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## The Conceptual Gap Between Doré and Vavilov

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*This paper argues that there is a fundamental conceptual gap between the cases of Doré and Vavilov. This is because both cases are motivated by different conceptions of administrative law. In Vavilov, the paper suggests that the Court melded together two theories of judicial review; a Diceyan theory based on a harmonious understanding of the principles of legislative sovereignty and the Rule of Law; and a “culture of justification” for administrative decision-makers. On the other hand, Doré is motivated by a functionalist understanding of administrative law, in which the expertise of decision-makers is emphasized. The paper explores the doctrinal gap and suggests two ways in which it might be bridged. First, Doré might be recalibrated to bifurcate the standard of review analysis, so that decisions implicating the scope of Charter rights are reviewed more stringently. Second, Vavilov’s justificatory standards might be imported into the Doré context.*

*Dans le présent article, nous soutenons qu’il existe un fossé conceptuel fondamental entre les arrêts Doré et Vavilov. Cela s’explique par le fait que les deux affaires sont motivées par des conceptions différentes du droit administratif. Dans l’arrêt Vavilov, nous suggérons que la Cour a fusionné deux théories de la révision judiciaire : la théorie du juriste Dicey fondée sur une compréhension harmonieuse des principes de la souveraineté législative et de l’État de droit, et une « culture de la justification » pour les décideurs administratifs. Par ailleurs, l’arrêt Doré se fonde sur une compréhension fonctionnaliste du droit administratif, qui met l’accent sur l’expertise des décideurs. Dans l’article, nous explorons le fossé conceptuel et suggérons deux façons de le combler. D’abord, l’arrêt Doré pourrait être recalibré afin de réorienter le cadre d’analyse de la norme du contrôle judiciaire, de sorte que les décisions impliquant la portée des droits garantis par la Charte soient examinées de façon plus rigoureuse. Deuxièmement, les normes justificatives énoncées dans l’arrêt Vavilov pourraient être importées dans le contexte de l’arrêt Doré.*

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*Introduction*

*Doré* is one of the Supreme Court of Canada's most controversial administrative law decisions of the 21st century.<sup>1</sup> *Doré* introduced a standard of review of reasonableness<sup>2</sup> for administrative decisions implicating what the Court called "*Charter* values."<sup>3</sup> The Court held that decision-makers must, when exercising statutory discretion, balance *Charter* values with statutory objectives,<sup>4</sup> and the question on judicial review is whether the balancing was reasonably proportionate in light of those values.<sup>5</sup> In other words, the traditional *Oakes* test would not apply in situations where the *Charter* challenge is aimed at administrative discretion rather than a statute. Overall, *Doré* was designed to introduce a more unified public law into Canadian constitutional adjudication, where

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1. *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

2. *Ibid* at para 45.

3. *Ibid* at paras 54-55.

4. *Ibid* at para 55.

5. *Ibid* at para 57.

courts respect constitutional decisions rendered by administrative actors, provided they are fully reasoned.<sup>6</sup>

The simple description of the *Doré* approach elides its many nuances. For example, the definition of a *Charter* value is subject to much discussion in the literature.<sup>7</sup> Who bears the onus in determining whether a particular limit is reasonable is yet another issue that has warranted judicial attention.<sup>8</sup> And questions remain about whether reasonableness review is analogous to the proportionality analysis that is the hallmark of the *Oakes* test.<sup>9</sup> These and other questions have become ever more relevant following the Supreme Court's decision in *Vavilov*.<sup>10</sup> While *Vavilov* nominally refused to consider the continued propriety of the *Doré* framework,<sup>11</sup> a number of comments in *Vavilov* can be taken as undermining the conceptual bases of *Doré*.<sup>12</sup> This raises the question: can *Doré* survive *Vavilov* at the conceptual level?

This article argues that there is a potential conceptual gap between *Vavilov* and *Doré*.<sup>13</sup> Put differently, in my view, the latter case cannot stand without some substantial amendment.<sup>14</sup> Indeed, *Vavilov* and *Doré* appear motivated by different views of administrative law and judicial review. *Vavilov*, with its focus on the statute as the most "salient" aspect of review on a reasonableness standard,<sup>15</sup> and the Court's preoccupation with

6. Matthew Lewans, "Administrative Constitutionalism and the Unity of Public Law" (2018) 55 OHLJ 515 at 518-19 [Lewans, "Unity"]. For more on the concept of the unity of public law, see David Dyzenhaus, "Baker: The Unity of Public Law" in David Dyzenhaus, ed, *The Unity of Public Law* (Hart Publishing: Portland, 2004) at 1.

7. See eg Matthew Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014) 67 SCLR (2d) 361; Audrey Macklin, "Charter Right or Charter-Lite?: Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561. For a more positive take on the question of values, see Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 SCLR (2d) 391.

8. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 117 per McLachlin CJC; see also para 195 per Rowe J [TWU].

9. Some scholars argue that such a harmony does not or should not exist. See Iryna Ponomarenko, "Tipping the Scales in the Reasonableness-Proportionality Debate in Canadian Administrative Law" 21 Appeal 125 at 127 [Ponomarenko].

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

11. *Ibid* at para 57.

12. See *Ibid* at para 56; see also Mark Mancini, "After *Vavilov*, *Doré* is Under Stress," online: *Double Aspect* <<https://doubleaspect.blog/2020/01/06/after-vavilov-dore-is-under-stress/>> [https://perma.cc/94R9-VC4U].

13. Some courts have already been faced with the potential gap between *Dore* and *Vavilov*: see *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112. In *Strom*, the Saskatchewan Court of Appeal did not address the question of "what is the standard of review when the issue of whether an administrative decision has unjustifiably limited Charter rights is raised on judicial review, rather than on appeal?" See *Strom*, at para 133.

14. As I will note below, this difference matters, even despite the different contexts, facts, and holdings of the two cases.

15. *Supra* note 10 at para 110.

reasons,<sup>16</sup> tends to straddle two schools of administrative law thought. First, it incorporates a formalist school motivated by a harmonious understanding of legislative supremacy and the Rule of Law, championed by the jurist A.V. Dicey.<sup>17</sup> Second, it incorporates a justificatory school, which focuses on ensuring the exercise of public power is justified, championed by scholars like David Dyzenhaus.<sup>18</sup> On the other hand, *Doré*, which is premised on functional<sup>19</sup> understandings of the superior expertise of administrative bodies over constitutional matters arising in their remit,<sup>20</sup> is inspired by older approaches associated with the Progressive school of administrative law.<sup>21</sup>

These schools, while not necessarily in conflict, call for different doctrinal applications. On the selection of the standard of review, *Vavilov* seems to endorse a broad-based application of the correctness standard on constitutional questions—contrary to *Doré*'s retention of the standard of reasonableness for constitutional questions. And even if reasonableness is the appropriate standard of review, *Vavilov*'s new reasonableness standard, focused as it is on justification, appears potentially more intensive than *Doré* reasonableness,<sup>22</sup> as it has been applied in cases subsequent to

16. *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 26: reasons-first approach.

17. AV Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885) [Dicey, "Introduction"].

18. David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 S Afr J on Hum Rts 11 [Dyzenhaus, "Justification"]; David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) at 279 [Dyzenhaus, "The Politics of Deference"].

19. For a good description of the theoretical underpinnings of functionalism as a school of administrative law thought, see Martin Loughlin, "The Functionalist Style in Public Law (2005) 55:3 UTLJ 361-403 [Loughlin].

20. See, for the distinction between formalism and functionalism in Canadian Administrative law, John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935-1936) 1 UTLJ 53 [Willis].

21. See, in the American context, Ronald J Pestritto, "The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis" (2007) 24:1 Social Philosophy & Policy 24; in the Canadian context, see, for example, Willis *supra* note 20; and Harry Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 OHLJ 1 [Arthurs, "Dicey"]; R Blake Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941" [Brown]; Harry Arthurs, "Protection Against Judicial Review" (1983) 43:2 R du B 277 [Arthurs, "Protection"]; Harry Arthurs, "Woe Unto You, Judges: Or How Reading Frankfurter and Greene, Ruined Me as a Labour Lawyer and Made Me as an Academic" (2002) 29 JL & Soc'y 657 [Arthurs, "Woe Unto You"]; Peter Hogg, "Judicial Review in Canada: How Much Do We Need It?" (1974) 26:3 Admin L Rev 337 [Hogg].

22. As I will note, there are good arguments on both sides of the question that *Vavilovian* reasonableness is more stringent. But as I will explain below, to my mind, it is true that reasonableness as applied in *Vavilov* is more stringent than the reasonableness standard that has characterized cases applying *Doré*, like *TWU*.

*Doré*.<sup>23</sup> All of this leaves *Doré* in a position of vulnerability, if *Vavilov* is followed on principle.

The paper proceeds in four parts. In Part I, I set out the facts and holdings of *Vavilov* and *Doré*. In Part II, I evaluate the core theories underlying *Vavilov*: namely, a focus on Diceyanism and a reasons-focused “culture of justification” theory. In Part III, I evaluate the theory of *Doré*, which is basically a functionalist theory focused on the expertise of decision-makers in contributing to constitutional discourse. I ultimately conclude that these differences in concept lead to three distinct doctrinal differences between *Doré* and *Vavilov*: (1) a change in approach on expertise (2) a difference in the role of the courts in each case and (3) a lesser requirement for reasons in *Doré* compared to *Vavilov*. Finally, in Part IV, I evaluate two options for bridging the conceptual gap between *Doré* and *Vavilov*: (1) bifurcating the standard of review, and (2) stricter reasonableness review. I review the benefits and drawbacks of each of these options.

## I. *Doré* and *Vavilov*

*Doré* and *Vavilov*, in my view, present different schools of administrative law that call for different doctrinal applications. Before turning to that important point, I outline the two cases, describing and analyzing the theories underpinning each decision.

### 1. *Doré*

*Doré* involved a lawyer who wrote a vituperative letter to a judge, for which he was sanctioned by the Disciplinary Council of the Barreau du Québec.<sup>24</sup> Mr. *Doré* argued that “the manner in which the relevant legislation was applied by the Disciplinary Council was unconstitutional because his comments were protected by s.2(b) of the *Charter*.”<sup>25</sup> In reviewing this argument, the Supreme Court in *Doré* set out to clarify “the appropriate framework to be applied in reviewing administrative decisions for compliance with *Charter* values.”<sup>26</sup> The Court imposed a starting requirement: “[i]t goes without saying that administrative decision-makers must act consistently with the values *underlying the grant of discretion*, including *Charter* values.”<sup>27</sup> The Court also noted, along this line, that “...administrative decisions are *always* required to consider fundamental values.”<sup>28</sup>

23. *TWU*, for example.

24. *Supra* note 1, at 16-17.

25. *Ibid* at para 18.

26. *Ibid* at para 23.

27. *Ibid* at para 24 [emphasis added].

28. *Ibid* at para 35.

The Court then discussed the functional justifications for its proposed standard. It noted that "...the fact that *Charter* interests are implicated does not argue for a different standard" compared to the one imposed in ordinary cases of disciplinary panels.<sup>29</sup> The starting point for this argument was "the expertise of the tribunals in connection with their home statutes."<sup>30</sup> So the reasoning goes, when an administrator exercises power under her home statute, she has "by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values."<sup>31</sup> This is the "distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation."<sup>32</sup> Expertise, then, played a dominant role in justifying the reasonableness standard in these circumstances.

