
Volume 34 *Toronto v Ontario: Implications for
Canadian Local Democracy*
Guest Editors: Alexandra Flynn & Mariana
Valverde

Article 4

2021

The Missing Constitutionalism of Canada v Vavilov

Kate Glover Berger
Osgoode Hall Law School of York University

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/jlsp>



Part of the [Law Commons](#)

Citation Information

Glover Berger, Kate. "The Missing Constitutionalism of Canada v Vavilov." *Journal of Law and Social Policy* 34. (2021): 68-93.

<https://digitalcommons.osgoode.yorku.ca/jlsp/vol34/iss1/4>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.

The Missing Constitutionalism of *Canada v Vavilov*

KATE GLOVER BERGER*

This article argues that the Supreme Court of Canada's recent opinion in *Canada (Minister of Citizenship and Immigration) v Vavilov*—the biggest administrative law case in a decade—pays insufficient attention to the constitutional dimensions of the case. *Vavilov* represents, therefore, a missed opportunity to engage deeply with issues of structural and administrative constitutionalism, issues that arise in countless public law cases, including in *Toronto (City) v Ontario (Attorney General)*. This article argues that when *Vavilov*'s constitutional dimensions are brought to the surface, they reveal neglected possibilities in the *Toronto (City)* appeal and map some of the legal terrain on which the case could be received and should be analyzed. This article presents this argument in three parts. First, it provides an overview of *Vavilov*, pointing to some of its key legal developments and implications for administrative law. This part considers whether the majority reasons in *Vavilov* promote a thin approach to constitutionalist reasoning in administrative cases. Second, it considers two additional matters of constitutional structure that are at stake (but insufficiently addressed) in *Vavilov*: (a) the consequences of an inconsistency between legislation and unwritten constitutional principles; and (b) the significance of institutional design to understanding the role, relationships, and reform of public actors. Each of these matters is also at stake in *Toronto (City)* and this part shows why it is important to look to *Vavilov* when resolving them. This article concludes with a discussion of a third matter of constitutional structure and administrative constitutionalism that is implicated (but neglected) in *Vavilov*, and is of relevance to *Toronto (City)*: the place and status of the administrative state within the Canadian constitutional order. *Vavilov* was a perfect opportunity to engage with decades of administrative law developments in order to address some of that neglect, but unfortunately, the opportunity was missed.

THE SUPREME COURT OF CANADA'S 2019 opinion in *Canada (Minister of Citizenship and Immigration) v Vavilov* was one of the most significant administrative law cases in a decade.¹ In it, the Court set out a new approach to choosing the standard of review in applications for judicial review and a revised approach for assessing the reasonableness of administrative decisions. These issues are quintessential matters of Canadian administrative law, taken up in *Vavilov* not because of anything particularly demanding on the facts of the case but because, it seems, that the Supreme Court deemed it time to respond to extensive criticism of the existing approach to judicial review from administrative law scholars, counsel, and the bench.

While clearly an administrative law case, *Vavilov* is, this article argues, a case of fundamentally constitutional character. The task the Supreme Court set for itself in *Vavilov*—that is, to establish a principled, pragmatic, and just approach to judicial review that accounts for the

* Kate Glover Berger is an Assistant Professor at Osgoode Hall Law School. She is grateful to Simon Archer, Alexandra Flynn, and Mariana Valverde for organizing the Workshop on Canadian Municipalities and the Constitution and for serving as guest editors of this Special Issue. She is also grateful to the editors and staff of the *Journal of Law and Social Policy* for their valuable work on this piece and to the anonymous peer reviewers for their insightful comments.

¹ 2019 SCC 65 [*Vavilov*].

realities of the public institutions involved and of the parties affected by administrative action²—called on the Court to adopt not only an administrative law perspective but a constitutional perspective as well. The exercise of judicial review is always constitutional in the small “c” sense. It is an exercise in determining the proper relationship between organs of government³—the courts, the legislature, and the administrative state (standard of review)—in a particular instance and an exercise of authority that lies at the inherent core of the superior courts’ constitutional jurisdiction, namely to uphold the rule of law through assessing the legality of state action.⁴

But determining the framework for how the courts should exercise their powers of judicial review, rather than simply carrying out such powers within that framework, calls for a more searching constitutional analysis. To properly realize the constitutional balance of power between the legislature, the courts, the executive, and the administrative state, the Court must have a deep understanding of the realities and status of each of the institutions involved, as well as a comprehensive vision of how those institutions should relate to each other, that is, of “the grander constitutional order, and the nature and position of the administrative state within that order.”⁵ In “The Constitution of the Administrative State,” I observed that at the heart of critical calls for reform of, and stability within, the jurisprudential approach to judicial review, that is at the heart of the criticisms that ultimately led to *Vavilov*, is a longing for “a jurisprudence of administrative law that is sustained by a grand vision of the Canadian public order” and “for administrative law reasoning that connects individual cases to a thick conception of the administrative state.”⁶ I concluded that in order to satisfy these longings, the Supreme Court need not be unanimous in its approach to judicial review despite calls for stability and unity (and indeed, *Vavilov* was not unanimous), but rather that the Court’s “analysis of administrative law questions [including how to conduct judicial review] must be built from architectural materials, from inferences drawn out of ‘the structure of government that [the Constitution] seeks to implement,’ from an accounting of the assumptions that underlie the public order [and their implications], and from the links and relationships between public actors and elements of the Canadian state.”⁷ In other words, I pointed to a desire for a judicial review jurisprudence that is based on a careful and updated account of the nature of the administrative state, its position within the public order as a whole, and the resulting character of its interactions with other institutions of governance and the public.

This article continues this argument but with a more specific focus. It argues that when the Court took on the task of rethinking its approach to judicial review in *Vavilov*, it should have drawn more heavily on insights from architectural features of the constitution⁸ (structural constitutionalism) and from the relationship between administrative decision-making and constitutional interpretation (administrative constitutionalism). Doing so would have promoted coherence and comprehensiveness in the majority’s revised approach to judicial review in *Vavilov* and future cases of judicial review, and would have also promoted the development of a consistent

² *Ibid* at paras 4-15.

³ *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 at para 86 [*OPSEU*].

⁴ *Crevier v AG (Québec) et al.*, [1981] 2 SCR 220 at 236-8.

⁵ Kate Glover Berger, “The Constitution of the Administrative State” in Marcus Moore & Daniel Jutras, eds, *Canada’s Chief Justice: Beverley McLachlin’s Legacy of Law and Leadership* (Toronto: LexisNexis, 2018) 167 at 184 [Berger, “The Constitution”].

⁶ *Ibid* at 169.

⁷ *Ibid*.

⁸ In this article, I use “constitution” to refer to “the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state”: *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 874 and “Constitution” to refer to the formal, entrenched features of the constitution.

vision of the grand constitutional order across constitutional and administrative law, showing how cases of administrative law can be precedents for constitutional cases and *vice versa*. As this article will show, this opportunity to participate in promoting this form of unity within public law was not fully realized in *Vavilov*.

Before moving on to the specific claims of this article, the terms “structural constitutionalism” and “administrative constitutionalism” warrant elaboration. Both concepts are interested in the relationship between constitutional and administrative law and the interaction between the constitution and the administrative state. First, I use “structural constitutionalism” to refer to an interest in, or the study of, the architectural—or structural—features of the Constitution, the interaction between these features, the ways in which these features change, and their interpretive implications. The structural features of the Constitution reflect the “structure of government that [the constitution] seeks to implement”⁹ and include the institutional design of individual public actors, the institutional arrangements found within the constitutional order as a whole, the foundational assumptions underlying the constitutional text, the implications of those assumptions, and the relationships and interactions between constitutional elements.¹⁰

A structural perspective is associated with a form of interpretation, namely structural reasoning. As the Supreme Court explains, the “notion of architecture expresses the principle that ‘[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.’”¹¹ “In other words,” the Court writes, “the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.”¹² Put yet another way, structural reasoning draws “inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.”¹³ This article examines what *Vavilov* says about the structural features of the constitution, in particular what it says about the administrative state and its position relative to other state institutions by establishing a new approach to judicial review. In addition, this article presents three issues of structural constitutionalism, each raised in *Vavilov* and none adequately addressed, and each of relevance to the administrative law context and beyond: the impact of unwritten principles on the constitutionality of legislation, the relevance of institutional design to public law decision-making, and the constitutional status of the administrative state.

