prac at 130–31; Paul Daly, "Why is Administrative Law So Complicated?" in Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: University of British Columbia Press, 2023) at 17.

8 2000 SCC 44 at para 158.

legislated rules.[9] They require creative solutions, often involving the delegation of authority to administrative decision-makers to promulgate regulations and determine how the law applies in specific cases. There is no one-size-fits-all institutional design that will address these problems. Thus, variability seems to be an inescapable feature of the modern administrative state. If this is the problem, it seems that the quest for stability in the law of substantive review is futile. The necessary variability in administrative contexts means that achieving this goal may not be possible.[10]

Others believe that the judiciary is ultimately to blame. In what he called a "plea for doctrinal coherence and consistency," Justice David Stratas lamented that "administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan."[11] In other writing,[12] he more directly criticized judges, arguing that they have failed to construct and maintain coherent doctrine because they have been prescribing rules and determining outcomes based on their personal views about the appropriate relationship between the various branches of government, rather than developing law in accordance with well-settled principles, including the rule of law and legislative supremacy. In his view, if judges just committed to establishing doctrine based on those principles, the problems would evaporate.[13]

Justice Stratas does not specify the content of the "personal views" that judges have operationalized in their opinions, but it is likely that he is referring to the divide between so-called "formalists" and "functional-

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9 For an argument to this effect on legal responses to national security emergencies, see generally David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, UK: Cambridge University Press, 2006). For a parallel argument on legal responses to climate change, see Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Oxford: Hart, 2018) at 7.

10 For a conclusion along these lines, see Dame Sian Elias, "The Unity of Public Law?" in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark, eds, *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart, 2018) 15 at 19.

11 The Honourable Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Consistency and Coherence" (2016) 42:1 Queen's LJ 27 at 29 [Stratas, "The Canadian Law of Judicial Review"].

12 The Honourable Justice David Stratas, "A Decade of Dunsmuir: Please No More (Hon David W Stratas)" (8 March 2018), online (blog): <administrativelawmatters.com> [perma.cc/KTH7-RD44].

13 For Justice Stratas's proposed framework, see Stratas, "The Canadian Law of Judicial Review", *supra* note 11 at 59.

ists."[14] The debate between these two camps, which is both legal and political in character, can be summarized as follows. Formalists are committed to a strict separation of powers between the legislative, executive, and judicial branches of government. Among formalists, this commitment is often paired with a distrust of public administration, and a belief that the courts must be empowered to protect the private rights of individuals against government overreach. Functionalists reject a strict separation of powers, viewing it primarily as a mechanism through which formalist judges frustrate the progressive projects of modern government. Their position is characterized by a trust in public administrators who, in their view, are best positioned to implement complex policy-driven schemes.[15] Most functionalists grudgingly accept that there remains a place for judicial review, but insist that it be tightly constrained, with their practical recommendation being that judges should defer to administrative decision-makers in most cases.[16] On this account of the problem with substantive review, judges have allowed their commitments to either formalist or functionalist thinking to determine how substantive review cases should be resolved, rather than basing their decisions on well-settled principles of administrative law.

In this paper, my aim is not to show that these existing diagnoses are wrong *per se*. It would be foolish to deny that the variability of administrative contexts and the influence of judges' personal views on the determination of substantive review cases are contributors to instability in the law. My aim here is instead to highlight another dimension of the problem—one that is foundational but is at the same time routinely overlooked. I will argue that a significant contributor to the problem with the law of substantive review is the assumption that its theoretical basis is well-settled and stable. Careful attention to the jurisprudence shows that, in fact, the law of substantive review is built on two contested principles that are conceptualized in different ways. In the process of developing the law of substantive review, the Court has, perhaps unwittingly, invoked different conceptions of these principles, some of which are in tension with each other. As a result, the law of substantive review has been

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[14] For a helpful overview of the debate, see Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart, 2016) at 58–59.

[15] Paul Daly has suggested that Justice Abella, who penned several leading administrative law judgments during her time on the Supreme Court of Canada, is best characterized as a functionalist in light of her commitment to this view (see Paul Daly, "The Autonomy of Administration" (2023) 73 UTLJ (supplement 2) 202 at 217 [Daly, "Autonomy"]).

[16] On this point, see Michael Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43:3 Osgoode Hall LJ 223 at 259–60.

marked by unprincipled compromises instead of being guided by a sustained theoretical vision. The assumption that the theoretical foundations of the law are well-settled renders this problem invisible, leading to a failure to consider it—let alone resolve it.

In Part II, I show that the two principles that the Court has held provide the foundation for the law of substantive review—the rule of law and the obligation to give effect to legislative intent—are contested principles that are conceptualized in multiple, sometimes competing, ways. Part III demonstrates that the Court has embraced different conceptions of those principles while developing the law of substantive review. It highlights the tensions between some of these conceptions and draws out how they cause instability in the law. Finally, Part IV demonstrates that those same tensions have persisted in *Vavilov*, suggesting that it has not solved the problem of substantive review. Part V concludes.

I. Two Heavily Contested Principles

It is generally accepted that two constitutional principles underpin the law of substantive review: the rule of law and the obligation to give effect to legislative intent.[17] The Supreme Court of Canada has suggested that these two principles provide "clear, stable constitutional foundations"[18] upon which to develop substantive review doctrine. In its view, the problem has been at the level of implementation.[19] The Court is not alone in holding this view. Leading administrative law scholars have also argued that these principles are stable and provide clear guidance for the law.[20] This is the proposition I aim to contest in this section. In truth, the rule of law and the obligation to give effect to legislative intent are heavily contested principles. How they should be conceptualized is a matter of significant debate. Thus, it cannot be said that they straightforwardly

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[17] Over the years, the Court has used different terms to capture the latter principle, including democracy, legislative intent, legislative supremacy, and parliamentary sovereignty. The latter two terms do not fit comfortably within the Canadian legal order in which the Constitution, rather than the legislature, is supreme. The idea that the Court has tried to capture with these terms is that absent constitutional concerns, the courts are bound to give effect to the intention of the legislature.

[18] *Dunsmuir, supra* note 4 at para 32.

[19] *Ibid.*

[20] This view persisted even after it had become clear that *Dunsmuir* did not provide the stability that it promised (see e.g. Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62:2 McGill LJ 527 at 533-34; Stratas, "The Canadian Law of Judicial Review", *supra* note 11 at 43–44; Matthew Lewans, "Renovating Judicial Review" 68 UNBLJ 109 ("[e]veryone agrees that [judicial review] has a sound constitutional foundation" at 109).)

provide "clear, stable constitutional foundations" for the law of substantive review.[21]

Let us begin by considering the rule of law. It is relatively uncontroversial that the rule of law is opposed to arbitrary rule, and that it requires that the relationship between the state and its subjects be mediated by law.[22] Beyond this, though, the nature of the rule of law is heavily contested. Scholars and courts have advanced many competing conceptions of it. Contestation over the rule of law runs in multiple different directions. There is extensive debate about how, and to what extent, arbitrary rule can be prevented. There is also disagreement about why exactly arbitrary rule is objectionable, and so why we should value the rule of law. In short, when it comes to the rule of law, "[w]e disagree about the ailment, the medicine, and the character of the cure."[23] Already we can begin to see why we should not assume that the rule of law provides a straightforward and stable foundation for the law of substantive review. Claims about what the rule of law requires are not self-evident. They are a matter of argument, susceptible to defeat by good counter-arguments.

It might be objected that I have overstated the extent to which the rule of law is contested. Surely we have some sense of what the rule of law is, and what it is not. It might be added that we do not need a fully worked out account of the rule of law to build substantive review doctrine upon it. We could work from features of the rule of law that we can all agree upon, leaving the rest incompletely theorized.[24] Those familiar with the literature might point to the fact that although many different accounts of the rule of law have been advanced, there is often a great deal of commonality amongst them. Perhaps these common threads are all we

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21 *Dunsmuir*, *supra* note 4 at para 32.