The Court next analyzed about how its reasonableness standard would apply:

[55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives...

[56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.

[57] On judicial review the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play.<sup>33</sup>

With this, the contours of the *Doré* approach are set out. Proportionality is the core of the analysis on judicial review, but reasonableness also features strongly in the Court's analysis. Moreover, expertise in terms of the facts and the law rationalizes the application of reasonableness in this context. On this understanding, the proportionality analysis is highly-fact infused, which justifies an assumption of expertise on the part of administrators—even if the questions at issue are constitutional in nature.

29. *Ibid* at para 45.

30. *Ibid* at para 46.

31. *Ibid* at para 47.

32. *Ibid* at para 48.

33. *Doré*, *supra* note 1 at paras 55-57.

## 2. *Vavilov*

*Vavilov* involved a decision by the Registrar of Citizenship to revoke Mr. Vavilov's citizenship. Vavilov was the son of Russian spies. Generally, under Canadian law, persons born on Canadian soil are Canadian citizens (so-called *jus soli* citizenship). But under the *Citizenship Act*, there are exceptions: s.3(2)(a) of the statute prescribes that *jus soli* citizenship does not apply if, at the time of birth, either of Vavilov's parents were "a diplomatic or consular officer or other representative or employee in Canada of a foreign government." Vavilov was born on Canadian soil.<sup>34</sup> But the Registrar ultimately decided that his citizenship should be revoked, because the status of Vavilov's parents as spies satisfied s.3(2)(a) of the *Citizenship Act*.

The Supreme Court signalled that *Vavilov* would be the case in which it would revisit the standard of review analysis previously set out in *Dunsmuir*.<sup>35</sup> In so doing, the Court made multiple changes to the standard of review analysis, both when it comes to selecting the standard of review and applying the reasonableness standard.

On the selection of the standard of review, *Vavilov* retained the presumption of deference on home statute interpretation that characterized the post-*Dunsmuir* jurisprudence.<sup>36</sup> Instead of concluding that such a presumption was justified by, for example, the expertise of a decision-maker, the Court instead concluded that the legislative choice to delegate power to an administrative decision-maker is the central legal justification for a presumption of deference.<sup>37</sup> Expertise, on this account, is an unwieldy functional justification:

However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.<sup>38</sup>

On this account, legislative intent is the "polar star" of judicial review.<sup>39</sup> So, while a presumption of reasonableness review is justified by legislative intent, that presumption would need to be rebutted where a clear signal of

34. *Supra* note 10 at para 317.

35. *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

36. *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 27.

37. *Vavilov*, *supra* note 10 at para 26.

38. *Ibid* at para 28.

39. *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149; *Ibid* at para 33.



legislative intent arises. The Court described two such situations: where the legislature has actually legislated the standard of review, and second where the legislature has provided for a “statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.”<sup>40</sup>

The Court also noted that, in some situations, “respect for the rule of law requires courts to apply the standard of correctness for 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.”<sup>41</sup>

These categories are largely retained from *Dunsmuir*, with the exception of the “general questions” category, which used to include an assessment of the expertise of the decision-maker.<sup>42</sup> This means that for the most part, the standard of review would be reasonableness, justified by a presumption of legislative intent.

The Court also provided significant guidance on how to apply the reasonableness standard of review, guidance that was sorely missing in *Dunsmuir* itself. The Court started by noting that “[r]easonableness review aims to give effect to the legislature’s intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law.”<sup>43</sup> In this sense, “the focus on reasonableness review must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome.”<sup>44</sup> On this account, reasons come first: a court must review the reasons as a window to the decision.<sup>45</sup> Courts cannot use “yardsticks” to measure the appropriate outcome of the decision; cannot conduct a *de novo* analysis, and cannot try to ascertain a range of acceptable decisions.<sup>46</sup>

When conducting reasonableness review, courts are welcome to read the reasons in light of the surrounding context, including the record and the institutional setting.<sup>47</sup> But this can be taken too far: “it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision.”<sup>48</sup> Cases like *Alberta Teachers* and

40. *Vavilov*, *supra* note 10 at para 33.

41. *Ibid* at para 53.

42. *Ibid* at para 58.

43. *Ibid* at para 82.

44. *Ibid* at para 83.

45. *Ibid* at para 84.

46. *Ibid* at para 83.

47. *Ibid* at para 96.

48. *Ibid*.

*Newfoundland Nurses*, which permitted such supplementation of reasons, were distinguished by the Court.<sup>49</sup> For that reason, it is now the case that the relevant reasons are the ones provided by the decision-maker, not the court.

At this point, it is sufficient to note the core themes of *Vavilov*. There is a large focus on legislative intent and the institutional design choice of legislatures to establish administrative tribunals in the first place. This focus on legislative intent is rooted in the fact that all administrative decision-makers are creatures of statute, created for the purpose of enacting policy.<sup>50</sup> This focus on the legislative scheme bleeds over to the assessment of the reasonableness of a decision, under which the governing statutory scheme plays a leading role in constraining administrative discretion. Under this understanding, the reasons for a decision play an important role: they “may have implications for [an administrative decision’s] legitimacy,”<sup>51</sup> and they “facilitate meaningful judicial review.”<sup>52</sup> In this sense, reasons help to ensure that courts can police the boundaries of administrative decision-making.

## II. *Theory*

### 1. *Vavilov*

At first blush, one can see the major differences in theoretical underpinning between *Vavilov* and *Doré*. *Vavilov*, on one hand, starts with a basically Diceyan understanding of the relationship between courts and administrative actors, while endorsing a traditional understanding of the relationship between the Rule of Law and legislative intent. In support of this account, the reasons for decision play a role in ensuring that courts can exercise their traditional functions to guarantee the legality of state decision-making. Secondly, under *Vavilov*, reasons also support a “culture of justification” in which the legitimacy of an administrative decision depends on the reasons for it. *Doré*, on the other hand, is premised on a functionalist understanding of administrative law, under which expertise is at the forefront of the analysis, and a certain trust is placed in administrative decision-makers to make decisions in the remit of their statutes. While these schools of thought are not necessarily in conflict, they are distinct in nature, leading to potentially different doctrinal applications.

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49. *Ibid* at para 96-98.

50. *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 24.

51. *Vavilov*, *supra* note 10 at para 81.

52. *Ibid*.

a. *Dicey*

*Vavilov* is first supported by a focus on Dicey's understanding of the relationship between a sovereign English Parliament, the courts, and administrative actors. Much has been written about Dicey and his mistakes.<sup>53</sup> It is important to assess Dicey on his own terms, and in this sense, Dicey's focus is on the relationship between two important principles: parliamentary sovereignty and the Rule of Law. As it turns out, these principles largely animate the process of selecting the standard of review in *Vavilov*.

For Dicey, the Rule of Law and parliamentary sovereignty are not at odds, and indeed, are complementary. Parliamentary sovereignty means that Parliament can "make or unmake any law whatever."<sup>54</sup> Further to this notion of parliamentary sovereignty was a restriction on other bodies in the constitutional polity—"no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."<sup>55</sup> The only relevant limitation on parliamentary sovereignty arises from the people themselves, "matters of political or popular morality."<sup>56</sup> In this sense, for Dicey, Parliament is the supreme institution in the British Constitution, and its law must be respected by courts. On the other hand, the Rule of Law for Dicey means three things:

- (1) "...the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power..."<sup>57</sup>
- (2) "...equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts..."<sup>58</sup>
- (3) "....the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts."<sup>59</sup>

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53. One basic strand of mistakes that plagued Dicey's work was the limited acknowledgment of nascent and developing administrative agencies in the UK at the time of writing. For an analysis of this mistake and others, see, notably, the following: Harry Arthurs, "Dicey" *supra* note 21 at 6-7; Matthew Lewans, "Rethinking the Diceyan Dialectic" (2008) 58:1 UTLJ 75 at 85 *et seq* [Lewans]; W Ivor Jennings, *Book Review of A.V. Dicey, Introduction to the Study of the Law of the Constitution*, 9th ed by ECS Wade (1940) 3 Mod L Rev 321; Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990) at 26-27.

54. Dicey, "Introduction," *supra* note 17 at 3.

55. *Ibid* at 40.

56. Lewans, *supra* note 53 at 82.

57. Dicey, "Introduction," *supra* note 17 at 120.

58. *Ibid* at 121.

59. *Ibid*.

Of note, here, is the focus on the regular courts as the enforcers of the Rule of Law. Indeed, it is through the judicial role that, for Dicey, parliamentary sovereignty and the Rule of Law find harmony. It is the judiciary that is the interpreter of law, because Parliament and other political actors are not institutionally capable to do so.<sup>60</sup> Given that this is the case, when Parliament passes a law, the Rule of Law and parliamentary sovereignty find harmony because "...from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land..."<sup>61</sup>

Where does administrative law fit into this schema? Dicey's views cannot be described monolithically, so that broad claims that Dicey's theory left no place for administrative jurisdiction must be qualified.<sup>62</sup> At first blush, Dicey was obviously hostile to administrative decision-making, or at least the *droit administratif* that characterized France. His main argument was that the system of *droit administratif* was hostile to the Rule of Law, which presupposed the independent judgment of courts separate from government. However, Dicey's views in this respect must be qualified. Later in life, Dicey's views towards *droit administratif* softened considerably.<sup>63</sup> And as a corollary to parliamentary sovereignty, Dicey also theorized the place of so-called "subordinate" law-making bodies in the constitutional structure.<sup>64</sup> In other words, Dicey does recognize that administrative jurisdiction can be parasitic on delegated parliamentary authority, thereby accepting the ability of legislatures to delegate power.<sup>65</sup> And a modern theory of Diceyanism must take into account the very existence of modern administrative government to be applicable.<sup>66</sup>

In this respect, there is—at least—a second strand of Diceyanism that might be seen as a less formal. That is, as Walters notes, private papers from Dicey's collection might indicate that Dicey's theory is not as formal as so far described.<sup>67</sup> According to Diceyan theory, substantive and procedural

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60. *Ibid* at 273.

61. *Ibid*.

62. See eg Lewans, *supra* note 53 at 83.

63. See AV Dicey, "Droit Administratif in Modern French Law" (1901) 17 Law Quarterly Review 302.

64. Dicey, "Introduction," *supra* note 16 at 41.

65. *Ibid*: These bodies "possess a certain legislative authority, though the authority is clearly delegated and subject to the obvious control of a superior legislature."

66. See for example Jeffrey Pojanowski, "Neoclassical Administrative Law" (2019) 133 Harv L Rev 852 at 883: "Neoclassical administrative law recapitulates Dicey's sharp distinction between rule of law and legislative supremacy but nests it within an administrative state that serves as a deputized lawmaker."

