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One Rule to Rule Them All: Subordinate Legislation and the Law of Judicial Review

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Article abstract

The Supreme Court's decision in *Vavilov* purported to provide a complete rule regime for the review of administrative action, simplifying an area of the law subject to erratic doctrinal amendment. One question, post-*Vavilov*, is how far this rule regime sweeps.

For some time, Canadian courts have struggled to review subordinate legislation — executive regulations, municipal bylaws, and other binding rules. At some points, courts have suggested that this sort of legislation should be reviewed highly deferentially such that only a regulation completely unrelated to an enabling statute would be *ultra vires*. At other times, courts have simply applied the run-of-the-mill reasonableness standard, which governs adjudicative decisions, to municipal bylaws and other binding rules. This confusion has only proliferated after the Supreme Court's rejigging of the law of judicial review in *Vavilov*, and courts have since struggled to determine whether *Vavilov*, which sets a presumptive standard of reasonableness for all administrative action, applies to subordinate legislation.

This paper argues that *Vavilov*'s rule regime, whatever its flaws, provides a set of constitutionally compliant rules that are workable in the context of subordinate legislation, including executive legislation. It argues that *Vavilov*'s simplifying mission should be construed broadly. By centring the institutional design choices of legislatures, *Vavilov* connects to the legitimate constitutional source of subordinate legislation: its attachment to a statute adopted in the primary lawmaking act. This core feature of *Vavilov* makes it transferable, if imperfectly, to the context of subordinate legislation. It also makes *Vavilov* an attractive starting point for other areas of the law of judicial review.

ARTICLE

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For some time, Canadian courts have struggled to review subordinate legislation — executive regulations, municipal bylaws, and other binding rules. At some points, courts have suggested that this sort of legislation should be reviewed highly deferentially such that only a regulation completely unrelated to an enabling statute would be *ultra vires*. At other times, courts have simply applied the run-of-the-mill reasonableness standard, which governs adjudicative decisions, to municipal bylaws and other binding rules. This confusion has only proliferated after the Supreme Court's rejigging of the law of judicial review in *Vavilov*, and courts have since struggled to determine whether *Vavilov*, which sets a presumptive standard of reasonableness for all administrative action, applies to subordinate legislation.

This paper argues that *Vavilov*'s rule regime, whatever its flaws, provides a set of constitutionally compliant rules that are workable in the context of subordinate legislation, including executive legislation. It argues that *Vavilov*'s simplifying mission should be construed broadly. By centring the institutional design choices of legislatures, *Vavilov* connects to the legitimate constitutional

LA DÉCISION DE la Cour suprême dans l'affaire *Vavilov* visait à fournir un régime de règles complet pour le contrôle de l'action administrative, simplifiant ainsi un domaine du droit sujet à des modifications doctrinales erratiques. Une question qui se pose, après *Vavilov*, est de savoir jusqu'où s'étend ce régime de règles.

Depuis un certain temps, les tribunaux canadiens s'efforcent d'examiner la législation subordonnée — les règlements exécutifs ou municipaux et les autres règles contraignantes. À certains moments, les tribunaux ont suggéré qu'il faut faire preuve de déférence en examinant ce type de législation, de sorte que seul un règlement complètement étranger à une loi habilitante serait *ultra vires*. À d'autres moments, les tribunaux ont simplement appliqué la norme standard du caractère raisonnable, qui régit les décisions administratives, aux règlements municipaux et à d'autres règles contraignantes. Cette confusion n'a fait que proliférer après le remaniement du droit du contrôle judiciaire par la Cour suprême dans *Vavilov*, et les tribunaux se sont depuis efforcés de déterminer si *Vavilov*, qui établit une présomption de l'application de la norme du caractère raisonnable à toutes les actions administratives, s'applique à la législation subordonnée.

Cet article affirme que le régime de règles de *Vavilov*, malgré ses défauts, fournit un ensemble de règles conformes à la Constitution qui sont applicables

source of subordinate legislation: its attachment to a statute adopted in the primary lawmaking act. This core feature of *Vavilov* makes it transferable, if imperfectly, to the context of subordinate legislation. It also makes *Vavilov* an attractive starting point for other areas of the law of judicial review.

dans le contexte de la législation subordonnée, y compris la législation exécutive. Il affirme que la mission simplificatrice de *Vavilov* doit être interprétée au sens large. En mettant l'accent sur les choix des législatures en matière de conception institutionnelle, *Vavilov* établit un lien avec la source constitutionnelle légitime de la législation subordonnée : son rattachement à une loi adoptée dans le cadre de l'acte législatif primaire. Cette caractéristique essentielle de *Vavilov* le rend transférable, bien qu'imparfaitement, au contexte de la législation subordonnée. Elle fait également de *Vavilov* un point de départ intéressant pour d'autres domaines du droit du contrôle juridictionnel.

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One Rule to Rule Them All: Subordinate Legislation and the Law of Judicial Review

Mark P. Mancini[*]

INTRODUCTION

It is commonly said that "the principles and grounds of judicial review apply differently in many contexts."[1] A contextual approach to judicial review seems inevitable, a result of the complexity created by legislatures "who wisely decided that not all administrative agencies would operate in the same way."[2] This complexity and variability is now a hallmark of the ever-changing modern regulatory state.[3] Nonetheless, Canadian administrative law has struggled with this complexity through debates over the standard of review of administrative action. The Supreme Court has cycled through different "rule-regimes" for this purpose.[4]

In *Vavilov*, the Court provided a new, extensive, and sweeping template for selecting the standard of review of administrative action and applying the presumptive reasonableness standard.[5] Namely, it focused on "institutional design choices" made by legislatures, rationalizing a strong presumption of reasonableness review.[6] *Vavilov* structures its reasonableness

* Assistant Professor, Thompson Rivers University, Faculty of Law. Thank you to the anonymous reviewers for the helpful comments.

1 Michael Taggart, "Proportionality, Deference, Wednesbury" [2008] NZLR 423 at 450.

2 The Honourable Justice Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002) 27:2 Queen's LJ 859 at 872.

3 Chief Justice of Canada Beverley McLachlin, "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016) 29:2 Can J Admin L & Prac 127 at 128.

4 Dean R Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge, UK: Cambridge University Press, 2018) (rule-regimes are doctrinal schemata that "regulate the exercise of power and discretion of judges in the supervisory jurisdiction" at 24).

5 *Canada* (*Minister of Citizenship and Immigration*) *v Vavilov*, 2019 SCC 65 at para 7 [*Vavilov*].

6 *Ibid* at para 36.

standard around institutional design choices. Conditioned by several "constraints," administrative decision makers are bound by the law they must interpret.[7] Importantly, *Vavilov* declared that it was a "holistic revision of the framework for determining the applicable standard of review," meaning that courts should "look to these reasons first in order to determine how this general framework applies" to a future case.[8]

Yet questions remain after *Vavilov*. While *Vavilov* purports to simplify the law of judicial review around legislative delegation, one question is how far this principle sweeps.[9] This question has characterized a significant problem in the pre- and post-*Vavilov* world:[10] under what framework should courts review subordinate legislation—regulations promulgated by the executive, municipal by-laws, and other rules of general application?[11] In *Katz,* the Supreme Court's most recent substantive statement on the matter, it restated the rule for review of these instruments: the only

7 *Ibid* at paras 108–10.

8 *Ibid* at para 143.

9 American administrative law has struggled with this problem, and it has spawned an array of literature debating the metes and bounds of *Chevron*'s domain—in other words, what is the "trigger" for deference? See Thomas W Merrill & Kristin E Hickman, "*Chevron*'s Domain" (2001) 89:4 Geo LJ 833; Kristin E Hickman & Aaron L Nielson, "Narrowing *Chevron*'s Domain" (2021) 70:5 Duke LJ 931.

10 See generally John Mark Keyes, *Executive Legislation*, 2nd ed (Markham, ON: LexisNexis Canada, 2010) at 552 [Keyes, *Executive*]; John M Evans, "Reviewing Delegated Legislation After *Vavilov*: *Vires* or Reasonableness?" (2021) 34:1 Can J Admin L & Prac 1; John Mark Keyes, "Judicial Review of Delegated Legislation: The Long and Winding Road to Vavilov" (2020) Ottawa Faculty of Law, Working Paper No 2020-14 [Keyes, "Vavilov"]; Mark Mancini, "Issue #68: November 27, 2022" (27 November 2022), online (newsletter): <sear.substack.com/p/issue-68-november-27-2022>; Paul Daly, "Resisting which Siren's Call? Auer v Auer, 2022 ABCA 375 and TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs), 2022 ABCA 381" (24 November 2022), online (blog): <administrativelawmatters.com/blog/2022/11/24/resisting-which-sirens-call-auer-v-auer-2022-abca-375-and-transalta-generation-partnership-v-alberta-minister-of-municipal-affairs-2022-abca-381> [Daly, "Siren's Call"]; Mark Mancini & Martin Olszynski, "Reviewing Regulations Post-*Vavilov*: *Ecology Action Centre v Canada* (Part II)" (24 December 2021), online (blog): <ablawg.ca/2021/12/24/reviewing-regulations-post-Vavilov-ecology-action-centre-v-canada-part-ii>; Shaun Fluker, "Judicial Review on the *Vires* of Subordinate Legislation: Full *Vavilov*, Partial *Vavilov*, or No *Vavilov*?" (6 February 2023), online (blog): <ablawg.ca/2023/02/06/judicial-review-on-the-vires-of-subordinate-legislation-full-Vavilov-partial-Vavilov-or-no-Vavilov> [Fluker, "Full *Vavilov*"]; Shaun Fluker, "Judicial Review on the *Vires* of Subordinate Legislation" (24 May 2018), online (blog): <ablawg.ca/2018/05/24/judicial-review-on-the-vires-of-subordinate-legislation> [Fluker, "Judicial Review"]; Sara Blake, "Clarity on the Standard of Review of Regulations" (20 December 2022), online (commentary): <canliiconnects.org/en/commentaries/90432>.