22 The Supreme Court of Canada has adopted these basic truths about the rule of law. See *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) (the rule of law "provides a shield for individuals from arbitrary state action" at paras 70–71); *Ref re Remuneration of Judges of the Prov Court of PEI*; *Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, 1997 CanLII 317 (SCC) (the rule of law entails that "the exercise of all public power must find its ultimate source in a legal rule" at para 10); *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC) (the rule of law must mean "[f]irst, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power… Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order" at 748–49).

23 Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21:2 Law & Phil 137 at 159.

24 On incompletely theorized agreements and their usefulness for overcoming theoretical impasses, see generally Cass R Sunstein, "Incompletely Theorized Agreements" (1995) 108:7 Harv L Rev 1733.

need for practical purposes. The rest of the contestation can be left to the academics.

While I am sympathetic to this line of thinking, I worry that even the common threads do not necessarily provide solid ground. Take, for example, the proposition that the rule of law requires the state to rule, at least primarily, via clear, stable, consistent, and general rules. This is a common thread among many of the most well-known accounts of the rule of law.[25] Yet there are other common threads within rule of law thought that push against this proposition. As the legal philosopher Neil MacCormick put it: "Law is an argumentative discipline."[26] Fora in which people can challenge the meaning, scope, impact, and even the validity of legal rules are a characteristic feature of legal systems. This flows from a central rule of law commitment: the state must have legal warrant for actions that impact people's rights, privileges, or interests. If this commitment is to be safeguarded, people must be provided with opportunities to contest the state's legal warrant when it acts. In turn, the state must be required to provide some legal justification for its actions. This process naturally has an unsettling effect on the law. No matter how clear legislators and judges are when articulating legal rules, they "are always defeasible, and sometimes defeated"[27] when challenged. Contests of this sort "are not some kind of pathological excrescence on a system that would otherwise run smoothly." Rather, "[t]hey are an integral element in a legal order that is working according to the ideal of the Rule of Law."[28] There thus seems to be a tension in rule of law thought between the requirements of legal certainty, clarity, consistency, and generality on one hand, and the dynamic, arguable character of law on the other.[29]

Mark Walters has shown that much of the field of rule of law theorizing can be mapped along these lines. Those who emphasize legal certainty and the like subscribe to a conception of the rule of law which he calls "le-

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25 See e.g. Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 39; Joseph Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) at 214–16 [Raz, "The Rule of Law"]; Tom Bingham, *The Rule of Law* (London, UK: Penguin Books, 2011) at 37–132; Friedrich A Hayek, *The Constitution of Liberty* (Oxford: Routledge, 2006).

26 Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005) at 14.

27 *Ibid* at 28.

28 *Ibid* at 27.

29 See also Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in James E Fleming, ed, *Getting to the Rule of Law: Nomos* (New York and London, UK: New York University Press, 2011) 3.

gality as order."[30] They tend to give pride of place in their thinking to legal certainty and thus to legal rules, aiming to understand what they are, and to delineate the distinct conditions that must be satisfied if law is to function effectively as a system of rules.[31] Those who emphasize the arguable character of law subscribe to a conception of the rule of law which Walters calls "legality as reason."[32] They argue that the rule of law is characterized by processes of justification, and focus on the dynamic nature of legal reasoning.[33] The tension between legality as order and legality as reason will become significant again when we consider the law of substantive review more carefully. For now, though, all that needs to be borne in mind is that even the most seemingly benign statements about the rule of law are the site of contestation. Unless we commit to a coherent conception of the rule of law and defend that decision with argument, it cannot be said that the rule of law provides a clear or stable foundation for the law of substantive review.

What about legislative intent? Those familiar with the Canadian law of statutory interpretation might believe that judges' obligation to give effect to the intention of the legislature is a relatively straightforward idea. The Supreme Court of Canada has held that it is "trite law"[34] that legislative intent is the object of statutory interpretation. And, the Court has described legislative intent as the "polar star"[35] of judicial review of administrative action. The proposition that legislative intent exists and can guide courts thus seems beyond dispute in Canadian law. Yet the very idea of legislative intent is heavily contested in other common law jurisdictions. In Australia, for example, judges of the High Court have expressed skepticism about whether legislative intent exists at all. They have described it as a metaphor or a fiction,[36] suggesting that intention is nothing more than a conclusion reached about the proper construction of the law.[37] This type of skepticism about legislative intent is not complete-

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30 Mark D Walters, "Legality as Reason: Dicey, Rand, and the Rule of Law" (2010) 55:3 McGill LJ 563 at 572.

31 Joseph Raz's conception of the rule of law is a good example of one that fits this description. See Raz, "The Rule of Law", *supra* note 25 at 214-16; see also Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175.

32 Walters, *supra* note 30 at 572.

33 *Ibid*.

34 *Michel v Graydon,* 2020 SCC 24 at para 21.

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

36 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*, [2012] HCA 56 at para 25; *Zheng v Cai*, [2009] HCA 52 at para 28; *Lacey v Attorney-General of Queensland*, [2011] HCA 10 at para 44.

37 See e.g. *Momcilovic v The Queen*, [2011] HCA 34 at para 341.

ly foreign to Canada. In one of the leading Canadian treatises on statutory interpretation, Ruth Sullivan acknowledged that the concept of legislative intent is "troubling" and subject to "weighty ... theoretical objections."[38]

Theories about legislative intent can be divided into two camps: those that suggest that there is a fact of the matter regarding legislative intent, and those that insist that legislative intent is a normative construct. The leading figure in the latter camp is Ronald Dworkin. His position on legislative intent was motivated by the thought that the legislature is an institution, not a being that is capable of intentions of its own accord. When interpreters speak of "the intention of the legislature," Dworkin argued that they must therefore be speaking of some aggregation of the intentions of the individuals involved in the legislative process, as only they can have intentions. Interpreters aiming to discern the intention of the legislature will thus inevitably face problems associated with aggregation. They will be required to answer at least the following questions: Whose intentions count? At which moment in time are the relevant intentions pinned down and collected? How will their intentions be discovered? When the relevant intentions differ from one another, how are they to be combined to reach a synthesized institutional intention? Since there is no generally agreed upon answer to these questions, at each stage an interpreter has no choice but to exercise their own judgment. This led Dworkin to conclude that there is no fact of the matter when it comes to legislative intent. Rather, legislative intent is always a normative construct created by interpreters and then imputed to the legislature.[39]

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[38] Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007) at 32–33.

[39] Dworkin makes this point clear in a discussion of the debates surrounding the Framers' intentions in American constitutional law:

> Both sides to this debate suppose that the intention of the Framers, if it exists at all, is some complex psychological fact locked in history waiting to be winkled out from old pamphlets and letters and proceedings. But this is a serious common mistake, because there is no such thing as the intention of the Framers waiting to be discovered, even in principle. There is only some such thing waiting to be invented (Ronald Dworkin, "The Forum of Principle" (1981) 56:2/3 NYUL Rev 469 at 477).

