The Constitution of Administrative Authority: Interpreting Judicial Review as a Power-Conferring Practice

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One challenge of administrative law is explaining why public officials must abide by the duty of reasonableness, even when the statute purports to confer an absolute power to the administrative decision-maker. However, underlying this challenge is often an assumption that judicial review is a regulative practice that aims to constrain or control the administrative state through the imposition of duties. It is this assumption, however, that puts the practice of judicial review under scrutiny, and results in Parliament and the courts competing for supremacy, as it is unclear why unelected judges should be able to superimpose restraints on Parliament's statutory design choices. This paper aims to challenge that assumption. Drawing on three foundational cases of administrative law (Roncarelli v Duplessis; CUPE v NB Liquor Corporation; and Canada (Minister of Citizenship and Immigration) v Vavilov), I argue that judicial review is a power-conferring practice that makes possible administrative authority, rather than constrains it. I do so principally by arguing that reasonableness is not a duty but a power-conferring norm that produces the validity of exercises of administrative authority.

While a duty often constrains our actions, power-conferring norms are facilitative in nature; they secure legal ways of acting in the world and provide for the valid exercise of that action. As a power-conferring norm, reasonableness generates rather than constrains administrative authority by making it legally possible for the administrator to act with genuine legal authority. Consequently, the aim of judicial review is not to control the administrative state but to facilitate it by securing the legality of Parliament's statutory design schemes. On the power-conferring interpretation, therefore, the courts and Parliament do not compete for supremacy but collaborate to confer and constitute administrative authority. I explore several important consequences that flow from this argument in the article, including implications for the theoretical foundations of judicial review, the way in which administrative power is constituted, the separation of powers and the strength of parliamentary sovereignty.

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Introduction

It is often assumed that administrative actors gain their legal authority from Parliament through the process of delegation.[1] This view was affirmed in the landmark decision of *Canada (Minister of Immigration and Citizenship) v Vavilov* (*Vavilov*)[2] in which the majority of the Supreme Court of Canada argued that the "central rationale" for deferring to administrative decisions "has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute".[3] Here, the Court suggests that administrative actors hold the authority to administer statutory schemes because Parliament has delegated them the power to do so. However, later in the judgment, the Court suggests that merely pointing to a statutory authorization is not sufficient to demonstrate that an exercise of public authority is legitimate.[4] Instead, the law requires that most administrative actors provide a "reasoned explanation" as to why they, for example, chose a particular interpretation of a statutory term.[5] These reasoned explanations, the Supreme Court found in *Vavilov*, must be coherent, intelligible, and internally coherent in light of the relevant legal and factual constraints that bear upon the decision.[6] These relevant legal constraints include the governing statutory scheme,[7] past practices,[8] and responding to the submissions provided by parties.[9]

1. See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*].
2. *Ibid.*
3. *Ibid* at para 26.
4. *Ibid* at para 79.
5. See *Portnov v Canada (Attorney General)*, 2021 FCA 171 at para 53 [*Portnov*].
6. *Vavilov*, *supra* note 1 at paras 85, 99.
7. *Ibid* at paras 108–10.
8. *Ibid* at paras 129–32.
9. *Ibid* at paras 127–28.

As such, it cannot be the case that the basis of administrative authority is rooted purely in statutory delegation because it is also rooted in the reasons for which the decision-maker acts in particular cases.[10]

Vavilov's conflicting account of administrative authority raises a deep tension in administrative law. First, the conflicting account suggests that there may be an important distinction between authorizing an administrative body to act via a process of delegation, and the reasonable exercise of authority. In other words, administrative authority and hence the legitimate exercise of administrative power, is not linked purely to statute, but is in fact linked to the common law requirement of reasonableness. This in turn raises the question of whether imposing these common law requirements through the practice of judicial review is in fact legitimate.[11] This tension is especially evident when judges insist that administrative decision-makers must exercise their powers reasonably, regardless of any specific statutory stipulation mandating so, and even sometimes in contradiction to the obvious reading of the statute.[12] The recent conflicting account in *Vavilov* thus serves as a reminder that understanding the nature and basis of administrative authority, and the legitimacy of judicial review are not obvious or straightforward. These tensions always animate administrative law and are fundamental to understanding the proper ambit of judicial intervention, the legitimacy of administrative actors, and the relationships between the courts, Parliament, the executive, and individuals subject to coercive public authority.[13]

In this paper, I lay out a unique theory of how public authority is constituted and why judicial review is legitimate, looking particularly at the requirement that administrative decision-makers act reasonably. The thrust of the argument is that reasonableness is not a *duty*, as is often assumed by case law and academics, but a *power-conferring norm*. While a duty often constrains our actions, changing what we otherwise have a reason to do, power-conferring norms are facilitative in nature; they create new legal ways of acting in the world and provide for the valid exercise of that action.[14] Reasonableness as a power-conferring norm thus facilitates, or makes possible, rather than constrains, administrative authority, and governs the valid exercise of that authority. This argument thus rests on an important distinction between norms that authorize a decision-maker to act, and those norms that govern the valid exercise of authority.

10. *Ibid* at para 14.

11. For an overview of the debate on the legitimacy of judicial review, see Christopher Forsyth, *Judicial Review and the Constitution* (Oxford, UK: Hart Publishing, 2000).

12. *Roncarelli v Duplessis* (1959), 16 DLR (2d) 689, 1959 CanLII 50 (SCC) [*Roncarelli*]; *CUPE v NB Liquor Corporation*, 1979 CanLII 23 (SCC) [*CUPE*].

13. John McGarry, *Intention, Supremacy and the Theories of Judicial Review* (Oxford, UK: Routledge, 2017) at 2.

14. HLA Hart, *The Concept of Law*, 2nd ed (Oxford, UK: Clarendon Press, 1961) at 26–49.

In administrative law, we can locate the relevant statute as authorizing a particular decision-maker to act. By contrast, reasonableness makes possible the valid exercise of authority, telling the administrator that if she wishes to exercise her power properly in law, she must do so in a reasonable fashion, which primarily means acting with due solicitous concern for the statutory scheme[15] and the position of the individual subject to the power.[16] When the administrator acts reasonably, she produces a valid legal change in the position of the individual, for instance, by conferring a liquor licence or revoking a citizenship.

Interpretating reasonableness as a power-conferring norm thus explains the tensions raised by *Vavilov*'s conflicting account of authority. First, it explains why reasonableness is relevant to the legality of the power and why delegation alone is insufficient to determining administrative authority. On the power-conferring view, legal authority is more complex and collaborative, created by Parliament through statute, by the courts through the power-conferring norm of reasonableness, and the executive through the reasons offered by the decision-maker.

Second, it explains why judicial review is legitimate by flipping our understanding of what the court is doing in judicial review on its head. The court is not, as it is often assumed, controlling or constraining what the administrator is allowed to do by imposing duties on top of Parliament's statutory design choices.[17] It is this assumption that brings the legitimacy of judicial review into question, as it is unclear why unelected judges should be able to impose duties that control the actions of decision-makers duly authorized by Parliament. Courts and Parliament thus "compete for supremacy" as Parliament's articulated mandate is placed in competition with the court's power to interpret statutes and impose

15. *Vavilov*, *supra* note 1 at para 33, citing *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149.

16. *Vavilov*, *supra* note 1 at para 135.

17. *Ibid* at para 111 (the "common law will also impose constraints on how and what an administrative decision maker can lawfully decide"); *Doré v Barreau du Québec*, 2012 SCC 12 at paras 33–35 (administrative law involves the "control of discretion" and thus to ameliorate this control, deference ought to be required); *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para 59 [*West Fraser Mills*] ("respect for legislative intent — a cornerstone of judicial review — requires that courts accurately police the boundaries of delegated power"); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, NY: Oxford University Press, 2003) at 32; Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge, UK: Cambridge University Press, 2009) at 23; William Wade & Christopher Forsyth, *Administrative Law*, 10th ed (Oxford, NY: Oxford University Press, 2009) at 5; David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" in Dieter Grimm, Alexandra Kemmerer & Christoph Möllers, eds, *Human Dignity in Context* (London, UK: Bloomsbury Publishing, 2018) 239 at 15.

common law constraints.[18] Instead, on the power-conferring interpretation, the court is facilitating the legality of regulatory schemes and constituting administrative power as proper legal authority. On this understanding, courts and Parliament do not compete, but collaborate to confer and constitute administrative authority.[19] Judicial review therefore aids, guides, and assists in facilitating Parliament's statutory design schemes, as well as aids administrators by securing the legal validity of their claims to authority. The power-conferring view also, therefore, has implications for the separation of powers, as we can interpret the court as engaging in a collaborative exercise with Parliament and the administration to generate and create administrative authority. It also has important consequences for parliamentary sovereignty because it suggests that the doctrines of judicial review cannot be derogated from without disabling the decision-maker from being able to bring about valid normative changes in the positions of legal subjects. This suggests that Parliament is precluded from passing statutes that attempt to oust the supervisory jurisdiction.