The last two issues of structural constitutionalism, along with the *Vavilov* majority’s new approach to judicial review, are also of interest to administrative constitutionalism. Administrative constitutionalism is often used to refer to the interpretation and implementation of constitutional rights by administrative actors.¹⁴ Indeed, this is one of the core areas of interest for administrative

⁹ *Reference re Reform of the Senate*, 2014 SCC 32 at para 26 [*Senate Reform Reference*].

¹⁰ See e.g. *ibid*; *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at paras 76-103 [*Supreme Court Act Reference*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 32-105 [*Secession Reference*].

¹¹ *Senate Reform Reference*, *supra* note 9 at para 26, quoting from *Secession Reference*, *ibid* at para 50.

¹² *Ibid*.

¹³ Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford, 1982) at 74; Robin Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 Can Bar Rev 67 at 74.

¹⁴ See e.g. Sophia Z Lee, “Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present” (2010) 96 Va L Rev 799; Leonid Sirota, “The Unholy Trinity: The Failure of Administrative

constitutionalists. But as Gillian Metzger explains, the scope of administrative constitutionalism can be fruitfully understood to capture a more expansive set of interactions between administrative action and constitutional interpretation in order to more fully work through the relationship between administrative decision-making and the constitutional.¹⁵ The more expansive understanding of administrative constitutionalism emphasizes the “constitutional dimensions of seemingly ordinary implementation and policymaking, combined with its frequent creative character”¹⁶ and is thus, interested in matters such as the “application of established constitutional requirements by administrative agencies,”¹⁷ “the elaboration of new constitutional understandings by administrative actors,”¹⁸ and the “construction (or ‘constitution’) of the administrative state through structural and substantive measures.”¹⁹

With these understandings, it may be obvious that setting the parameters for the exercise of judicial review is a matter of interest to both structural constitutionalism and administrative constitutionalism as it amounts to identifying the roles of and relationships between branches and actors of government in supervision of the administrative state.²⁰ But the claim of this article is that the Court’s redesign of judicial review in *Vavilov* raises additional issues that are helpfully, and importantly, exposed and elaborated by these two constitutionalist perspectives. More specifically, this article explores how greater attention to the constitutional dimensions of judicial review is necessary to working through the issues taken up in *Vavilov*. Taking on perspectives of structural and administrative constitutionalism helps to expose these constitutional dimensions and their relevance. Further, this article shows that the constitutional issues that could have been developed in *Vavilov* but were not are relevant not only in the context of administrative review but also outside the context of judicial review. In other words, when we approach the issues in *Vavilov* through the lenses of structural and administrative constitutionalism, we can see how administrative and constitutional law—and the administrative state and the constitution—are, and indeed must be, in conversation with each other. More accurately, we come to wonder where the edges of constitutionalism end in the administrative sphere.

To make this last point about the common terrain of administrative and constitutional law, that is to show how public law more broadly can benefit from the analysis of *Vavilov* presented here, this article relies on another public law case, *Toronto (City) v Ontario (Attorney General)*, as a case study.²¹ This case lies outside of administrative law, involving instead a constitutional challenge to provincial legislation.²² This case is, invoking language used above, a quintessential constitutional case. Thus, it may be thought that *Vavilov* and *Toronto (City)* have little to say to each other. But this article shows that *Vavilov*, a major administrative law case dealing with standard of review in judicial review, has much to offer when it comes to understanding and resolving what is at stake in *Toronto (City)*. These offerings are helpfully revealed when *Vavilov*

Constitutionalism in Canada” (2020) 2 J Commonwealth L 1; Matthew Lewans, “Administrative Constitutionalism and the Unity of Public Law” (2018) 55:2 Osgoode Hall LJ 515.

¹⁵ Gillian E Metzger, “Administrative Constitutionalism” (2013) 91 Texas L Rev 1897 at 1912.

¹⁶ *Ibid.*

¹⁷ *Ibid* at 1900.

¹⁸ *Ibid* at 1900.

¹⁹ *Ibid* at 1900. As examples of these kinds of works of administrative constitutionalism, see e.g. William N Eskridge Jr & John Ferejohn, *A republic of statutes: the new American Constitution* (New Haven: Yale University Press, 2010); and Jerry L Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of the American Administrative Law*” (New Haven: Yale University Press, 2012).

²⁰ The two perspectives have meaningful areas of overlap but neither is subsumed by the other.

²¹ 2019 ONCA 732 [*Toronto (City)*].

²² *Ibid* at para 1.

is examined through the lenses of administrative and structural constitutionalism. Put in more critical terms, this article argues that the Supreme Court’s recent opinion in *Vavilov*²³—the biggest administrative law case in a decade—is an example of insufficient judicial attention to the structural matters underlying administrative review. *Vavilov* is, this article argues, a missed opportunity to model the kind of structural and administrative constitutionalist thinking that would strengthen Canadian public law and allow for deeper engagement with the countless issues and cases that lie at the intersection of constitutional and administrative law, cases like *Toronto (City)*.²⁴ As discussed below, when the structural issues at stake in *Vavilov* are brought to the surface, they are illuminating, both in approach and in substance, for the *Toronto (City)* appeal, by revealing neglected arguments and mapping some of the legal terrain on which the case would be received.

This article proceeds in three parts. First, it provides an overview of *Vavilov*, pointing to its key legal developments for judicial review and some of its implications for administrative law. This part considers what the majority reasons in *Vavilov* contribute to the understanding of the structure of Canada’s constitutional order and the thin approach to constitutionalist reasoning they promote in administrative law. Second, it considers two additional matters of constitutional structure that are at stake in *Vavilov* but which are insufficiently addressed: (a) the consequences of an inconsistency between legislation and unwritten constitutional principles; and (b) the significance of institutional design to understanding the role, relationships, and reform of public actors. Each of these matters is also at stake in *Toronto (City)* and this part shows why it is important to look to *Vavilov* when resolving the issues in *Toronto (City)*. This article concludes with a discussion of a third matter of constitutional structure and administrative constitutionalism that is implicated but neglected in *Vavilov*, and of relevance to *Toronto (City)*: the place and status of the administrative state within the Canadian constitutional order. *Vavilov* was a perfect opportunity to engage with decades of administrative law developments in order to address some of that neglect, but unfortunately, the opportunity was missed.

I. VAVILOV AND A NEW APPROACH TO JUDICIAL REVIEW

The facts underlying *Vavilov* and (what became) its companion cases of *Bell Canada v Canada (Attorney General)* and *National Football League v Canada (Attorney General)*²⁵ had already made these cases somewhat high profile before they arrived at the Supreme Court. *Vavilov* involved the citizenship status of the children of undercover Russian spies who had operated under assumed identities in North America for years (and is the real-life story behind a successful American television show). *Bell Canada* cases dealt with the airing of American Superbowl commercials, determining whether Canadian football fans could view these ads during Canadian broadcasts of the Superbowl. While the facts may have continued to generate some public interest in these cases, it was only at the Supreme Court that *Vavilov* and its companion cases took on high profile legal significance as the “administrative law trilogy.”

²³ *Vavilov*, *supra* note 1 at para 13.