After reviewing the wide range of questions that an interpreter must answer to "invent" such an intention, Dworkin explains:

> This long catalog of problems and issues was meant to show that the idea of a legislative or constitutional intention has no natural fixed interpretation that makes the content of the Framers' intention just a matter of historical, psychological, or other fact. The idea calls for a construction which different lawyers and judges will build differently. Any justification for one construction, and therefore for one view of what the Framers intended, must be found not in history or semantic or conceptual analysis, but in political theo-

Common law constitutionalists like Mark Walters join Dworkin in insisting that legislative intent is a normative construct.[40] Walters's position flows from an account of what it is to exercise legislative power. He understands the act of legislating to be an exercise of a legal power conditioned by legal constraints. Walters explains: "Parliamentary sovereignty is a legal principle that exists within, reinforces and is conditioned by a normative world defined by the common law commitment to legality and by a common law interpretive or discursive style."[41] Thus, according to common law constitutionalists, interpreters should approach acts of legislation in this frame of mind, seeking to integrate them within the legal system as a whole, including its over-arching commitment to legality— as if all of this forms one coherent system.

Theories best placed in the opposing camp seek to identify facts about legislative intent that can be isolated from normative judgments. Within this camp, there is extensive debate about the content of legislative intent. Jeremy Waldron has advanced a minimalist account of that content. He argues that complex modern legislation, produced as it is in diverse multi-member assemblies, is not plausibly described as intentional. Given that legislation is significantly influenced by logrolling, compromise, and last-minute amendments, we should resist the urge to treat statutes as the product of a single author with one coherent intention. If it makes sense to think of legislation as having an author at all, the author is the institution of the legislature, not any single legislator or group of legislators. All an interpreter has from that author is the text of the relevant legislation and its conventional meaning. Thus, on Waldron's account, it is impermissible to reach to anything other than the text of legislation as evidence of legislative intent. This has significant implications. Legislative intent is supposed to resolve cases where the text of a statute does not speak directly to an issue, or where there is ambiguity in the text that cannot be settled satisfactorily by appeals to conventional meaning. If we

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> ry. It must be found, for example, in an argument that one conception fits better with the most compelling theory of representative government. But then the idea with which we began, that judges can make apolitical constitutional decisions by discovering and enforcing the intention of the Framers, is a promise that cannot be redeemed. For judges cannot discover that intention without building or adopting one conception of constitutional intention rather than another, without, that is, making the decisions of political morality they were meant to avoid (see *ibid* at 498).

40 For an extended discussion of this view, see generally Mark Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge, UK: Cambridge University Press, 2020) at 259–98.

41 See generally *ibid* at 282.

adopt Waldron's account, there is no further legislative intent in those cases.[42]

Richard Ekins has made efforts to show that there is a fact of the matter of legislative intent, and that it has more content than minimalist accounts like Waldron's suggest.[43] Ekins draws from the philosophy of group action to make out his argument, explaining that the legislature is a complex purposive group capable of having intentions arising from the interlocking intentions of the legislators. The group has a standing intention to change the law by legislating in accordance with a defined process when there is good reason to do so. Its specific intentions are to adopt the complex reasoned schemes expressed in the texts of legislation, considered in context. This means that interpreters should give effect to the intention that it infers the legislature had, given all the publicly available evidence of it.[44] The central difference between Ekins's and Waldron's accounts of legislative intent is that an interpreter, on Ekins's account, is entitled to proceed on the basis that legislation is the product of a coherent intention. Thus, they can permissibly draw inferences about legislative intent from the text and context concerning, among other things, the purpose of the scheme, and the means the legislature chose to achieve that purpose, to resolve interpretive disputes.

Each one of these conceptions of legislative intent is subject to important objections that I have not reviewed here. It is not my aim at this stage to enter the debate about which one is right. Instead, my objective has been to highlight the range of ways that legislative intent is conceived to make the case that the obligation to give effect to legislative intent is another contested principle. This further undermines the suggestion that the foundations of the law of substantive review are clear and stable.

Acknowledging that the rule of law and the obligation to give effect to legislative intent are heavily contested principles may lead some to feel cynical about the prospect of arriving at stable substantive review doc-

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[42] For two other minimalist accounts of legislative intent, see Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) at 279–85 and John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012) at 59–62. In their view, the legislature intends to change the law by legislating. The intention, however, is minimal in the sense that it does not necessarily include an understanding of the specific change that the legislation will make in the law.

[43] See generally Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012).

[44] Notably, this does not normally include statements made by individual legislators during legislative debates, because they do not necessarily bear a relation to the act of the institution (see *ibid* at 268–74).

trine. This would be too quick. Contestation over a principle does not prevent us from refining our understanding of it, and ultimately committing to a conception that is capable of guiding legal doctrine. Participation in the process of contestation will help us to do so. What the point about contestability rules out is treating propositions about the rule of law or legislative intent as self-evident. Instead, we should acknowledge the contestability, notice when competing conceptions are advanced, and be prepared to defend claims about either principle through reasoned argument. With that in mind, let us turn to the law of substantive review.

II. The Rule of Law and Legislative Intent in the Law of Substantive Review

In the last section, we saw that the rule of law and the obligation to give effect to legislative intent are both contested principles, at least in the academic literature. It might be suggested that these academic debates do not threaten their ability to serve as a stable foundation for the law of substantive review, so long as they are stable in Canadian law.[45] That is, if Canadian law has insulated itself from contestation over the rule of law and the obligation to give effect to legislative intent by committing to one conception of each that coheres with the other, then it might still be plausible to suggest that they provide "clear, stable constitutional foundations" for the law of substantive review.

In this section, I will argue that this is not the case. Multiple conceptions of the rule of law and legislative intent have been embraced by the Court while developing substantive review doctrine. The first conceptions of the rule of law and legislative intent, which I will call the "orthodox conceptions," are irreconcilably in tension with each other and therefore, they cannot provide a stable foundation for the law of substantive review. It is because of this first tension that a second set of conceptions of the rule of law and legislative intent emerged in Canadian administrative law. These "alternative conceptions" are in tension with the orthodox conceptions, which continue to appear at times because the Court has never made a clean break from them. The result is a jurisprudence that is in conflict with itself on two fronts: between the orthodox conceptions of the rule of law and legislative intent, and between the orthodox conceptions and the alternative conceptions of those principles.

Recall that the Court's critics have admonished it for failing to execute the purportedly simple task of building coherent doctrine based on well-settled principles. My analysis in this section will show that this is a mis-

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[45] Of course, there would still be a worry that the conceptions of these principles embraced in Canadian law are flawed in some significant way.

characterization. On one hand, there is no way to build coherent doctrine based on the most well-settled conceptions of the principles that underlie the law of substantive review. Those conceptions are irreconcilably in tension with each other. On the other hand, the slow emergence of the alternative conceptions shows that the principles themselves cannot accurately be characterized as well-settled. Unless all of this mess is cleaned up, we cannot expect to have stable substantive review doctrine.

A. The Tension Between the Orthodox Conceptions of the Rule of Law and Legislative Intent

We should start by considering the orthodox conceptions of the rule of law and legislative intent. In *Dunsmuir v. New Brunswick*, the leading case prior to *Vavilov*, the Court made efforts to expressly articulate its understanding of the foundations of the law of substantive review. Its analysis reveals the outline of the orthodox conceptions. Justices LeBel and Bastarache held for the majority that "[j]udicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers."[46] Their suggestion that these principles are in tension says a great deal about the justices' conceptions of them.[47]

The conception of the rule of law alive in this part of the judgment has overtones of the conception that we saw in Part I, which Mark Walters calls legality as order. It is one that emphasizes legal certainty and stability, giving pride of place to the judiciary in its maintenance.[48] This is clearest in the Court's suggestion that "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority."[49] The "jurisdictional limits" the Court speaks of in

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[46] *Dunsmuir, supra* note 4 at para 27.

[47] On the Court's treatment of the tension between the rule of law and the foundational democratic principle, see David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (23rd McDonald Lecture delivered at the Centre for Constitutional Studies, University of Alberta Faculty of Law, 1 October 2011) at 16–22.