11 I follow Elmer Driedger in using the category of "subordinate legislation" as the starting point (see Elmer A Driedger, "Subordinate Legislation" (1960) 38:1 Can Bar Rev 1 at 2–3).

question is whether the regulation is "completely unrelated" to its enabling statute's purpose.[12] In other moments, the Court suggested that municipal by-laws, and administrative rules with a legislative character, are reviewed like normal administrative decisions, using the modern approach to statutory interpretation.[13] After *Vavilov*, appellate courts have split on whether to apply *Katz*, or the standards of judicial review in *Vavilov*, to a wide range of "legislative" instruments, with a prominent "exchange" on the issue between the Alberta Court of Appeal and the Federal Court of Appeal.[14]

This paper argues that *Vavilov*'s rule-regime provides a set of constitutionally compliant rules that are workable in the context of all delegated administrative actions, including executive legislation and other subordinate legislative acts. By centering the institutional design choices of legislatures nested within a system of divided and limited constitutional powers, *Vavilov* connects to the legitimate constitutional source of all administrative authority: its attachment to a statute adopted in the primary law-making act. This core feature of *Vavilov* makes it transferable, if imperfectly, to the context of subordinate legislation,. This conclusion does not just resolve the question of the standard of review for regulations, but it also paves the way for how future debates in administrative law might be resolved: with reference to the principles and rules contained in *Vavilov*. In this sense, the resolution of the subordinate legislation question has implications for future controversies in administrative law.

In part I, I explain how *Vavilov*'s rule-regime works, and why its design is principled and practically sound for all administrative action. In part II, I specify the rule-regime for the context of subordinate legislation. The fundamental question is whether the subordinate legislation falls within

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As I will later point out, this category also includes executive legislation—legislation promulgated by the executive.

12 *Katz Group Canada Inc v Ontario* (*Health and Long-Term Care*), 2013 SCC 64 at para 28 [*Katz*].

13 See e.g. *West Fraser Mills Ltd v British Columbia* (*Workers' Compensation Appeal Tribunal*), 2018 SCC 22 at para 10 [*West Fraser*]; *Green v Law Society of Manitoba*, 2017 SCC 20 at para 20 [*Green*]; *Catalyst Paper Corp v North Cowichan* (*District*), 2012 SCC 2 at para 12 [*Catalyst*].

14 For cases applying *Vavilov*, see *Portnov v Canada* (*AG*), 2021 FCA 171 [*Portnov*]; *Innovative Medicines Canada v Canada* (*AG*), 2022 FCA 210 [*Innovative Medicines*]; *Médias Transcontinental c Ville de Mirabel*, 2023 QCCA 863; *Colchester County* (*Municipality*) *v Colchester Containers Limited*, 2021 NSCA 53; *1120732 BC Ltd v Whistler* (*Resort Municipality*), 2020 BCCA 101; *Service de calèches et traîneaux Lucky Luc c Ville de Montréal*, 2022 QCCA 1610 at paras 56–59. For the most prominent examples of cases following *Katz*, see *Auer v Auer*, 2022 ABCA 375 [*Auer*]; *TransAlta Generation Partnership v Alberta* (*Minister of Municipal Affairs*), 2022 ABCA 381 [*TransAlta*]; *Ecology Action Centre v Canada* (*Minister of Environment and Climate Change*), 2021 FC 1367.

the "perspective within which a statute is intended to operate."[15] The theory developed in the Alberta courts elides this constitutional basis, while *Vavilov* provides a useful rule-regime for the review of subordinate instruments that respects it. In part III, I show how *Vavilov*'s constitutional commitments practically play out in the context of subordinate legislation, while adverting to this context to show how *Vavilov*'s general template is appropriate, if imperfect. I explain how *Vavilovian* reasonableness is concerned with the principles of statutory interpretation and the legal scope of regulatory action, not its policy merits. I also explain how *Vavilov*'s focus on justification jibes with this commitment to legislative design choices.

The contribution of this work is two-fold. First, it explores some of the principles and doctrinal design choices that characterize *Vavilov*, and in doing so, it suggests that *Vavilov*'s template reveals a set of important starting points for problems—current and future—in the law of judicial review.[16] Second, it purports to provide a path forward for the review of subordinate instruments, one that seeks to preserve the principled accomplishment of *Vavilov*.[17] This paper is not a historic examination of the grounds of review for subordinate legislation; that trajectory is well-documented.[18] Rather, I hope to use the context of subordinate legislation as a proving ground for *Vavilov*'s rule-regime.

I. *VAVILOV*'S RULE-REGIME

A. *Vavilov*'s Commitments

Before turning to the specific context of subordinate legislation, it is worth stating an organizing premise: *Vavilov* embeds commitments to certain principles that are probative for the entire world of administrative law. *Vavilov* was a unique case. It was a wide-ranging investigation—invited by the Supreme Court—of the soundness and workability of the law of judicial review. For this reason, and given the extensive template it entrenches,

15 See *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC) at 140 [*Roncarelli*]. In the context of subordinate legislation, see *West Fraser*, *supra* note 13 at para 10.

16 I make this point with reference to another area of the law of judicial review: see Mark Mancini, "Foxes, Henhouses, and the Constitutional Guarantee of Judicial Review: Re-Evaluating Crevier", Can Bar Rev [forthcoming in September 2024].

17 One appellate court judge has suggested that "*Vavilov* stands as one of the Supreme Court's finest cases, setting out doctrine based on coherent underlying theory" (see Justice David Stratas, "Issue #100: August 6, 2023" (6 August 2023), online (newsletter): <sear.substack.com/p/issue-100-august-6-2023>).

18 See Keyes, "Vavilov", *supra* note 10.

there is good reason to see *Vavilov* as a holistic starting point for questions that were outside of the scope of the case's contemplation.

Vavilov begins with a strong presumption of reasonableness review, rooted in the act of delegation itself. This is a deferential standard that depends on the strength of an administrator's reasons in support of its understanding of a statutory delegation. In *Vavilov*, a delegated power to administer a statute includes an implied power to interpret that statute.[19] This rule is powerful and sweeping: the Court eliminated several contextual reasons that might motivate a presumptive posture of deference, "some of which have taken on influential roles in the standard of review analysis at various times."[20] These are legion, including "the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice," and generalized presumptions of expertise.[21] *Vavilov* concluded that none of these rationales should guide the process of selecting the standard of review any longer. Instead, a simpler idea prevailed: the mere delegation of power itself justified the reasonableness standard's application as a presumptive matter.[22]

While this clear presumptive rule will apply in most cases, escaping complexity is nearly impossible in the law of judicial review. *Vavilov* accepts this reality in two ways. First, it carves out exceptions to the presumptive rule of deference in cases where the legislature indicates a contrary institutional design choice: these include a legislated standard of review, a right of appeal, or a scheme that contemplates concurrent jurisdiction between courts and administrators.[23] This is no small thing. In pre-*Vavilov* law, statutory rights of appeal that provided a full appeal—as to a court—from an administrative decision, were not treated as compelling legislative signals inviting courts to act as they would on appeal.[24] This, as the *Vavilov* Court pointed out, was unprincipled: when the legislature uses the word "appeal," it is a signal about the relationship it wanted to entrench as between an administrative decision maker and the court in relation to a decision.[25]

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19 *Vavilov*, *supra* note 5 at para 24.

20 *Ibid* at para 26.

21 *Ibid* at para 29.

22 *Ibid* at para 26.

23 See *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at paras 26–28.

24 *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 27–31.

25 *Vavilov*, *supra* note 5 at paras 44–45.

Second, in outlining several constraints that will condition a court's application of the reasonableness review, the Court states that "[b]ecause administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision."[26] This too, centres the enabling statute's language. In a reasonableness review, it is "the biggest constraint of all."[27] Where that language is circumscribed, it will constrain the range of outcomes available to the decision maker.[28] Where language is broad, instead, more latitude will be afforded to the decision maker.[29] Nonetheless, legislative language acts as a hard stop: "[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."[30]

The strength of the rule should not be understated. Overriding another contextual guide to the standard of review—the nature of the question[31]—the Court held that so-called "jurisdictional questions" no longer attract a correctness review.[32] This is because the reasonableness standard could adequately uphold a core idea at the heart of the law of judicial review: it "does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended."[33] There was no need to carve out a special category protecting correctness review over jurisdictional questions if the focus on statutory language is sufficiently robust.

Under *Vavilov,* determining whether an administrative act is consistent with a statutory grant depends on the administrator's justification.[34] For this reason, *Vavilov* lists other constraints that could be relevant in each

26 *Ibid* at para 108.