This paper is divided into three sections. Part I presents the argument that power-conferring norms are inherent to the concept of legal powers and the exercise of legal authority. Part II demonstrates how reasonableness can be understood as a power-conferring norm by analyzing three foundational administrative law cases: *Roncarelli v Duplessis* (*Roncarelli*),[20] *CUPE v NB Liquor Corporation* (*CUPE*),[21] and *Vavilov*.[22] In the final section of this paper, I explore the implications of the power-conferring interpretation. I argue that the power-conferring interpretation has implications for the legitimacy of judicial review, the constitution of administrative authority, the separation of powers, and the strength of parliamentary sovereignty.

I. Legal Powers

Judicial review is the body of law that supposedly regulates the exercise of public powers.[23] But what exactly is a legal power, and

18. See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, NY: Cambridge University Press, 2006) at 7 [Dyzenhaus, *Constitution of Law*], citing Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth & Peter Leyland, eds, *Public Law in a Multi-Layered Constitution* (London, UK: Bloomsbury Publishing, 2003) at 311.

19. On the idea that the courts and Parliament collaborate, see Aileen Kavanagh, *The Collaborative Constitution* (Cambridge, NY: Cambridge University Press, 2023).

20. *Roncarelli*, *supra* note 12.

21. *CUPE*, *supra* note 12.

22. *Vavilov*, *supra* note 1.

23. William Wade & Christopher Forsyth, *Administrative Law*, 9th ed (Oxford, NY: Oxford University Press, 2004) at 5.

how is that power constituted by law? Some may believe that statutory authorization is both necessary and sufficient to confer power to a public body.[24] It is necessary because in a constitutional order in which Parliament is sovereign, administrative authority must be rooted in explicit statutory authorization. It is sufficient because the statute is all that is needed to confer authority onto administrative decision-makers. Statutory authorization does indeed explain a great deal about administrative power. A labour board, for example, is established by its home statute, which stipulates the makeup of the tribunal[25] and the kinds of powers held by the tribunal and their scope (e.g., the power to make regulations or the power to hear proceedings).[26] However, authorization cannot explain all aspects of legal authority, particularly authority's temporal character.

While *having* a power is a result of a formal delegation, discretion is not something that is held statically but is something exercised temporally.[27] This is because authorizations cannot hope to delimit in advance every instance for which the power will be exercised, and thus, often statutes will confer a discretion to the decision-maker. The exercise of this discretion is, however, still governed by law. The example of labour boards again elucidates. Statutes establishing labour boards often include a "privative" clause that shields the board's decisions from judicial review.[28] If statutory authorization alone is sufficient and necessary to confer power, the strict wording of the statute ought to be enough to confer what would in essence be an unlimited power to decision-makers. Yet, the courts have repeatedly held that despite the existence of a privative clause, administrative decision-makers do not hold absolute or extraordinary powers; instead, they must exercise their powers reasonably to exercise proper legal authority.[29] This requirement of reasonableness enables the decision-maker to exercise proper legal authority *every time* she decides to exercise her discretion. Reasonableness is thus a non-negotiable term which constitutes, in some fashion, the proper, valid exercise of an authorized power. Thus, while authorization explains the delegative process by which a decision-maker holds powers, authority explains the *terms* upon which a power can be exercised and the effects of its exercise.[30]

24. See e.g. *Roncarelli*, *supra* note 12 at 714.

25. *Canada Labour Code*, RSC, 1985, c L-2, ss 9(2)(b)–(c) [*Canada Labour Code*].

26. *Ibid* at ss 15–16.

27. See Jennifer Marie Raso, *Administrative Justice: Guiding Caseworker Discretion* (SJD Thesis, University of Toronto Department of Law, 2018) [unpublished] at 18–31.

28. *Canada Labour Code*, *supra* note 25, s 22(2).

29. *CUPE*, *supra* note 12; *Royal Oak Mines Inc v Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC); *Vavilov*, *supra* note 1.

30. See Evan Fox-Decent, "Trust and Authority" in Paul Miller & Matthew Harding, eds, *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge, UK: Cambridge University Press, 2020) at 176.

I contend that the terms that explain how a power can be exercised are the legal system's power-conferring norms that make it possible for powerholders to bring about valid legal changes in the positions of others. Just as a private individual must exercise her power to make a will according to the rule that it must be signed by the testator and three witnesses,[31] administrative actors must exercise their powers according to the rule that their decisions must be reasonable. In both these cases, the valid exercise of the power is made dependent upon the condition, and when these instructions are followed, the legal effect is brought about (e.g., the legal effect of a valid will, or the legal effect of a tribunal imposing a duty on an employer to pay damages to an employee). It is thus not enough to simply have an authorized power; a power must also be exercised in a particular way, namely, in a manner consistent with the power-conferring norms that constitute the administrative actor's significant legal authority. Courts' insistence that administrators cannot hold totally unfettered power taps into this idea that legal powers must be exercised according to the relevant power-conferring norms that provide for a decision-maker's legal authority. When we analyze closely the nature of legal powers, it becomes obvious why legal powers must come with power-conferring norms that govern their exercise. This is because, I contend, power-conferring norms are *internal* or *inherent* to the very concept of a legal power, and a legal power cannot exist without them. To build this claim, it is necessary to analyze how legal powers work in contrast to factual powers.

Analyses of legal powers often begin with Wesley Hohfeld, who famously described a legal power as "[a] change in a given legal relation [that] may result . . . from some superadded fact or group of facts which are under the volitional control of one or more human beings".[32] This need for volitional control by an individual importantly distinguishes legal powers from operations of law, the latter being changes in legal status that occur by external or at least non-volitional acts.[33] However, the problem with Hohfeld's analysis here is that not all legal changes or changes in status caused by individuals are exercises of legal powers.[34] For example, if I hit you with my car, I have changed your legal position in that now you have grounds to sue me, but my raw ability to damage your car is not a legal power. This is because the change in legal position was merely factually caused by the tortious activity in my control. The problem with Hohfeld's

31. An example used in Joseph Raz, "Legal Principles and the Limits of Law" (1972) 81:5 Yale LJ 823 at 835.

32. Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 at 44.

33. Andrew Halpin, "The Concept of a Legal Power" (1996) 16 Oxford J Leg Stud 129 at 142.

34. Neil MacCormick & Joseph Raz, "Voluntary Obligations and Normative Powers" (1972) 46:1 Aristotelean Society Supplementary Volume 59 at 93.

reliance on volitional control then is that it expresses power merely in terms of factual possibility and natural consequence.[35] Scholars point out, therefore, that we need a more precise definition of a legal power that distinguishes factual powers from legal powers.

The primary distinction between legal powers and factual powers is that the latter tends to operate by causation—they *cause* consequences to occur. To take Michael Pratt's non-legal example: "A consequence of pulling a trigger may be that the window shatters".[36] By contrast, Christopher Essert notes that legal powers intrinsically and non-causally bring about a legal result.[37] By intrinsic and non-causal he means that the result and the action are correlative, and each take their meaning from the other such that to do the action *is* the result, and vice versa.[38] To take again Pratt's non-legal example: "[T]he result of pulling the trigger is that the trigger is pulled".[39] To apply this to a legal example, if I effectuate a sale of land through a deed, this act cannot be separated from the resulting transfer—the result of doing the acts of sale *is* the transfer.[40] In other words, the exercise of the power of sale "grounds" the legal result[41] and produces the "invisible legal effects"[42] of a "sale" that is not perceivable to the naked eye.[43] Legal powers, in other words, produce effects in the legal world as an "act-in-the-law",[44] as opposed to on the material plane. This invisible legal result can thus be contrasted with the material consequences of the sale which could be, for instance, that my change in address triggers a host of new tax

35. Lars Lindahl, *Position and Change: A Study in Law and Logic* (Dordrecht, NL: Reidel Publishing, 1977) at 207.

36. Michael G Pratt, "Promises, Contracts and Voluntary Obligations" (2007) 26:6 Law & Phil 531 at 541.

37. Christopher Essert, "Legal Powers in Private Law" (2015) 21:3/4 Leg Theory 136; see also Joseph Raz, *Practical Reason and Norms* (Oxford, UK: Oxford University Press, 1999) at 103; J E Penner, *Property Rights: A Re-Examination* (Oxford, NY: Oxford University Press, 2020) at 72; Lisa M Austin, "The Power of the Rule of Law" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford, UK: Oxford University Press, 2014) at 277.

38. Essert, *supra* note 37 at 145.

39. Pratt, *supra* note 36 at 541.

40. Austin, *supra* note 37 at 279.

41. Essert, *supra* note 37 at 145.

42. Lindahl, *supra* note 35 at 211.

43. Thus, the distinction then between Pratt's trigger example and the legal examples is that legal powers bring about normative results that are invisible to the naked eye, rather than bringing about factual results that are visible; see the text accompanying note 40.