[48] This court-centric conception of the rule of law persists outside of administrative law cases as well, especially in the Court's jurisprudence on the jurisdiction of superior courts, judicial independence, and access to justice. See e.g. *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, Lamer CJ ("the provincial superior courts are the foundation of the rule of law itself" at para 37). That proposition was affirmed more recently in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 39.

[49] *Dunsmuir*, *supra* note 4 at para 30, quoting the Honourable Justice Thomas Cromwell, "Appellate Review: Policy and Pragmatism" (Isaac Pitblado Lectures, Appellate Courts:

this quotation are the legal limits of a tribunal's authority. Thus, implicit in this statement is the idea that judges have unique access to the right answer to questions regarding the contours of those legal limits. In light of its insistence that the courts, and only the courts, speak in the law's voice, the conception leaves no room for administrative decision-makers to play a role in the rule of law framework, except insofar as their decisions on what the law requires match the courts' interpretations of the law.

The conception of legislative intent—what the Court calls "the fundamental democratic principle"—in this statement is a minimalist one, reminiscent of accounts like Waldron's. According to this conception, the legislature's intent prevails when the decision-maker it chose makes the decisions delegated to it according to the constraints explicitly articulated in the statute. The legislature, on this conception, does not intend that the administrator act in accordance with rule of law constraints beyond those explicitly articulated in the statute—say, only in accordance with certain purposes, or more general legal standards. If it did, there would be no tension between the two principles. These two orthodox conceptions are often in tension with one another because where the courts intervene in the name of the rule of law to enforce constraints beyond those clearly articulated in the statute, they fail to respect the legislature's intent. However, if a court were to defer to an administrator's decision even though it diverged from their view about the legal limits on the administrator's authority—thereby respecting legislative intent—they would fail to uphold the rule of law.

I call these conceptions of the rule of law and legislative intent the "orthodox conceptions" because of their long lineage in administrative law.[50] They can be traced back to an early era of administrative law in which the concept of jurisdictional error governed. During that time, courts rarely referred explicitly to the rule of law or legislative intent, but the orthodox conceptions are implicit within the jurisdictional error framework. The animating idea under that framework was that the role of the courts conducting judicial review was to enforce the legal boundaries of an ad-

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Policy, Law and Practice delivered at the Law Society of Manitoba, November 2006) V-1 at V-12.

50 These conceptions are often credited to English legal scholar Albert Venn Dicey, whose influence on administrative law is much lamented. See generally Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: MacMillan & Co, 1915); *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1331–46, 1990 CanLII 49 [*Corn Growers*]; HW Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 Osgoode Hall LJ 1; David Dyzenhaus, "Dicey's Shadow" (1993) 43:1 UTLJ 127; Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford and Portland, Or: Hart, 2016) at chs 2–3.

ministrator's jurisdiction. So long as an administrator's decision fell within those boundaries, it was treated as unreviewable by courts. Hence, in one of the leading UK cases on the doctrine of jurisdictional error, Lord Reid held that a decision made within an administrator's jurisdiction "is equally valid whether it is right or wrong."[51] However, courts had a monopoly on answering "jurisdictional questions," meaning they could impose their own view of the appropriate answer to such questions regardless of what the administrator had to say about the issue.

The jurisdictional error framework did not reconcile the orthodox conceptions of the rule of law and legislative intent that underpinned it. By far the most common critique of the framework was that the category of "jurisdictional questions" was so malleable that all a judge needed to do if they wanted to intervene on an administrative decision was to deem an issue jurisdictional.[52] This allowed courts to sacrifice the orthodox conception of legislative intent in the name of the rule of law as they pleased. Despite the prevalence of this critique, it is certainly not the only problem with the jurisdictional error framework. The flip side of the doctrine of jurisdictional error was an extreme form of judicial deference justified by the idea that decisions made by an administrator within the bounds of their jurisdiction were not subject to supervision by the courts. This meant that administrative decisions deemed to be within the bounds of an administrator's jurisdiction were not subject to any legal standards. As Justice Rand put it in the 1952 case of *In re Ontario Labour Relations Board*: "It is to no purpose that judicial minds may be outraged by seemingly arbitrary if not irrational treatment of questions raised: these views are irrelevant where there is no clear departure from the field of action defined by the statute."[53] Here the orthodox conception of legislative intent was privileged over a basic truism about the rule of law: that it is opposed to the arbitrary exercise of state power.

It was against this backdrop that the Supreme Court of Canada began to develop the modern approach to substantive review in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*.[54] Justice Dickson held for a unanimous Court that although jurisdictional questions were to be reviewed on a standard of correctness, that category was to be tightly circumscribed pursuant to a general policy of judicial restraint. Courts conducting judicial review were not to "brand as jurisdictional, and therefore subject to broader curial review, that which

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51 *Anisminic Ltd v Foreign Compensation Commission*, [1968] UKHL 6 at 171.

52 See *Vavilov*, *supra* note 4 at para 209, Abella & Karakatsanis JJ.

53 1953 CanLII 10 at 30 (SCC).

54 *Supra* note 3 at 237.

may be doubtfully so."[55] All other questions were to be reviewed on a deferential standard of patent unreasonableness. *CUPE* contained important shifts that signaled the emergence of the "alternative conceptions" of the rule of law and legislative intent. These shifts will be relevant to the discussion in the next subsection. For present purposes, though, it is important to note the features of *CUPE* that preserved the orthodox conceptions of those principles.

The clearest sign that the Court failed to make a clean break from the orthodox conception of the rule of law is its preservation of the concept of jurisdictional questions, which were to be assessed on the "correctness" standard. Like under the jurisdictional error framework, this allowed courts conducting judicial review to intervene whenever an administrator's answer to a jurisdictional question diverged from their preferred approach. This part of the judgment in *CUPE* permitted courts to maintain a monopoly on answering certain questions of law, consistent with the orthodox conception of the rule of law. That the Court called the standard applicable to jurisdictional questions "correctness" is significant. It signals the persistence of the idea, implicit in the orthodox conception of the rule of law, that Courts have unique access to the single "correct" answer to legal questions. Further, it suggests that those subject to administrative decisions must accept something less than the "correct" legal answer to non-jurisdictional questions.

That compromise was justified in *CUPE* in part based on the orthodox conception of legislative intent. The Court held that judicial restraint in substantive review was appropriate because the legislature had given a clear signal that it intended the Public Service Labour Relations Board to deal with matters under the *Public Service Labour Relations Act* promptly and finally.[56] This came in the form of a strong privative clause which purported to shield the Board's decisions from judicial review on any basis. According to Justice Dickson, the presence of this clause within the *Act* was one significant reason in favour of a rule that required courts to defer to the Board's interpretation on non-jurisdictional questions. Indeed, it meant that "not only would the Board not be required to be 'correct' in its interpretation, but ... that the Board was entitled to err and any such error would be protected from review by the privative clause."[57] Here we see the logic of the jurisdictional error framework, with its suggestion that there is a single right answer to all questions that come before administrators, and that administrators have a right to be wrong

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55 *Ibid* at 233.

56 *Ibid* at 235.

57 *Ibid* at 236.

within their jurisdiction, extending into the Court's modernized framework for substantive review.