27 *Alexion Pharmaceuticals Inc v Canada (AG)*, 2021 FCA 157 at para 27.

28 *Vavilov*, *supra* note 5 at para 110.

29 *Ibid*.

30 *Ibid*.

31 *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] ("[t]he nature of the question of law" was an important contextual factor that could rebut the presumption of reasonableness review at para 55). *Vavilov*, *supra* note 5 ("general question[s] of law of central importance" are still recognized as attracting correctness review, but this justification does not carry over to jurisdictional questions at para 60).

32 *Vavilov*, *supra* note 5 at para 65.

33 *Ibid* at para 68.

34 See Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: UBC Press, 2023) at 125–26.

case: the evidence before the decision maker,[35] the submissions of the parties,[36] administrative precedents,[37] and the impact on the affected individual, will also condition reasonableness review.[38] These constraints affect how an administrator justifies a particular interpretation of a statutory power, and through an administrator's reasons, courts will determine whether the decision maker understood their statutory authority within the parameters set by the statute. For example, where a court has previously interpreted a statute, that interpretation is owed some weight in whether a decision maker's interpretation of a statute is reasonable.[39]

Overall, the *Vavilov* framework is tightly connected to orthodox constitutional principles. It contains a core commitment to respect for the act of delegation as an instantiation of legislative power. Courts acting under *Vavilov* pay closer attention to legislative design choices (for example, a right of appeal) when selecting the standard of review, including the extent to which the legislature signalled that it intended the courts to play a role in the enforcement of statutory rules.[40] In fact, the attention *Vavilov* gives to these design choices reflects core methodological commitments in statutory interpretation. As the Supreme Court has insisted, legislatures do not seek to achieve their objectives at all costs.[41] When courts interpret statutes, they must understand the interlocking plan or scheme that the legislature creates in the statute.[42] This includes the relationships between various offices, procedural considerations, and other design choices.[43] When *Vavilov* speaks of design choices, it is concerned with understanding the statute to determine the relationship between the administrator and the courts.

This commitment also pays attention to how delegating power is expressed, even under a reasonableness standard. The relative narrowness or breadth of delegating power is an important consideration that

35 *Supra* note 5 at para 125.

36 *Ibid* at para 127.

37 *Ibid* at para 129.

38 *Ibid* at para 133.

39 *Ibid* at para 112.

40 Legislatures may establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery" (see *Seneca College of Applies Arts and Technology v Bhadauria*, 1981 CanLII 29 (SCC) at 194–95). This was properly relied on by *Vavilov*, *supra* note 5 at para 36.

41 *R v Rafilovich*, 2019 SCC 51 at para 30, citing *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 174.

42 Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 186–87.

43 *Ibid*.

structures a court's review function. For example, a broad delegating power "in the public interest" can be exercised reasonably if it falls within the broad purview of the delegating language.[44] But other times, statutes will contain preconditions or "recipes" that constrain a decision maker's discretion.[45] These choices are themselves purposive choices that indicate how legislatures wanted an administrative scheme to operate, ones that *Vavilov* grants considerable respect.

In this sense, the *Vavilov* framework provides a more convincing account of legislative sovereignty than the rule-regime that preceded it. The treatment of appeal clauses and concurrent schemes of jurisdiction are examples of this more forensic account of what legislatures do when they delegate power in confined statutory schemes. They do not just confer power, but they limit and condition it, sometimes by inviting strict judicial review. By incorporating this consideration, *Vavilov* offers a fuller account of the principles underlying the law of judicial review, one that connects to the general rules of statutory interpretation.

B. Implementing the Review

Though these are the principles at the heart of *Vavilov,* the claim that *Vavilov* is a workable template for all delegated action—adjudicative or legislative—requires attention to doctrinal construction. The ability for parties to seek redress in the courts is at least in part related to the workability of the doctrine of judicial review. One question is whether judicial doctrine should be developed for delegated action at large, or whether specific doctrines should be tailored for the various manifestations in which administrative action arises.

There are two planes on which rules governing a court's review function can be formulated. As Thomas Merrill argues, at a "meta-level," courts decide "which legal doctrine to use…in determining whether to accept the agency interpretation."[46] At a second level, *Vavilov* also operates on what Merrill calls the "primary decisional level," in which "courts decide whether to accept any particular agency's interpretation of a statute."[47] At both stages, courts can design rule-regimes to govern the inquiry.

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44 *Vavilov*, *supra* note 5 at para 110.

45 *Canada (AG) v Almon Equipment Limited*, 2010 FCA 193 at paras 38–39.

46 Thomas W Merrill, "The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards" (2002) 54:2 Admin L Rev 807 at 808.

47 *Ibid*.

Whether to select one, two, or more rule-regimes for different administrative instruments depends on whether one rule-regime—in this case, *Vavilov*—is capacious enough to cover all administrative action. This problem raises the rules versus standards debate, and the disputes in legal theory over the design of legal doctrine.[48] The choice of a rule or standard for a particular area of legal regulation is a complex choice, and "[n]o one could say that rules are always preferable to standards, or the reverse."[49] In general, rules can be defined as "legal commands which differentiate legal from illegal behavior in a simple and clear way" while "[s]tandards…are general legal criteria which are unclear and fuzzy and require complicated judiciary decision making."[50] There are certain features of this debate that might be relevant to the specification of a regime, at Merrill's meta-level, for the law of judicial review. First, the frequency of the phenomenon sought to be regulated by a legal rule is important. A standard may best encompass cases where frequency is low, because the phenomenon will not arise often, and it will be possible for courts to take account of factors specific to a particular context.[51] Second, the relative complexity of design of the standard might impose burdens and costs on those operating in the system: in this case, litigants, judicial review courts, and administrative decision makers.[52] Since the content of standards is specified *ex post*, it may cost more for individuals to predict how to behave.[53] While these factors are variable, and the choice between rules and standards is contingent, they may help determine whether the judicial review function should be relatively more like a rule or a standard.

At the meta-level, *Vavilov* is more rule-like, and appears to see itself as a simplifying project that is ground zero for Canadian administrative law. The Supreme Court has commented that *Vavilov*'s core aim was to bring "simplicity, coherence, and predictability to the law" of judicial review.[54] Accordingly, as Vincent Roy argues, in assessing administrative

48 See Pierre Schlag, "Rules and Standards" (1985) 33:2 UCLA L Rev 379; Louis Kaplow, "Rules Versus Standards: An Economic Analysis" (1992) 42:3 Duke LJ 557; Frederick Schauer, "The Convergence of Rules and Standards" [2003] NZLR 303.

49 See Frank H Easterbrook, "Text, History, and Structure in Statutory Interpretation" (1994) 17:1 Harv JL & Pub Pol'y 61 at 63.

50 See Hans-Bernd Schaefer, "Legal Rules and Standards" in Charles K Rowley & Friedrich Schneider, eds, *The Encyclopedia of Public Choice*, vol 2 (New York: Springer, 2004) 347 at 347.

51 Kaplow, *supra* note 48 at 563.

52 This is phrased in some of the literature as relating to the costs of legal advice (see *ibid* at 564).

53 *Ibid* at 562–63.

54 *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7.

law precedents after *Vavilov*, "what is contrary to [*Vavilov*'s] principles goes; what is not, stays."[55]

This principle is evident in the language used in the case. Its endorsement of a strong presumption of reasonableness, supported by the mere fact of delegation, stands at the apex of the decision, reflecting a choice to make the selection of the standard of review simpler and far more categorical. This presumption applies to the "sheer variety of decisions and decision makers."[56] These decision makers include "specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more."[57] Additionally, administrative actors are asked to deal with matters of "'high policy' on the one hand and 'pure law' on the other."[58] The *Vavilov* presumption of reasonableness applies at the meta-level to all of these bodies and their decisions. Furthermore, derogations from the rule are rooted in the same justification for the rule itself: a legislative choice.

But *Vavilov* also cannot be described as a clear rule, because of its acceptance of context at the primary decisional level. That level contemplates that the relative breadth of legislative language is a significant feature that conditions the application of the reasonableness standard. In this way, while *Vavilov* is rule-based at the meta-level, it seeks to capture the complexity of legislative expression at the primary decisional level, organized by the same principle of respect for legislative delegation and statutory design choices.

As a matter of rule design, the choices *Vavilov* makes at the meta-level and the primary decisional level combine rule-boundedness with sufficient flexibility, but both features of the regime are keyed to delegated power and set within constitutional limits. This makes it a useful and workable template. At the meta-level, which governs a wide array of executive, administrative, and legislative action, *Vavilov* generally prescribes an approach that carries the principle of parliamentary sovereignty as far as it can go in service of the creation of a simple rule. This has served, in the post-*Vavilov* world, to considerably reduce debate over selecting the standard of review, moving the parties to the merits of reasonableness review. Once there, the

55 Vincent Roy, "The Implications of the *Vavilov* Framework for *Doré* Judicial Review" (2022) 48:1 Queen's LJ 1 at 17.

56 *Vavilov*, *supra* note 5 at para 88.

57 *Ibid*.

58 *Ibid*.

focus remains on the statutory language, requiring a decision maker to justify its decision under the terms of the enabling statute.