67. See Mark Walters, "Legality as Reason: Dicey, Rand, and the Rule of Law" (2010) 55 McGill LJ 563 at 582-83 [Walters].

limitations are applied by the courts on delegated actors: a decision-maker must “conform precisely to the language of any statute by which the power is given” and must align itself with “the spirit of judicial fairness and equity.”<sup>68</sup> But this “spirit of judicial fairness” might encompass an ideal of not only “legality as order” but one of “legality as reason.”<sup>69</sup> Indeed, Dicey was not just concerned with law as an abstract idea, but rather noted (variously) that the Rule of Law required a “spirit of legality,” a “legal turn of mind” or the “spirit of law.”<sup>70</sup> These various instantiations of the same idea, to Walters, indicates that Dicey’s theory must be connected to a “political order.”<sup>71</sup> That order involved one in which “[a] society that accepts the rule of law...will always seek to justify power through legal forms and precedents, not for the sake of formalism itself but because consistent respect for forms and precedents is substantively “rational” and “good.”<sup>72</sup> As we shall see, Dicey foreshadows the connection between formalism and justification in *Vavilov*.

Of course, there are problems with this understanding of the Rule of Law and parliamentary sovereignty. For example, the special case of privative clauses poses a significant challenge for Dicey’s harmonious reading of the principles. So goes the challenge, “[w]hen Parliament issues a clear directive that it wants judges to abstain from reviewing certain administrative decisions, Dicey’s resolution is unhelpful, because judges have to choose which constitutional principle will prevail.”<sup>73</sup> On this account, privative clauses demonstrate the potential incoherence of Dicey’s dialectic; at some point, either the Rule of Law or parliamentary sovereignty will have to give, and Dicey does not say when each should have to relent to the other.

Nonetheless, Dicey’s descriptive analysis of English constitutional principles came to be accepted.<sup>74</sup> And so, in Canadian case law, the ghost of Dicey was a common reference point for judges who came to represent the functionalist strain of administrative law, described below.<sup>75</sup> Yet even

68. Dicey, “Introduction,” *supra* note 17 at 151-52.

69. See Walters, *supra* note 67 at 585.

70. *Ibid* at 583. Dicey, “Introduction,” *supra* note 17 at 187, 199-200, 414.

71. Walters, *supra* note 67 at 583.

72. *Ibid* at 582.

73. Lewans, *supra* note 53 at 90.

74. AWB Simpson, “The Common Law and Legal Theory” in AWB Simpson, ed, *Oxford Essays in Jurisprudence* 2d ser (Oxford: Clarendon Press, 1973) 77 at 96: “Dicey announced that it was the law that Parliament was omniscient, explained what this meant, and never devoted so much as a line to fulfilling the promise he made to demonstrate that this was so. The oracle spoke, and came to be accepted.”

75. See, for example, the opinion of Wilson J in *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1336: “Canadian courts have struggled over time to move away from

as the Canadian law of judicial review developed, the principles of the Rule of Law and parliamentary sovereignty continued to dominate the analysis for determining the standard of review. This is clear in *Dunsmuir*. There, the Supreme Court sought to (once again) clarify the law of judicial review in Canada. While the particulars of the standard of review analysis are not relevant here, the Court was anxious to solve the Diceyan dialectic, which it called a “tension”:

Judicial 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. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.<sup>76</sup>

The purpose of the standard of review analysis, for the *Dunsmuir* court, was thus to ensure the “legality, the reasonableness and the fairness of the administrative process and its outcomes”<sup>77</sup> by determining “what authority was intended to be given to the body in relation to the subject matter.”<sup>78</sup> Like Dicey, the courts were the natural institutional actors to complete this task,<sup>79</sup> because of their constitutional role in policing the boundaries of administrative action, by “maintaining legislative supremacy.”<sup>80</sup>

*Vavilov* largely picks up where *Dunsmuir* left off. It accepts the continued relevance of parliamentary sovereignty and the Rule of Law,<sup>81</sup> and particularly the role of the courts to enforce Parliament’s will.<sup>82</sup> But in so doing, *Vavilov* largely recreated Dicey’s dialectic in a number of ways. First, accepting the continued relevance of these understandings of the Rule of Law and parliamentary sovereignty is itself significant, and corresponds with Dicey’s definition of the concepts. The Court, in the *Pan-Canadian Securities Reference*, confirmed that the basic Diceyan idea of sovereignty continues to apply in Canada, even if it is qualified by the

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the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state.”

76. *Dunsmuir*; *supra* note 35 at para 27.

77. *Ibid* at para 28.

78. *Ibid* at para 29.

79. *Ibid*.

80. *Ibid* at para 30.

81. *Supra* note 10 at para 2.

82. *Ibid* at paras 108-110.

idea of a written Constitution.<sup>83</sup> And in *Vavilov*, the Court accepts, when applying reasonableness review, that it is Parliament's law that governs. For example, as noted above, it stresses that the governing statute is "the most salient aspect of the legal context relevant to a particular decision."<sup>84</sup> Indeed, administrative decision-makers cannot "disregard or rewrite the law as enacted by Parliament and the provincial legislatures."<sup>85</sup> They are nourished only by power that is specifically delegated to them: "...an administrative body cannot exercise authority which was not delegated to it."<sup>86</sup> Thus, Parliament is the master when it comes to the range of movement that might be afforded a particular decision-maker,<sup>87</sup> and no decision-maker can justify a decision that misapprehends statutory limits, as set by Parliament.<sup>88</sup>

In relation to administrative actors, this description finds perfect harmony with Dicey's theory. As noted above, and as Dicey argues, administrative decision-makers are "subordinate" to a supreme legislature.<sup>89</sup> They are limited by the words of the statute granting them power.<sup>90</sup> On the *Vavilovian* and Diceyan account, administrative actors possess no jurisdiction as of right, or because of specific expertise or specialization; rather, their authority is established only by delegation.

And on the *Vavilovian* account, the Rule of Law is largely the rule of courts. That is, the conception of the Rule of Law accepted by the Court is a rather thin one,<sup>91</sup> focused on ensuring that Parliament's law is adhered to by administrative decision-makers. On this account, the goal of judicial review is to police the boundaries of administrative decision-making to ensure the substantive legality of administrative decisions. It merely exists, as in Dicey's terms, to ensure that Parliament's will in language is given effect, and that delegated administrative discretion is subordinated to the law.

But more specifically, the selection of the standard of review also brings into stark relief how the *Vavilov* majority reconciled the principles of the Rule of Law and parliamentary sovereignty. In the common law

83. *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 54, 56.

84. *Vavilov*, *supra* note 10 at para 108.

85. *Ibid.*

86. *Ibid* at 109.

87. *Ibid* at para 110.

88. *Ibid.*

89. Dicey, "Introduction," *supra* note 17 at 75.

90. See AV Dicey, "The Development of Administrative Law in England" (1915) 31 Law Q Rev 148 [Dicey, "1915"] at 151; *Vavilov*, *supra* note 10 at para 108.

91. Dicey's description of the "thin" conception of the Rule of Law is likely one of the most famous. For other discussions of "thin" versus "thick" conceptions of the Rule of Law, see: Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) at 91.



analysis, the presumption of reasonableness is “the starting point.”<sup>92</sup> But Parliament remains in the driver’s seat. It can specify the standard of review through either a legislated standard of review or through a statutory right of appeal. Both signals, for the *Vavilov* majority, are designed to ensure that Parliament’s law governs.<sup>93</sup> The fact that courts must give effect to Parliament’s law in this sense means that, on Diceyan grounds, courts are merely enforcing the law as written. In other cases, however, the supremacy of the law requires that courts rebut the presumption of reasonableness. For example, certain constitutional questions attract a standard of correctness because they implicate the court’s role as guardian of the Constitution and because such questions require consistent answers. This is all a function of the Rule of Law principle, under which, in certain cases, parliamentary will must give way to higher law, including the law of the Constitution.

It is true that there are some differences between a *Vavilovian* understanding of administrative law and Diceyanism. Dicey noted that, at least in the English system, there was no warrant for courts to question Parliament’s law; specifically, there was no difference between Parliament’s law and a more “fundamental” law—such as a written constitution—that could override it. Obviously, Dicey’s account of English principles no longer applies to Canada, with a written Constitution. But the difference here is not particularly difficult to adapt into the Dicey-*Vavilov* theory of administrative law. That is because Dicey’s vision of the Rule of Law is coterminous with the so-called “supremacy of the law.”<sup>94</sup> Constitutionalism—that idea which holds that a Constitution is the supreme law of the land—is but a variant of the principle of supremacy.<sup>95</sup> As such, supremacy of the law in a system with a written Constitution necessarily requires subordination of ordinary law to the Constitution. The differences between the Canadian system and Dicey’s theory can therefore be folded into a larger theory of the relationship between parliamentary sovereignty and the Rule of Law.

But, in addition, Dicey’s blind spots track to *Vavilov*. Particularly, as noted above, Dicey did not point out how parliamentary sovereignty and the Rule of Law interact with one another in certain cases. And in *Vavilov*, this is a problem. For example, it is unclear whether the principle of legislative supremacy endorsed in *Vavilov* means that Parliament could

92. *Vavilov*, *supra* note 10 at para 31.

93. *Ibid* at para 34, 36.

94. Dicey, “Introduction,” *supra* note 17 at 110, equating the rule of law with the supremacy of the law.

95. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 70, 72 [QSR].



specify the standard of review on constitutional questions. If so, it means that that principle is supra-ordinate over the Rule of Law. But if the Rule of Law is a standalone principle with normative force,<sup>96</sup> then it is possible that it could override parliamentary sovereignty, such that Parliament could not specify the standard of review on constitutional questions. This is a lacuna in *Vavilov*, and in Dicey's theory.

These nuances, however, should not take away from the larger point. There is much similarity between *Vavilov* and Dicey's theory.

b. *A culture of justification*

On the other hand, *Vavilov* represents another school of administrative law thought: that school seeking a "culture of justification" as a way of justifying administrative action.

The justificatory school of administrative law thought is championed by scholars like Dyzenhaus and Mashaw. The culture of justification, unlike Diceyan theory, does not insist on a stringent standard of review; rather, it accepts deference as a function of the legitimacy of the administrative state. On this account, the reasons for the decision are the locus of the analysis; the legitimacy of an administrative decision is not necessarily due to the imprimatur of a court ruling, but rather to the cogency of reasons offered in justification for a decision. Reasons play a salutary function on this account.<sup>97</sup>

Reasons contribute to a general "culture of justification" as opposed to a "culture of authority." As first expounded by South African scholar Etienne Mureinik, the culture of justification is related to democratic norms privileging "persuasion" over "coercion."<sup>98</sup> Coercion, in a culture of authority, is based "on the authority of government to exercise power."<sup>99</sup> In a culture of justification, the authorization to act is not the be all and end all of the analysis. Instead, the legitimacy of administrative action depends on its reasonableness and its cogency, in either a procedural or substantive sense.<sup>100</sup>

The justificatory school is deeply connected to principles of democracy. As Dyzenhaus notes:

96. As held in *ibid* at para 54.

97. See Jocelyn Stacey & the Hon Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016) 74 SCLR (2d) 211 at 220.

98. See Dyzenhaus, "Justification," *supra* note 18.

99. Moshe Cohen-Eliya & Iddo Porat, "Proportionality and the Culture of Justification," (2011) 59:2 Am J Comp L 463 at 475.