²⁴ Metzger argues, from an American perspective, that judges often avoid explicitly acknowledging the constitutional dimensions of their administrative law decisions: Metzger, *supra* note 15 at 1914; and see Gillian E Metzger, “Ordinary Administrative Law as Constitutional Common Law” (2010) Col L Rev 479 at 506.

²⁵ *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 [*Bell Canada*]. This judgment deals with the issues at stake both between Bell Canada and the Attorney General of Canada and between the National Football League and the Attorney General of Canada.

The applications for leave to appeal in *Vavilov* and *Bell Canada* arrived at the Supreme Court a decade after the Court's landmark decision in *Dunsmuir v New Brunswick*.²⁶ *Dunsmuir* had sought to simplify certain features of judicial review by reducing the number of standards of review available in Canadian administrative law from three to two and by streamlining the analysis used to determine the applicable standard in individual cases. It also sought to provide clear and effective guidance on how to apply the two standards, striving to focus judicial review on the merits of applications rather than the preliminary issue of standard of review. But in the decade after *Dunsmuir*, consensus emerged that the Court's laudatory aims had not been realized.²⁷ Criticism of the judicial review jurisprudence in the years after *Dunsmuir* was widespread, cut across areas of law, and came from the bench, the bar, and the academy.²⁸

The leave applications in *Vavilov* and *Bell Canada* also arrived at the Court at a time of unrest on certain administrative law issues amongst the judges. The Court's administrative law opinions since *Dunsmuir* and in particular over the past several years reflected deep divisions on major foundational issues, including on the elements of the standard of review analysis, the outcome of the analysis in particular cases, and application of the reasonableness standard.²⁹ Further, the case law reflected a restlessness amongst the judges, a restlessness borne of frustration with the *status quo* and manifesting in repeated (and unsuccessful) attempts by individual judges to corral the bench into consensus on reform related to standard of review.³⁰ Further still, *Vavilov* and *Bell Canada* arrived at the Court at a time when the case law had been affirming deference as the preferred posture of reviewing judges,³¹ but was also witnessing a growing resistance to and questioning of the foundations and realities of deferential review.³²

The critical consensus from commentators, combined with the division, restlessness, posture, and resistance within the Court itself, culminated in the Court's decision to rely on *Vavilov* and *Bell Canada* as an opportunity to "consider"—or more accurately *reconsider*—"the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, and subsequent cases."³³ Announcing this intention in its (very rarely issued) reasons on the applications for leave to appeal, the Court further noted, "[t]o that end, the appellant and respondent are invited to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review, and shall be allowed to file and serve a factum on appeal of at most 45 pages."³⁴ Three months later, the Chief Justice appointed

²⁶ 2008 SCC 9 [*Dunsmuir*].

²⁷ See e.g. Paul Daly and Leonid Sirota, *Canadian Journal of Administrative Law and Practice Special Issue - A Dunsmuir Decade/Les 10 ans de Dunsmuir* (Toronto: Carswell, 2018); David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" *SSNR* (17 February 2016), online: <ssrn.com/abstract=2733751 > [perma.cc/35DL-7BHU].

²⁸ *Ibid.*

²⁹ See e.g. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [TWU]; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 [Edmonton East]; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 [CHRC]; *Dunsmuir*, *supra* note 26.

³⁰ See e.g. *Wilson v Atomic Energy of Canada Limited*, 2016 SCC 29 [Wilson]; TWU, *supra* note 29.

³¹ See e.g. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [Newfoundland Nurses]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [Alberta Teachers]; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 [McLean].

³² See e.g. *Edmonton East*, *supra* note 29; CHRC, *supra* note 29.

³³ *Bell Canada v Canada (Attorney General)*, 2017 FCA 249, leave to appeal to SCC granted, 37896 (10 May 2018); *Minister of Citizenship and Immigration v Alexander Vavilov*, 2017 FCA 132, leave to appeal to SCC granted, 37748 (10 May 2018).

³⁴ *Ibid.*

two *amici curiae* to make written and oral submissions in the three cases, and the next month, Justice Karakatsanis granted intervenor status to the twenty-seven individuals and groups that had applied to participate.³⁵ With these developments, the much-hyped and eagerly anticipated administrative law trilogy—with *Vavilov* as the lead case—was born.

There is no better reminder of the practical and material impact that administrative decision makers can have on individuals than *Vavilov*. This article focuses on the legal analysis and implications of the case, but does so with full appreciation that this case is ultimately about the traumatic personal experience of two brothers that was exacerbated and legalized by failures of bureaucratic decision-making.³⁶ In a condensed version of the key legal facts,³⁷ this case begins with a decision of the Registrar of Citizenship (“Registrar”) to cancel the citizenship certificate of Alexander Vavilov. Mr. Vavilov was born in Canada in 1994 to parents who, at the time and for many subsequent years, were believed to be Canadian citizens. As a Canadian-born child of Canadian parents, Mr. Vavilov was legally entitled to Canadian citizenship.³⁸ In 2010, it was discovered that Mr. Vavilov’s parents had been living in Canada and then in the United States under false identities and had been, for Mr. Vavilov’s whole life, operating as undercover agents for Russia. After his parents pled guilty to charges of espionage and were returned to Russia, Mr. Vavilov applied to renew his Canadian passport; his application was denied. He was told that, in addition to his Canadian birth certificate, he needed a certificate of citizenship in order to renew his passport. He applied for and received this certificate in 2013; the following year, it was cancelled.

The Canadian Registrar of Citizenship is responsible for granting and, when necessary, cancelling certificates of citizenship and so, it was the Registrar who ultimately cancelled Mr. Vavilov’s citizenship certificate (“the cancellation decision”). The Registrar’s decision was based on a report prepared by an analyst within Citizenship and Immigration Canada. The report included an interpretation of section 3(2)(a) of the *Citizenship Act*. Section 3(2)(a) establishes an exception to the general rules of citizenship entitlement. It provides that the general rule that a person born in Canada is entitled to citizenship “does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government.”³⁹ The report concluded that section 3(2)(a) applies to employees of foreign governments even if those employees did not enjoy diplomatic and consular privileges. Accepting this interpretation and applying it to Mr. Vavilov’s case, the Registrar determined that Mr. Vavilov was not entitled to Canadian citizenship and thus, cancelled his certificate pursuant to section 26(3) of the *Citizenship Regulations*.⁴⁰

Mr. Vavilov applied for judicial review of the Registrar’s decision on grounds of procedural unfairness and substantive unreasonableness. The Federal Court dismissed the

³⁵ Supreme Court of Canada, “Docket 37748 Minister of Citizenship and Immigration v. Alexander Vavilov” *Supreme Court of Canada* (4 May 2018), online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37748> [perma.cc/DCW8-C275].

³⁶ The Associated Press, “Son of Russian Spies Relieved to Keep Canadian Citizenship” (21 December 2019), online: *CBC News* <<https://www.cbc.ca/news/politics/son-of-russian-spies-relieved-to-keep-canadian-citizenship-1.5405790>> [perma.cc/EZ6Q-GWXX].

³⁷ Facts summarized in *Vavilov*, *supra* note 1.

³⁸ *Citizenship Act*, RSC 1985, c C-29, s 3(1).

³⁹ *Ibid*, s 3(2)(a).

⁴⁰ SOR/93-246, s 26(3).

application.⁴¹ On appeal, a majority in the Federal Court of Appeal held that the Registrar's interpretation of section 3(2)(a) of the *Citizenship Act* was unreasonable and quashed the cancellation decision.⁴² The Minister of Citizenship and Immigration appealed to the Supreme Court. At this stage and in the ways noted above, the case became about much more than Mr. Vavilov's citizenship status.