44. Jason Grant Allen, *Non-Statutory Executive Powers and Judicial Review* (Cambridge, UK: Cambridge University Press, 2022) at 199.

liabilities.[45] In administrative law, therefore, acting in a reasonable manner when exercising a power produces the invisible legal effect of, for instance, a revocation of a permanent residency. This of course has enormous material consequences, like deportation, but the *legal* change in position is incited by or grounded in the reasonable nature of the reasons offered. I come back to the consequences of this analysis for administrative law below in my discussion of *Vavilov*.

The intrinsic relation between exercising a power and the ensuing legal result highlights again the important distinction between having a legal power and exercising the power.[46] While having a power is a result of a formal delegation, the norms governing the exercise of a power enable the powerholder to choose if and when to exercise a power and explain how to do so validly. Thus, while laws authorizing a power most often come from a higher or external source, such as a statute, or even a constitution, the jurisdiction created by these delegations is internally regulated by power-conferring norms. Although statutes often do prescribe the power-conferring norms necessary to exercise a legal power, the common law may also provide instructions that constitute, and form the validity and legal effect of legal powers. The common law of contract provides a good example. The power-conferring norms of offer, acceptance, and consideration that regulate the power to make a contract have been developed and applied by the common law, as opposed to through statute. This example serves as a reminder that power-conferring norms in administrative law could have their source in common law as opposed to statute.

An important consequence that follows from this analysis of legal powers is that all legal powers are inherently limited and constituted by legal norms, meaning, there can be no such thing as an unfettered "legal" power. Given that legal powers bring about legal effects in the legal world, they require legal norms to incite or produce those legal effects. Put differently, because legal effects are intrinsically produced by following the relevant power-conferring norms, these norms are a constituent part of the very concept of a legal power, and their presence is necessary for the ensuing legal effect to be valid and legitimate. As such, it is not possible for a *legal* power to exist without power-conferring norms, and by consequence, all legal powers are constituted and regulated by law. Consequently, the formal rule of law principle that all power must be constituted and regulated by law follows from the very nature of legal powers. The question remains, however, whether *any* manner and form of norm would conceptually satisfy the formal need for power-conferring norms, or if certain more substantive norms, such as "reasonableness", can be, or perhaps should be, central to some legal powers.

45. Raz, *supra* note 37 at 102.

46. Austin, *supra* note 37 at 275.

In my view, we can also locate a more substantive rule of law principle inherent to legal powers, which suggests that reason-giving may be an inherent aspect of a power's valid exercise. A substantive rule of law principle emerges when we turn to analyse the internal point of view of exercising a legal power. Readers may be familiar with Herbert Hart's primary contribution to legal positivism, which interprets obligations as requiring individuals to endorse a critical reflective attitude expressed from an internal point of view as "ought" statements.[47] Hart used this internal point of view to analyse the rule of recognition, the rule which specifies the ultimate validity criteria of a legal system and which officials use as a standard to apply legal norms.[48] In contrast to his analysis of obligations and the rule of recognition, Hart failed to provide us with a sustained analysis of the rule of change and the internal point of view of power-conferring rules. He was, however, adamant that a power-conferring rule should not be considered an antecedent condition of an obligation.[49] By this he meant that the purpose of power-conferring norms is not to let legal officials know how to apply sanctions for breaches of obligations that ensue from the exercise of the power, but it is to facilitate the wishes of powerholders.[50] From this we can discern that the internal point of view of powers must centralize the view of the powerholder.[51]

Stephen Perry supports this view in his analysis of the internal point of view of the rule of change. He argues, "even if a power-conferring rule is formulated as a conditional duty imposing rule, legislators must still think of themselves as being guided by a rule such that if they act in certain ways their subjects will come under an obligation to do such and such".[52] Perry raises an important point here; we must suppose that powerholders believe themselves to be guided by legal rules which result in new obligations arising, binding the liability holder (and potentially also the powerholder). Perry therefore suggests that the internal point of view of a legal power is an intention to bring about normative changes coupled with a belief about the law's ability to empower the powerholder and to change the normative situations of others.[53] Crucially therefore, underlying the intention to exercise a power is a belief that power-conferring norms, and the law and

47. Hart, *supra* note 14 at 55–57.

48. *Ibid* at 100–10.

49. *Ibid* at 37.

50. *Ibid* at 28.

51. Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011) at 68.

52. Stephen Perry, "Where Have all the Powers Gone?: Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law" in Matthew D Adler, ed, *The Rule of Recognition and the U.S. Constitution* (Oxford: Oxford University Press, 2009) 295 at 316.

53. *Ibid* at 313.

legal system more generally, possess the legitimate moral authority to empower the powerholder and change the normative positions of others.[54]

Given the exercise of a legal power inherently involves a belief about the law's normativity and moral legitimacy, Perry argues that this belief can be probed into as true or false by the liability holder, who also implicitly recognizes that law holds the moral legitimacy it claims to possess.[55] Thus, while traditional positivism tries to maintain a distinction between law and morality, Perry's argument suggests that power-conferring norms inherently rely on a claim to moral authority, which may need to be justified to others. There is thus an important relational and intersubjective aspect to legal powers, in which beliefs about them can perhaps be questioned by liability holders, and further explanations may be required. Nicole Roughan similarly argues that officials should not be viewed as making bald assertions of authority, but, instead, are to be interpreted as "advocates . . . for those subject to law; they *seek to justify law's authority* over subjects rather than asserting authority on law's behalf".[56] This raises the possibility that powerholders may need to justify the exercise of power, and, furthermore, liability holders may be entitled to express their own interpretations of the power and its legitimacy.[57] As David Dyzenhaus puts it, the legal subject becomes entitled to ask: "But how can that law be for me?"[58] This relational and justificatory component inherent in legal powers is, I contend, expressed in administrative law through the power-conferring norm of reasonableness, which ensures that administrative decisions are justified and justifiable. Accordingly, this analysis of legal powers perhaps explains why reasonableness is the central power-conferring norm, at least in public law.[59]

I will now turn to analyze three foundational cases of administrative law (*Roncarelli*, *CUPE*, and *Vavilov*) to demonstrate that reasonableness can be interpreted as the power-conferring norm that constitutes administrative authority.

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54. *Ibid* at 298.

55. *Ibid* at 322.

56. Nicole Roughan, "The Official Point of View and the Official Claim to Authority" (2018) 38:2 Oxford J Leg Stud 191 at 215 [emphasis added].

57. Geneviève Cartier, *Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue* (SJD Thesis, University of Toronto Faculty of Law, 2004) [unpublished] at 299.

58. David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge, UK: Cambridge University Press, 2022).

59. Whether or not private powerholders need to justify the exercise of powers is beyond the scope of this article. But, for the argument that property owners cannot exercise their powers of ownership for spiteful, malicious, or arbitrary reasons, see Larissa Katz, "Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right" (2012) 122:6 Yale LJ 1444 at 1448.

II. Power-Conferring Interpretations of Landmark Cases

In this section, I analyze the cases *Roncarelli*, *CUPE*, and *Vavilov* to illustrate that we can interpret reasonableness as a power-conferring norm that regulates and constitutes administrative authority. I chose to analyze *Roncarelli* and *CUPE* because in both cases, the application of the reasonableness standard requires an explanation. In the case of *Roncarelli*, Parliament purportedly conferred an unfettered power to the relevant decision-maker, but the Court nevertheless asserted that the decision-maker must act reasonably. In *CUPE*, Parliament had seemingly conferred an absolute power to the Labour Board by including a privative clause in the statute that protected the Board from review. The Court, however, decided to review the decision on a standard of patent unreasonableness. I believe a power-conferring interpretation can explain why it was legitimate in these cases for the Court to require that the administrative decision-maker acts reasonably, despite the statute's suggestion that the decision-maker held an absolute power. This is because, as argued above, there is no such thing as a power that is not governed by power-conferring norms and that the exercise of public powers needs to be justified. Thus, through the practice of reviewing on a standard of reasonableness, the Court is supplying the legal framework that enables administrators to exercise valid legal authority. I end the section with a short discussion of *Vavilov*. I chose this case because it is the most recent in-depth analysis of the reasonableness standard, and because, as suggested in the introduction, it also importantly showcases that the reasonableness standard operates as a *source* of an administrative actor's legal authority.