100. *Ibid*; see also David Dyzenhaus et al, "The Principle of Legality in Administrative Law: Internationalisation and Constitutionalisation" (2001) 1 Oxford U Commonwealth LJ 5, 29.

The principle is inherently democratic. It adopts the assumption that what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them... The legislature, the administration and the courts are then just strands in a web of public justification...[w]hen administrative tribunals make decisions on points of law, those subject to the decision are entitled to require that the tribunal should offer reasons that in fact justify the decision.....<sup>101</sup>

On this account, the virtues to be inculcated by a culture of justification include “participation” and “accountability” as “different institutional ways of articulating the basic principle of democracy.”<sup>102</sup> Participation and the quality of reasons are connected. On Dyzenhaus’ account, decision-makers are owed deference when they reason properly, which they can only do by “taking account of the different interests and values at stake.”<sup>103</sup> Taking account of those interests require participation by those affected by a decision. Reasons must be given in respect of that participation.

The culture of justification presupposes the legitimacy of the administrative state. Justification is the way in which administrators contribute to the legal order. Indeed, the democratic vision of the culture of justification “builds into the idea of democracy a commitment both to human rights and the legitimacy of the administrative state.”<sup>104</sup> An alternative account rooted in a more formalist understanding of the relative capacities of administrative actors and Parliament, so goes the story, fails to take account of the distinctive role in administrative actors in modern government.<sup>105</sup> Overall, by asking decision-makers to reason effectively with respect to decisions that have a significant impact on the lives of individuals, what one sees is a conception of democracy that is different than the so-called Diceyan or formalist conception of parliamentary sovereignty.<sup>106</sup>

That is not to say that, under a culture of justification, courts have no role to play. According to Dyzenhaus, courts do have a role in enforcing justification in the “web of public justification” which characterizes modern government.<sup>107</sup> This web is made up of the legislature, the administration,

101. Dyzenhaus, “The Politics of Deference,” *supra* note 18 at 305; see Henry S Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (Oxford: Oxford University Press, 2002).

102. Dyzenhaus, “Justification,” *supra* note 18 at 35.

103. David Dyzenhaus, “Dicey’s Shadow” (1993) 43:1 UTLJ 127 at 142 [Dyzenhaus, “Dicey”].

104. David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 Queen’s LJ 445 at 451 [Dyzenhaus, “The Rule of Law”].

105. Lewans, *supra* note 53 at 78.

106. Dyzenhaus, “Dicey,” *supra* note 103 at 142.

107. Dyzenhaus, “The Politics of Deference,” *supra* note 18 at 305.

and the courts, each giving effect to the definition of what constitutes “law.” The currency is effective justification, and courts enforce the strictures of “effective” justification through the means of judicial review. But, necessarily, this review is based not on abstract questions of vires or jurisdiction, but on the strength of justification offered for particular decisions. In this sense, deference is owed when a legal determination “is both fully reasoned and reasonable.”<sup>108</sup>

How does justification find its way into *Vavilov*? In many ways, it is the centrepiece of the decision. *Vavilov*, if it accomplishes anything, moves the administrative law division of labour away from selecting the standard of review to applying the reasonableness standard of review. The decision begins by noting that its project was to create a culture of justification for administrative decision-making. And in this regard, *Vavilov* notes that reasons “may have implications for [a decision’s] legitimacy...” as a matter of law.<sup>109</sup> Reasonableness review, on this account, is intimately connected to the reasons offered for a particular decision.<sup>110</sup> Administrative decision-makers, through their reasons, must demonstrate that they have applied their expertise in dealing with the matter in front of them.<sup>111</sup> Given the centrality of reasons, courts generally<sup>112</sup> cannot supplement or supplant the reasons of administrative decision-makers; allowing a court to do so would permit a decision-maker “to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion.”<sup>113</sup>

On this account, the reasons for decision, for the reviewing court, provide a window into the reasonableness of a decision, facilitating proper judicial review.<sup>114</sup> The bottom line is that decision-makers must properly justify decisions through cogent reasons, especially with respect to the individuals subject to a particular decision.<sup>115</sup>

108. Dyzenhaus, “Dicey,” *supra* note 103 at 142.

109. *Ibid* at para 81.

110. *Ibid* at para 82-83.

111. *Ibid* at para 93.

112. I acknowledge some ambiguity on this point. While the Court generally rebuffs the line of cases which permitted such supplementation in the first place, it also notes that a reviewing court might consider the record and the history/context of proceedings in which the decision arose in order to justify a particular decision: see *Vavilov* at para 94 and para 96: “Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is **not ordinarily** appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision” [emphasis added].

113. *Vavilov*, *supra* note 10 at para 96.

114. *Ibid* at para 81.

115. *Ibid* at para 95.

c. *Synthesis*

At first blush, one might posit that the democratic vision of the culture of justification is inconsistent with Diceyanism.<sup>116</sup> Indeed, Dyzenhaus argues that the vision of democracy put forward by those supportive of a culture of justification is far richer than the Diceyan vision. On one hand, the Diceyan vision depends primarily on parliamentary sovereignty. That is, courts must authentically interpret Parliament's will when it delegates power, and enforce the inherent limits set out by that will on the delegate. Dyzenhaus says this is a submission to Parliamentary will.<sup>117</sup> On the other hand, a culture of justification depends on a principle of "deference as respect," under which reasons are the means by which courts evaluate whether deference is owed. On this account, there is a clear distinction between Diceyan principles and the concept of a culture of justification. Both schools, at bottom, present different visions of the Rule of Law.<sup>118</sup>

As noted above, though, Dicey could be read in multiple ways. Walters' description of Dicey's account as one that is amenable to "legality as reason" would also support the role of courts in policing the boundaries of administrative decision-making; power must be justified to courts (and others) in a society that values the Rule of Law. *Vavilov*, too, seems to envision both schools operating in tandem. This is because the role of reasons is designed to facilitate a court-driven concept of the Rule of Law, under which courts police the statutory boundaries of administrative decision-making. In this sense, decision-makers must reason with reference to the governing statute, in order to facilitate judicial review.

*Vavilov* points to this synthesis in a number of areas. It first states, as noted above, that reasons facilitate meaningful judicial review. Reasons are directed, on the *Vavilovian* understanding, to the courts and affected parties. Here, we see the bifurcated theory of *Vavilov*: on one hand, the reasons are directed to the affected parties in the name of the democratic principle of effective participation; on the other hand, reasons are means by which the courts can review decisions. Reasons, on this account, assist the court in policing the boundaries of administrative decision-making.

But *Vavilov* goes further. The Court states that reasons for decision need to be directed to various factors in order for a decision to be reasonable.<sup>119</sup> For the Court, the most "salient" of these factors will be the

116. See generally David Dyzenhaus, "The Rule of Law," *supra* note 104.

117. Dyzenhaus, "The Politics of Deference," *supra* note 18 at 286.

118. *Ibid.*

119. *Vavilov*, *supra* note 10, at para 106. The Court calls these "constraints," but what they are, effectively, are things to which the reviewing court must turn its mind in given cases.

governing statutory scheme under which power was delegated.<sup>120</sup> So, on this account, even though decision-makers contribute to elucidating the meaning of law, they cannot disregard statutory restrictions.<sup>121</sup> They must reason in relation to them. But there will be a certain point at which the statute cannot support certain forms of reasoning: “[i]t will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.”<sup>122</sup>

In this sense, *Vavilov* imposes what one might call new reasoning requirements in relation to statutory limits.<sup>123</sup> If it was not clear before, decision-makers must now engage with the text, context, and purpose of the statutes they are interpreting, under the modern approach to interpretation,<sup>124</sup> with only limited opportunity for error or misapprehension of these fundamental tenets of interpretation.<sup>125</sup> The goal of imposing these requirements is so that the decision-maker “interpret[s] the contested provision in a manner consistent with the text, context and purpose,”<sup>126</sup> to authentically determine “meaning and legislative intent.”<sup>127</sup> One might argue that the reasoning requirements of *Vavilov* are deeply rooted in discerning authentic legislative meaning; they are connected to the statute governing the grant of decision-making authority to the administrator.

In this way, the culture of justification and Diceyanism meet, as Dicey alluded to himself in his later work. On one hand, justification is designed to facilitate judicial review, on one account. As Dicey notes, the Rule of Law requires a system of “ordinary courts” administering the law, and additionally requires the subordination of delegated actors to law. It further posits that there is no conflict between parliamentary sovereignty and the Rule of Law because when Parliament legislates, courts enforce Parliament’s will as set out by the words of the particular statute.<sup>128</sup> The reasons requirements imposed in *Vavilov* are designed to demonstrate that the administrator *actually justified a decision in relation to the statutory constraints on the decision-maker*. The role of the courts on review is to determine whether the reasons adequately probed these statutory factors; in other words, the courts enforce the Rule of Law by authentically determining whether the administrator properly interpreted Parliament’s

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120. *Ibid* at para 108.

121. *Ibid*.

122. *Ibid* at para 110.

123. *Ibid* at paras 115-124.

124. *Ibid*.

125. *Ibid* at para 122.

126. *Ibid* at para 121.

127. *Ibid*.

128. Dicey, “Introduction,” *supra* note 17 at 273.

will. The way in which this determination is made is through the reasons. Thus, reasons are a means to an end for the Court; a way to not only justify a decision to affected parties, but also a way to ensure that the Rule of Law, as the Court understands it, is upheld.

Now, it is true that there are other ways one can interpret *Vavilov*, rather than a synthesis between a culture of justification and Diceyanism. And there are many ambiguities, even if one accepts this synthesis: for example, put together, these schools of administrative law thought might be marshalled to create a more stringent standard of reasonableness than what predated *Vavilov*. But one could also view *Vavilov* as more restrained. This question has been one that has divided commentary<sup>129</sup> and cases<sup>130</sup> on the matter. Without resolving that particular conundrum,<sup>131</sup> it is probably fair to say that proportionality as defined in *Doré* and subsequent cases, as I will note below, is more restrained than *Vavilovian* reasonableness. That is, courts have historically asked administrators to do less to justify their decisions in the *Doré* context than what *Vavilov*, at least facially, prescribes.

In this way, *Vavilov* encompasses two schools of administrative law thought that might be said to be contradictory. That said, the amalgam reached in *Vavilov* is different than the theory underlying *Doré*.

### III. *Doré*

#### 1. *Functionalism*

On the other hand, *Doré* is a representative example of the school of administrative law theory known as *functionalism*. While there are many potential descriptions of functionalism, at a base level it focuses on pragmatic reasons for favouring the exercise of administrative discretion over intensive judicial review. It asks a basic question: “how shall the powers of government be divided up?”<sup>132</sup> The answer to this question, for the functionalists, was to “assign[] the new work to the body which experience has shown best fitted to perform work of that type.”<sup>133</sup> For

129. See, for example, Mark Mancini, “Richardson: Rigorous Vavilov Review,” Double Aspect, online: <<https://doubleaspect.blog/2020/02/05/richardson-rigorous-vavilov-review/>> [<https://perma.cc/9J7V-XXKQ>] and Paul Daly, “A Few Observations about Life Post-Vavilov,” Administrative Law Matters, online: < <https://www.administrativelawmatters.com/blog/2020/02/21/a-few-observations-about-life-post-vavilov/>> [<https://perma.cc/CE5X-NEHX>].