On the merits, the Supreme Court unanimously agreed that the Registrar's interpretation of the *Citizenship Act* was unreasonable and thus, the decision to cancel Mr. Vavilov's certificate of citizenship could not stand. But the Court was divided on many aspects of the broader agenda it had set for itself. There is much to explore in the division between the seven-judge majority and the concurring minority reasons of Justices Abella and Karakatsanis, and indeed, much to analyze and assess in the case as a whole. This article does not try to exhaust that analysis and assessment. There is much more to say about *Vavilov* from a general administrative law perspective,⁴³ as well as from the perspective of narrower areas of law under the administrative law umbrella.⁴⁴ And there will be much to learn about the impact of *Vavilov* in these areas as reviewing courts carry out the daily practical work of judicial review and as decision-makers respond to the systemic demands of the case on the administrative justice sector. At this time, this article aims to contribute one claim to the conversation about the future of judicial review, namely that *Vavilov* represents a missed opportunity to surface many of the structural and constitutional issues that always underlie judicial review and that underlie the specific new approach to judicial review established in *Vavilov*. To make this argument, the article focuses on the majority opinion in *Vavilov* and its main claims. Accordingly, following the majority's analysis, the summary of *Vavilov* set out below focuses on two issues: the new standard of review analysis, and the majority's guidance on applying the reasonableness standard.

A. THE NEW STANDARD OF REVIEW ANALYSIS

One of the innovations of the *Dunsmuir* era was to rely primarily on precedent, categories, presumptions, and general expectations when identifying the standard of review in any particular case. The aim was simplification and so the *Dunsmuir* "standard of review analysis"⁴⁵ sought to make the applicable standard easily identifiable in most cases. Contextual analysis was supposed to be rare and relied on only when necessary. In this way, *Dunsmuir* marked a turn away from the "pragmatic and functional" or factors-based approach to determining standard of review that governed the pre-*Dunsmuir* era.

To respond to the critiques of *Dunsmuir* and its jurisprudential progeny, *Vavilov* doubles-down on categories and simplification, writing context out of the standard of review analysis completely. The majority wants "greater coherence and predictability"⁴⁶ in the law of standard of review, seeking to overcome demonstrable problems in real cases: uncertainties about when to rely

⁴¹ *Vavilov v Canada (Citizenship and Immigration)*, 2015 FC 960.

⁴² *Vavilov v Canada (Citizenship and Immigration)*, 2018 FCA 65.

⁴³ For an early contribution, see e.g. Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" SSRN (12 February 2020), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519681> [perma.cc/7LA6-R8AH].

⁴⁴ For an early contribution, see e.g. Jamie Chai Yun Liew, "A Preliminary Assessment of whether the *Vavilov* Framework Adequately Addresses Concerns of Marginalized Communities in the Immigration Context" (2020) 98:2 Can Bar Rev 398.

⁴⁵ *Dunsmuir*, *supra* note 26.

⁴⁶ *Vavilov*, *supra* note 1 at para 10.

on contextual factors, selective commitments to legislative intent, undue complexities in applying the standard of review analysis, and access to justice concerns flowing from the “costly debates” over standard of review.⁴⁷ Accordingly, the majority sets out a new standard of review analysis, one that is intended to catch all cases without the need for contextual analysis.⁴⁸

What does the new framework entail?

The starting point is a presumptive standard of reasonableness applied across all applications of judicial review. Invoking precedential trends and legislative intent, the majority explains, “for years, this Court’s jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court’s review of an administrative decision.”⁴⁹ While an incremental step towards a presumptive application of reasonableness had been taken in *Alberta Teachers*⁵⁰ and *Edmonton East*,⁵¹ the *Vavilov* majority completes the journey, stretching the limited presumption established in those cases to all applications of judicial review. The majority justifies this stretch on the basis of “respect for the legislature’s institutional design choice to delegate certain matters to non-judicial decision makers through statute.”⁵²

By defining the relevant legislative intent in terms of “institutional design,” the majority abandons a long-standing debate over the role of administrative expertise in the standard of review analysis. After *Vavilov*, courts should no longer speculate as to the legislature’s specific rationale for establishing a particular administrative scheme or presume that an administrative actor’s expertise justifies deference. Rather, the legislature’s ultimate institutional design choice to delegate a power to an administrative body cuts across all other possible rationales on which the legislature may have been relying, whether expertise, efficiency, flexibility, accessibility, and so on. “Institutional design” serves as an umbrella under which all of these rationales fit. The effect is that a “reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead ... it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review.”⁵³

The *Vavilov* presumption of reasonableness is, though, only a presumption. It is rebuttable on two grounds.

First, legislative intent. Reasonableness will be displaced when the legislature “has indicated that it intends a different standard or set of standards to apply.”⁵⁴ This will be the case in two kinds of situations: (a) where the legislature expressly prescribes the applicable standard of review; or (b) where the legislature provides that the decisions of a certain administrative actor can be appealed to a court.⁵⁵ Establishing this statutory appeal mechanism to a court is, on the *Vavilov* approach, taken as a clear signal that the legislature intended for appellate standards to apply when the administrative decision at issue is challenged in court.

⁴⁷ *Ibid* at paras 7-9, 21-22.

⁴⁸ The majority explains that its approach “offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a ‘contextual inquiry’ ... in order to identify the appropriate standard”: *Ibid* at para 17. See also *Ibid* at paras 69-70.

⁴⁹ *Ibid* at para 25.

⁵⁰ *Alberta Teachers*, *supra* note 31.

⁵¹ *Edmonton East*, *supra* note 29.

⁵² *Ibid* at para 26.

⁵³ *Ibid* at para 30 [emphasis in original].

⁵⁴ *Vavilov*, *supra* note 1 at para 17.

⁵⁵ *Ibid* at para 17.

Second, the rule of law. Reasonableness will be displaced when the rule of law requires that the correctness standard apply. According to the majority, the rule of law requires that correctness apply for the review of certain categories of questions—constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies.⁵⁶ According to the majority, applying the correctness standard to the review of these questions “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.”⁵⁷

The majority conceded that in setting out these five ways to rebut the presumption of reasonableness, it was not foreclosing the possibility that another ground of rebuttal could emerge in time. However, it notes that “at this time ... these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review.”⁵⁸ Further, the majority strongly discourages parties from making context-based arguments to identify other categories and sets a high bar for recognition of new grounds for rebuttal.⁵⁹

With this new framework, the majority not only adopted a new approach to judicial review but also erased two major questions that have been lingering and generating debate in administrative law for years: when are contextual factors relevant to determining the standard of review in a particular case? (Answer: Never, except in the rare instance when a new “category of derogation” is warranted.) And do “true questions of jurisdiction” exist and thereby warrant another category of correctness? (Answer, no).

B. THE APPLICATION OF REASONABLENESS

The second new feature of the *Vavilov* approach to judicial review is its revised understanding of reasonableness. In introducing this understanding, the majority is striving, they say, for an approach to reasonableness that “focuses on justification, offers methodological consistency and reinforces the principle ‘that reasoned decision-making is the lynchpin of institutional legitimacy.’”⁶⁰

The majority’s framing of *Vavilov* reasonableness is familiar. The majority recalls and relies on much of the pre-*Vavilov* jurisprudence to frame its conception of reasonableness. It continues to be a standard calling for “judicial restraint” and respect for the “distinct role of administrative decision makers.”⁶¹ In a case in which reasons must be provided, the standard of reasonableness asks a reviewing court to begin with the reasons provided by a decision maker, “examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion.”⁶² The reviewing court is to be concerned with the outcome of an administrative decision-making process, as well

⁵⁶ *Ibid* at para 53.

⁵⁷ *Ibid* at para 17.

⁵⁸ *Ibid* at para 69.

⁵⁹ *Ibid* at para 70.

⁶⁰ *Ibid* at para 74, citing *amici curiae factum* at para 12.

⁶¹ *Ibid* at para 75.