A) Roncarelli v Duplessis, 1959

Frank Roncarelli was an owner of a successful restaurant in downtown Montreal. On multiple occasions between 1944 and 1946, Mr. Roncarelli bailed out fellow Jehovah's Witnesses who, due to the government's ire against the religion, were arrested for the minor offence of canvassing without a licence. To punish Roncarelli, Maurice Duplessis, the Premier of Quebec, directed Edouard Archambault, the Chairman of the Quebec Liquor Commission, to cancel Roncarelli's liquor licence. Archambault cancelled the licence without notice under section 35 of the *Alcoholic Liquor Act* which read: "The Commission may cancel any permit *at its discretion*".[60] All liquor was confiscated from Roncarelli's restaurant and after six months of a failing business, the restaurant shut down. Roncarelli commenced an action for damages against Duplessis.

60. *Alcoholic Liquor Act*, RSQ 1941, c 255, s 35 [emphasis added].

In his defence, Duplessis argued it was an exercise of his function as Attorney General, as well as Premier, to direct Archambault to cancel the licence. He argued he was protected from suit due to a time limitation in article 88 of the *Civil Code of Procedure*: "No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the *exercise of his functions*, . . . unless notice of such action has been given to him at least one month before the issue of the writ of summons".[61]

In the Supreme Court of Canada, for the minority, Taschereau J agreed Duplessis was acting within the remit of the Attorney General's mandate to ensure the good administration of justice, and he was thus entitled to the article 88 immunity.[62] Chief Justice Fauteux, also in dissent, found that Duplessis did not have any power to direct Archambault, but because in good faith he believed it to be part of his functions as Attorney General, article 88 was determinative. Chief Justice Cartwright, the remaining dissenter, did not much consider article 88, because in his view, "within its province, [the Liquor Commission] is a law unto itself"[64] and there was no actionable wrong. While legal rights are the purview of the judiciary, a permit to serve alcohol is a "privilege" bestowed by the exercise of an administrative power.[65] Unless the statute proclaims differently, an administrative power is void of any legal norms or principles.[66] The Commission could thus take counsel from whomever they wish, in this case from Duplessis.

Chief Justice Cartwright's argument implicitly assumes all law and authority stems from Parliament. In this case there was no statutory law guiding the Commission's exercise of a power and the Commission was therefore free to act as it pleased.[67] However, as I argued above, it is impossible to hold a legal power and for there to be no rules guiding its exercise, since it is in the nature of all legal powers that they have, at a minimum, implicit power-conferring norms pertaining to their exercise. Furthermore, the exercise of a power can change any legal position—a privilege, right, duty, or even another power. Hence, the rights and privilege distinction on which Cartwright CJ relied is not relevant to determining the legality of exercises of powers and the subsequent changes in position. These confusions led Cartwright CJ to conclude there was no need

61. Art 88 CCP (1897) [emphasis added].

62. *Roncarelli*, *supra* note 12 at 695–96.

63. *Ibid* at 727.

64. *Ibid* at 715, citing *Re Ashby* [1934] OR 421 at 428, 3 DLR 565 (CA) at 428.

65. *Roncarelli*, *supra* note 12 at 715–17.

66. Implied, Cartwright CJ argues if a statute confers an unlimited power to remove such privileges, it is for the legislature to consider the "wisdom and desirability" of such a provision. See *Roncarelli*, *supra* note 12 at 716. See also David Dyzenhaus, "The Deep Structure of *Roncarelli v Duplessis*" (2004) 53 UNBLJ 111 at 125–27.

67. *Roncarelli*, *supra* note 12 at 714.

to provide notice, a hearing, or reasons for the cancellation of the licence,[68] and Roncarelli had no actionable right to ground any claim for damages.[69]

The majority found that Archambault and Duplessis had acted unlawfully, and Duplessis was ordered to compensate for the loss of profits and damage to personal reputation and goodwill. Justices Martland and Abbott argued Duplessis was not "exercising his functions" because no statute enabled Duplessis to direct Archambault to cancel the licence,[70] and thus article 88 did not apply.[71] Duplessis acted "without any legal authority whatsoever",[72] and the fact that Duplessis believed in good faith and that he held a relevant public power was irrelevant to determining authorization.[73] Accordingly, Duplessis usurped the lawful exercise of Archambault's discretion and breached the non-delegation principle, which prohibits exercising a power "under the dictation of some other person or persons".[74]

The problem with Martland and Abbott JJ's judgments is, like Cartwright CJ, they assume authority is exhausted by a formal authorization. The primary difference between these approaches was that Martland and Abbott JJ focused on Duplessis' lack of a formal authorization, whereas Cartwright CJ focused on the Commission's completely unfettered authorization.[75] Both, in their own way, adopt an all-or-nothing approach to court intervention. If there is no formal authorization, the court can intervene wholesale to set aside the unauthorized action, but if one holds a formal, unfettered authorization, this is sufficient to shield the exercise of power from review.[76]

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68. Chief Justice Cartwright entertained the argument that *ultra vires* activity could give rise to damages but argued that if the power was quasi-judicial, as opposed to administrative, this would render the action voidable as opposed to void, and thus no wrong could attach. See *ibid* at 717.

69. *Ibid* at 717.

70. Specifically in *The Attorney-General's Department Act*, RSQ 1941, c 46, *The Executive Power Act*, RSQ 1941, c 7, or the *Alcoholic Liquor Act*, *supra* note 60.

71. *Roncarelli*, *supra* note 12 at 730–31.

72. *Ibid* at 730.

73. *Ibid*.

74. *Ibid* at 743.

75. Chief Justice Cartwright barely addressed the issue of Duplessis' authority and focused primarily upon the nature of the power held by the Commission, in particular, whether it was administrative or judicial. One can infer the importance was that if the power is administrative, the reasons for which the decision was taken did not matter, including, that it was taken on the direction of a third party. See *Roncarelli*, *supra* note 12.

76. This formal approach leaves review susceptible to manipulation by the courts. See e.g., *Metropolitan Life Insurance Co v International Union of Operating Engineers*, 1970 CanLII 7 (CSC); *Bell v Ontario Human Rights Com'n*, 1971 CanLII 195 (SCC).

In contrast to Abbott and Martland JJ's analysis of authorization, Rand J's analysis focused on how Duplessis abused his authority. Rand J accepted that, in his role as Attorney General, Duplessis could advise administrative bodies on legal questions and direct the administration of justice.[77] However, Duplessis used his power to "deliberately and intentionally . . . destroy the vital business interests of a citizen",[78] and this was such a "gross abuse of legal power"[79] it could not be said that Duplessis acted with any good faith. He noted, "'[d]iscretion necessarily implies good faith in discharging public duty"[80] and that good faith in this context "means carrying out the statute according to its intent and for its purpose",[81] and thus to depart "from its lines or objects is just as objectionable as fraud or corruption".[82] Acting in bad faith, or for an improper purpose, Duplessis therefore—"converted what was done into his personal act"[83] as opposed to an official act of office, and for that reason, his action was an intrusion upon the functions of the Commission.

More generally, Rand J fervently argued that there was no such thing as an "untrammelled power" and such a concept offended "the principles of the underlying public law of Quebec"[84] that law is not to be superseded, "according to the arbitrary likes, dislikes, and irrelevant purposes"[85] of public officials. Justice Rand went as far as to lay down that, "*[N]o legislative Act* can, without express language, be taken to contemplate an unlimited arbitrary power exercisable *for any purpose*, however capricious or irrelevant, regardless of the nature or purpose of the statute".[86]

In essence, Duplessis' motives did not track the purpose of his office, which were to direct the administration of justice, but were exercised in an irrelevant fashion. Hence, he could not avail himself of article 88.[87] Whereas for Martland and Abbott JJ the irrelevance of article 88 followed because Duplessis had no jurisdiction whatsoever to counsel the Commission and, for Rand J, it was Duplessis' reasons or motives in the "exercise of his function" that gutted the exercise of that function of any authority. In other words, to properly exercise his functions and be shielded by article 88, Duplessis needed to act for the right reasons, and reasons are what form the core of his authority.

77. *Roncarelli*, *supra* note 12 at 707.

78. *Ibid* at 703.

79. *Ibid* at 706.

80. *Ibid* at 705.

81. *Ibid* at 707.

82. *Ibid* at 705.

83. *Ibid* at 707.

84. *Ibid* at 706.

85. *Ibid* at 707.

86. *Ibid* at 705 [emphasis added].

87. *Ibid* at 708.

In other words, *reasons* for Rand J had a critical productive quality in that they actually formed the base of Duplessis' authority. Thus, Rand J's abuse of office reasoning, read in conjunction with the article 88 issue, makes his judgment particularly iconic from a rule of law perspective.[88] Despite the wide and purportedly unfettered power held by Duplessis or the Liquor Commission, *legal* authority cannot be exercised arbitrarily or unreasonably such that it is unaccountable to law and review by a court.