130. Compare *Farrier v Canada (Attorney General)*, 2020 FCA 25 and *Radzevicius v Workplace Safety and Insurance Appeals Tribunal*, 2020 ONSC 319.

131. It is my view that saying, definitively, whether *Vavilov* is more “rigorous” or “restrained” will need to be an issue worked out in the lower courts.

132. Willis, *supra* note 20 at 75.

133. *Ibid.*

functionalists, administrative agencies met this test. Specifically, one can say that functionalism has three strands: (1) a substantive strand, promoting a progressive agenda with a skepticism of common law courts and conceptual thinking (2) a focus on the expertise and efficiency of administrative actors relative to courts in elucidating the content of the law and (3) a skepticism of judicial review as a means of correcting administrative decisions.

In general, functionalists were concerned about the sort of law required for a new age, an age of social welfare rather than private individualism. W.P.M. Kennedy, a famous functionalist, urged attention to the urgent issues of the day as a motivator:

New standards must be developed in all fields of human endeavor which will be in harmony with the new social philosophy of the age. Care of the sick, the poor, the aged, and the infirm, elimination of slums, control of industry in the interests of humanity, protection of children, universal education, development of natural resources for the benefit of mankind, all demand immediate attention.<sup>134</sup>

For functionalists, the answer to these new social problems required administrative agencies. These agencies would help to deliver, efficiently and expertly, the programs required to meet the standards of all “mankind.”

On the other hand, functionalism was beset by an intense skepticism of courts and traditional institutional actors. J.A. Corry wrote that Parliament and the courts were ill-suited to implementing new government programs,<sup>135</sup> and specifically, that courts emphasized “private right rather than social need.”<sup>136</sup> Relatedly, functionalists attacked the individualism of a previous generation of scholars born and bred on Dicey. For Arthurs, for example, Dicey “implies that judges deliberately revise the expression of parliamentary will—a “collectivist” will—in order to preserve the “individualist” values of the common law.”<sup>137</sup> This, to Arthurs, was a classic example of judicial “overreach.”<sup>138</sup> This was because Dicey’s formulation of the Rule of Law rendered ineffective efficient administration, a requirement of a modern society dedicated to social welfare.<sup>139</sup> The

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134. WPM Kennedy, “Aspects of Administrative Law in Canada” (1934) 46 *Jurid Rev* 203 at 221 [Kennedy].

135. See Brown, *supra* note 21 at 55 JA Corry, “Administrative Law in Canada” (1933) *Proceedings of the Canadian Political Science Association* 190 [Corry].

136. *Ibid* at 193.

137. Arthurs, “Dicey,” *supra* note 21 at 17.

138. *Ibid*.

139. See Arthurs, “Dicey,” *supra* note 21 at 22.



common law of Dicey, in other words, produced results that “seemed contrary to social justice...”<sup>140</sup>

On the second strand, functionalists stress the expertise of decision-makers as a way of justifying administrative action. Harry Arthurs perhaps best encapsulates this view in a famous article where he underscored the importance of administrative expertise:

There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternative interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.<sup>141</sup>

Additionally, scholars like Willis,<sup>142</sup> Corry,<sup>143</sup> and Kennedy,<sup>144</sup> all championed an expertise-based account of administrative decision-making that counselled deference to administrative action by courts. And courts, prior to *Vavilov*, accepted the role of expertise in administrative decision-making. In the prior “pragmatic and functional” era, courts were concerned with relative expertise as one of the factors that guided the selection of the standard of review. In *Southam*, for example, Justice Iacobucci held that expertise was the most important factor in selecting the standard of review.<sup>145</sup> And in *Pezim*, despite the presence of a statutory right of appeal, deference to the expertise of decision-makers was seen as an important reason for courts to stay their hand in the standard of review analysis.<sup>146</sup> The doctrinal strength of expertise in this era of administrative law is a testament to its staying power as a functional reason for deference.

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140. Arthurs, “Woe Unto You Judges,” *supra* note 21 at 659.

141. Arthurs, “Protection Against Judicial Review,” *supra* note 21 at 289.

142. Willis, *supra* note 20.

143. Corry, *supra* note 135.

144. Kennedy, *supra* note 134.

145. *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 50.

146. *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at 591.



The third strand of functionalism is a skepticism of judicial review as a means of error correction, and a focus on the benefits of conferring jurisdiction on administrative decision-makers. There are two ways that this strand can be understood. First is a legal conclusion about the role of superior courts in the Canadian constitutional schema. On an extreme end, scholars as eminent as Bora Laskin suggested that judicial review was not a necessary corollary of any of Canada's constitutional arrangements. Indeed, Laskin argued that "there is no constitutional principle on which courts can rest any claim to review administrative board decisions."<sup>147</sup> To Laskin, the legislature had full authority to override judicial review because of the fact that, at least at the time, judicial supremacy was not "enshrined...in any fundamental constitutional law or in our political system."<sup>148</sup> Instead, legislative supremacy, particularly in the enactment of privative clauses, must be respected.<sup>149</sup> Laskin's early views were picked up by later scholars like Harry Arthurs who suggested that the judicial jurisdiction to review administrative decisions was not "inherent" but rather was "subject to any contrary or limiting directions from Parliament."<sup>150</sup> On this account, then, judicial review is not even a guarantee in the Canadian legal system.

Secondly, functionalism on this strand of thinking also takes issue with judicial review as a relative matter. That is, it suggests that judicial review is not empirically sound measure of error correction of administrative decision-making, a view advanced by Peter Hogg:

There is nothing intrinsically good about judicial review-or indeed any other kind of review. On the contrary, review always means that a question decided once has to be decided again. Review is a duplication of effort which involves extra expense and extra delay. It is not worth bearing these costs unless there is a strong likelihood of improvement in the quality of decision.<sup>151</sup>

This strand of functionalism questions the propriety of judicial review as a relative means of solving administrative errors. While it does not necessarily object to judicial review writ large in the vein advanced by Laskin, it does suggest that judicial review is not necessarily the best means of correcting administrative error.

These strands of functionalism all coalesce around a simple idea: in the contest between administrative decision-makers and courts,

147. Bora Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30 Can Bar Rev 989

148. *Ibid* at 990.

149. *Ibid*.

150. Arthurs, "Protection," *supra* note 21 at 278.

151. Hogg, *supra* note 21 at 338.

administrative decision-makers are legally and functionally better suited to decide certain matters. On this account, courts have a limited role to play, if any at all. Instead, the functional reasons guiding delegation to administrative decision-makers are dominant: their supposed expertise, efficiency, and specialization.

Where does this leave *Doré*? *Doré* does not envision the stronger functionalist strain—the one that questions whether judicial review is a constitutional good at all. Indeed, this would be a hard case to make on constitutional matters. *Doré* merely applies a reasonableness standard of review to constitutional questions arising within the remit of the decision-maker. But the reasons *why* *Doré* does so are squarely within the functionalist strain, particularly as it applies to relative expertise and the role of the courts. Recall that *Doré* insists that “[t]he notion of deference” should not stand in the way of conducting rigorous judicial review of constitutional issues.<sup>152</sup> That notion of deference, as Justice Abella notes, is justified by the expertise of decision-makers: “[t]he starting point is the expertise of the tribunals in connection with their home statutes.”<sup>153</sup> For Justice Abella, citing John Evans, expertise does not lose its force specifically because an issue has a constitutional dimension.<sup>154</sup> As such, it would constitute the amateur overturning the expert<sup>155</sup> if courts applied a more searching review simply because an issue was constitutional.<sup>156</sup>

With expertise as the lynchpin of the *Doré* approach, there is a concomitant fear of courts overreaching, and a desire for a legitimate place for administrators in the overall legal scheme. Setting up the *Doré* approach was, in Justice Abella’s view, a different relationship between courts and administrative actors in the Court’s jurisprudence.<sup>157</sup> That revised relationship, brought forward by *Dunsmuir*, was guided by a “policy of deference” that is rooted in legislative intent and expertise.<sup>158</sup> The approach set out in *Doré* emphasizes that expert administrators should have a role in elucidating the content of constitutional protections in the context of their enabling statutes.<sup>159</sup> This, to Justice Abella, citing Mary Liston, opens “an institutional dialogue about the appropriate use and control of

152. *Supra* note 1 at para 5.

153. *Ibid* at para 46.

154. *Ibid*; see John Evans, “Establishing the Standard of Review: The Struggle for Complexity?” (2004) 17 CJALP 59 at 93).

155. Willis, *supra* note 20 at 79.

156. See *Doré*, *supra* note 1 at para 54.

157. *Ibid* at para 30.

158. *Ibid*.

159. *Ibid* at para 35.

discretion, rather than the older command-and-control relationship.”<sup>160</sup> What is envisioned is a decided break from Diceyan thinking, towards a world in which administrators have something valuable to say about the Constitution because of their particular institutional expertise.

In *Doré*, then, one sees how functionalism comes to the fore. The justification for deference—even on constitutional matters—is rooted in the natural expertise and field sensitivity of decision-makers in managing their statutes. But, additionally, there is an implicit worry that generalist courts will unduly interfere with the workings of these statutes, in the name of a specious constitutional claim.<sup>161</sup> The presence of a constitutional claim, on this account, should not transform the respect courts have for the distinct capacity of administrative actors to contribute to the content of the law. So, one sees the respect for expertise of administrators in *Doré* in the act of elucidating the law of the Constitution. This a fundamentally functionalist understanding of administrative law.

## 2. Comparison

The marriage in *Vavilov* between Diceyanism and a culture of justification, and *Doré*’s functionalism, present an opportunity to demonstrate how these theories differ in the doctrine presented in these cases. Indeed, while the theories may in some senses be complementary,<sup>162</sup> there are distinct differences between them. And in the context of *Doré* and *Vavilov*, these differences turn out to be quite significant—and call into question whether *Doré* can stand by in a *Vavilovian* world, as a matter of doctrine.

First, a disclaimer: as noted above, these theories are not watertight compartments that prescribe certain doctrinal answers in every case. Put differently, there are some ways in which Diceyanism, functionalism, and the justificatory school are fundamentally similar. There are a few examples of this. First, functionalism and the justificatory school both envision administrators as contributing to the enterprise of legal development. On this account, the rule of law is not the rule of courts. It is rather the rule of both courts and administrators (and legislatures), contributing to the act of

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

161. *Doré*, *supra* note 1 at para 52: “So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.”

162. See for example, G Blaine Baker, “Willis on ‘Cultured’ Public Authorities” (2005) 55:3 UTLJ 335-336, where the author explores how Willis thought that the internal cultures of administrative agencies made them well-suited to public deliberations about the law.

law-making.<sup>163</sup> And, in terms of other similarities, the justificatory school and functionalism envision a different role for courts: a role in which courts treat decision-makers with respect, rather than suspicion, as under the Diceyan model. And even Diceyanism and functionalism have some similarities. Both are rooted in a respect for Parliament's wish to delegate power. While Diceyanism may view delegation with more suspicion than functionalism, this is a matter of degree: Diceyans still must recognize that, if parliamentary sovereignty is real, so is Parliament's desire to delegate power to other actors, as a matter of empirical fact in the modern administrative state.