The law of substantive review has been altered by the Court on numerous occasions since *CUPE*. However, its basic structure—what I called the "familiar formula" in the introduction to this essay—has been preserved on each occasion. When faced with an application for judicial review, courts are required first to select the appropriate standard of review, ranging from a "correctness" standard to some variety of deferential standard, and then determine if the administrative decision withstands scrutiny under it. Correctness review has consistently been justified on the grounds that certain questions fall within the domain of the judiciary. The modifications the Court has implemented on this issue over the years have related to which types of questions make up that category and how to identify them. For example, in *Pushpanathan v. Canada (Minister of Employment and Immigration)*,[58] the Court established a multi-factor "pragmatic and functional" test designed to identify the appropriate standard of review between correctness, reasonableness and patent unreasonableness. In the years that followed *Pushpanathan*, the Court began carving out abstract categories of cases in which correctness would automatically apply on the basis that they fell within the purview of the judiciary. These categories included constitutional questions,[59] true questions of jurisdiction,[60] questions regarding the jurisdictional lines between two or more tribunals,[61] and general questions of law of central importance to the legal system.[62] This more categorical approach was then endorsed by the Court in *Dunsmuir*.[63]

Meanwhile, the Court continued to appeal to the idea that deferential review is justified—at least in part—on the basis of the legislature's signal that it intended the relevant administrator, rather than the courts, to make the decision. The Court repeatedly affirmed that one of the main indicators of such a signal is the presence of a privative clause.[64] In *Dun-*

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58 *Supra* note 4 at paras 28–38.

59 *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 31.

60 *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 5.

61 *Regina Police Assn Inc v Regina (City) Board of Police Commissioners*, 2000 SCC 14 at para 39; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, 2004 SCC 39 at paras 7–10.

62 *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 62 [*Toronto v CUPE*].

63 *Supra* note 4 at paras 57–61.

64 See e.g. *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1992] 2 SCR 1993 at 773–74, CanLII 106 (SCC); *Pushpanathan*, *supra* note 4

smuir, it adopted the same reasoning, holding that "a privative clause is evidence of Parliament or a legislature's intent that an administrative [decision- maker] be given greater deference and that interference by reviewing courts be minimized."[65] The modifications on the issue of deference over the years were not primarily regarding its justification, but rather were focused on its nature, and the degree to which it is owed to administrative decision-makers.[66]

Notice that just like the jurisdictional error framework, the familiar formula fails to resolve the tension between the orthodox conceptions of the rule of law and legislative intent. By requiring courts to review some questions of law on a correctness standard, the familiar formula fails to preserve the orthodox conception of legislative intent. Recall that this conception requires courts to respect the legislature's intention that an administrative body be the one to make the decisions delegated to it on a final and binding basis, so long as they do not stray beyond the limits explicitly articulated in the statute. When courts apply the correctness standard, they simply perform their own analysis in abstraction from the decision before them, and then determine whether the administrator complied with their approach. They need not give any weight to the administrator's reasoning, and therefore do not show any regard for the legislature's decision to delegate legal authority to an administrative body. In this way, the familiar formula allows courts to retain exclusive authority over certain questions of law regardless of whether the legislature intended those questions to be determined by administrative decision-makers. The judiciary's monopoly on questions of law is maintained in part, at the expense of the orthodox conception of legislative intent.

The familiar formula also compromises the orthodox conception of the rule of law. Recall that it prevails where courts have the last word on legal questions. When the familiar formula requires courts to apply a deferential standard of review, they are prevented from intervening simply because they would have come to a different decision than the administrator. They must cede part of their monopoly on answers to questions regarding the interpretation and application of the law. This means that

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("the presence of a 'full' privative clause is compelling evidence that the court ought to show deference to the tribunal's decision" at para 30).

65 *Supra* note 4 at para 52.

66 Key developments in this regard were the introduction of the reasonableness standard (see *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 at para 56 (SCC)), the recognition of deference as respect (see *Baker, supra* note 4 at para 65), and the abandonment of the patent unreasonableness standard (see *Dunsmuir, supra* note 4 at para 34).

whenever they apply a deferential standard, they are compromising the orthodox conception of the rule of law. They must accept something different from the "correct" answer, which the familiar formula tells them that they have exclusive access to. This is why deference feels so uncomfortable for many judges.

Thus, the familiar formula does not resolve the tension between the orthodox conceptions of the rule of law and legislative intent. Rather, it elevates one over the other on a case-by-case basis. On the one hand, when courts apply the correctness standard, they ignore the orthodox conception of legislative intent, giving no weight to the administrative decision-maker's decision. On the other hand, when courts apply a deferential standard, they fail to uphold the orthodox conception of the rule of law because they are required to loosen their grip on answers to questions of law. As a result, depending on which standard is selected, the familiar formula compromises the orthodox conceptions of the rule of law or legislative intent.[67] This has prompted courts to teeter back and forth between varying levels of deference and stringency over the years since *CUPE*. Either option under the familiar formula feels like a compromise of a fundamental principle. Thus, the tension between the orthodox conceptions of the rule of law and legislative intent is one key source of instability in the law of substantive review.

B. The Tension Between the Orthodox and the Alternative Conceptions

The analysis above prompts the following question: if the sacrifices to the orthodox conceptions of the rule of law and legislative intent within the familiar formula are as obvious as I have made them seem, why did this not raise red flags about the framework? Surely judges and academics whose minds were turned to the principles at stake in the law of substantive review would balk at such obvious compromises and demand a change of course. There is a great deal of truth in this suggestion. Obvious sacrifices to the basic principles underpinning a body of law are cause for judges' and academics' concern. It is for this reason that the Supreme Court of Canada has been put, time and time again, in the difficult position of having to explain how the evident sacrifices might be justified. In this subsection, I will demonstrate that in the process of reflecting on that question, the Court has developed alternative conceptions of the rule of law and legislative intent. These alternative conceptions are in tension

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[67] Proponents of familiar formula acknowledge these trade-offs. For example, in his discussion of the rule of law and legislative intent, Justice Stratas, argues that the familiar formula assists courts in determining which principle "trumps" the other depending on the context, see Stratas, "The Canadian Law of Judicial Review", *supra* note 11 at 44.

with the orthodox conceptions, and thus they are another source of instability in the substantive review jurisprudence.

As I mentioned earlier, the seeds of the alternative conception of the rule of law were sown in the Court's decision in *CUPE*. *CUPE* involved the review of the Public Service Labour Relations Board's interpretation of a provision of the *Public Service Labour Relations Act*. Importantly, the provision's ambiguity was "acknowledged and undoubted."[68] In Justice Dickson's view, "there is no one interpretation that can be said to be 'right.'"[69] The case thereby upset one of the fundamental premises of the orthodox conception of the rule of law: that judges always have unique access to the right answer to legal questions.

After acknowledging the provision's ambiguity, the Court went on to provide a rationale for deference to the Board's interpretation. Here, the Court relied on two main lines of reasoning. First, it looked to the privative clause within the *Act* and an interpretation of it in line with the orthodox conception of legislative intent. Second, it relied on the fact that a decision-making body charged with administering a specialized statutory scheme would develop considerable expertise in its operation, making it especially well-situated to deal with the matters delegated to it.[70] This implied that the Board's decisions could constitute rational and legally valid interpretations of the *Act*, rather than brute exercises of discretion. In short, the Court made room for administrators within the rule of law framework.

The final feature of *CUPE* that signaled the emergence of an alternative conception of the rule of law was the subjection of administrative discretion to a minimum standard of justification. Under the Court's express policy of judicial restraint, an administrator's decision on a non-jurisdictional question was to stand unless it was "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review."[71] This was a natural concomitant of the recognition that administrators' decisions could be rationally and legally justified.[72] If the justification for judicial deference to administrative decisions was that they might constitute

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68 *Supra* note 3 at 237.

69 *Ibid.*

70 *Ibid* at 236.

71 *Ibid* at 237.

72 David Dyzenhaus calls this phenomenon "the paradox of the recognition of rationality" (see David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (London, UK: Hart, 1997) 279 at 286–87).

reasonable legal interpretations, then it only makes sense to limit deference to those decisions that actually meet a minimum standard as such. Thus, in *CUPE* we see for the first time a glimmer of the idea that the validity of a purported interpretation of the law depends on whether it is adequately justified,[73] rather than whether it accords with what judges think is right.