Vavilov's embrace of general, simple rules was and is not shared by all in the pre- and post-*Vavilov* era.[59] Fluker and Woolley, for example, argue that every administrative decision must be evaluated anew, according to the point "truly at issue in all modern substantive judicial review cases: given the nature of the question, who is best positioned to decide it, the court or the administrative decision-maker?"[60] An approach that is guided by rules, and geared towards simplicity, seems misguided as "it is impossible to simplify something innately complex."[61] Post-*Vavilov,* some lamented the fall of context. Cristie Ford, for example, argued that the Court's previous recognition of a tribunal's expertise was "intellectually connected not just to the growth of the administrative state but also…linked to modern developments brought by feminism, respect for diversity, recognition of the limits of formal law and a better understanding of the complexity of the challenges that tribunals face."[62] *Vavilov*, instead, reflects different commitments. It "reflects a choice in favour of clarity—lists, categories, bright lines—which almost inevitably comes at the price of congruence."[63] While Ford is ultimately content to accept that *Vavilov* may make the law more workable, she concludes that "administrative law has been at its most profound and resonant when grappling with the deep and difficult questions that underpin deference."[64]

As we shall see, this debate plays out in relation to subordinate legislation. Fluker suggests that "[t]he *Vavilov* framework gives insufficient attention to the exercise of legislative power."[65] As Fluker relates, a "one-size-fits-all umbrella of judicial review in administrative law" cannot properly account

59 Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014) 47:2 UBC L Rev 443 ("[t]he emphasis on the need for more sensitivity to context is not new" at 445).

60 Alice Woolley & Shaun Fluker, "What Has *Dunsmuir* Taught?" (2010) 47:4 Alta L Rev 1017 at 1019.

61 *Ibid.*

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

63 *Ibid*.

64 *Ibid*.

65 Fluker, "Judicial Review", *supra* note 10.

for this form of power.[66] This same sentiment was expressed by John Evans shortly after *Vavilov* in relation to delegated legislation.[67]

Despite these (and other) alleged theoretical imperfections,[68] there are good reasons to favour *Vavilov* as a complete template for review of all subordinate instruments. Its breadth rests on the idea that the power to administer or implement a statutory scheme necessarily includes a power to interpret the law. It requires reflection—on some level—on the limits of statutory power. The rule is self-consciously broad, and equally applies to the subordinate legislation that is parasitic on delegated power. Nonetheless, it captures that complexity inherent in the different relative breadths of statutory power.

First, the claim that *Vavilov* should account for the complexity of delegated power—and indeed, the general calls for a contextual approach to judicial review—rests on the thinking that it is desirable for the law of judicial review to take account of the context of administrative decision-making in all its qualities. But given the frequency at which judicial review courts are asked to review subordinate legislation and other administrative acts, there may be reason to doubt that this is so. Indeed, whatever criticisms might be levelled towards *Vavilov*'s focus on institutional design and legislative language, its framework reflects a commitment to a form of judicial humility, appropriate to the context of an on the record judicial review.

How is this so? Rather than attempting to capture a world of ever-growing complexity, *Vavilov* simply chooses not to play the game—it does not seek perfect justice, or correspondence with all aspects of the administrative instruments, or the identity of its promulgators that it is asked to review.[69] These features are not unimportant and do affect how courts, practically, conduct judicial review. But in framing the conceptual basis for the law of judicial review, it identifies "one of the obvious and necessary constraints imposed on administrative decision makers:" the scope

66 *Ibid*.

67 *Supra* note 10 ("[i]n its attempt to provide an all-encompassing model for the judicial review of the exercise of public power, the Court seems to have glossed over some fundamental differences between legislative and adjudicative powers. As administrative lawyers know only too well, one size does not fit the great variety in the statutory powers conferred on public bodies or officials" at 25).

68 For the imperfection see e.g. Leonid Sirota, "Chevron on 2" (8 January 2020), online (blog): <doubleaspect.blog/2020/01/08/chevron-on-2>.

69 For the tension between the ideal of perfect justice and simple, workable rules, see Richard A Epstein, *Simple Rules for a Complex World* (Cambridge, Mass: Harvard University Press, 1995) at 37–38.

of delegated power embedded in an enabling enactment.[70] No matter the decision maker at issue—no matter how expert, efficient, and responsive—every decision maker will render decisions or promulgate instruments on the strength of delegated power. The scope of this delegated power is the most basic restraint on administrative decision-making. By fastening on to this basic restraint, courts avoid speculating or opining further about other characteristics that may or may not be present in specific administrative regimes.

Secondly, there is the problem of complexity. Under a system in which the level of deference is calibrated by any number of contextual factors—identity of the decision maker, type of instrument, and nature of the question—an individual faced with challenging administrative action will be left in a difficult position of predicting what standard will apply in each case.[71] This, all else equal, increases the cost of legal advice. Given the variability of decision-making in the modern administrative state, this sort of doctrine requires careful judicial work to select and weigh appropriate contextual factors, and potentially incorporate new ones as the administrative state grows and changes. Additionally, many of these factors are, in essence, empirical observations. Their existence cannot be presumed by a court in the abstract, and, if they could, the doctrine must have an ability to change based on shifting empirical realities. For example, the efficiency of tribunal processes depends on the speed of government appointments, a priority that might become a political football, changing with the colour of governments.

This problem is unfortunate given the core aim of the law of judicial review. As the Supreme Court has noted, superior courts "have the power to review exercises of public power for legality and to ensure that citizens are protected from arbitrary government action."[72] That the superior courts regulate the relationship between the individual and the state in its administrative capacities is a key aspect of the rule of law in Canada.[73] A law of judicial review that leans too heavily on context might increase the cost and difficulty of navigating this law for those who are faced with the burden of challenging state action. The *Vavilov* Court was alive to this possibility: the uncertainty that characterized its earlier case law was highlighted by, among others, "litigants who have come before this Court, and

70 *Vavilov*, *supra* note 5 at para 109.

71 See also Knight, *supra* note 4 at 7–8.

72 *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27 at para 51.

73 *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para 71 [*Secession Reference*].

organizations that represent Canadians who interact with administrative decision makers."[74]

Canadian law struggled with this problem in its standard of review jurisprudence generally, and in its subordinate legislation jurisprudence specifically. It seems that "[t]he virtue of simplicity…is never explicitly deprecated, but it does suffer from insufficient respect and appreciation."[75] As Justice Stratas related in *Innovative Medicines,* the history of Canadian administrative law is rife with references to labels (judicial, legislative, and ministerial functions) and various intricacies related to the tortured concept of *ultra vires*.[76] This has negatively impacted litigants, who have been largely unable to advance their arguments on the merits without significant attention to the meta level.[77] As Justice Binnie said in *Dunsmuir,* a framework that moves parties to the merits and simplifies the selection of review should be desirable.[78]

A general template will not perfectly account for all of the nuances of administrative action. In fact, it makes a deliberate choice not to do so. Underlying this choice is an implicit judgment that "[t]o achieve what is, from the standpoint of the substantive policies involved, the 'perfect' answer is nice—but it is just one of a number of competing values."[79] In the law of judicial review, the deployment of simple rules keyed to core principles should not be given short shrift. Litigants know that they have a right to hold administrators to account according to the law, and courts know that they have a constitutional warrant to probe the basis of administrative action. A rule-regime that is keyed to this agreed upon starting point is not necessarily flawed simply because it does not account for all of the contextual elements of the law of judicial review.

II. SUBORDINATE LEGISLATION

With *Vavilov*'s general rule template set out, it can now be specified and applied in the context of subordinate legislation. I first outline the constitutional fundamentals governing the area in (A), before moving on in (B) to explain how the courts have taken different perspectives on subordinate

74 *Supra* note 5 at para 9.
75 Epstein, *supra* note 69 at xi.
76 *Supra* note 14 at para 35.
77 *Dunsmuir*, *supra* note 31 at para 133.
78 *Ibid.*
79 Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175 at 1178.

legislation. This sets up the discussion to follow about the appropriateness of *Vavilov*'s set of rules for subordinate legislation. As we shall see, courts have deployed different rule-regimes at different times for subordinate legislation, with contextual approaches sometimes dominant.[80]

A. Constitutional Fundamentals: Characterizing Subordinate Legislation

Even in 1960, Driedger could say the terms used to describe various instruments "do not have precise or generally accepted meanings."[81] This is an inevitable challenge in analyzing the complexity of modern law-making. Nonetheless, Driedger offered a useful starting point: the category of *subordinate legislation*.[82] Driedger defines subordinate legislation broadly, as instruments "made under the authority of a statute," since "neither the executive nor any other authority has the power to make laws."[83] Put this way, the category includes "laws made by the executive or by some body or person that is subject to some degree of control by the executive" alongside "independent or quasi-independent local governments."[84] All of these instruments are subordinate to an enabling statute.

Executive legislation—a subset of subordinate legislation that is promulgated by a minister, the governor in council, or a body controlled by the executive—could raise different constitutional stakes than other forms of subordinate legislation.[85] This is because the separation of powers directly engages the scope of executive power.[86] On the orthodox account, the legislature makes laws, the executive implements them, and the judiciary applies them.[87] But, this separation is only contingent. As Mary Liston argues, "[a]ny excavation of the origins of our Constitution…discloses the basic reality that the three branches often share each other's functions

80 *Auer*, *supra* note 14 at para 34.

81 *Supra* note 11 at 2.