In my view, we can explain why Duplessis' reasons did not produce valid legal authority in this case by interpreting reasonableness as a power-conferring norm. Justice Rand's judgment is iconic because it holds that a decision-maker can technically act within her mandate but nevertheless abuse her power if she acts with "improper intent".[89] This starkly contrasts with Cartwright CJ's view that within its province, an agency is a law unto itself. However, as noted, legal powers necessarily come with instructions for use, rendering unfettered and arbitrary legal powers as an impossibility. Legal powers are only legal if there are norms explaining to public decision-makers how to exercise their mandate, and which intrinsically secure the validity of the change in the legal subject's position. Furthermore, public powers not only require that there be some power-conferring norms to make the power possible (e.g., bare manner and form norms), but may also need to express the substantive rule of law principle that powers need to be explained and justified to legal subjects. The power-conferring theory thus explains why Rand J relied on the rule of law principle to find that reasonableness constitutes the proper exercise of administrative authority. First, the theory explains why power cannot be untrammelled and must be constituted by some norms (the formal aspect of the rule of law inherent in legal powers). Second, it explains why public power must be exercised reasonably (the substantive aspect of the rule of law inherent in legal powers).

Thus, in choosing to review for proper purposes, relevant considerations, the non-delegation principle, and good faith, Rand J infused the purportedly empty administrative "province" with power-conferring norms that make administrative action possible in law. In so doing, Rand J transformed the power held by Archambault, by sheer dint of his position as Commissioner, into a position of *legal authority* by presupposing the power-conferring norms that intrinsically generate and produce valid legal effects. Thus, notwithstanding that section 35 of the *Alcoholic Liquor Act* had not, at least expressly, laid down any specific purpose or "rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted"[90]

88. See Robert Leckey, "Complexifying Roncarelli's Rule of Law" (2010) 55:3 McGill LJ 721 at 732.

89. *Roncarelli*, *supra* note 12 at 707.

90. *Ibid* at 714.

public powers are limited by the power-conferring norms upon which the decision-maker is entitled to act.

The implication of Rand J's judgment is that the statute alone is not sufficient to confer authority onto public decision-makers; it is also the practice of judicial review that confers authority onto administrative actors. In other words, while Parliament may regulate the kinds of measures public agencies may use to implement their mandates, the classic doctrines of administrative law constitute the terms upon which public power can be held and exercised. Judicial review can thus be seen as a practice that legally facilitates Parliament's institutional design choices by supplying the framework that makes valid exercises of administrative authority possible. As I will explain further, judicial review can thus be justified based on its authority-constituting dimension, as opposed to its regulative dimension. A similar analysis can be made when it comes to the administration's authority to determine questions of law, as demonstrated in the *CUPE* decision.

B) CUPE v NB Liquor Corporation, 1979

In *CUPE*, The Canadian Union of Public Employees (CUPE) filed a complaint with the Public Service Labour Relations Board (The Board) after the New Brunswick Liquor Corporation (NBLC) replaced striking employees with management during a lawful strike. They argued that this was contrary to section 102(3)(a) of the *Public Service Relations Act* (the Act): "the employer shall not replace the striking employees or fill their position with any other employee".[91]

Before the Board, NBLC argued that "'with any other employee' referred to the word 'replace' as well as 'to fill their positions'".[92] Given management did not fall within the statutory definition of employees, the NBLC claimed they were not replacing striking employees with any person defined as an employee. However, the Board found for CUPE, arguing the NBLC's interpretation would frustrate Parliament's intention to restrict picket line violence. NBLC applied for judicial review of the Board's decision, and the Board argued it was protected by section 101 of the Act: "[E]very order, award, direction, decision, declaration, or ruling of the Board . . . is final and shall not be questioned or reviewed in any court".[93]

The New Brunswick Court of Appeal characterised the interpretation of section 102(3)(a) as a condition precedent that needed to be construed correctly for the Board to have the jurisdiction to embark on its inquiry.[94]

91. *Public Service Labour Relations Act*, RSNB 1973, c P-25, s 102(3)(a) [*PSLR*].

92. See *CUPE*, *supra* note 12 at 230.

93. *PSLR*, *supra* note 91, s 101(1).

94. *New Brunswick Liquor Corp v Canadian Union of Public Employees, Local 963*, [1978] NBJ No 1, NBR (2d) 441 at paras 20–21.

The Court of Appeal determined the Board had not correctly answered the question and therefore the privative clause did not protect the Board from review.[95] However, the unanimous judgment of the Supreme Court of Canada, delivered by Dickson CJ, rejected the Court of Appeal's approach. Chief Justice Dickson famously stated, "what is and is not jurisdictional is often very difficult to determine"[96] and that the court "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".[97] Chief Justice Dickson recognized that administrators are often authorized to interpret questions of law and even sometimes develop a specialised jurisprudence around their home statutes.[98] Thus, "not only would the Board not be required to be 'correct' in its interpretation, but one would think that the Board was entitled to err and any such error would be protected from review by the privative clause in s. 101".[99]

Nevertheless, privative clauses cannot protect arbitrary decisions. Chief Justice Dickson stated that if the Board applied an interpretation of section 102(3)(a) that was so patently unreasonable, it would take "the exercise of its powers outside the protection of the privative or preclusive clause".[100] Examples of patent unreasonableness included, "acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the *Act* so as to embark on an inquiry or answer a question not remitted to it".[101]

Irrespective of any privative clause, the exercise of an agency's power to interpret or determine a question of law will be abused if the decision is patently unreasonable. Judicial review is thus justified because the administration holds a derivative power to decide, including on questions of construction, and that the valid exercise of this interpretive power must accord with the norms that make the exercise of that interpretive power valid and possible in law. Consequently, where a question of law has been left to the tribunal, the court reviews not the authorized scope of the action—its "jurisdiction", but the exercise of its authority on grounds of bad faith, procedural fairness, and relevant or irrelevant considerations, or more broadly, reasonableness. Canadian jurisprudence thus began to eschew the idea that jurisdiction, or authorization alone, formed the basis

95. On the issue of where the privative clause was mentioned in passing in relation to another decision made by the Board which was *intra vires*, see *ibid* at para 2, Hughes CJNB.

96. *CUPE*, *supra* note 12 at 233.

97. *Ibid*.

98. *Ibid* at 235–36.

99. *Ibid* at 236.

100. *Ibid* at 237.

101. *Ibid*, citing *Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses Association et al*, 1973 CanLII 191 (SCC) at 389.

of administrative authority. Instead, tribunal validity rests upon whether exercises of interpretive powers are reasonable. This is important because we know from the analysis above that power-conferring norms constitute and regulate exercises of authority rather than pertain to the authorization of the power.[102] Thus, just as we can interpret reasonableness as a power-conferring norm that constitutes and regulates the exercise of discretionary powers, as in *Roncarelli*, we can interpret reasonableness as the power-conferring norm that makes possible the valid exercise of interpretive powers and powers to determine questions of law in *CUPE*. In other words, Dickson CJ implicitly facilitated the absolute power held by the Board as a legal power through supplying the relevant power-conferring norms, that not only constrained what the Board was able to do, but also enabled the Board to exercise valid legal authority upon redetermination.

There are also some important developments after *CUPE* that support the idea that reasonableness is a doctrine that is constitutive of the proper exercise of a power, rather than a doctrine that assesses the scope of a decision-maker's jurisdiction. First, the intent of Dickson CJ's judgment was to retain a, "meaningful distinction between jurisdictional and non-jurisdictional errors of law"[103] with the latter to be reviewed on a standard of patent unreasonableness. As such, these "errors" pertained to the exercise of a jurisdiction, as opposed to its scope. This was confirmed in 1984 by Lamer J in *Blanchard v Control Data Ltd*, who held that intra-jurisdictional errors occurred when a decision-maker abused "the *exercise* of its jurisdiction" rather than "acting without jurisdiction"[104] and for that reason, intra-jurisdictional errors were subject to the patent unreasonableness standard. Reasonableness thus governed the proper exercise of administrative authority, just as we saw power-conferring norms do in Part I above.

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102. Some might argue that because power-conferring norms demarcate the boundaries of an exercise of authority, this is simply another way to describe jurisdiction "in the wide sense". See *Anisminic v Foreign Compensation Commission*, [1969] 2 AC 147 at 171. However, to interpret power-conferring norms as pertaining to jurisdiction, even the in wide sense, would tie power-conferring norms to the concept of authorization by interpreting them as fundamental "assumptions" intended by Parliament. See *ibid* at 207. Power-conferring norms, however, try to make sense of how the law constitutes authority independently of authorizations, which as argued above, cannot fully or adequately explain the nature of authority.

103. Mark Walters, "Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law" in Christopher Forsyth et al, eds, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010) at 305; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC) at para 28 [*Pushpanathan*]; *UES, Local 298 v Bibeault*, 1988 CanLII 30 at paras 114–15.

104. 1984 CanLII 27 at 492 [emphasis added].