⁶² *Ibid* at para 84, citing *Dunsmuir*, *supra* note 26 at para 48, citing David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in M Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286.

as the reasoning followed.⁶³ Further, it is, as it has been since *Dunsmuir* and *Khosa*, a “single standard that takes its colour from the context.”⁶⁴ And ultimately, reasonableness is not a standard that demands perfection of administrative decision-makers,⁶⁵ but rather seeks to ensure that the exercise of public power is characterized by the “hallmarks of reasonableness—justification, transparency and intelligibility.”⁶⁶

This framing of reasonableness is familiar but should not be taken to mean that *Vavilov* reasonableness is the same as *Dunsmuir* reasonableness. If *Vavilov* is applied as the majority seems to suggest it should be, reasonableness is now more demanding of both administrative decision-makers and reviewing judges. It expands the meaning of reasonableness, expanding the grounds on which decisions can be quashed on judicial review. It holds that reasonable outcomes cannot stand if reached through flawed or incomplete reasoning,⁶⁷ and reviewing judges are not, in the normal course, to fill gaps in administrative reasoning.⁶⁸

And so, what makes a decision unreasonable? The majority identifies “two types of fundamental flaws” that will reveal a decision’s unreasonableness: a failure of rationality internal to the reasoning process and a failure of justification in light of the legal and factual constraints that bear on the decision.⁶⁹ While not exhaustive, these failures are sufficient to establish unreasonableness if “sufficiently central or significant” to a decision.⁷⁰ On the first type of flaw, a decision will be unreasonable if the reasons for it, “read holistically,” do not “reveal a rational chain of analysis,” “reveal that the decision was based on an irrational chain of analysis,” show that “the conclusion reached cannot follow from the analysis undertaken,” “do not make it possible to understand the decision maker’s reasoning on a critical point,” or “exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise.”⁷¹ On the second type of flaw, a decision will be unreasonable if it is not justified “in relation to the constellation of law and facts that are relevant to the decision.”⁷² The catalogue of relevant elements include, but are not limited to, “the governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies.”⁷³ This catalogue is not intended to be a checklist and the relevant elements will always depend on the context. Ultimately, the task of the reviewing court is to determine whether the reasons and outcome, read in light of the relevant contextual elements, cause the court to “lose confidence in the outcome reached.”⁷⁴ If so, the decision is unreasonable.

⁶³ *Ibid* at paras 84-85.

⁶⁴ *Ibid* at para 89, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]; *Catalyst Paper v North Cowichan (District)*, 2012 SCC 2 at para 18 [*Catalyst Paper*]; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 44; *Wilson*, *supra* note 30 at para 22; *Canada (Attorney General) v Igloo Vikski Inc.*, 2016 SCC 38 at para 57, per Côté J, dissenting but not on this point; *TWU*, *supra* note 29 at para 53.

⁶⁵ *Vavilov*, *supra* note 1 at para 91.

⁶⁶ *Ibid* at para 99.

⁶⁷ *Ibid* at para 98.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* at para 101.

⁷⁰ *Ibid* at para 100.

⁷¹ *Ibid* at paras 103-104.

⁷² *Ibid* at para 105.

⁷³ *Ibid* at para 106.

⁷⁴ *Ibid*.

As promised, the majority's discussion of reasonableness in *Vavilov* is more specific and prescriptive than the conceptual and case-by-case approach to reasonableness seen in the *Dunsmuir* era. This specificity aligns with the majority's stated goal: to provide real guidance to courts that have struggled with the application of reasonableness in practice. The majority disputes the minority's claims that *Vavilov* reasonableness is a "'eulogy' for deference" and that the majority's approach will operate as a "checklist for 'line-by-line' reasonableness review."⁷⁵ The majority contends that its "clear wording" and "the delicate balance" underlying the framework counter the minority's claims.⁷⁶ It's true that the text of the majority opinion embraces deference and rejects a line-by-line approach to reasonableness review. But the "delicate balance" to which the majority refers is less obvious and the majority's rigorous review of the Registrar of Citizenship's reasons under the reasonableness standard is deferential only insofar as it starts from the administrative reasons provided.

Moreover, by identifying a set of contextual elements that are relevant to assessing the reasonableness of a decision, the *Vavilov* approach advises reviewing judges to move through them, one-by-one. While this "checklist" may not demand a "line-by-line" review of the administrative decision, it entails a fairly searching review of the reasons provided. Further, the majority indicates that a reviewing court must ensure that administrative reasoning sets out a chain of analysis that supports the conclusion; meaningfully accounts for the issues and concerns raised by the parties; is justified in light of the evidence; is consistent with the general principles of statutory interpretation; avoids any circular reasoning; addresses binding precedents and statutory provisions; is consistent with applicable international norms; and so on. How could a reviewing court ensure that these features of a reasonable decision are accounted for without something akin to a line-by-line review of the reasons offered by the administrative decision-maker?

Simply put, *Vavilov* reasonableness is more demanding than *Dunsmuir* reasonableness. The indicators of unreasonableness just listed are new and go beyond any list of well-established examples from past cases. They set expectations that may not be, for lack of a better word, unreasonable in some administrative contexts. But, as will be discussed below, these expectations do not adequately account for the radical diversity of decision-makers within the administrative state. Further, it is disingenuous for the majority to suggest that the specific guidance it offers on reasonableness is merely a restatement, consolidation, or "clarification" of existing approaches to reasonableness.⁷⁷ *Vavilov* reasonableness is new.

C. THE BIGGER CONSTITUTIONAL PICTURE

What are we to take from *Vavilov*'s new approach to judicial review? In terms of measuring its practical impact on judicial review, only time will tell. The Court is trying to affect real change and indeed, as described above, *Vavilov* turns away from *Dunsmuir* in meaningful analytical and conceptual ways. Early applications of the *Vavilov* approach indicate that it could offer courts a basis for more intrusive reasonableness review in some cases,⁷⁸ but there is also caselaw to the contrary.⁷⁹ And there's no denying that correctness will apply more often in the *Vavilov* era than

⁷⁵ *Ibid* at para 145.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* at para 143.

⁷⁸ See e.g. *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77; *Ennis v Canada (AG)*, 2020 FC 43; and *Canadian National Railway Company v. Richardson International Limited*, 2020 FCA 20.

⁷⁹ See e.g. *Radzevicius v Workplace Safety and Insurance Appeals Tribunal*, 2020 ONC 319.

it did in the age of *Dunsmuir*. This is inevitable when statutory appeal mechanisms and judicial review are no longer governed by the same standards of review. A different question is how the revised approach will trickle down to the administrative realm and affect administrative practice, and thus, the parties subject to administrative action. Again, we can only speculate at present, but it seems hard to imagine that there will be no effect. The *Vavilov* understanding of reasonableness demands more of administrative actors than did *Dunsmuir* in terms of reason-giving, statutory interpretation, and traditional legal analysis. Will decision-makers embrace or resist these demands? Or, more precisely, which decision-makers in what circumstances will embrace these demands and which decision-makers in what circumstances will resist them? What shapes will this embrace or resistance take? How will *Vavilov* be reflected in internal policies and procedures developed at the agency level? What training will be offered to administrative decision-makers in order to establish the conditions in which the *Vavilov* standards can be met?

Similar questions should be asked at the level of legislative drafting. Will *Vavilov* have an effect on legislative design of administrative actors? While legislatures have always had the power to expressly prescribe standards of review and legislate the parameters of judicial review, the traditional judicial approach to privative clauses has perhaps undermined legislative motivation to prescribe standards of review.⁸⁰ *Vavilov*'s affirmation that the courts will implement legislated standards of review, subject to constitutional concerns, may renew legislative energy to follow British Columbia's footsteps in expressly identifying generally applicable standards of review.⁸¹ Indeed, *Vavilov* reminds legislatures of their power in this regard.