From these features of *CUPE*, we can begin a rough sketch of the alternative conception of the rule of law. It is a conception under which it is not presumed that judges have unique access to the right answers to legal questions. It is one under which non-judicial decision-making bodies are treated as capable of providing valid interpretations of the law, and thereby contributing to the maintenance of the rule of law. Most fundamentally, it is one under which the validity of an answer to a legal question depends on whether it is adequately justified, making the existence of valid legal interpretations that diverge from what judges might believe is "correct" possible. Careful readers will note that this sounds much like the conception of the rule of law we saw in Part II called legality as reason.

My analysis in the foregoing paragraphs should not be taken as suggesting that the alternative conception of the rule of law was especially clear in *CUPE*. Given the persistence of reasoning in accordance with the orthodox conception of the rule of law, *CUPE* was a judgment full of contradiction. This caused the Court to struggle over the next few decades to develop the alternative conception in the face of strong countercurrents grounded in the orthodox conceptions. Along the way, there were serious hiccups.[74] However, there were also notable moments of lucidity.

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[73] It is important to note, however, that *CUPE* set the minimum standard quite low. The "patent unreasonableness" standard was concerned with the magnitude or immediacy of the defect in the administrator's reasoning, meaning that less obvious errors would be overlooked. This led to the "unpalatable" result of subjecting individuals to unreasonable decisions (see *Dunsmuir*, *supra* note 4 at para 42). Ultimately, the Court was convinced on this basis to abandon the patent unreasonableness standard in favour of a standard of reasonableness in *Dunsmuir*.

[74] The hiccups can be divided roughly into two categories. The first category is made up of cases in which courts succumbed to the temptation posed by the orthodox conception of the rule of law to impose their own view on the relevant legal issue regardless of the administrator's reasoning. In these cases, courts either improperly brand a legal question as jurisdictional and therefore expressly apply the correctness standard, or they engage in what has come to be called "disguised correctness review," where a court purports to apply the reasonableness standard but intervenes merely because it would have come to a different conclusion on the legal issue. For an example of the former, see *Syndicat des employés de production du Québec v CLRB*, 1984 CanLII 26 (SCC). For an example of the latter, see *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53; the second category is made up of cases in

In *National Corn Growers Assn v. Canada (Import Tribunal)*,[75] Justice Wilson took the initiative to reaffirm the ideas articulated in *CUPE*, in the face of what she saw as a regression from them by her colleagues on the bench. In a section entitled "What *CUPE* Sought to Leave Behind," she outlined the orthodox conception of the rule of law, under which the courts were given free rein to intervene upon the decisions made by administrators on any legal question.[76] In the following section, entitled "What *CUPE* Set Out to Achieve," she emphasized commitments to the ideas that legislative provisions do not invariably yield one particular, correct interpretation, and that administrators are often well-placed to interpret and apply the law in light of their unique experience and expertise.[77] This gave administrative decision-makers a role to play within the rule of law framework of the Canadian state, and made reasonableness the appropriate standard of review.

These ideas persisted all the way through to *Dunsmuir*, where the Court again held that reasonableness review is grounded in the idea that legal questions do not always lend themselves to one particular answer. Review for reasonableness, according to the Court, "is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." Importantly, the Court held that "[t]here is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness."[78] Given that the rule of law was one of the two principles that it had held underpin the law of substantive review, we can take from that statement that the Court understood there to be no com-

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which courts succumbed to the temptation posed by the orthodox conception of legislative intent to engage in "submissive deference," where they defer to an administrative decision-maker regardless of whether it adequately justified its decision. See e.g. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 38, where the Court held that when applying the reasonableness standard, courts should not evaluate the weight the administrator accorded to the relevant factors. Rather, it should confine itself to ensuring that all and only the relevant factors were considered (see *ibid* at para 41). As many commentators have pointed out, this turned reasonableness review into a mechanistic box-ticking exercise rather than a test for bona fide justification. Another case that encouraged submissive deference was the Court's decision in *Newfoundland Nurses*, where it held that a court conducting judicial review should attempt to supplement an administrator's deficient reasons before quashing their decision. This required courts to uphold decisions that had not been adequately justified by the relevant administrator (see *Newfoundland Nurses*, *supra* note 4 at para 12).

75 *Supra* note 50 at 1332–46.

76 *Ibid* at 1332–35.

77 *Ibid* at 1336–46.

78 *Dunsmuir*, *supra* note 4 at para 56.

promise to the rule of law entailed by reasonableness review. Reasonable justification is, at least in this part of the Court's judgment, a standard that safeguards the rule of law.

The qualification in the last sentence is important, because as I explained above, the orthodox conception of the rule of law also appears in parts of the Court's analysis in *Dunsmuir*. The decision therefore provides a useful example of how the tension between the orthodox and the alternative conceptions of the rule of law manifests. The Court held that it is "without question" that some questions of law must be determined on a correctness standard to prevent "inconsistent and unauthorized applications of the law." Within the same judgment, the Court held that there is no sacrifice to the rule of law when questions of law are assessed on a reasonableness standard. Here, we see the conflict between the orthodox and alternative conceptions of the rule of law in full force. The orthodox conception indicates that a court's final judgment on the correct answer to the relevant legal question constitutes the rule of law standard, while the alternative conception identifies adequate justification as the standard. The former standard centres on who speaks, while the latter centres on the justification given. It is no wonder that *Dunsmuir* was later criticized for sending mixed messages.[79]

Legislative intent has also been the site of mixed messaging in the substantive review jurisprudence. Recall that according to the orthodox conception, legislative intent prevails when the legislature's chosen decision-maker makes the relevant decision on a final and binding basis, so long as it does not stray beyond the constraints expressly provided for in the statute. Over the years, the Court has at times acknowledged an alternative to this vision, if only implicitly.[80]

It is possible to trace the roots of the alternative conception of legislative intent at least as far back as *CUPE*.[81] In that case, hints of the alternative conception can be detected in Justice Dickson's discussion of the rationale for the legislature's choice to delegate discretionary authority to the Public Service Labour Relations Board. He held that the legislature

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79 See e.g. Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012) 38:1 Queen's LJ 59 at 61.

80 The Court has explicitly stated its intention to leave behind the "court-centric" orthodox conception of the rule of law in favour of an alternative conception on several occasions. See e.g. *Corn Growers*, *supra* note 50 at 1336–46; *Dunsmuir*, *supra* note 4 at para 30. However, to my knowledge, it has never explicitly acknowledged that it is developing an alternative conception of legislative intent.

81 I say "at least" here because the alternative conception of legislative intent is detectable in earlier judgments of the Court. See e.g. Justice Rand's famous reasons in *Roncarelli v Duplessis*, 1959 CanLII 50 at 130–45 (SCC).

had "called upon [the Board] not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area."[82] It was intended to undertake those tasks to further the "twin purposes of the legislation"[83] which were to maintain the provision of public services while preserving the system of collective bargaining. What we see here is a conception of legislative intent which, for lack of a more perspicuous adjective, might be described as thicker than the orthodox conception. It suggests that the intention of the legislature is not just that the Board be the one to make the decisions delegated to it, whatever their content. Rather, the legislature's intention was that the Board would make those decisions in a manner that is sensitive to the facts and the relevant Canadian law, in furtherance of the *Act*'s more general purposes. In other words, the legislature was taken to have intended that the Board would contribute to the rational and legal operation of the scheme it chose to implement. This conception should remind readers of the account of legislative intent provided by common law constitutionalists like Mark Walters.