Similarly, in the 1990s and early 2000s, the court continued to distinguish correctness and patent unreasonableness along the lines of intra-jurisdictional and jurisdictional questions of law.[105] However, whether a question was "jurisdictional" or "intra-jurisdictional" was not the conclusion of "ossified interpretations of statutory formulae"[106] but the conclusion of what was known as the pragmatic and functional test,[107] which asked judges to consider various contextual factors to decide which standard to apply.[108] Eventually, this approach was abandoned in *Dunsmuir v New Brunswick*,[109] and jurisdiction was said to "play no part in the courts' everyday work of reviewing administrative action".[110] The Supreme Court of Canada thus moved further away from understanding reasonableness, and review in general, as a jurisdictional question and became more focused on the reasons for which a decision-maker acts when exercising its powers to interpret questions of law.[111]

Another important development in Canadian law that also suggests reviewing questions of law is primarily concerned with the proper exercise of authority, in that since 1999, review of discretion has been subsumed into the standard of review analysis.[112] In

105. *Pushpanathan*, *supra* note 103 at para 26.

106. *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 25.

107. *Pushpanathan*, *supra* note 103 at para 28.

108. For a full list of factors, see *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 (SCC) at paras 28–53.

109. 2008 SCC 9 [*Dunsmuir*].

110. *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 97–98 [*Alberta Teachers*]. Jurisdiction remained a controversial presumption in favour of correctness review. See *ibid* at para 59 stating, "[a]dministrative bodies must also be correct in their determinations of true questions of jurisdiction or vires"; see also *West Fraser Mills*, *supra* note 17 at paras 56–74.

111. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 12.

112. *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 at paras 51–56 [*Baker*]; *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at paras 33–34 [*Wilson*].

collapsing the two under one banner of substantive review, L'Heureux-Dubé J noted that:

> "It is . . . inaccurate to speak of a rigid dichotomy of 'discretionary' or 'non-discretionary' decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making . . . . In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options".[113]

In this passage, L'Heureux-Dubé J implicitly recognizes the temporal nature of authority, noting that discretion permeates all aspects of an administrative decision-maker's task. Furthermore, collapsing together review of law and review of discretion presupposes that there is not one objective or correct interpretation of a provision, fossilised within a formal statutory utterance. Instead, this view presupposes the idea that authority is a deliberative "interpretative process"[114] which must be *exercised* "in accordance with the principles of the rule of law, . . . [the] general principles of administrative law"[115] as well as be consistent with the *Charter*. On this approach, authority emerges temporally through the reasonable manner in which a decision is exercised, and it is thus the reasonableness standard, not jurisdiction, that acts as the source of administrative authority. The idea that reasonableness acts as the source of administrative authority has been further developed and deployed in the current *Vavilov* framework.

C) Vavilov v Minister of Citizenship and Immigration, 2019

Alexander Vavilov was born in Canada to parents who were working as undercover spies for the Russian foreign intelligence service. Usually, if an individual is born in Canada, they are a Canadian citizen. There is an exception, however, under section 3(2)(a) of the *Citizenship Act 1985,* which states if a child is born to, "a diplomatic or consular officer or other representative or employee in Canada of a foreign government"[116] they would not qualify as a Canadian

113. *Baker*, *supra* note 112 at para 54.

114. *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 64.

115. *Baker*, *supra* note 112 at para 53 [emphasis added]. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

116. *Citizenship Act*, RSC 1985, c C-29, s 3(2)(a).

citizen by birth. After Vavilov's parents were arrested and returned to Russia, Vavilov attempted to renew his Canadian passport, but this proved unsuccessful. The Canadian Registrar of Citizenship concluded that, at the time of Vavilov's birth, his parents were employees or representatives of Russia, and he was thus not a citizen of Canada. His certificate of citizenship was therefore cancelled, and his passport denied.

The *Vavilov* case was an opportunity to bring clarity, simplicity, and coherence to the law of substantive review,[117] and to provide guidance on how to conduct reasonableness review.[118] A reasonable decision in the *Vavilov* framework is one that is transparent, intelligible, and justified,[119] remaining mindful that "administrative justice" will not always look like "judicial justice".[120] The court should not survey the possible range of outcomes, but start with and respect the reasons offered because they are the primary way in which a decision will be shown to be reasonable "both to the affected parties and to the reviewing courts".[121] Reasonableness is concerned with both the outcome and the "reasoning that led to the administrative decision".[122] Where reasons are expressly provided, or can be impliedly discerned from the record and surrounding circumstances,[123] there is a marked shift towards analyzing the reasoned explanation[124] or justification given by the decision-maker, rather than the justifiability of the outcome.[125]

To be reasonable, decisions must also adhere to the constellation of legal and factual constraints that bear on the decision.[126] The Supreme Court of

117. For some critiques of the Dunsmuir jurisprudence, see *Wilson*, *supra* note 112 at para 27 (disguised correctness review). Whether expertise is an institutional presumption or applied to each individual decision-maker, see *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 27. Whether the court can supplement reasons, see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 12. See also *Alberta Teachers*, *supra* note 110.

118. *Vavilov*, *supra* note 1 at para 73.

119. *Ibid* at paras 15 and 82, citing *Dunsmuir*, *supra* note 109 at para 47.

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

121. *Ibid* at paras 81–87. The court can look at outcomes first in situations where reasons are not required, alongside the history and context of the proceedings. See *ibid* at paras 94 and 137–38. See also *Canada (Citizenship and Immigration) v Montoya*, 2022 FC 105 at para 19.

122. *Vavilov*, *supra* note 1 at para 85.

123. *Ibid* at 88–90; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 [*Mason (FCA)*] at para 33.

124. *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at para 7; *Portnov*, *supra* note 5 at para 53; *Mason (FCA)*, *supra* note 123 at para 31.

125. *Vavilov*, *supra* note 1 at para 86.

126. *Ibid* at paras 99–100.

Canada lists seven such factors, but I will discuss two: statutory interpretation and the submissions of the parties. First, administrators must justify why a particular interpretation of a statute was justified.[127] In *Vavilov*, the Court found that exempting Vavilov from Canadian citizenship was unreasonable because the Registrar "did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text".[128] Merely pointing to a statutory authorization and perfunctorily or retrospectively claiming the interpretation falls within the range of possible interpretations, extracted via a formalistic construction, may thus be insufficient to discharge the requirement of reasonableness.[129] In other words, even if the decision-maker "acts according to the letter of the power"[130] if she does not explain how she is furthering the purpose of the statutory scheme, the decision may be set aside.[131]

This suggests that parliamentary authorization is not, on its own, sufficient to generate administrative authority, otherwise acting to the letter of the statutory power would technically be enough to demonstrate authority. Instead, the Court underscored it is the reasons themselves that generate and create administrative authority,[132] explicitly stating that "public decisions gain their democratic and *legal authority* through a *process of public justification*".[133] Accordingly, the Court's inquiry under the Vavilov framework is keenly focused on the administrator's deliberative process and *how* a decision was made. This is why, as the majority implied, the reasonableness requirement acts as the source of administrative authority, and hence *generates,* rather than merely constrains, the legal authority held by administrators.

Taking reasons as the source of administrative authority adds another important layer to the power-conferring argument. As noted above, power-conferring norms incite and produce valid legal results. In this case, administrative actors produce valid legal changes in the positions of legal subjects

127. *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 30.

128. *Vavilov*, *supra* note 1 at para 172.

129. See *ibid* at para 102, citing Roderick A MacDonald & David Lametti, "Reasons for Decision in Administrative Law" (1990) 3 Can J Admin L & Prac 123 at 139.

130. *Three Rivers District Council v Governor and Co of the Bank of England (No 3)*, [2003] UKHL 16 at 235.

131. *Vavilov*, *supra* note 1 at para 118; *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 34 at para 74([The official needs to be] "alive to the essential elements of statutory interpretation"); Paul Daly, "One Year of Vavilov" (2020) University of Ottawa - Common Law Section, Working Paper No 2020-34 at 15, online: <papers.ssrn.com> [perma.cc/UKS9-FU7E].

132. *Vavilov*, *supra* note 1 at para 84.

133. *Ibid* at para 79, citing Jocelyn Stacey & Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016) 74 SCLR 2d 211 at 220 [emphasis added].

where they act reasonably. This means that the *reasons* for which the decision-maker acts are not just a record of the decision; reasons, where applicable, *are* the decision and ground the relevant legal change in the position of the legal subject.[134] Reasons are an act-in-the-law and as such "*perform* a symbolic legal act"[135] and therefore have a critical jurisgenerative quality in that they actually produce and incite valid legal effects.[136] Thus, while Parliament delegates administrative power, and power-conferring norms developed by the common law create the conditions under which administrative authority can be exercised, administrators themselves also generate their own legal authority, through their reasons which ground and intrinsically bring about changes to the legal positions of legal subjects.