These questions about the practical impact of *Vavilov* will—and should—be the subject of study going forward. But what can be said now about *Vavilov* on doctrinal and jurisprudential grounds? Of particular interest here is what *Vavilov* offers to the understandings of Canada's constitutional structure and of the relationship between administrative action and constitutional meaning. As noted above, all cases of judicial review are constitutional in the small “c” sense. At their heart and in very practical terms, they are cases about the proper relationship between branches of government and between particular actors within those branches. The standard of review analysis demands that we consider the relationship between the judiciary, executive actors, the legislature that created and empowered those actors, and the individuals affected by the impugned executive action. Accordingly, in every instance of judicial review of administrative action, the standard of review analysis is a proxy for charting and understanding the specific arrangement of the public institutions involved. Applying the standard of review is a similarly constitutional exercise. It requires a reviewing court to assess the legality of some executive action from a particular vantage point and in light of specific contextual factors. This vantage point is defined by constitutional relationships, those between the branches of government, and the contextual factors include not only input from legislation and executive policies and procedures, but also demands of the broader principles and grander institutional configurations that structure how the judiciary, the administrative state, the executive, the public, and the legislature are to interact with each other. In this way, every exercise of judicial review necessarily “bear[s] on organs of government” and thus implicates constitutional questions of a structural order.⁸² Each case, *Vavilov* included, is, then, at a minimum, an implicit statement about constitutionalism, the arrangement of the public order, and the place of the administrative state in that public order.

⁸⁰ See e.g. *Dunsmuir*, *supra* note 26 at paras 52 and 143.

⁸¹ See e.g. *Administrative Tribunals Act*, SBC 2004, c 45, ss 58-59.

⁸² *Secession Reference*, *supra* note 10 at para 50; *OPSEU*, *supra* note 3 at 57; *Supreme Court Act Reference*, *supra* note 10 at para 82; *Senate Reform Reference*, *supra* note 9 at para 26.

Vavilov is, of course, more than just a case of exercising powers of judicial review. It is the flagship case in the Supreme Court's project of renovating the Canadian approach to judicial review. As such, the majority's reasons serve as an explicit statement of the judges' vision of the constitutional order, including the administrative state's place within that order and the relationships between the branches of government. The vision underlies the approach to judicial review set out above. Judicial review necessarily bears on relationships between organs of government and speaks to the powers and responsibilities of state actors. In effect, judicial review is always an expression of constitutional structure; it must therefore be shaped and carried out with a deep appreciation of that structure and its legal implications. If this is the case, it seems to go without saying that the necessary structural analysis and appreciation must include some understanding and appreciation of the nature of the administrative state and its place in the constitutional order. A court cannot meaningfully design or execute an approach to judicial review without a rich account of the nature, character, powers, duties, and status of the administrative state in the grander public order, that is, in relation to the other major and local institutions of governance. Moreover, this account must be up to date, speaking to the realities of the administrative state as it is rather than as it was in earlier eras categorized by continued growth of the administrative sector rather than its well-established ubiquity.⁸³

The majority opinion in *Vavilov* does not expressly offer such a vision of the administrative state and looking deeper at the reasoning, we are left wondering what that vision might be. On the majority approach, administrative decision-makers are owed deference but that deference comes in the form of strict judicial oversight and in a hierarchical rule of law culture in which judges know best. Moreover, the majority aims to enhance the legitimacy of administrative decisions by cultivating a strong culture of justification,⁸⁴ but to do so, it expects the reasoning of administrative actors subject to review (in addition to those subject to judicial appeal) to increasingly replicate that of courts. Further still, the majority affirms the distinctive and challenging diversity that characterizes the expansive set of actors that comprise the administrative state, but then writes out most of that diversity in both its standard of review analysis and its guidance on how to review administrative decisions.

There may be a coherent vision of the administrative state in the majority's reasoning; the tensions and aspirations underlying administrative justice and judicial review are not necessarily amenable to or in need of resolution. But what that vision might be or how the majority might explain its embrace of sustained tension is not obvious or even acknowledged. More attention to structural reasoning, and to the constitutional questions at stake, in administrative law and judicial review could have reminded the majority to contemplate these issues more deeply in developing its approach to judicial review in *Vavilov* and offered guidance for realizing its aspirations for judicial review going forward. Moreover, it could have avoided rendering *Vavilov* another example of insufficiently structural and constitutional thinking in administrative law. And it could have seized the opportunity to model, in approach and substance, the kind of public law thinking that is needed in cases, cases like *Toronto (City)*, as discussed below, that must assess the legal

⁸³ On this point, see Kate Glover Berger, "The Constitutional Status of the Administrative State" [Berger, "The Constitutional Status"] [forthcoming].

⁸⁴ *Vavilov*, *supra* note 1 at para 2.

consequences of institutional actions and relationships that involve or affect actors within the administrative state.⁸⁵

In addition, the majority's reasoning raises questions about how to understand the position of the administrative state within the constitutional order as a whole, yet these questions—and any account of their answers—go unacknowledged in the majority reasons. The biggest shift on this issue flows from the majority's justification for the presumption of deference. In the *Dunsmuir* era of judicial review, deference to administrative decision-makers was justified at least in part because of features of the administrative actor involved or of the administrative state as a whole, features such as field of expertise, specialized contextual knowledge within a particular legislative sphere, and on the ground experience with the polycentric issues to be dealt with by the administrative agency. But after *Vavilov*, the presumption of deference is justified not because of any feature or set of features of an administrative actor but rather because of executive and legislative policy decisions to delegate some authority to a statutory body. Thus, the nature of the administrative decision-maker, and the special circumstances in which decision-makers operate, is irrelevant.

The majority's shift in thinking on this point—the revised justification for the presumption of deference—is the result of structural reasoning. It is an artefact of the majority's analysis of which institutional powers are of primary importance when setting the parameters of judicial review. According to the *Vavilov* majority, the legislative decision to delegate and how to construct that delegation is the foundation of the approach as a whole. The majority's reasoning fits with the concerns of structural constitutionalists—it is about institutional relationships and powers. But the majority's commitment to the structural constitutionalist perspective, more specifically, its structural reasoning, is thin because it fails to acknowledge its revised justification for deference as a constitutional shift. It justifies the change in pragmatic terms. As explained above, with the new approach, there is no need to assess the expertise of individual decision-makers, there is a degree of certainty available to parties seeking judicial review, access to justice is promoted, and so on. But the revised approach to deference does reflect a structural shift—the administrative state has been demoted from active agent to legislative observer. This shift not only affects the administrative state's relative power but also raises questions about other administrative doctrines and powers—such as the power of an administrative decision-maker to hear and decide constitutional questions—that have been justified in terms of administrative strength, expertise, specialization, and access to justice.⁸⁶ Does *Vavilov* undermine the authority of those precedents?

The critique offered in this article is, in part, in agreement with a claim that has been raised elsewhere that one of *Vavilov*'s shortcomings is its lack of engagement with principle. For example, Paul Daly has argued that the majority's reasoning ultimately prioritizes pragmatism over principle, and has provided examples from the reasoning where this can be seen.⁸⁷ I agree and both this part and the next elaborate some of those examples. Noting the prioritization of pragmatism over principle is an important and useful comment on *Vavilov* as it highlights the need to be attentive to the practical, conceptual, and jurisprudential dimensions of the judgment, and to interrogate the choices made by the judges. As Daly explains, there may be good reasons to strive

⁸⁵ Consider, for example, how a richer analysis of the nature of administrative actors and of municipal councils in particular could thicken the interpretation of s 92(8) of the *Constitution Act, 1867*, as seen at *Toronto (City)*, *supra* note 21 at paras 93-95.

⁸⁶ See e.g. *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54; *R v Conway*, 2010 SCC 22.