82 Like Driedger, I do not aim to adopt "any precise definitions" (see *ibid* at 3).

83 *Ibid* at 1.

84 *Ibid* at 3.

85 Here, I adopt the definition of executive legislation offered by Keyes, *Executive*, *supra* note 10 at 46.

86 See e.g. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 27; *Fraser v Public Service Staff Relations Board*, 1985 CanLII 14 (SCC) at 469–70 [*Fraser*].

87 *Fraser*, *supra* note 86 at 469–70.

and, in doing so, check, overlap, and cooperate with each other."[88] The separation of powers invites convergence between the branches in defined circumstances.

One meeting point occurs in the legislative process. Ministers of the Crown, individually or collectively, "play an essential role in, and are an integral part of, the legislative process."[89] In their roles as members of the legislature, they act as members of "[c]onstitutionally established parliamentary bodies."[90] In *Reference re Pan-Canadian Securities Regulation*, the Supreme Court defined the "*primary*" law-making power held by these bodies as an "authority to enact, amend and repeal statutes—in respect of matters that fall within [a legislature's] exclusive jurisdiction under Part IV of the *Constitution Act, 1867*."[91] The executive plays an important role in this process.

The primary law-making process carries constitutional significance. The Court in *Mikisew* reaffirmed that this "law-making process—from initial policy development to and including royal assent—is an exercise of legislative power which is immune from judicial interference."[92] This is so because the legislature, composed of elected members, is the organ through which the unwritten principle of democracy finds expression. The legislature is "the voice of the electorate,"[93] and enjoys a separation from the other branches of government.[94] The executive is also tied to the legislature in another way. Crown ministers and the governor in council are accountable to the legislature through the convention of responsible government.[95]

This process is different from the procedures that generate subordinate legislation, and, more specifically, executive legislation. At the level of form, a regulation promulgated with this authority appears legislative.

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88 Mary Liston, "Bringing the Mixed Constitution Back In" (2021) 30:4 Const Forum Const 9 at 10.

89 *Mikisew Cree First Nation v Canada* (*Governor General in Council*), 2018 SCC 40 at para 117 [*Mikisew*].

90 Keyes, *Executive*, *supra* note 10 at 26.

91 2018 SCC 48 at para 75 [emphasis in original].

92 *Supra* note 89 at para 117. It is true that in *Canada* (*Attorney General*) *v Power*, a majority of the Supreme Court held that the Crown, in its executive capacity, can be held liable in damages when it enacts unconstitutional legislation. In this sense, *Power* can be seen as qualifying the statement in *Mikisew.* Nonetheless, litigants seeking *Power* damages will need to meet a high bar, and *Power* surely does not overturn the settled distinction between primary and secondary legislation (see *Canada* (*Attorney General*) *v Power*, 2024 SCC 26).

93 *Ibid* at para 36.

94 See e.g. *Canada* (*House of Commons*) *v Vaid*, 2005 SCC 30 at para 20; *Wells v Newfoundland*, 1999 CanLII 657 (SCC) at para 52.

95 See *Secession Reference*, *supra* note 73 at paras 65, 68.

But, more fundamentally, the power is *subordinate* to a primary legislative power.[96] Put this way, it can be analogized to other forms of executive and administrative action which, in substance, flesh out the content of the law.[97]

B. Judicial Treatment

The question left unanswered on the face of *Vavilov* is its application to subordinate legislation as a general category.[98] *Katz* only makes one appearance in the decision, in a passage relating to common law constraints on administrative decision-making.[99] Confusingly, *Vavilov* does contemplate application to subordinate legislation, referencing situations "where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute…."[100] But in fairness, and for argument's sake, *Vavilov*'s references to subordinate legislation are in passing, and it is unclear what to make of them.

The generation of executive legislation could be viewed from different perspectives for the purposes of the law of judicial review. Courts could interpret executive legislation differently than other delegated acts because of the identity of the promulgator and its proximity to the primary legislative process. These contextual factors might be seen as derivative of the separation of powers, protecting the executive's role in the constitutional

96 Keyes, *Executive*, *supra* note 10 ("[i]nstruments made under that authority are subordinate to the intention of the person or body that delegates it" at 26). See also Daly, "Siren's Call", *supra* note 10.

97 *Auer*, *supra* note 14 ("[r]egulations, on the other hand, are generated internally by the executive branch of government…The regulations are therefore generated by the government to flesh out the policy set by the statute" at para 67).

98 The Supreme Court has not helped matters in its post-*Vavilov* case law. In *References re Greenhouse Gas Pollution Pricing Act*, the majority opinion did not mention the *ultra vires* doctrine or the reasonableness standard in its review of the regulations (see 2021 SCC 11). Similarly, in *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, the Court mentioned *Katz*, but only in the context of common law rules governing review of executive legislation, with no mention of the standard of review (see 2023 SCC 17 at para 54, citing *Katz*, *supra* note 12 at para 25).

99 These constraints, while relevant to how courts review subordinate (executive legislation), do not concern the intensity of review applied by courts in relation to these instruments (see *Vavilov*, *supra* note 5 at para 111, citing *Katz*, *supra* note 12 at paras 45–48).

100 This statement occurs in the context of the Court's discussion of jurisdictional questions (see *Vavilov*, *supra* note 5 at paras 66, 111). As Evans notes, the *ultra vires* ground of review for delegated legislation is different from the ground of jurisdictional error for adjudicative decisions (*Supra* note 10 at 20).

framework. Indeed, as we shall see, courts sometimes identified these contextual concerns as key reasons motivating a special approach to review of executive legislation.[101] Similarly, courts analogized subordinate legislation—for example, bylaws or binding rules—subject to approval by the executive, to true executive legislation generated by a minister of the Crown or the governor in council.[102]

Katz falls into this category, and its application by the Alberta Court of Appeal in *Auer* is best representative of this constitutional perspective.[103] In essence, *Auer* offered several reasons for selecting *Katz* as the governing authority, even in the post-*Vavilov* world:

- The *Katz* test respects the separation of powers because the promulgation of regulations is "an act incidental to the legislative process" and cannot be subject to the normal standards of judicial review.[104] Put differently, "[f]ederal regulations are enacted by the Governor in Council in its *legislative* role, subject to review under the test in *Katz Group*."[105] Relatedly, *Vavilovian* reasonableness "would require superior courts to engage in a wholesale second-guessing of the policy choices made by the [g]overnor in [c]ouncil in enacting the *Guidelines*."[106]
- The application of *Vavilovian* reasonableness to executive legislation "is neither seamless nor natural."[107] Generally speaking, there are no "'reasons'" or evidence to guide a court in the judicial review of executive regulations.[108]

Auer specifically suggests that the "singular distinction" between executive legislation and other subordinate instruments is the proximity of the former to the primary legislative process, implicitly calling upon a contextual approach to judicial review, which pays attention to the level of control exercised by the legislature over the executive.[109]

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101 See Keyes, *Executive*, *supra* note 10 at 45.

102 See *Ibid*. See also *Brown v Alberta Dental Association*, 2002 ABCA 24 at para 35; *UL Canada Inc c Québec (PG)*, 2003 CanLII 7993 (QCCA) at para 76.

103 *Katz*, *supra* note 12; *Auer*, *supra* note 14 at para 7.

104 *Auer*, *supra* note 14 at paras 56, 59.

105 *Ibid* at para 62 [emphasis in original].

106 *Ibid* at para 83.

107 *Ibid* at para 64.

108 *Ibid* at para 73.

109 *Ibid* at para 34.

Katz follows the tendency to afford considerable deference to executive legislation.[110] In contrast, executive legislation—and other forms of subordinate legislation—could be viewed as exercises of delegated power that are conditioned by that power, regardless of the identity of the promulgator. This has, in some part, been the historic situation for municipal bylaws.[111] Historically, these instruments were also reviewed on the ground that they were *ultra vires*, but there was a residual discretion to find a bylaw "manifestly unjust" on the basis of irrationality as an aspect of *ultra vires* review.[112] But by the time of the development of Canada's modern law of judicial review, the ground of *ultra vires* had largely been amalgamated to the standards of review: reasonableness and correctness.[113] Put differently, and in some cases, the Supreme Court applied the normal rules of judicial review to subordinate legislation.[114]

This is generally the tack taken post-*Vavilov* by the Federal Court of Appeal in *Innovative Medicines*.[115] In that case, at issue was a challenge to "portions of a regulation…that amends the *Patented Medicines Regulations*."[116] *Innovative Medicines*, relying in part on the Federal Court of Appeal's previous decision in *Portnov*, offers counter-arguments to *Auer*:[117]

- Even if the form of a regulation is legislative in nature, that form is unimportant: subordinate legislation is "just like a municipal by-law, an order-in-council, an administrative rule, or an administrative ruling on the merits."[118] All of these instruments are "subject to constraints and limits imposed by the statutory regime,"[119] regardless of the identity of the promulgator. *Vavilov*'s reasonableness standard can encompass all of these forms of decision-making because it goes "straight to [the] key" of the statutory language in any given case.[120]
- *Vavilov* was categorical in its approach by emphasizing "simplicity, clarity and coherence…" in the law of judicial review.[121] That approach

110 *Supra* note 12 at para 26.
111 Keyes, *Executive*, *supra* note 10 at 45.
112 See *Kruse v Johnson*, [1898] 2 QB 91 (Div Ct UK) at 99–100 [*Kruse*].
113 See Keyes, "Vavilov", *supra* note 10 at 12–13.
114 *Ibid*; *West Fraser*, *supra* note 13 at para 8.
115 *Supra* note 14.
116 *Ibid* at para 1.
117 *Ibid* at paras 27, 34, 36–37, 40; *Portnov*, *supra* note 14; *Auer*, *supra* note 14.
118 *Innovative Medicines*, *supra* note 14 at para 34.
119 *Ibid*.
120 *Ibid* at para 40.
121 *Ibid* at para 36.