Furthermore, legal subjects are also engaged in this jurisgenerative exercise. This is because under the *Vavilov* framework, administrators must adequately respond to the submissions made by the parties and ensure that their resulting reasons "reflect the arguments made by the parties".[137] The legal subject is thus invited to interpret the statutory norms that apply to his situation, through his submissions, and the administrator must then fold these submissions into their reasons for the decision. The fact that citizen interpretations of law are relevant to the valid exercise of a power presupposes the idea that interpretations of law are not determined by formal, abstract statutory authorizations, but emerge out of an interpretive exercise between the administrator and legal subject. It also supports the argument made above that legal powers rely on a relational recognition and belief in a power's normativity, and consequently, a power's exercise may need to be justified in a dialogic fashion between powerholder and liability holder. Accordingly, reasonableness, as it currently exists in the *Vavilov* framework, expresses this idea more concretely than patent unreasonableness because the legal subject's interpretation of a powerholder's

134. *Vavilov*, *supra* note 1 at para 91.

135. Dawn Oliver, "Void and Voidable in Administrative Law: A Problem of Legal Recognition" (1981) 34:1 Current Leg Probs 43 at 52.

136. Juris generativity refers to the production of meaning or validity outside of formal legal processes; see Robert M Cover, "Foreword: Nomos and Narrative Supreme Court 1982 Term" (1983) 97:1 Harv L Rev 4 at 11–18. Jurisgenerativity is also the study of how legal subjects produce legal meaning via an interactive interpretative discourse, rendering them authors as well as subjects of law; see Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (John Wiley & Sons, 2013) at 15.

137. *Vavilov*, *supra* note 1 at para 28; Cartier, *supra* note 57 at 285 ("discretion be both exercised at the close of a meaningful and authentic communication between the parties involved, and justified in the light of the content of that communication"); see also Geneviève Cartier, "The Baker Effect: A New Interface Between the Canadian Charter of Rights and Freedoms and Administrative Law" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford, UK: Hart, 2004) at 83.

authority must be heard and responded to. Another important consequence of this is that administrative authority is something that is created collaboratively: by Parliament via statutory authorization, by the practice of judicial review via the doctrine of reasonableness, by the administration itself via the reasons for their decisions, and by the legal subject whose submissions to the agency must figure productively in the substance of administrative decision-making.

To conclude this case analysis section, once the Court accepted that administrative agencies held wide discretionary powers, including the power to interpret questions of law, the common law recognised that such powers cannot be unfettered or unaccountable to law, because such powers, to be legal, require power-conferring norms to generate their legal validity. In choosing to review on a standard of reasonableness, the Court presupposed the power-conferring norms necessary to constitute that delegated power as legitimate public authority. Reasonableness was thus found to be the necessary power-conferring norm that makes possible valid exercises of administrative authority. In the next section, I explore some of the consequences of the power-conferring interpretation of judicial review. I argue that the power-conferring interpretation has consequences for the legitimacy of judicial review, the temporal and relative nature of administrative authority, the separation of powers and inter-institutional dynamics, and the strength of parliamentary sovereignty.

III. Consequences of the Power-Conferring Interpretation

The main consequence of the power-conferring interpretation is that judicial review is not a practice that constrains administrative authority, or at least not in the way ordinarily understood. Instead, judicial review is a practice that *produces* administrative authority. In other words, the practice of judicial review creates a framework of public decision-making by deploying power-conferring norms that lend legal validity to the administration's claims to authority. Accordingly, interpreting the doctrines of judicial review as power-conferring norms indicates that the legitimacy of the supervisory jurisdiction rests upon its facilitative and constitutive character as opposed to its regulative character. The supervisory jurisdiction, therefore, is legitimate because the doctrines of judicial review cannot be derogated without disabling the decision-maker from being able to bring about valid changes in the legal positions of legal subjects. Supervision on these grounds is therefore pertinent because the practice of review is what partially confers legal authority onto the administrative decision-maker's decision.

Furthermore, in producing a framework within which administrative power can be exercised validly, the practice of judicial review thereby sets the requirements that enable us to know if public administration has been properly

executed. Power-conferring norms thus assist the public administrator by explaining how to execute her discretionary powers, enabling her to exercise her powers properly according to law. However, it is not necessary for the court to review *every* administrative decision. In my view, the crucial point is that there is a general practice of judicial review and that this practice determines the power-conferring norms that make possible the exercise of authority. This consequently ensures that proper authority *can* be exercised in individual cases, outside of immediate supervision by the courts, through an interpretive dialogue that occurs between powerholder and liability holder, facilitated by the power-conferring norm of reasonableness.

The power-conferring interpretation can thus better explain the legitimacy of judicial review than the two leading theories. The two current leading theories of judicial review are the *ultra vires* and common law constitutionalist theories.[138] For *ultra vires* theorists, the common law requirement of reasonableness is dubious because it arises outside of any legislative source. *Ultra vires* theorists therefore tend to argue that reasonableness is an implied statutory term, so as to link reasonableness to statutory intent.[139] The doctrines of judicial review must be linked to Parliamentary intent because otherwise the common law would be unduly imposing constraints on Parliament's statutory choices. But once we understand that administrative authority is produced by power-conferring norms developed and applied by the common law, then the *ultra vires* theorist's concerns dissipate. This is because the common law is not trying to superimpose constraints on top of Parliament's choices, but aims to facilitate those choices by making it legally possible for administrators to act with authority.

Ultra vires theorists could insist that power-conferring norms must come from Parliament, but this would conflate authorization with the nature of authority. While the distribution of public powers comes from a higher source that has the authority to delegate powers, like Parliament, authority issues from the very concept of legal powers, which require power-conferring norms to make legal interactions possible. In other words, power-conferring norms need not come from Parliament because they inhere within the notion of legal power. Furthermore, the fact that administrative actors partially generate their own legal legitimacy through reason-giving suggests that judicial review does not undermine parliamentary sovereignty because it is not disrupting the "transmission belt" of authority passed from Parliament to executive actors.[140] Where administrative actors generate their own legitimacy via the reasons for their decisions, made possible by the power-conferring norm of reasonableness,

138. Forsyth, *supra* note 11.

139. Wade & Forsyth, *supra* note 17 at 30–35.

140. Richard Stewart, "The Reformation of American Administrative Law" (1975) 88:8 Harv Law Rev 1667 at 1675.

if anything, judicial review enhances parliamentary sovereignty by making it possible for Parliament's design schemes to have valid legal effects. I return to the issue of parliamentary sovereignty below.

In contrast to *ultra vires* theorists, common law constitutionalists believe that we do not need to link reasonableness to statutory intent. Instead, common law constitutionalists argue that it was the common law, not statutory intent, that created the duties of fairness and reasonableness.[141] The main normative justification given for this judicial development is that judicial review controls the exercise of public power,[142] and it thus protects the rule of law principle that public power cannot be exercised arbitrarily.[143] However, the problem with interpreting reasonableness as controlling or constraining arbitrary power is that it implies that reasonableness merely decreases the arbitrary impact of a power that has *already* been properly constituted by statutory utterance. This line of reasoning still rests on the assumption that administrative authority primarily has its source in Parliamentary authorization, and implies reasonableness is superimposed on top of statutory utterance rather than constitutive of or inherent to administrative authority. This is problematic for two reasons. First, it implies that these constraints, if merely superimposed on top of statutes, can ultimately be overridden by statutes.[144] Second, like *ultra vires* theorists, it confuses authorization as being sufficient to delegate power to administrative actors and ignores the important role that power-conferring norms play in creating and generating authority.[145]

However, for some common law constitutionalists, such as Dyzenhaus, fairness and reasonableness are unwritten norms that do constitute what it means to hold public authority.[146] However, by interpreting fairness and reasonableness as duties, there is still a focus on how law regulates the proper exercise of power.[147] In my view, the power-conferring theory can complement common law constitutionalism by explaining how and why requirements such as reasonableness constitute and generate administrative power, not merely regulate and limit it. Furthermore, as implied in Part I above, it is actually law's power-conferring dimension, as opposed to its duty-imposing dimension, that results in decision-makers holding limited power. This is because on the power-conferring model, discretion

141. See also Paul Craig, "Ultra Vires and the Foundations of Judicial Review" (1998) 57:1 CLJ 63; Dawn Oliver, "Is the Ultra Vires Rule the Basis of Judicial Review?" (1987) Public L 543.

142. Craig, *supra* note 141 at 88.

143. Allan, *supra* note 17 at 2.

144. Craig, *supra* note 141 at 88.

145. *Ibid*.

146. Dyzenhaus, *Constitution of Law*, *supra* note 18 at 12.

147. Allan, *supra* note 17 at 32; Dyzenhaus, *Constitution of Law*, *supra* note 18 at 3.

is always governed by law (by power-conferring norms), which precludes the creation of truly unfettered powers, and protects against arbitrariness by constituting the terms upon which power can be exercised by ensuring the exercise of a power is justified to legal subjects.