⁸⁷ Daly, *supra* note 43.

for pragmatism at this particular administrative law moment however, that does not diminish or erase the effect of choosing to do so on the theoretical richness (or thinness) of *Vavilov*.⁸⁸

This article is similarly concerned with the theoretical wanting of *Vavilov* but the focus is somewhat different. The claim here is that by failing to engage on the level of principle, in particular principles of importance in administrative and structural constitutionalism, *Vavilov* is too self-regarding; it is too narrow in its outlook. It fails to acknowledge that the structural and constitutional questions at stake in every instance of judicial review are heightened in the exercise of articulating a new judicial approach to judicial review, and as a result, does not deeply engage with these questions. It positions itself as a transformative but pragmatic administrative law case. In this framing, the majority ignores the much more expansive public law terrain on which the case sits.

In seizing *Vavilov* as an opportunity to undertake a project of reforming judicial review, the Court signalled that *Vavilov* would be an example of grand administrative law thinking; it intended the case to be transformative and to begin a new era of judicial review. The administrative law trilogy was therefore an opportunity for the Court to model the kind of deep structural and constitutional thinking that must underlie an approach to judicial review. Unfortunately, by prioritizing pragmatism at the expense of principle and by failing to acknowledge constitutional dimensions of its new approach, *Vavilov* missed that opportunity.

II. MORE MISSED OPPORTUNITIES IN *VAVILOV* (AND THEIR BROADER IMPACT)

The preceding part dealt with a structural shortcoming in the majority's reasoning on the new approach to judicial review itself. This part turns its focus to two ways in which the *Vavilov* majority missed opportunities to engage with relevant matters of constitutional structure. It highlights the broader impact of these missed opportunities within public law using the case study of the *Toronto (City)* litigation. In brief, in *Toronto (City)* the City of Toronto ("City" or "Toronto") is challenging the constitutionality of provisions of the *Better Local Government Act, 2018*⁸⁹ ("BLGA"), arguing that these provisions contravene section 2(b) of the *Canadian Charter of Rights and Freedoms*,⁹⁰ section 92(18) of the *Constitution Act, 1867*,⁹¹ and unwritten constitutional principles. In short, the *Better Local Government Act, 2018* amended the *City of Toronto Act, 2006*,⁹² the *Municipal Act, 2001*,⁹³ and the *Municipal Elections Act, 1996*⁹⁴ with the effect of redrawing Toronto's electoral map, requiring that the 2018 municipal election in Toronto proceed on the basis of the revised electoral map, and providing that Toronto's City Council would now be composed of one councillor for each of the new wards.⁹⁵ In effect, the BLGA reduced the number of electoral wards in the City, and thus the membership of the Council, from forty-seven to twenty-five.

⁸⁸ *Ibid.*

⁸⁹ SO 2018, c 11 [BLGA].

⁹⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁹¹ *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

⁹² SO 2006, c 11.

⁹³ SO 2001, c 25.

⁹⁴ SO 1996, c. 32.

⁹⁵ BLGA, *supra* note 89.

The most controversial feature of the BLGA was its timing. It came into force on 14 August 2018, in the middle of the City’s 2018 municipal election. The nomination period for the election had opened on 1 May 2018 and closed on 27 July 2018, and the election was scheduled for 22 October 2018. Though the BLGA extended the nomination period until 14 September 2018, it retained the October election date. This extension did not address the time, money, care, and energy that had already been invested by candidates. The evidence established that at the time the BLGA came into force, candidates seeking Council seats had relied on the original forty-seven-ward electoral structure when deciding where to run, the content of their platforms, how to connect with voters, fundraising models, and the design of their publicity campaigns. Indeed, “[a] great deal of the candidate’s time and money had been invested within the boundaries of a particular ward when the ward numbers and sizes were suddenly changed.”⁹⁶

The City’s constitutional challenge was successful at first instance.⁹⁷ Justice Belobaba of the Superior Court held that the BLGA contravened section 2(b) of the *Charter* and could not be justified under section 1. He declared the impugned provisions of the BLGA to be of no force and effect and ordered the election to proceed as originally planned, on the basis of a forty-seven-ward model and a forty-seven-member Council. As it was unnecessary to do so, Belobaba J did not address the other constitutional arguments raised. In September 2018, the Court of Appeal granted a stay of Justice Belobaba’s order pending appeal.⁹⁸ Accordingly, the election proceeded on the basis of a twenty-five-ward electoral map. In September 2019, a five-judge panel of the Court of Appeal allowed Ontario’s appeal of Belobaba J’s order. A majority of the panel concluded that the BLGA did not infringe section 2(b) of the *Charter* and that none of the other constitutional arguments could succeed.⁹⁹ In rejecting these alternative arguments, Justice Miller held that “unwritten constitutional principles do not invest the judiciary with a free-standing power to invalidate legislation” and could not, as a result, be relied on to invalidate the BLGA.¹⁰⁰ Further, he concluded that the unwritten constitutional principles of democracy and the rule of law were of no use in interpreting provincial legislative authority over municipalities provided for in section 92(8) of the *Constitution Act, 1867*. As there was no open question of constitutional interpretation or a new legislative subject matter at stake in this case, unwritten constitutional principles were not relevant to delineating the province’s expansive legislative power over municipalities.¹⁰¹

The case is now headed to the Supreme Court of Canada. In its materials, the City identifies three issues for the Court:¹⁰² First, does the *Charter* protect “the expression of electoral participants from substantial mid-election changes to the election framework and rules?” Second, can legislation be declared of no force and effect because it is inconsistent with the unwritten constitutional principles of democracy and/or the rule of law? And third, are municipal electors constitutionally entitled to effective representation?

This summary shows that in approach, *Toronto (City)* is a standard constitutional challenge to legislation. In that sense, it may seem to be unrelated to, and likely unaffected by, the Supreme Court’s judgment in *Vavilov*. That initial reaction makes *Toronto (City)* an apt case study for this article, as my point is that the insights of structural and administrative constitutionalism from *Vavilov* are pertinent beyond the narrow judicial review context, thereby bolstering calls for greater

⁹⁶ *City of Toronto et al v Ontario (AG)*, 2018 ONSC 5151 at para 29.

⁹⁷ *Ibid.*

⁹⁸ *Toronto (City) v Ontario (AG)*, 2018 ONCA 761 at para 1.

⁹⁹ *Toronto (City)*, *supra* note 21 at paras 30-95.

¹⁰⁰ *Ibid* at para 89.

¹⁰¹ *Ibid* at paras 93-95.

¹⁰² Memorandum of Argument of the Applicant, City of Toronto (Application for Leave to Appeal) at para 9.

unity in public law analysis. To make this point, I turn now to two additional issues of constitutional structure that are at stake in *Vavilov* but which remain underdeveloped in the majority's reasoning. These issues are not exhaustive of the kinds of sub-issues of structural and administrative constitutionalism at stake in cases of judicial review, but they are illustrative of the problem. The discussion of each example offers some insight into what the majority opinion implicitly says on these issues and considers the impact of this reasoning not only in *Vavilov* and in the judicial review context, but also outside of administrative law.

A. UNWRITTEN PRINCIPLES AND THE CONSTITUTIONALITY OF LEGISLATION

The first structural issue that is implicated but not discussed in *Vavilov* is the constitutionality of legislation that is inconsistent with an unwritten principle of the Constitution. The issue is particularly interesting and fraught when the legislation in question deals with the powers and mandate of a public decision-maker, who is, of course, itself bound by the Constitution and its principles.