> sought to complete the erasure of age-old, formal distinctions between "'legislative', 'quasi-judicial' or 'judicial…'" decisions.[122] A reasonableness standard conditioned by legislative language is adequately workable.[123]

The "debate" between *Auer* and *Innovative Medicines* sets up several points of contrast in the post-*Vavilov* world when it comes to subordinate legislation.[124] *Auer* advances a claim that executive legislation carries a special constitutional significance because of its proximity to the legislative process.[125] In this sense, *vires* challenges to regulations stand aside from reasonableness review.[126] The constitutional argument is bolstered by a claim that *Vavilov* is simply not workable in this context.[127] *Innovative Medicines* responds by saying that the separation of powers can be adequately respected through the reasonableness standard, and that *Vavilov*'s mission to simplify and rationalize the law of judicial review can be extended, without workability problems, to all subordinate legislation.[128]

III. APPLYING *VAVILOV* TO SUBORDINATE LEGISLATION

This leaves the question of how to specify this review in a manner that respects the promulgation of subordinate legislation doctrinally. *Auer* follows *Katz* on the basis that reasonableness review necessarily invites a review of the policy merits of a regulatory instrument, violating the separation of powers.[129] However, this position arguably rests on a mischaracterization of reasonableness review. Reasonableness review as adopted in *Vavilov* is keyed to the breadth of statutory language—the source of subordinate legislation—but its flexibility at the primary decisional level makes it suitable to the context of subordinate legislation.

In Part (A) of this section, I explain how questions of law—including questions of regulatory compliance—should be reviewed under the *Vavilov*

122 *Ibid* at para 37.
123 For a "reasoned explanation" of the regulation see *ibid* at para 48.
124 *Auer*, *supra* note 14; *Innovative Medicines*, *supra* note 14.
125 *Auer*, *supra* note 14 at para 59.
126 *Ibid*.
127 *Ibid*.
128 *Supra* note 15 at para 42.
129 *Auer*, *supra* note 15 at paras 58–59.

framework.[130] In Part (B), I address how *Vavilov*'s commitment to justification plays out under reasonableness review. In general, when conducting reasonableness review, the principles of interpretation, the 'reasons' underlying the process, and any record direct towards the basic question of all judicial review questions: is the form of administrative action at issue consistent with the authorizing, primary legislation from which it draws its authority?

A. Questions of Law Under the Vavilov Framework

1. Presumption of Reasonableness Review

The first question is whether it is possible for *Vavilov*'s presumption of reasonableness review to encompass challenges to the authority of an administrative actor to adopt a subordinate instrument; what would, traditionally, have been a question of *vires*. The second question is how *Vavilov*'s deployment of the rules of interpretation at the primary decisional level adequately captures the significance of subordinate legislation.

At the meta level, *Vavilov*'s choice of a presumptive reasonableness standard applies across the board to all questions of law. As I have explored, this choice limits debate about the selection of the standard of review and moves parties to the factors and considerations under the governing statute that should define the scope of the administrator's authority.

Evans advanced an argument shortly after *Vavilov* that courts should deviate from reasonableness review in the context of subordinate legislation in relation to delegated legislation.[131] He suggests that a power to promulgate a regulation is distinct from a power to interpret law because a power to decide questions of law is "not necessary for the delegate to exercise its statutory power to enact delegated legislation or to fulfill its mandate."[132] For that reason, Evans appears to argue that *Vavilov*'s presumption of reasonableness cannot apply to subordinate legislation, since

130 I presume, as the Federal Court of Appeal suggested in *Portnov*, that reasonableness review would apply to the review of subordinate legislation (*supra* note 14 at para 27). I do not address the case for the application of the correctness standard in this context.

131 *Supra* note 10 ("[i]n its attempt to provide an all-encompassing model for the judicial review of the exercise of public power, the Court seems to have glossed over some fundamental differences between legislative and adjudicative powers. As administrative lawyers know only too well, one size does not fit the great variety in the statutory powers conferred on public bodies or officials" at 25).

132 *Ibid* at 21.

those empowered to promulgate that legislation may not actually have power to interpret the law.[133]

This attempt to parse out *Vavilov*'s presumption of reasonableness serves to limit its force as a presumptive rule while also, like *Katz*, deviating from the source of administrative authority. Consider, first, on what authority subordinate legislation depends for its validity. It may be superficially true that a minister does not strictly 'interpret' the law when they promulgate a regulation, but the validity of the regulation depends on an interpretation of the instrument with an enabling legislation. In other words, when a minister promulgates a regulation, they inevitably undertake an implied interpretation of law, a power that is bundled in the power to promulgate.

Vavilov recognizes this reality. It suggests that the receipt of delegated power imports a presumption that "the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it."[134] This implies that the nature of the question before the decision maker; the features of the decision-making body; or the nature of the instrument are all less important than the connection between the power of delegation and the concomitant power to ensure that any administrative action is consistent with the law.

Evans's argument, however, depends on unravelling *Vavilov*'s strong presumption of reasonableness and adopting a more contextual approach to judicial review.[135] Evans suggests that courts should look closely at whether an express or implied power to determine questions of law is present, like in other legal contexts.[136] He also suggests that the nature of the question at issue in regulatory challenges matters.[137] For example, a challenge to the authority for adopting a regulation is different from a challenge to the reasonableness of a regulation adopted under that authority.[138] While, historically, this was the case, *Vavilov* and its predecessors combined *vires* and reasonableness.[139] As I will note below, *Catalyst* and its progeny are organized around the fact that questions of policy and

133 *Ibid* at 20.

134 *Vavilov*, *supra* note 5 at para 24.

135 *Supra* note 10.

136 *Ibid* at 21, citing *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at paras 41, 48.

137 Evans, *supra* note 10 at 22.

138 *West Fraser*, *supra* note 13 at paras 56, 114 (dissenting opinions).

139 *TransAlta*, *supra* note 14 at para 49.

legality—reasonableness and *vires*—are especially difficult to tease apart.[140] This is especially so when, as is often, a power to promulgate regulations is relatively unconstrained.[141]

This was the same mode of thinking that led *Vavilov* to conclude that a standalone category of jurisdictional error could no longer do any meaningful work.[142] In cases where there is a broad delegation of power "that allows [an administrative decision maker] to make regulations in pursuit of the objects of the enabling statute," the question can be conceived as one of law or jurisdiction (*i.e.* or *vires*).[143] But, in any event, the issue remains compliance with the enabling statute. And, while Evans is right that questions of jurisdiction have been historically more difficult to adjudicate than questions of *vires*, he admits that *Vavilov*'s dispatch of jurisdictional questions as questions attracting correctness review makes it much harder to sustain *vires* as a standalone category.[144]

Evans's argument leads to the problem that *Vavilov* sought to address: a shift in the empirical ground that undercuts the justification for a doctrine of deference, requiring close attention to empirical realities that courts cannot grapple simply. Under this approach, the nature of the question and the features of the body under review take on central importance, but courts are simply unsuited to undertake the sort of analysis required by contextualism in every case. Daly explains that, in *TransAlta*, the Alberta Court of Appeal was faced with a regulation, promulgated by a Minister, "under a statute which specifically exempts the regulations from the scrutiny provisions of the provincial *Regulations Act*."[145] Yet, it applied *Katz* to that regulation, even though it was exempt from the scrutiny process that *TransAlta* sees as constitutionally significant.[146] If this is a regular occurrence under the standard justified by the theory of *Katz*, then its conceptual justification will be lacking in a series of cases, reverting back to the same problem that the *Vavilov* Court sought to dispel.

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140 *Catalyst*, *supra* note 13 at para 14; *West Fraser*, *supra* note 13 at para 23. For a spirited dissent by Côté J, questioning whether *Catalyst* truly did away with a standalone ground of *vires* review see *West Fraser*, *supra* note 13 at para 64.

141 *Vavilov*, *supra* note 5 at para 66.

142 *Ibid* at para 67.

143 *Ibid* at para 66.

144 *Ibid*.

145 Daly, "Siren's Call", *supra* note 10.

146 *TransAlta*, *supra* note 14 at para 53.