But this is largely where the similarities end. If one compares *Vavilov* and *Doré* on their own terms, one sees the doctrinal differences flowing from theoretical differences in these cases.

Take first the topic of expertise, and its role in selecting the standard of review. In *Doré*, as for the functionalist, expertise is the lynchpin of judicial review. It is largely because of the expertise of decision-makers that deference accrues to them. Indeed, it is expertise even on constitutional matters that justifies the selection of a reasonableness standard when decision-makers must balance *Charter* values arising in their mandate. Note, as well, how expertise is used in *Doré*: it is *assumed* by the Court in selecting a reasonableness standard, but it is not required that a decision-maker actually demonstrate their relative expertise through reasons.

But *Vavilov* presents a different story. *Vavilov* resiles from expertise as a reason for deference in terms of selecting a standard of review. Now, expertise is not a reason for deference;<sup>164</sup> expertise comes into play only in the justification stage of the analysis, where reasons can evince expertise to which courts should pay attention.<sup>165</sup> But it is not expertise that is the driver of deference on a wholesale basis. Such an understanding of expertise is justified by the marriage between Diceyanism and the justificatory school. On the Diceyan side, as mentioned above, no administrator can arrogate to themselves power that was not assigned to them by Parliament; and courts, therefore, cannot grant more deference to an administrative decision-maker simply on the basis of assumed expertise. And on the justificatory side, deference is not a submissive concept; instead, it is based on whether a decision-maker has made a fully reasoned and reasonable decision.<sup>166</sup>

163. Kevin Stack, "Overcoming Dicey in Administrative Law" (2018) 68 UTLJ 293.

164. *Vavilov*, *supra* note 10 at para 31.

165. *Ibid* at para 119.

166. Dyzenhaus, "The Politics of Deference," *supra* note 18 at 305.

Expertise is not a reflexive reason for deference on this account. And so, one sees *Vavilov* and *Doré* differing fundamentally on this doctrinal point.

*Vavilov* also differs from *Doré* in another fundamental respect. The role of the courts envisioned in both *Doré* and *Vavilov* are fundamentally different, especially when it comes to constitutional matters and the standard of review. It is true that *Vavilov* expressly withdraws *Doré* from its revisions to the standard of review, but the comments made in *Vavilov* regarding the role of the courts on constitutional issues are stark, indeed. As noted above, the Court largely aligns itself with a Diceyan understanding of the courts when it speaks of constitutional issues. It starts by saying, generally, that the Rule of Law will sometimes require the court to “provide the last word” where it also requires “consistency and for which a final and determinate answer is necessary.”<sup>167</sup> In such cases, discord among administrative actors cannot be tolerated because of what Dicey would call the supremacy of the law. Specific among these cases are those raising constitutional questions. It is worthwhile to quote extensively from what the Court said about its understanding of the relationship between administrative actors, legislatures, and courts:

The Constitution—both written and unwritten—dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.<sup>168</sup>

This is a rather muscular conception of the role of the courts under the Rule of Law, which finds accord with Dicey’s Rule of Law. On this account, administrators are granted the powers they have only by statute, and cannot alter the constitutional scope of those powers. It is the role of the court to ensure that, when administrators interpret the Constitution, they do so in concert with its limits. While, as noted above, *Vavilov* does not include *Doré* in these comments, it is hard to distinguish the areas in which these comments apply (scope of Aboriginal rights, division of powers, etc) from the context in which *Doré* -type claims arise.

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

168. *Ibid* at para 56.

But *Doré* obviously takes a different approach to constitutional questions. Inspired by the functionalist strain of analysis, *Doré* does not concern itself with the traditional roles of legislatures and courts, as *Vavilov* does. Rather, it rests its selection of a reasonableness standard on the expertise of particular decision-makers. But this is a different theoretical basis than *Vavilov*. Under *Vavilov*, correctness is selected because the courts are required to ensure stability in the law on constitutional questions. Under *Doré*, such stability is undermined because multiple administrative actors could have multiple things to say about particular constitutional guarantees on the face of their enabling statutes. Such a state of affairs seems contradictory to *Vavilov*'s clear language.

Secondly, one might argue that *Vavilov* overtakes *Doré*.<sup>169</sup> This view is advanced by Professor Daly, who argues that *Doré* actually “emerges strengthened” after *Vavilov*.<sup>170</sup> The argument goes like this: the *Vavilov* reasonableness presumption applies to all issues going to the “merits.”<sup>171</sup> *Doré*-type questions are part of the merits. Therefore, on this line of thought, the *Vavilov* presumption applies to *Doré*-type issues.

Despite the neatness of the logic in this argument, in my view, it runs up against important constitutional principles. Recall that *Vavilov* roots the presumption of reasonableness on the basis of legislative intent.<sup>172</sup> It is the very fact of legislative delegation that legitimizes the presumption of reasonableness.

This presumption requires a leap in logic (ie) it is not obvious that reasonableness should follow simply because a matter is delegated to an administrative decision-maker. However, to expand the *Vavilov* presumption to encompass *Doré*-type questions—constitutional questions—turns constitutional principles on their head. This is because a legislature cannot do indirectly what it cannot do directly. Specifically, the legislature cannot, itself, dictate the intensity of scrutiny applied to its own enactments by courts.<sup>173</sup> When it comes to statutes and the standard of review, *Vavilov* confirms that legislatures can only specify the standard of review within the

169. I also deal with this argument in similar terms in Mark Mancini, “*Vavilov*’s Rule of Law: A Diceyan Model and its Implications,” CJALP (forthcoming).

170. Paul Daly, “Unresolved Issues after *Vavilov* II: The *Doré* Framework” Administrative Law Matters, online, <<https://www.administrativelawmatters.com/blog/2020/05/06/unresolved-issues-after-vavilov-ii-the-dore-framework/>> [https://perma.cc/FK6G-HTPQ].

171. *Ibid*; *Vavilov*, *supra* note 10, at para 23.

172. *Supra* note 10 at para 30.

173. See *Amax Potash Ltd Etc v The Government of Saskatchewan*, [1977] 2 SCR 576 at 591: legislatures do not have the ability to “limit judicial review of constitutionality.” See also Mark Mancini, “*Doré* Revisited: A Response to Professor Daly,” online, Double Aspect <<https://doubleaspect.blog/2020/05/21/Dore-revisited-a-response-to-professor-daly/>> [https://perma.cc/NKN3-NKPP].

limits imposed by the Rule of Law, a constitutional principle.<sup>174</sup> Applying this line of thought to administrative actors, the legislature should not be able to specify a deferential standard on constitutional matters if it cannot do so with regards to its own legislation. This would convert the tool of delegation into a way for legislatures to escape constitutional scrutiny. For this constitutional reason, the *Vavilov* presumption cannot apply to *Doré*-type questions. *Doré*, in this way, cannot be said to have emerged strengthened from *Vavilov*.

When presented in this fashion, *Vavilov* tends to present a more “centralist” version of administrative law than *Doré*’s “pluralist” version.<sup>175</sup> On the centralist understanding, the courts are largely the guardians of the Constitution, and should intervene freely to ensure that constitutional guarantees are interpreted equally across the board. Correctness review, at least in theory, guarantees this stability. But on a reasonableness standard, as endorsed in *Doré*, the legal system could tolerate “multiple reasonable interpretations” of constitutional guarantees, which take the flavour of the particular statutory objectives that are at play. This could be seen as a contradiction in doctrinal terms between the two cases. Finally, putting aside the selection of the standard of review, there are theoretical strains between *Vavilov*’s justification requirements and *Doré*. Without determining whether *Vavilov* is more rigorous than *Dunsmuir*, it is probably fair to say that *Vavilovian* reasonableness review will be more stringent than *Doré* reasonableness/proportionality review. As noted above, in *Vavilov*, the Court endorsed a culture of justification as defining, in part, what administrators must do to make their decisions reasonable. Reasons are the centerpiece of the analysis, the coin in which administrators buy deference from the courts. A decision, in order to be reasonable, must not only be justified in result, but supported by cogent reasons that engage with a number of key factors, most notably the enabling statute.

But on the other hand, *Doré* mentions no requirements of reasonableness in the constitutional context. While *Doré* makes much of an equity between reasonableness and proportionality,<sup>176</sup> arguing that the approach it adopted works the same “justificatory muscles” as the *Oakes* test,<sup>177</sup> that equity has often amounted to little more than judicial rubber-stamping. Indeed, in *Trinity Western*, the majority noted that all that was required from the Law Society in that case was that it was “alive” to the

174. *Supra* note 10, at para 35.

175. Harry Arthurs, “*Without the Law*”: *Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at 1-12.

176. *Supra* note 1 at para 7.

177. *Ibid* at para 5.



*Charter* issues.<sup>178</sup> There was little in the way of reasoning requirements in terms of constitutional interpretive methodology, or other requirements for reasons. Even though *TWU* involved a law society, typically not subject to stringent reasoning requirements, there was no requirement *at all* for explicitly reasoned decision-making from the Law Society. The dissent took the majority to task for this test:

While the Benchers may not have had a duty to provide formal reasons (Majority Reasons, at para. 55), the rationale for deference under *Doré*—expertise in applying the *Charter* to a specific set of facts (paras. 47-48)—requires more engagement and consideration from an administrative decision-maker than simply being “alive to the issues”, whatever that may mean (Majority Reasons, at para. 56).<sup>179</sup>

Contrast this state of affairs with *Vavilov*, which incorporates aspects of interpretive methodology, and imposes those requirements on decision-makers. More specifically, *Vavilov* asks decision-makers to ensure that their decisions comport with the text, context, and purpose of the statute they are interpreting. This bears a remarkable difference from *Doré* and *TWU*, which import no such requirements when decision-makers engage in constitutional reasoning.

These are the main pressure points in the relationship between *Vavilov* and *Doré*. On one understanding, *Vavilov* tends to revert to a Diceyan understanding of administrative law, under which courts reserve to themselves the final say on certain issues. It also shows a focus on justification, as a doctrinal requirement in most cases. However, *Doré* is rooted in a more functionalist understanding of administrative law, under which expertise is taken as a given and administrators are seen as competent to contribute to the content of the law. These differences in theory lead to direct doctrinal differences.

#### IV. *Saving Doré?*

Given the opposition in theory between *Doré* and *Vavilov*, the question remains: can *Doré* stand as a doctrinal matter? In my view, it can only do so with significant amendment to its fundamental doctrinal precepts. Here, I outline the benefits and drawbacks to various approaches to synchronizing *Doré* and *Vavilov*.

Before turning to this issue, there is a question that should be addressed: should the courts even attempt to reconcile differences between these doctrines? In other words, why is it necessary for doctrine to be

178. *Supra* note 8 at paras 55-56.