The alternative conception of legislative intent has surfaced on a few key occasions since *CUPE*. For example, in the administrative law blockbuster that was *Baker v. Canada (Minister of Citizenship and Immigration)*, Justice L'Heureux Dubé held that although courts must afford administrators a degree of deference when reviewing discretionary decisions, "discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law ... in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*."[84] This passage is admittedly ambiguous. It is not entirely clear whether the principles of the rule of law, the general principles of administrative law, and the *Charter* constrain administrative discretion on their own accord, or because the legislature intended them to. However, the latter interpretation of the passage is at least plausible. Indeed, it was cited by Justice Binnie in his concurring reasons in *Dunmsuir* for the proposition

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82 *CUPE*, *supra* note 3 at 235–36.

83 *Ibid.*

84 *Baker*, *supra* note 4 at para 53.

that "[j]udicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards."[85]

A strikingly similar conception of legislative intent emerges in Justice LeBel's reasons in *Toronto (City) v. CUPE, Local 79*.[86] There, he held:

> As a matter of statutory interpretation, courts should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent ... As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.

This is a conception of legislative intent that incorporates background principles of statutory interpretation, including the rule of law. It is the alternative conception in full voice.

Notice that the orthodox and the alternative conceptions of legislative intent give conflicting prescriptions for the role of courts conducting review of administrative decisions. All that matters under the orthodox conception is that the legislature's chosen decision-maker be the one to make the decision delegated to it, in accordance with the express limits in the statute. Thus, if the orthodox conception of legislative intent is the operative one, reviewing courts must defer to the decision regardless of its content, unless the decision-maker clearly exceeded the express terms of the delegation. However, if the alternative conception is the operative one, things look different. The administrator might fail to justify its decision reasonably in accordance with the facts, the relevant law, (including the common law), or the over-arching purposes of the *Act*. The alternative conception of legislative intent thereby makes room for a more significant role for courts conducting review than the orthodox conception. Here we see yet another contributor to instability and discord in the substantive review jurisprudence.

The foregoing section has shown that the substantive review jurisprudence is not built upon a coherent and stable theoretical foundation. It features multiple conceptions of both the rule of law and legislative in-

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[85] The idea that Parliament intends legislation to be interpreted in accordance with the basic principles of the Canadian legal system, including the rule of law, also finds expression outside of administrative law (see *Dunsmuir*, *supra* note 4 at para 131, Binnie J [emphasis in original]). Consider, for example, the presumptions in the law of statutory interpretation against retroactive application, and in favour of common law and constitutionally compliant interpretations. All of these presumptions are presumptions about legislative intent (see Sullivan, *supra* note 38 at 236–45).

[86] *Toronto v CUPE*, *supra* note 62 at para 133 [emphasis in original, reference omitted].

tent. The result is a jurisprudence that conflicts with itself on multiple fronts. The first tension, between the orthodox conceptions of the rule of law and legislative intent, is irresolvable. Honouring the orthodox conception of the rule of law leads to sacrifices to the orthodox conception of legislative intent and vice versa. In the process of trying to justify these sacrifices over the years, the Court has developed alternative conceptions of each principle. But, since it has never made a complete break from the orthodox conceptions, tensions have also emerged between the orthodox and alternative conceptions. The problem with substantive review thus exists at the foundational level, rather than at the level of doctrinal implementation. To resolve it, challenging theoretical work is necessary. The question becomes whether the Court rose to the occasion in *Vavilov*.

III. Vavilov and the Problem with Substantive Review

Vavilov was an exceptional case in many ways. As I mentioned above, the Court took the unprecedented step of announcing in advance its intention to revise the law. As a result of this announcement, the Court received the assistance of numerous parties, *amici curiae*, and interveners. It also took its time. After an unusually long hearing, the Court wrestled with the judgment for over a year. The Court thus had the time necessary to consider the foundational issues that I have highlighted in this paper. It was also aware that achieving coherence in the law should be treated as a priority. Indeed, its explicit aim was "to develop a coherent and unified approach to judicial review."[87] However, beyond brief statements like this, *Vavilov* is notable because of its retreat from theory.[88] The Court glossed the issue in one sentence, stating that "[t]he revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick* ... that judicial review functions to maintain the rule of law while giving effect to legislative intent." This statement is curious for a number of reasons. Not only is it rather brisk, but it mysteriously omits *Dunsmuir*'s suggestion that there is an "underlying tension" between those principles. Readers are left to determine for themselves whether the Court miraculously resolved the tension, or whether it simply swept the tension under the rug.

A review of the remainder of the judgment shows the latter to be true. One of the clearest indicators that this is the case is that the familiar formula survived in *Vavilov*. The Court held that there would be a pre-

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87 *Vavilov*, *supra* note 4 at para 88.

88 Here, I join the growing group of scholars who have criticized the Court's failure to engage with principle in *Vavilov* (see e.g. Daly, "The *Vavilov* Framework", *supra* note 6 at 143; Kate Glover Berger, "The Missing Constitutionalism of *Canada v Vavilov*" (2021) 34:4 JL & Soc Pol'y 68).

sumption in favour of deferential review. This presumption was justified on the basis of the orthodox conception of legislative intent. The Court explained that whenever the legislature delegates decision-making authority to an administrative body, "it can safely be assumed that the legislature intended the administrative [decision-maker] to function with a minimum of judicial interference."[89] Thus, "respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review."[90] The Court here insists that reviewing courts relinquish their orthodox monopoly over determining questions regarding the interpretation and application of law to respect the orthodox conception of legislative intent.

The Court went on to describe two circumstances in which that presumption could be rebutted. The first was where the legislature explicitly provided for a statutory appeal, signaling its intention that appellate standards should apply. This followed from the orthodox conception of legislative intent—the idea was that since the legislature had explicitly expressed an intention that courts play a more significant role in the administrative process, courts should respect that intention.[91] The presumption of deferential review would also be rebutted where the rule of law requires a correctness standard to apply.[92] This is the point in *Vavilov* where the orthodox conception of the rule of law most clearly presents itself. The Court held that the rule of law "requires courts to apply the standard of correctness to certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies."[93] In the Court's view, this was necessary to respect the "unique role" of the courts in interpreting the Constitution and allows the judiciary to have the last word on questions where the rule of law requires it. The Court thus preserved the judiciary's exclusive authority on certain questions of law at the expense of the orthodox conception of legislative intent.[94] Because the Court preserved the

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89 *Vavilov*, *supra* note 4 at para 24.

90 *Ibid*.

91 *Ibid* at paras 36–45.

92 *Ibid* at para 17.

93 *Ibid* at para 53.

94 Mark Mancini highlights these lines of reasoning in his argument that the Court adopted a Diceyan model of the rule of law in *Vavilov* (see Mark Mancini, "*Vavilov*'s Rule of Law: A Diceyan Model and Its Implications" (2020) 33:2 Can J Admin L & Prac 179). To some extent, I agree with him on this point, as what I call the "orthodox conception" of the rule of law is often attributed to Dicey. However, later in this section I will show that the alternative conception of the rule of law is also present in *Vavilov*. In my view, it is a mistake to suggest that the Court embraced a single model of the

logic of the familiar formula, we see familiar tradeoffs to the orthodox conceptions of the rule of law and legislative intent within it. The tension between the orthodox conceptions of these principles thus persists in *Vavilov*.

Whispers of the alternative conception of the rule of law also persist in *Vavilov*. Although the Court doubled down on its commitment to the orthodox conception of the rule of law while re-articulating the familiar formula, it affirmed the alternative conception while discussing reasonableness review. The Court held on numerous occasions that a proper application of the reasonableness standard did not constitute a derogation from the rule of law.[95] It follows that at least in these parts of the judgment, reasonableness—with its emphasis on justification, transparency, and intelligibility—is the relevant standard for rule of law compliance, rather than whatever the Court thinks is right. It affirmed this proposition by quoting with approval the idea that administrative decisions gain legal authority through a process of public justification.[96] Thus, the alternative conception of the rule of law played a role in the Court's reasoning in *Vavilov*, if only a marginal one. The presence of the alternative conception of the rule of law alongside the orthodox conception is another source of tension in *Vavilov*.