2. The Principles of Statutory Interpretation

Once the decision has been made to adopt the presumption of *Vavilov* reasonableness for all subordinate legislative instruments, including executive legislation, the next question is how this review is undertaken at the primary decisional level. The case for adopting a highly deferential standard (*i.e.* à la *Katz*) is dependent, as we have seen, on a contextual approach to review.[147] This approach is seen as important to capture the significance of executive legislation.[148] The contrary approach—adopting *Vavilovian* reasonableness—"will 1) inevitably descend into an examination of the policy choices behind the regulation, or 2) examine the effectiveness of the regulation."[149] However, an analysis of the principles of statutory interpretation reflect the ability of reasonableness review to stick closely to the enabling legislation.[150]

Authority to promulgate primary or enabling legislation is traceable to Part IV of the *Constitution Act, 1867*,[151] and the steps in the legislative "process—from initial policy development to and including royal assent—..." are different dimensions of constitutionally granted, primary legislative power.[152] They are entirely immune from judicial interference, even though the executive may participate in the process of legislative development.[153] In contrast, all subordinate legislative power—no matter proximity to the legislative process—is parasitic on primary legislative authority, conditioned by the terms of that authority.[154] As Keyes argues, "delegated legislation cannot be wholly equated with primary legislation and reviewed in the same way: its defining element of delegation requires an additional level of review to ensure it conforms to the intent expressed in the legislation that delegates the authority to make it."[155] *Auer*'s analogy to the primary legislative process suggests that this additional level of review is simply unnecessary.[156]

Deviating from the enabling statute could lead to further distortions. A special rule-regime for executive legislation would arguably run counter

147 *Auer*, *supra* note 14 at paras 34–35.
148 *Ibid* at para 58.
149 *Ibid* at para 74.
150 *Ibid*.
151 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
152 *Mikisew*, *supra* note 89 at para 117 (concurring opinion).
153 *Ibid*.
154 *Auer*, *supra* note 14 at para 56.
155 Keyes, "Vavilov", *supra* note 10 at 1.
156 *Ibid*; *Auer*, *supra* note 14 at para 56.

to the source of subordinate legislation "lead[ing] to drastically different results."[157] This is because of the basis for deference under each rule-regime. "*Vavilov* goes straight to [the] key [of the primary statute's limiting language], focusing on what meanings the language of the regulation-making power can reasonably bear."[158] *Katz*, instead, proceeds on the assumption that the executive should receive a fixed, deferential scope of action based on the status of the executive *qua* executive.[159] This ignores that the executive, at least when it promulgates legislation, is bound by the law like any other administrative actor.[160] A special, 'dispensation' from the enabling statute for executive actors is in tension with the basic idea that "[i]n our system of governance, all holders of public power, even the most powerful of them—the [g]overnor-[g]eneral, the [p]rime [m]inister, [m]inisters, the [c]abinet, [c]hief [j]ustices and puisne judges, [d]eputy [m]inisters, and so on—must obey the law."[161] A greater scope of authority for members of the executive, beyond what might be disclosed by the text, context, and purpose of the enabling statute, leaves open the possibility that the law confining the executive's power will be glossed over.

The question, then, is what this reasonableness review looks like when the enabling statute is seen as the locus of authority for all delegated legislation. How can reasonableness review be specified to respect the role of the executive, often—but not always—nourished by broad grants of power? This is not a new question. Consider the seminal case of *Kruse*, in which Lord Russell pronounced the ground of unreasonableness as available in a challenge to a municipal bylaw.[162] In describing this ground, Lord Russell was careful to define the sense in which he was speaking of unreasonableness.[163] Unreasonableness is not available merely because "particular judges may think that it goes further than is prudent or necessary or convenient…."[164] This view of reasonableness is not legally relevant. Instead, unreasonableness concerned Lord Russell as it pertains to the

157 *Innovative Medicines*, *supra* note 14 at para 41. Of course, it may be that *Vavilov* and *Katz* would lead to the same results in many cases (see David J Mullan, "2022 Developments in Administrative Law Relevant to Energy Law and Regulation" (April 2023), online (blog): <energyregulationquarterly.ca/regular-features/2022-developments-in-administrative-law-relevant-to-energy-law-and-regulation>).

158 *Innovative Medicines*, *supra* note 14 at para 40.

159 *Ibid* at para 30; *Katz*, *supra* note 12 at para 25.

160 *Innovative Medicines*, *supra* note 14 at para 33.

161 *Canada* (*Citizenship and Immigration*) *v Tennant*, 2018 FCA 132 at para 23.

162 *Supra* note 112 at 91.

163 *Ibid* at 99.

164 *Ibid* at 100.

interpretation of the statutory boundaries of the power under review.[165] Absent express language found in the statute, no bylaw should be presumed to, for example, draw discriminatory distinctions, be "manifestly unjust," or "disclos[e] bad faith."[166]

This understanding of reasonableness, as Justice Beetz so eloquently observed in *Montréal v Arcade Amusements Inc*, "has been observed from time immemorial in British and Canadian public law."[167] It concerns not the substantive policy merits of administrative action, but how enabling legislation should be read under the normal rules of interpretation. In situations where, for example, a regulation's text can be read to expand the purported scope of the enabling statute widely—through discriminatory distinctions, rank irrationality, *etc.*—or otherwise, the enabling statutory text will not be stretched to lead to this result absent express language. This requires a reading of the statute as a structural whole. For example, in *Alaska Trainship Corporation v Pacific Pilotage Authority*, the Supreme Court would not read the enabling authority as permitting compulsory pilotage of ships based on place of registry (*i.e.* the flag it flies).[168] For the Court, a purposive understanding of the enabling statute permitted the creation of pilotage rules for reasons of safety.[169] The structure of the statute—the way it operated—reinforced this conclusion. The Court could find no connection between prescription of a ship's flag with any concern for safety.[170]

This is just another way of expressing what *Vavilov* expresses: the ordinary rules of statutory interpretation apply when a court is conducting judicial review for reasonableness of executive legislation.[171] The primary question that *Vavilov* asks involving questions of law is whether the subordinate legislation—whatever policy choices it encompasses—fits within the ambit of the enabling statute's authorizing provision.[172] In answering this question, the primary constraints that will specify the court's review

165 *Ibid* at 99–100.

166 *Ibid* at 99.

167 1985 CanLII 97 (SCC) at 404.

168 1981 CanLII 175 (SCC) at 277 [*Alaska Trainship*].

169 *Ibid* at 268–69.

170 *Ibid* at 277.

171 See e.g. *Portnov*, *supra* note 14 ("[i]n the specific case of decisions of the Governor in Council, reasoned explanations can often be found in the text of the legal instruments it is issuing…" at para 34); *Zeifmans LLP v Canada*, 2022 FCA 160 at paras 6, 10–12, citing *Zeifmans LLP v Canada* (*MNR*) 2021 FC 363 at paras 17–19, 32.

172 *Catalyst*, *supra* note 13 ("[i]n passing delegated legislation, a municipality must make policy choices that fall reasonably within the scope of the authority the legislature has granted it" at para 14).

function involve the governing statutory scheme and whether the subordinate legislation is consistent with the scope of action disclosed by the text, context, and purpose of the regime.[173]

While the tools of interpretation are not self-executing, they are relatively stable, such that they can easily be transposed into the realm of regulatory law. As the Supreme Court has held, the text of the enabling legislation is the object of interpretation.[174] It is the medium through which the legislature seeks to achieve certain aims.[175] *Vavilov* builds on this instruction, telling courts that the relative semantic breadth of the delegating power is "the most salient aspect" of reasonableness review.[176] In this rule-regime, however, purpose plays an important role. Purpose can help determine which of two plausible interpretations of a regulatory scheme is most plausible—the interpretation most connected to the purpose of a provision is likely to be the best possible interpretation of that provision.[177] In this analysis, purpose does not override text, but merely helps to select between plausible textual options.[178] This is a particularly useful tool in cases of broad regulatory powers. In a case like *Alaska Trainship*, for example, the broad enabling provision could support two interpretations of the text, including one that permits distinctions to be drawn based on a ship's flag.[179] However, with the purpose of safety in mind, this textual interpretation is simply not as plausible as the alternative.[180]

The *Alaska Trainship* situation also sheds light on how the purpose of statutes enabling regulatory powers should be understood.[181] Courts cannot attribute purposes to legislatures that would, absent express language, empower the delegated power to be exercised in a manner untethered from governing legal rules.[182] Put differently, courts cannot stretch enabling language to authorize action that, at common law, would have been forbidden. As *Vavilov* says, "where the governing statute specifies a standard that is well known in law," decision makers cannot alter the statutory language to

173 *Vavilov*, *supra* note 5 at para 118.
174 *MediaQMI Inc v Kamel*, 2021 SCC 23 at para 39.
175 *Ibid*.
176 *Vavilov*, *supra* note 5 at para 108.
177 For the use of this principle in a case, see *Williams v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at para 52.
178 *Vavilov*, *supra* note 5 at para 118.
179 *Supra* note 168 at 277.
180 *Ibid*.
181 *Ibid* at 278.
182 *Vavilov*, *supra* note 5 at para 111.

abridge that specified understanding.[183] Relatedly, decision makers interpreting the scope of their "authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers." The nature of these powers include the age-old rules that they cannot be used for discriminatory or substantively unreasonable purposes.[184] Perhaps this is why, in cases where administrative action will have especially "harsh consequences…the decision maker must explain why its decision best reflects the legislature's intention."[185]

It is important to note that this understanding of reasonableness is akin to the legal sense of reasonableness review endorsed in *Kruse*.[186] It is not an at large assessment of the wisdom of a policy.[187] In a situation like *Alaska Trainship,* this review means that a regulation purporting to expand the scope of the primary enactment would, by its nature, run contrary to the text, context, and purpose of its enabling regime, which does not authorize the expansive interpretation of pilotage rules.[188] Though the choice to expand that authority may be motivated by policy aims, those aims are not under review. Put this way, as the Supreme Court did in *Catalyst*, while "courts can review the substance of bylaws," that review is for the sole purpose of "ensur[ing] the lawful exercise of the power conferred on municipal councils and other regulatory bodies."[189] The proper application of the principles of interpretation, coupled with the normal rules associated with reasonableness review, ensures that a judicial review court focuses on the law.[190]

183 *Ibid*.