179. *Ibid* at para 294.



consistent in these different contexts? While *Doré* raises constitutional issues, and *Vavilov* does not, the same fundamental problem arises: the powers of administrative actors and the amount of scrutiny they should receive. The specific question is whether and how deference should apply in constitutional cases in comparison to cases involving ordinary questions of law. Put differently, if *Vavilov* insists on a rather formalist approach for ordinary questions of law, what compelling reason is there *not* to import parts of this approach for constitutional matters? In this sense, and in the name of consistent doctrine, courts should try to treat these areas the same, while being alive to particularly different, nuanced applications of the doctrine in particular cases.

### 1. *Bifurcation*

One possible remedy to the problem of the schism between *Doré* and *Vavilov* asks courts to bifurcate the standard of review analysis. So this argument generally goes, courts will apply a correctness standard to the question of whether to consider constitutional rights *at all*. This is a legal question, which is a matter of statutory analysis: does the statute permit discretion to consider Charter rights or values? In turn, decision-makers will apply a reasonableness standard to the application of constitutional rights to the facts (say, in a proportionality analysis) if constitutional rights need to be considered.

This approach has a number of benefits. It, at least facially, reconciles the Court's comments in *Vavilov* with *Doré*. That is, it retains a superintending power for the courts on questions of the existence of constitutional rights, but it makes the case for *Doré*'s reliance on expertise much stronger. While it may be true that administrative actors do not have expertise on deciding on the scope or relevance of constitutional values, once those values are ascertained, their application to the facts or in relation to statutory objectives might be an issue over which administrators are more likely to have expertise. Put differently, this approach leaves the courts in a "best of both worlds" situation. On one hand, the court retains the core power of judicial review over constitutional protections but leaves factual inferences to be drawn from those protections to expert administrators. This straddles the Diceyan and functionalist worlds in a way that might be thought to be defensible.

Additionally, bifurcation is supported by precedent. This was the approach adopted by the Ontario Court of Appeal in a post-*Vavilov* decision, *Ferrier*.<sup>180</sup> *Ferrier* involved the *Police Services Act*. Under the

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180. *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 [*Ferrier*].

*Police Services Act*, subject to certain exceptions, police hearings are “open to the public.”<sup>181</sup> In other words, a provision of the statute (s 35(4)) sets out the test for whether a hearing should be closed. In this case, the relevant decision-maker decided that the hearing should be closed. The CBC and others argued that the decision-maker “failed to pay adequate attention to the s. 2(b) *Charter* right to freedom of expression by failing to require an open hearing.”<sup>182</sup> Specifically, the applicants argued that the so-called *Dagenais/Mentuck*<sup>183</sup> test applied to the case: “[t]his test applies to discretionary decisions limiting freedom of the press in relation to court proceedings.”<sup>184</sup> The decision-maker, though, rejected the application of this test because (1) *Dagenais/Mentuck* apparently only applies to situations in the courtroom and (2) the relevant statute prescribed the proper test for determining whether to hold a closed hearing, and that statutory test ousted the consideration of *Dagenais/Mentuck*.

In determining the standard of review, the Court was in an awkward position because “[t]his appeal had been argued and a complete draft of these reasons had been written before the Supreme Court released its decision in [*Vavilov*].”<sup>185</sup> Nonetheless, the Court went on to assess the standard of review under the *Vavilov* framework. Relying on both the “central questions” and constitutional questions correctness categories from *Vavilov*, Sharpe JA noted that “the attack on the decision focussed on the refusal to apply the *Dagenais/Mentuck* test when concluding that the extension hearing should be closed.”<sup>186</sup> This, to the Court, “should” be reviewable on a correctness standard.<sup>187</sup> To Sharpe JA, “[t]he s.2(b) *Charter* right to freedom of expression and freedom of the press relied upon by the appellants is both a matter of central importance to the legal system and a constitutional question.”<sup>188</sup> This was because, as confirmed by *Vavilov*, correctness review “...respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.”<sup>189</sup> In this situation, correctness review was appropriate because the decision of whether the

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181. *Police Services Act*, s.35(3)-(4).

182. *Ferrier*, *supra* note 179 at para 4.

183. From the cases *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *R v Mentuck*, 2001 SCC 76.

184. *Ferrier*, *supra* note 180 at para 15.

185. *Ibid* at para 29.

186. *Ferrier*, *supra* note 180 at para 32.

187. *Ibid* at para 35.

188. *Ibid* at para 36.

189. *Vavilov*, *supra* note 10 at para 53; *Ferrier*, *supra* note 180 at para 36.

*Dagenais/Mentuck* test applied was different from the issue faced in *Doré*, which was how the s.2(b) right implicated the discretionary decision.<sup>190</sup> Such situations would be subject to reasonableness review.

Bifurcation is also the *modus operandi* in cases involving the duty to consult with Indigenous peoples. Professor Daly argues, in this context, that “there is nothing novel in treating threshold questions of constitutionality as requiring correctness review.”<sup>191</sup> And he marshals two examples to prove his point: *Haida Nation*<sup>192</sup> and *Rio Tinto*,<sup>193</sup> in the context of the Aboriginal duty to consult, and *Ktunaxa*,<sup>194</sup> which was in essence a *Doré* case.

*Haida Nation* was, at least in the duty to consult context, the seminal statement on the standard of review. It said the following about how courts should review the assessment of the duty to consult by a “decision-maker”:

On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.<sup>195</sup>

*Haida Nation* thus, at least in one sense, endorses bifurcation. It suggests that extricable legal questions could be reviewed on a correctness standard

190. *Ferrier*, *supra* note 180 at para 37.

191. Paul Daly, “The Vavilov Framework and the Future of Canadian Administrative Law” (January 15, 2020) Ottawa Faculty of Law Working Paper No. 2020-09. Available online: SSRN: <<https://ssrn.com/abstract=3519681>> at 31.

192. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*].

193. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*].

194. *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.

195. *Haida Nation*, *supra* note 193 at para 61.

(the “existence” of the duty to consult falls in this category). But, on the other hand, it suggests that factual questions are subject to a “degree of deference.”

*Rio Tinto* solidifies the point when it comes to administrative tribunals and their handling of the duty to consult. The Court starts by noting that “[t]he duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal.”<sup>196</sup> The question, then, is fundamentally one of legislative interpretation. But, despite this, and notwithstanding the general standard of reasonableness that applied to such questions under *Dunsmuir*, the Court in *Rio Tinto* concludes that:

The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.<sup>197</sup>

*Rio Tinto*, then, confirms *Haida Nation* and the idea that at least in the duty to consult context, bifurcating the standard of review is a regular, uncontroversial practice.

In principle and in precedent, then, bifurcation appears to be a sound way to bridge the conceptual gap between *Doré* and *Vavilov*. But there are problems with bifurcation as a doctrinal approach. First, bifurcation seems inconsistent with the approach in *Doré*. As noted above, *Doré* approaches a unified public law in which the difference between constitutional and administrative review is “not as stark.”<sup>198</sup> In a unified public law:

...the licence to interpret and implement constitutional values extends to administrative officials, which entails that judges should respect administrative decisions concerning constitutional matters provided that they are rendered in a fair, transparent, and reasonably justified manner.<sup>199</sup>

*Doré* largely incorporates this public law theory, bolstered with functionalist credentials. By articulating the expertise of administrative decision-makers, *Doré* implicitly holds that these decision-makers can contribute to the meaning of the law, including the Constitution,<sup>200</sup> even

196. *Rio Tinto*, *supra* note 192 at 55.

197. *Ibid* at para 67.

198. See Paul Daly, “The Court and Administrative Law: Models of Rights Protection” (2017) 78 SCLR at 75.

199. Lewans, “Unity,” *supra* note 6 at 518-519.

200. Mark Mancini, “*Trinity Western*: Is this the price of good doctrine?” online: Double Aspect

though it does not impose explicit reasoning requirements on decision-makers. So goes this argument, a unified standard of deferential review should apply to decisions of administrators, who contribute to the shared enterprise of law-making in modern day Canada. The reasonableness standard on constitutional matters broadly construed achieves this goal by respecting the role of administrative decision-makers in contributing to the law.

Bifurcation upsets this unity. By extricating questions of law that are said to be above and beyond the remit of administrators, courts undermine the message of *Doré*: that administrators can contribute to shared constitutional meaning. Put differently, bifurcation says that the expertise of administrative decision-makers does not extend to the recognition of *Charter* values in the context of their statutory schemes. The approach is premised on an old distinction between questions of law and questions of fact: the former is the preserve of the courts. *Doré*, and the unity of public law thesis, are designed to break down these old barriers in favour of a new approach that recognizes the legitimate jurisdiction of administrative decision-makers.

Secondly, even if one does not accept *Doré*'s line of analysis on this question, bifurcation arguably does not go far enough on one interpretation of *Vavilov*'s own terms. That is, if one takes the strongest possible reading of *Vavilov* as requiring constitutional consistency across statutory contexts, then there is a chance that even the *Doré* proportionality analysis should fall to be reviewed on a correctness standard.

This is true on both sides of the bifurcated analysis. First, the decision whether a statute ousts *Charter* values arguably falls within a strong interpretation of *Vavilov*'s comments about the Rule of Law. When a decision-maker decides that a statute ousts discretion, as in *Ferrier*, and the *Charter* therefore does not apply, the decision-maker is effectively short-circuiting a potentially meritorious constitutional claim before it begins. This is a decision which has far-reaching effects beyond the statute or the case before the decision-maker; it goes, in the abstract, to the reach and force of the *Charter*. This is, at least arguably, a situation that engages the unique role of the courts in interpreting the Constitution, as confirmed by *Vavilov*.

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<<https://doubleaspect.blog/2018/07/17/trinity-western-is-this-the-price-of-good-doctrine/>> [<https://perma.cc/FFK9-DN6C>]: "In effect, the Court merged administrative and constitutional review"; Matthew Lewans, "Administrative Law, Judicial Deference, and the *Charter*" (2013) 23:2 Constitutional Forum at 19: arguing that *Doré*, as part of a larger move away from "formal constitutionalism," blurred the lines between legislative, adjudicative, and administrative functions, permitting "administrative officials [to] share responsibility for interpreting the law."

Now turn to the proportionality side of the equation. *Doré* proceeds on the assumption that, because the proportionality analysis is rooted in the facts of particular cases, the decision-maker has expertise in applying constitutional values to those facts.<sup>201</sup> But there are three related reasons why *Doré*'s proportionality analysis could be a legal question of general importance or a constitutional question on a strong interpretation of *Vavilov*'s terms. First, while proportionality analysis purports to be about the particular exercise of discretion on particular facts, there is the fundamental question of whether *Charter* rights were adequately weighed in the balance with statutory objectives. This question, again, goes to the scope and application of the *Charter*, which itself could be a question that transcends any particular statutory arrangement, on *Vavilov*'s terms. Second, the role of the courts as unique constitutional interpreters would be undermined if they could not ensure the consistent application of constitutional law across all instances of discretionary actors. While reasonableness review is still *review*, there is the possibility that there could be multiple reasonable exercises of discretion when it comes to constitutional values. But this undermines the uniformity required by the Rule of Law, on *Vavilov*'s own terms. Finally, another issue is consistency: having to do with the difference between sorts of review in discretionary and statutory contexts. There is no doubt that the correctness standard applies when a statute is attacked as inconsistent with the Constitution. But *Doré* takes a different turn, applying a reasonableness standard in the proportionality analysis. The very act of applying deference in the context of proportionality means that the consistency required by the Rule of Law is undermined; based on whether a statute is attacked or an act of discretion is attacked, under *Doré*, constitutional rights mean something different.<sup>202</sup> This has been described as arbitrary,<sup>203</sup> and seems inconsistent with *Vavilov*'s focus on stability when it comes to constitutional questions.