The second consequence of the power-conferring interpretation of judicial review is that Parliament and the courts no longer compete for supremacy. Instead, the practice of judicial review supplies the architecture to facilitate the legality of public regulatory schemes, and hence the court and Parliament collaborate to generate public authority. The court is thus assisting Parliament and the administration by creating the conditions within which statutory schemes can be constituted as legal authority. The power-conferring theory thus aligns with what Aileen Kavanagh calls the "collaborative constitution" because we can interpret the judiciary as engaging in a "collaborative enterprise"[148] with the legislature, administration, and legal subject. This collaborative enterprise is "oriented towards a common goal"[149] to confer and constitute public authority and build a legitimate administrative state committed to good governance. Arguably, therefore, the goals of the supervisory jurisdiction align with that of Parliament because both collaborate to facilitate the legality of regulatory schemes by co-conferring authority onto administrators. Furthermore, as Kavanagh points out, we often think of each branch of government as operating in distinct forums with their own goals:[150] courts with the "forum of principle",[151] Parliament with a forum of democratic legitimacy, and the executive with a forum of policy.[152] On the power-conferring model, however, judicial review assists the forum of policy by setting the conditions that make it possible for the executive to act. Those conditions are partially democratic in the modest sense that they give a voice to the legal subject through the reason-giving requirement. Consequently, the silos within which each branch operates break down on the power-conferring interpretation, reflecting the collaborative constitution's more realistic approach to inter-institutional dynamics.

The third consequence of the power-conferring interpretation is that it can, as it was stated in *Vavilov*, explain why reasons generate the legal authority of administrative actors. The power-conferring view implicitly rejects the position that legal authority is a top-down concept (e.g., that authority is delegated from Parliament to the agency) and instead understands the constitution of authority as temporal, relational, and collaborative.

148. Kavanagh, *supra* note 19 at 86.

149. *Ibid* at 5.

150. *Ibid* at chs 1–2.

151. Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at 33–72.

152. Kavanagh, *supra* note 19 at 31.

Authority is *temporal* and *relational* on the power-conferring interpretation of the doctrine because authority partly emerges via an ongoing "discursive justification"[153] between the administrative decision-maker and the legal subject in a kind of jurisgenerative process. This jurisgenerative process between the legal subject and decision-maker cannot be merely explained by statutory authorization, which is by its nature a datable event within a particular context, issuing as it does from the intentions of particular individuals in Parliament. Instead, this jurisgenerative process is made possible by the common law requirement of reasonableness that provides for the legal effectiveness of administrative action *every time* a decision is made. This expresses the very nature of legal powers wherein valid legal authority is made possible both by the inherency of power-conferring norms and the need for a recognition of and dialogue about the authority and legitimacy that powerholder's claim to possess. Consequently, as suggested above, legal authority is generated as part of a *collaborative* endeavour between Parliament, the courts, administrative actors, and legal subjects.

The final consequence of the power-conferring interpretation is that it seems to limit Parliament's ability to oust the requirement of reasonableness (except where correctness review would apply instead). Parliament cannot create statutory schemes that attempt to subvert or oust substantive review without removing the conditions that enable administrative actors to exercise proper legal authority. While this might be a radical conclusion in the United Kingdom where parliamentary sovereignty remains a strong pillar of public law,[154] in Canada the situation is murkier. The advent of the *Charter* introduced Canadians to the idea that sovereignty can be limited in nature. Furthermore, in the *Reference re Secession of Quebec*, the Supreme Court of Canada did not explicitly identify parliamentary sovereignty as an unwritten constitutional principle, but instead preferred the principle of democracy, which the Court said worked in "symbiosis"[155] with other principles, such as the rule of law and constitutionalism.[156] If parliamentary sovereignty operates alongside the rule of law, this might imply that parliamentary sovereignty can be limited by the rule of law in some circumstances. In my view, legislation that attempts to preclude judicial review would violate the principle of the rule of law. First, because such a statute would "fundamentally alter"[157] a collaborative constitutional order by interfering with the supervisory jurisdiction's role in creating the conditions within which administrative actors may exercise proper legal authority. Second, because the rule of law requires that all government

153. Benhabib, *supra* note 136 at 74.

154. See *R (on the application of Miller) v The Prime Minister*, [2019] UKSC 41.

155. 1998 CanLII 793 (SCC).

156. *Ibid* at 261.

157. *Babcock v Canada (AG)*, 2002 SCC 57 at para 57.

actors have proper legal authority for their actions,[158] which without power-conferring norms, they would not hold.

However, the decision in *Toronto (City) v Ontario (AG)* (*Toronto City*) undermines this conclusion.[159] In this case, the majority found that unwritten constitutional principles, such as the rule of law, cannot be used to invalidate otherwise valid legislation.[160] Yet despite *Toronto City*'s strong finding that unwritten constitutional principles cannot strike down legislation, the Court, just two years earlier in *Vavilov*, found that although the legislature is free to stipulate the relevant standard of review for a particular administrative body, Parliament can only do so *except where* the rule of law demands a different standard.[161] Also, more generally, the Court noted that "judicial review functions to maintain the rule of law while giving effect to legislative intent".[162] The implication is that legislative competence may be limited by the rule of law in the administrative law context, which as Mark Mancini writes, reinforces the protection of superior courts under section 96 of the *Constitution Act* 1867.[163] Given *Vavilov* and *Toronto City*'s competing accounts of the interplay between the rule of law and parliamentary sovereignty, it is unclear in the current law whether a statute ousting the supervisory jurisdiction in the administrative law context could be struck down on the basis that it offended the rule of law. In my view, the power-conferring interpretation of judicial review lends weight to the idea that Parliament ought not to be able to oust the supervisory jurisdiction and suggests that *Vavilov*'s inclination on the interplay between the rule of law and parliamentary sovereignty is normatively desirable.

Conclusion

One of the biggest conundrums of public law is why public officials are constrained by common law norms that do not come from any statutory source. The purpose of this article was to argue that legal authority is generated not by authorizations alone, but by power-conferring norms that inhere within

158. *Ref re Remuneration of Judges of the Prov Court of PEI*, 1997 CanLII 317 (SCC) at para 10; *Re Manitoba Language Rights,* 1985 CanLII 33 (SCC) at 748; *Roncarelli*, *supra* note 12 at 142.

159. *Toronto (City) v Ontario (AG)*, 2021 SCC 34 [*Toronto City*].

160. *Ibid* at para 57.

161. *Vavilov*, *supra* note 1 at para 23.

162. *Ibid* at para 2.

163. Mark P Mancini, "The Rule of Law in Judicial Review Today" (2022) 25 SCLR 95 at 97; *Crevier v AG (Québec) et al*, 1981 CanLII 30 (SCC); *Constitution Act 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 96.

the very concept of legal powers. This is because legal powers facilitate legal effects that require norms to make those effects possible. Thus, where statutory authorizations fail to make these norms explicit, the common law will nevertheless presuppose the existence of power-conferring norms to secure the validity of a purported powerholders action.

I argued that in administrative law, the common law presupposes reasonableness as the central power-conferring norm that makes exercises of administrative power possible. The court requires that administrative decision-makers act reasonably, even where their authorizing statutes purport to confer absolute power. In *Roncarelli*, we saw that Rand J implicitly infused the purportedly empty provinces of Duplessis' and the Liquor Commission's power with power-conferring norms such as proper purposes, relevant and irrelevant considerations, and more generally, reasonableness to facilitate the legality of the liquor licence regime. In *CUPE*, we saw that Dickson CJ rejected jurisdiction as the backbone of review and instead understood the valid exercise of an interpretive power held by the Labour Board as governed by reasonableness. *Vavilov* continued this trajectory, and we saw that the requirement for a reasoned explanation to the legal subject forms the core of the authority that administrators possess.

Importantly therefore, the doctrines of judicial review are not duties that impose constraints upon administrative action but are power-conferring norms that produce administrative validity. This suggests judicial review is not so much a regulative practice but is a practice that generates administrative validity. The court is therefore not competing with Parliament's supremacy because administrative authority is *co-constituted* by the statutory purposes *and* the power-conferring norms that provide for the legitimacy of its exercise. Consequently, any concern public lawyers may have about the common law imposing constraints on statutory choices disappears because we can understand the court as facilitating Parliament's statutory choices, and legally facilitating the actions of public officials. Power-conferring norms thus explain why the common law can legitimately require that administrative decision-makers act reasonably. It explains why reasons are the core of the administration's legal authority under the *Vavilov* framework and implies that our constitutional order is collaborative in nature, suggesting reasonableness cannot be derogated from without Parliament violating the rule of law principle. The power-conferring interpretation offered in this article thus has significant implications for the way in which we understand administrative law and constitutional law.