184 *Ibid* at paras 111–12.

185 *Ibid* at para 133.

186 *Supra* note 112 at 100.

187 *Ibid*.

188 *Supra* note 168 at 277.

189 *Supra* note 13 at para 15.

190 Several rules of judicial review protect the administrator's ability to opine on the merits. As the Federal Court of Appeal has stated, new evidence on judicial review is traditionally not admissible because the legislature delegated the power to the administrator to "determine certain matters on the merits"; routinely permitting new evidence would undermine the demarcation between legislative and judicial roles, and so "[t]his Court can only review the overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done" (see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency* (*Access Copyright*), 2012 FCA 22 at paras 17–18).

B. Justification: Reasons and Record

Another set of problems might serve to doubt *Vavilov*'s application to subordinate legislation. *Vavilov*'s reasonableness standard focused on the notion of "'justification.'"[191] This means that the reasons offered for a decision will often be quite important in conditioning the court's review function.[192] Fluker argues that, as a result, *Vavilov* is "naïve to the fact that a full record of decision for subordinate legislation will rarely be available in judicial review."[193] And, he picks up on a point that *Auer* makes: "the record for a judicial review on subordinate legislation will need to be supplemented, which will almost certainly lead to process quagmire."[194]

The point raised by Fluker is serious and cannot be dismissed lightly. However, *Vavilov* arguably has built-in solutions to deal with situations in which reasons are not provided. Indeed, the challenge raised by Fluker and *Auer* can apply even to administrative decisions in which reasons are not offered and the record is exceedingly sparse. *Vavilov* encompasses these situations, and its reasonableness standard can also encompass deficiencies in reasoning in cases of subordinate legislation.[195]

Consider, first, situations where no justification is provided for a regulatory instrument. As noted above, justification is a core ethic of the *Vavilov* framework, and one of the purposes of justification is to facilitate proper judicial review.[196] Yet, *Vavilov* contemplates and encompasses cases where there are neither reasons nor a record in the first place.[197] This means that *Vavilov* may not necessarily be inapposite to cases of subordinate legislation at a practical level and, indeed, that it might contemplate such situations. Nonetheless, it does mean that the reasonableness standard will need to be specified appropriately for the context of subordinate legislation, with an attitude that, in some cases, it may be impossible to discern a basis for the legislative action.

In cases where a court promulgates a regulatory instrument without reasons or a record, *Vavilov*'s reasonableness standard can still apply.[198] As

191 *Supra* note 5 at para 81.

192 *Ibid* at para 311 (concurring opinion).

193 Fluker, "Full *Vavilov*", *supra* note 10.

194 *Ibid*. See also *Auer*, *supra* note 14 at paras 74–75.

195 *Supra* note 5 at para 138.

196 *Ibid* at para 81. For outlining several theoretical justifications for the culture of justification, including the facilitation of judicial review, see Janina Boughey, "The Culture of Justification in Administrative Law: Rationales and Consequences" (2021) 54:2 UBC L Rev 403.

197 *Supra* note 5 at para 138.

198 *Ibid*.

noted above, in such cases the text of the enabling statute and the principles of interpretation will likely be the most important constraints that bear on the question.[199] This is not surprising. A regulation is a legal instrument that fleshes out the legal content of the primary law. In this sense, while a court will base its analysis on the factual and policy context of a regulatory problem, the core question will be whether the regulatory instrument is consistent with the primary legislation's text, context, and purpose.[200]

There are two aspects of this constraint that courts should keep in mind when reviewing subordinate legislation in the complete absence of any reasons or records. The first is that, as noted above, deference cannot disappear. Rather, the intensity of review is primarily (and perhaps totally) conditioned by the breadth of the delegating power in the primary statute. As noted in *Innovative Medicines*, the breadth of this power will support a wide array of regulatory options to specify the primary law in many cases.[201] Nonetheless, the primary legislation will most prominently constrain the power. Indeed, this is perhaps what *Vavilov* meant when the Court said that, in cases where there is no record or reason, a focus on the reasonableness of the outcome will be inevitable.[202] The question is whether the regulation is consistent with the enabling statute.

Second, the fact that the legal constraints (*i.e.* the enabling statute itself and the principles of interpretation) bind most strongly—and perhaps exclusively—in cases of subordinate legislation should not be seen as undermining the workability of *Vavilov*. The Court put forward this argument in *Auer*, stating that *Vavilov* simply could not apply because many of its constraints were not relevant to the context of subordinate legislation.[203] This arguably ignored, however, the contextual features of *Vavilov*. Not all of its constraints need to apply in a given case.

However, something akin to a form of justification—whether a record of submissions, an accompanying statement of purpose, or specific recitals—may sometimes accompany regulatory action. Specifically—especially in the modern era—the problem of having neither a record nor reasons is less likely to arise. As Keyes noted, the sources for the "reasoning process" of executive legislation "have become increasingly rich as the processes for making it have become more transparent in the latter part of the

199 *Ibid* at para 117. See e.g. *Alaska Trainship*, *supra* note 168 at 277.
200 *Vavilov*, *supra* note 5 at para 118.
201 *Supra* note 14 at para 34.
202 *Supra* note 5 at para 138.
203 *Supra* note 14 at paras 78–83.

20th century and into the 21st."[204] At the federal level, statutory instruments, like regulations, "are accompanied by Regulatory Impact Analysis Statements outlining the reasons for regulations and their anticipated impact."[205] Courts can use Regulatory Impact Analysis Statements to assess the reasonableness of executive legislation by providing insight into the interlocking purposes of the enabling statute and regulatory instrument.[206] Other sources can generate information and internal documents that can inform a court's understanding of the relevant instrument and enabling statutory provisions.[207] As Keyes argued, "[m]odern governments increasingly build consultation into their policy development processes," with enabling legislation sometimes expressing these requirements explicitly.[208]

Importantly courts must organize these various sources properly to preserve the focus on the limiting statutory language. Again, the reasonableness review should not focus on the content of the inputs into the process or the policy merits of those inputs. Rather, courts must key these sources to the analysis of whether the subordinate instrument is consistent with the enabling statute's text, context, and purpose. For example, Regulatory Impact Analysis Statements can inform a court as to the link between an enabling statute's purpose and a regulatory aim, much like Hansard evidence.[209] These analyses can help show how the effects of a regulation which, at first blush appear unreasonable, are enabled by the primary legislation.

Consultation records and other submissions fed into a regulatory process can also support the court's interpretation of the enabling legislation. These submissions can help to explain what interpretive options might be open to a promulgator of subordinate legislation, as understood by those subject to the legislation. For example, submissions and consultations that feed into a record on judicial review will help a court determine which legal options were in front of the decision maker, which may explain the thinking behind a regulatory instrument.

On this account, justification is not a freestanding requirement of *Vavilov*. Rather, it is designed to demonstrate how and whether subordinate administrative action fits into the primary instrument. The enabling

204 Keyes, "Vavilov", *supra* note 10 at 11.

205 *Ibid*. See also Keyes, *Executive*, *supra* note 10 at ch 4.

206 *Portnov*, *supra* note 14 at para 34.

207 *Ibid*.

208 Keyes, *Executive*, *supra* note 10 at 193.

209 For an example of where the Court relies on both sources for discerning statutory purpose see *Bienvenu v Canada (AG)*, 2023 FC 175 at para 26.

statute may also prescribe important conditions under which the promulgation of the regulation must take place. The inputs from these processes will inform how a court determines whether the regulation is reasonable. From this, it seems unavoidable that an element of creativity will infuse the judicial role when conducting reasonableness review. But, so long as a court ties its analysis to *Vavilov*'s constraints, the sources that inform the context of subordinate legislation can also guide reasonableness review.

CONCLUSION

The question of whether *Vavilov* can apply to subordinate legislation, particularly executive legislation, raises important questions about the future of Canadian administrative law. For some time, the law of judicial review has laboured under byzantine standards of review that attempted, imperfectly, to track the growing administrative state. This effort was well-intentioned. But, as Justice Binnie related in *Dunsmuir,* "[j]udicial review is an idea that has lately become unduly burdened with law office metaphysics."[210] The problem has been a focus on "nomenclature" over "substance."[211]

This is precisely what has happened with subordinate legislation. To capture the nature of that decision-making, courts have sometimes applied the *ultra vires* label,[212] and sometimes the normal standards of judicial review.[213] In all of this, the legal source of authority for subordinate legislation—delegating legislative power—has been lost. *Vavilov*'s rule-regime provides an opportunity to adopt a full template for all action taken pursuant to delegated power. This template was hard-won. It attempts, within reason, to capture the complexity of delegated power without tracking all its infinite features. This workable framework, so long as it remains keyed to delegated power, can respect the legislative nature of instruments adopted by administrative actors of all kinds.

210 *Supra* note 31 at para 122.

211 *Ibid*.

212 *Auer*, *supra* note 14 at para 41.

213 *Vavilov*, *supra* note 5 at para 170.