But the point is not that any one argument is decisive: it is that there is a potential for conflict. Taken together, bifurcation presents problems from both the *Doré* and *Vavilov* perspectives. On the *Doré* perspective, it fails to respect the unity of public law thesis that defines the case. On the *Vavilov*

201. *Supra* note 1 at para 46, 54.

202. See also Evan Fox-Decent & Alexander Pless, "The *Charter* and Administrative Law: Cross Fertilization or Inconstancy?" in Lorne Sossin & Colleen Flood, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2012) at 431: the correct reading of *Doré* is that express authority to infringe a *Charter* right requires the *Oakes* analysis, but imprecise authority does not, one can legitimately question why, when the Constitution is the supreme law of Canada, there would be two different approaches to determining the constitutionality of government action depending on whether it is expressly authorized by legislation or not."

203. See Ponomarenko, *supra* note 9 at 127.

perspective, *Vavilov* could be said to strengthen the meaning of the Rule of Law in terms of the role of the courts on constitutional questions. On that front, it could be inconsistent with either *Doré* or *Vavilov*.

## 2. *Stricter reasonableness review*

One additional move that could be made to synthesize *Doré* with *Vavilov* might involve adopting the reasonableness standard from *Vavilov* into the *Doré* context. Stronger reasonableness review on constitutional matters might bolster the justificatory credentials of *Doré*, bringing it closer in line with *Vavilov*.

The approach might be based on *Vavilov*'s contribution to a "culture of justification." Specifically, the Court notes that "[w]here the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes."<sup>204</sup> Particularly, where a decision has consequences that are harsh, decision-makers will be asked to grapple with those consequences.<sup>205</sup> Where constitutional rights are at stake, there is good reason to worry about the consequences on individuals. Constitutional cases often involve highly important rights and interests that could clearly encompass life and death issues, as contemplated in *Vavilov*.<sup>206</sup>

What would this approach entail? Recall that *Vavilov*, in the context of legislative interpretation by administrators, asked decision-makers to focus on a number of "constraints" that would determine whether a particular decision is reasonable or not. Some of these constraints are particularly relevant to the constitutional context. For example, in the context of assessing the reasonableness of a decisionmaker's constitutional conclusions, *Vavilov*'s focus on the "governing statutory scheme" could easily simply be rebranded as the governing constitutional text; precedent, in both contexts, would be relevant; and the principles of statutory interpretation emphasized in *Vavilov* could become the principles of constitutional interpretation in the *Doré* context. Additionally, the Court could impose explicit reasoning requirements on all of these constraints; where they are in play, decision-makers should reason in relation to them, just as the Court asked decision-makers to reason respecting the *Vavilov* constraints.

Reasoning about constitutional rights in this way would require more than what *Doré* currently prescribes. That is, decision-makers may need to engage with the constitutional text more explicitly. This means that the

204. *Vavilov*, *supra* note 10 at para 133.

205. *Ibid.*

206. *Ibid.*



approach focusing on *Charter* values is somewhat beside the real point of inquiry: to determine what the Constitution itself prescribes in terms of “space” for the decision-maker to maneuver. In this sense, decision-makers will also be asked to engage with the “purposive approach” to constitutional interpretation, the leading interpretive approach at the Supreme Court.<sup>207</sup> Decision-makers, in their reasons, would need to explicitly engage with the text in its “proper linguistic, philosophic and historical contexts.”<sup>208</sup> There could be room for minor omissions in the context of this reasoning,<sup>209</sup> but in general, as in the statutory context, decision-makers will be asked to engage with the most salient and material aspects of the interpretive context.

In my view, this approach could be beneficial in bridging the gap between *Vavilov* and *Doré*. On one hand, asking administrators to reason explicitly about the Constitution arguably brings *Doré* closer to the justificatory roots of *Vavilov*. If reasons are the coin in which administrative decisions purchase their legitimacy, then the same should apply in the context of the Constitution; perhaps, actually, the case is stronger, given the stakes to the individual claimants. Additionally, asking decision-makers to deal with the actual text of the Constitution in its interpretive context arguably brings *Doré* into a tighter relationship with more traditional, formal legal materials. While it would be odd to say that such a move brings *Doré* closer to the world of Dicey, this approach does focus attention on the text of the Constitution, in a way that *Doré* previously did not.

However, there are problems with this approach. First, this approach says nothing about the selection of the relevant standard of review. Assuming there is a difference when courts apply a reasonableness standard over the correctness standard, this matters. As the Court in *Vavilov* notes, correctness review has a substantive element: it guards the role of the courts in enforcing the strictures of constitutional law.<sup>210</sup> This role of the courts is one that the Supreme Court appears to treasure in its precedents.<sup>211</sup> Yet simply focusing on reasonableness review as a way to bridge the conceptual gap between *Doré* and *Vavilov* ignores this important role of the courts, as interpreted by the Supreme Court of Canada.

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207. See, most recently, *R v Poulin*, 2019 SCC 47. But by no means is this the only interpretive approach: see Leonid Sirota & Benjamin Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 50:2 UBC L Rev 505.

208. *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 117.

209. *Vavilov*, *supra* note 10 at 122.

210. *Ibid* at para 53.

211. *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155; *Ell v Alberta*, 2003 SCC 35 at para 23; *United States v Burns*, 2001 SCC 7 at para 35; *Kourtesis v MNR*, [1993] 2 SCR 53 at 90; *Reference re Supreme Court Act*, ss 5-6, 2014 SCC 21 at para 89.



But also, this approach might be seen to undermine *Doré*, as well. If *Doré* accomplished anything, it was the “democratization” of administrative decision-making.<sup>212</sup> That is, “it gives non-lawyers the ability to produce binding interpretations of constitutional law (within the bounds of reasonableness/proportionality).”<sup>213</sup> Under the *Doré* approach, where decision-makers balance *Charter* values with statutory objectives, decision-makers are not asked to deploy onerous legalistic tools, as Paul Daly notes:

This approach recognizes that it would be unrealistic and inappropriate to require administrative decision-makers to have Professor Hogg’s loose-leaf *Constitutional Law of Canada* text to hand whenever they encounter a human rights issue and Ruth Sullivan’s text on the interpretation of statutes on the shelf in case a knotty interpretive problem arises in the course of their work. It *deformalizes* the process of decision-making by front-line officials. Rather than *the Charter*, they are directed towards *Charter values*; rather than *statutory text*, they are directed towards *statutory objectives*. And they are directed to *balance Charter values* against statutory objectives, having regard to “*the specific facts of the case*.”<sup>214</sup>

*Doré*, then, is based on an approach to decision-making that is far more informal than the proposed approach to constitutional questions advanced herein. It even appears more informal than *Vavilov*. While *Vavilov* does say that “[a]dministrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case”<sup>215</sup> it also says that “the merits of an administrative decision-maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.”<sup>216</sup> On this front, the principles of statutory interpretation “apply equally when an administrative decision maker interprets a provision.”<sup>217</sup> Imposing such constitutional interpretive principles on decision-makers tends to undermine the overall logic of *Doré*, which is designed to informalize the process of constitutional interpretation.

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212. See Paul Daly, “A Week of Arguments About Deference,” *Administrative Law Matters*, online: <<https://www.administrativelawmatters.com/blog/2018/06/18/a-week-of-arguments-about-deference/>> [<https://perma.cc/LZR9-MX8L>].

213. *Ibid.*

214. See Paul Daly, “Human Rights in Administrative Decision-Making IV: An Informal, Good Faith Approach,” *Administrative Law Matters*, online: <<https://www.administrativelawmatters.com/blog/2020/01/15/human-rights-in-administrative-decision-making-iv-an-informal-good-faith-approach/>> [<https://perma.cc/4GY7-8NQH>].

215. *Supra* note 10 at para 119.

216. *Ibid.* at para 120.

217. *Ibid.*

Additionally, as noted above, there is at least some judicial and academic disagreement over whether *Vavilov* actually does impose stricter reasonableness review. While, as I have noted above, it appears that *Vavilov* is stricter than what *TWU* imposed, if *Vavilov* does not impose stricter reasonableness review, then this option is not fairly available. This is an issue that has divided courts, already. But while it is possible that *Vavilov* is not as strict as what preceded it, there is at least a question over its status.

### 3. *Synthesis*

Which approach is ultimately adopted is a matter of assessing the benefits and drawbacks of both bifurcation and stricter reasonableness review. As noted above, bifurcation has the support of precedent; but it seems to run afoul of both *Doré* and *Vavilov*. On the other hand, stricter reasonableness review largely brings *Doré* in line with *Vavilov*'s conception of reasonableness review; but it has nothing to say about the role of correctness review and the classically understood role of the courts in enforcing constitutional guarantees.

Which understanding is adopted is ultimately a matter of the art of the possible. To my mind, the Court is less likely to want to upset the theoretical underpinnings of *Doré* through bifurcation. What is desirable is an approach which does the least violence to Court's existing body of precedents. Bifurcation would wholly undermine *Doré* without much in the way of imposing reasoning requirements on decision-makers, making *Vavilovian* reasonableness review quite different from reasonableness review in the constitutional context.

On the other hand, stricter reasonableness review is a likely candidate to renovate *Doré* in light of *Vavilov*. A template for this stricter reasonableness review already exists in *Vavilov*, and so it would be relatively easy for the Court to transpose it to the constitutional context. Additionally, if the Court is so inclined, it can keep the theoretical underpinnings of *Doré* intact while synthesizing it with the arguable true basis of *Vavilov*: the guidance it gives on the reasonableness standard. Perhaps more importantly, stricter reasonableness review will impose the "culture of justification" animating *Vavilov* across administrative contexts. No matter if the context is constitutional or run-of-the-mill legal interpretation, administrators will have basic reasoning requirements with which they must engage. This unified culture of justification arguably supports *Doré*'s underlying premises while keeping *Vavilov* intact.

*Conclusion*

In conclusion, this paper has argued that there is a conceptual gap between *Doré* and *Vavilov* that requires some sort of correction. *Vavilov* threads together two schools of administrative law thought: a classic school championed by A.V. Dicey, and a newer school focused on inculcating a “culture of justification” in administrative decision-making. On the other hand, *Doré* is largely premised on a functionalist understanding of administrative law, and perhaps secondarily by an understanding that promises administrative contributions to the enterprise of law-making. These schools of thought are not necessarily diametrically opposed; but they do lead to different doctrinal applications in certain areas.

As a result, what is required is a doctrinal approach that bridges the conceptual gap between *Vavilov* and *Doré*. This paper reviewed two: (1) bifurcation and (2) stricter reasonableness review. Both have their benefits and drawbacks, but stricter reasonableness review has the added benefit of synthesizing *Doré* and *Vavilov* on one important point: the content of the reasonableness standard, across the board.