The conflict between these two conceptions is clearest in the part of the Court's judgment where it explains why certain types of questions, and not others, attract a standard of correctness. As I mentioned above, the Court held that going forward, the correctness standard would apply to certain categories of questions: constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies. In the Court's view, the rule of law requires courts to give a final answer to these questions. Conspicuously absent from this list was the category of "jurisdictional questions," which had attracted a correctness standard since the advent of modern administrative law on the grounds that this was required to ensure that administrators did not exceed the bounds of their legal authority. The *Vavilov* Court's justification for its decision to demote jurisdictional questions to the realm of reasonableness review was that the category is "inherently 'slippery'"[97] and

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rule of law in *Vavilov*. Mancini acknowledges that there may be alternative models of the rule of law alive in *Vavilov* but does not expand on this point (see *ibid* at 180).

95 See e.g. *Vavilov*, *supra* note 4 at paras 32, 67, 72.

96 *Ibid* at para 79, citing Jocelyn Stacey & Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016) 74 SCLR 211 at 220.

97 *Supra* note 4 at para 66, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 38.

that "[a] proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority."[98] Given the Court's insistence that applying reasonableness review to these questions involves no sacrifice to the rule of law, it is hard to see why correctness review is necessary for any category of question. Surely if reasonableness review is fit to maintain the rule of law on jurisdictional questions, it would also be suitable for other types of questions that engage the boundaries of an administrator's authority. The Court does not so much as acknowledge this tension, let alone resolve it.

To complicate matters further, the alternative conception of legislative intent is also latent in the majority's judgment in *Vavilov*. Like the alternative conception of the rule of law, it is clearest in the Court's discussion of reasonableness review. It explained that reasonable decisions are those that are "justified in relation to the constellation of law and facts that are relevant to [them]" and went on to identify various elements of that constellation. They include: the text and purpose of the governing statutory scheme, other law (including statutory law, common law, and international law), the principles of statutory interpretation, the evidence before the decision-maker, the submissions of the parties, past practices and decisions, and the impact of the decision on the affected individual. It might be assumed that this list of constraints was grounded in the rule of law. However, interestingly, in the few cases where the Court explicitly tied a constraint to one of substantive review's guiding principles, legislative intent was the Court's chosen ground. For example, when discussing why the principles of statutory interpretation would be accounted for in an adequately justified decision, the Court held that:

> Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.[99]

This passage contains a conception of legislative intent that is notably different from the orthodox one that appeared earlier in the Court's reason-

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[98] *Ibid* at para 67.

[99] *Ibid* at para 118. See also the Court's explanation for why international law constitutes a constraint on adequately justified administrative decisions: "(…) legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is 'presumed to comply with the values and principles of customary and conventional international law'" at para 114.

ing. There, it had held that the legislature's intention concerned merely who would make the relevant decision. Here, we see an alternative to that vision that includes further substantive constraints. Read together with the other elements of the "constellation," it harkens back to Justice Dickson's observations in *CUPE* that when the legislature delegates decision-making authority to an administrative official, it intends that official to make those decisions in light of the facts, the relevant law, and the overarching purposes of the legislation, and to Justice Binnie's suggestion in *Dunsmuir* that the legislature does not intend administrators to depart from reasonable standards. It is unclear how the Court can possibly reconcile this conception with the minimalist, orthodox conception of legislative intent that motivated the earlier sections of its judgment.

Like its predecessors, *Vavilov* is built on unstable and incoherent theoretical foundations. It is thus a judgment full of mixed messaging. As Paul Daly has pointed out, this is a boon for clever advocates, who will cite different parts of the judgment depending on the position that will best facilitate their clients' preferred outcome.[100] But it is bad news for those who hoped that *Vavilov* would solve the problem of substantive review. The same tensions that have marked the substantive review jurisprudence for decades present themselves again in *Vavilov*. While it is not the primary purpose of this paper to make predictions about whether *Vavilov* will endure, I would venture to guess that these tensions will fester in the years to come, leading to still more confusion and instability in the law.

This is borne out in the jurisprudence since *Vavilov*. In *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*,[101] the Court chose to recognize another category of cases in which correctness would apply: cases when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute. Justice Rowe, for the majority, was clearly moved by concerns about conflicting interpretations of the relevant statute. In line with the orthodox conception of the rule of law, he held that certain questions require a clear and definitive answer from the courts. But, as Justices Karakatsanis and Martin took pains to point out in dissent, the Court had held in *Vavilov* that robust reasonableness review was sufficient to safeguard against the kinds of legal inconsistencies that would threaten the rule of law. The best explanation for the disagreement between majority and dissent in this case is that they made their decisions on the basis of different conceptions of the rule of law. The majority reasoned on the

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[100] See Daly, "The *Vavilov* Framework", *supra* note 6 at 123.

[101] 2022 SCC 30 at paras 26–42.

basis of the orthodox conception, while the dissent was committed to the alternative one.

A similar divide occurred recently in *Mason v. Canada (Citizenship and Immigration)*. Justice Côté in dissent would have recognized yet another category for correctness review: certified questions under section 74(d) of the *Immigration and Refugee Protection Act*. In her view, "the fundamental importance of certified questions" and "the potential consequences for affected individuals" led to "the corresponding need for courts to provide correct and definitive answers" in order to safeguard the rule of law.[102] The majority rejected this proposition, arguing that the presumption of reasonableness review was not rebutted by the rule of law.[103] Again, this divide is best understood as a dispute over the nature of the rule of law—and specifically, whether it requires courts to resolve legal questions on a final and binding basis like the orthodox conception suggests—or whether the kind of justification contemplated by *Vavilov*'s robust reasonableness review is sufficient. This is a debate that is worth having out in the open, but unfortunately, the Court has only been willing to address it in the shadows of its judgments.

Conclusion

Canadian administrative lawyers would be forgiven for feeling like they are living in a time loop. About every ten years, the Court takes on the task of reformulating the law of substantive review. Each time, the Court proceeds in much the same way. It treats the principles that underpin the law as clear and stable and tries, with varying degrees of commitment, to build substantive review doctrine upon them. This paper has shown why this approach fails to address a problem with substantive review that sits at its very foundations. Since the principles that the Court has held underpin the law of substantive review are neither clear nor stable, it is impossible to build clear and stable doctrine upon them.

The analysis in this paper has shown why we should resist the common suggestion to "abandon the doomed search for a 'grand unified theory' of substantive review."[104] Simply put, we cannot hope to transcend the loop without one. Such a theory would either resolve or prevent the tensions between the various conceptions of the principles that the Court has held lie at its core. Creating such a theory will require critical and con-

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[102] 2023 SCC 21 at para 165, Côté J, dissenting.

[103] *Ibid* at para 47.

[104] *Vavilov*, *supra* note 4 (Factum of the Intervenor, Queen's Prison Law Clinic at para 5).

structive thinking about the law's normative foundations. This may be a daunting task, but that is no excuse for dodging it. What we can take from this is that the Court's retreat from theory in *Vavilov* was a significant misstep. The Court cannot hope to resolve the problem with substantive review by ignoring the issue of theory. Rather than ending on a pessimistic note, let this paper be a source of encouragement for those interested in thinking deeply about administrative law theory. This work is not only of academic interest; it has the potential to yield practical benefits for judges, lawyers, and the people whose rights, privileges, and interests are at stake in administrative law.