This issue is addressed directly in *Toronto (City)*. In his majority reasons, Miller JA rejects the City's argument that provisions of the BLGA should be declared of no force and effect because they are inconsistent with unwritten principles of the Constitution, namely, democracy and the rule of law. Noting the primacy of constitutional text, concerns about "judicial governance," and the near impossibility of legislative response to judicial declarations of invalidity,¹⁰³ Miller JA concludes, as noted above, that "unwritten constitutional principles do not invest the judiciary with a free-standing power to invalidate legislation" and so they "cannot be invoked to invalidate the Act."¹⁰⁴

Justice Miller rightly notes that the role of unwritten principles in invalidating statutory provisions is contested.¹⁰⁵ But his definitive conclusion that unwritten principles writ large cannot be the basis of a declaration of constitutional invalidity is not consistent with the jurisprudence. While the courts have declined to declare legislative provisions of no force and effect when there is no inconsistency with an unwritten principle,¹⁰⁶ the Supreme Court has indicated its willingness to make such declarations when such an inconsistency arises.¹⁰⁷

In the administrative and executive spheres, certain unwritten constitutional principles give rise to substantive legal obligations and have combined to construct the scaffolding for procedural design.¹⁰⁸ The unwritten principle of judicial independence also sustains legislative obligations to implement specific decision-making procedures when certain conditions, such as judicial salary negotiations and, as I argue elsewhere, investigation of complaints against federally appointed

¹⁰³ *Toronto (City)*, *supra* note 21 at paras 84-88.

¹⁰⁴ *Ibid* at para 89.

¹⁰⁵ *Toronto (City)*, *supra* note 21 at para 84. See e.g. M D Walters, "Written Constitutions and Unwritten Constitutionalism" in G Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Oxford: Oxford University Press, 2008) 245; Janna Promislow & Naomi Metallic, "Realizing Aboriginal Administrative Law" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3d ed (Toronto: Edmond Publishing, 2017) 87.

¹⁰⁶ See e.g. *Ell v Alberta*, 2003 SCC 35 [*Ell*]; *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3 [*Remuneration Reference*].

¹⁰⁷ See e.g. *Ell*, *ibid*.

¹⁰⁸ *Roncarelli v Duplessis*, [1959] SCR 121; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73; and *Secession Reference*, *supra* note 10.

judges, are met.¹⁰⁹ These are uses of the Constitution’s unwritten principles that are in addition to the interpretive and structural purposes that the principles serve. As the Supreme Court explains in the *Secession Reference*, the unwritten principles “breathe life” into the Constitution, “dictat[ing] major elements of the architecture of the Constitution itself and are as such its lifeblood.”¹¹⁰ They assist in “the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions.”¹¹¹ And they are, the Court explained, meaningful sources of legal obligation:

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have “full legal force”, as we described it in the *Patriation Reference, supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. “In other words”, as this Court confirmed in the *Manitoba Language Rights Reference, supra*, at p. 752, “in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada.”¹¹²

There are general observations that can be made about unwritten principles, as seen in the *Secession Reference*, but it does not follow that all principles can or will serve all purposes in any particular situation or that each principle has the same normative effects as any other principle in specific cases. The details, including the meaning and content of any principle that is relevant in the circumstances, will always be determinative. This must be true in *Toronto (City)*, as it is in every case. But the details must be examined; a simple rejection of the possibility of legislative unconstitutionality stemming from unwritten principles is not borne out in the jurisprudence.

Vavilov was an opportunity for the Court to offer insight into the role of unwritten principles in assessing the constitutionality of legislation. In fact, the majority’s new approach to judicial review directly raised the issue, but the majority does not acknowledge or engage with it. Implicitly, though, the majority reasoning in *Vavilov* signals support for an argument that Miller JA erred in his definitive conclusion on unwritten principles. While the majority fails to complete its analysis on this point, the effect of *Vavilov* is that in at least some circumstances, legislation will not be given effect if it is inconsistent with the rule of law.

The issue arises in *Vavilov* in relation to legislative prescriptions of the standard of review. Recall that one of the circumstances in which we are to derogate from the presumption of reasonableness is when the legislature identifies the applicable standard of review. The majority explains, “[w]here a court reviews the merits of an administrative decision ... the standard of review it applies must reflect the legislature’s intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law.”¹¹³ Explaining further, the

¹⁰⁹ *Remuneration Reference, supra* note 106; Kate Glover Berger, “The Administrative Demands of Unwritten Principles” (2020) 65:2 McGill LJ [forthcoming].

¹¹⁰ *Secession Reference, supra* note 10 at para 51.

¹¹¹ *Ibid* at para 52.

¹¹² *Ibid* at para 54.

¹¹³ *Vavilov, supra* note 1 at para 23.

majority contends that the courts must apply a legislated standard of review in order to give effect to legislative intent. The only limit will be the rule of law:

It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.¹¹⁴

Imagine, then, legislation that provides that a tribunal's decisions regarding the division of powers are to be reviewed on the standard of reasonableness. What is the constitutional status of this legislative provision? The new standard of review analysis requires legislative prescriptions be followed. However, it also requires that legislative prescriptions be followed unless they are inconsistent with the rule of law. Recall that the majority also holds that the rule of law requires that constitutional questions be reviewed on a standard of correctness.¹¹⁵ It seems to follow that a court cannot give effect to a legislated standard of reasonableness on review of a constitutional question dealing with the division of powers.

The majority does not call attention to the consequences of this conclusion or engage with the debates regarding unwritten principles. Those broader debates remain under the reasoning's surface. But the implication of the majority's reasoning is clear—legislative intent, even legislative intent clearly articulated in an otherwise valid statute, is constrained by the rule of law. Judicial review is, therefore, a context in which legislation that is inconsistent with the rule of law will not be given full effect.

One might argue that this amounts to treating legislated standards of review like privative clauses: they are not given effect but are not unconstitutional. Yet this analogy does not work on the *Vavilov* model. The presence or absence of a privative clause was accounted for in the pragmatic and functional approach and the *Dunsmuir* contextual analysis. The legislative intent behind a privative clause was “given effect” insofar as it was folded into a broader contextual assessment of what standard of review should apply in a particular case. But the majority in *Vavilov* has abandoned any contextual analysis in the standard of review analysis. In the *Vavilov* universe, the only basis to refuse to give effect to legislative intent is the Constitution. And with this example, the constitutional basis is the unwritten principle of the rule of law.

This issue is a clear matter of structural constitutionalism—a question of the normative and operational status of the unwritten principles and of the pressures these principles can exert on legislative action. The majority's reasoning in *Vavilov* points to an undeniable potential for conflict in the circumstances—the rule of law cannot tolerate a posture of deference on a federalism question. But the majority offers no guidance on the constitutional consequences of this conflict. More broadly, by not acknowledging the issue, the Court misses the opportunity to signal to public law counsel and scholars to consider this manifestation of the conflict between unwritten principles

¹¹⁴ *Ibid* at para 35.

¹¹⁵ *Ibid* at paras 17, 54-57.

and legislation. It thus keeps this conflict between principle and prescription tucked within the administrative law sphere, without either drawing constitutional considerations into the administrative law analysis or projecting the issue into constitutional circles for consideration. Without merging the constitutional and administrative perspectives in this context, the majority reasoning in *Vavilov* signals that administrative law—and the administrative state—has its own constitutional law rather than participates in the development and elucidation of “regular” constitutional law. The majority had the chance to explain and justify this reasoning, limiting it if desired (and if possible). Instead, the reasons do not engage with the issue. The issue of the impact of unwritten principles on the constitutionality of legislation that affects administrative action is thus left to be resolved in *Toronto (City)*, where the issue is raised head on.

B. THE SIGNIFICANCE OF INSTITUTIONAL DESIGN

The second structural issue that is implicated but remains under-analyzed in *Vavilov* is the legal significance of institutional design and reform. This claim may seem strange because the majority positions institutional design at the heart of its new standard of review analysis. As explained above, the majority justifies the new presumption of reasonableness, as well as one of the two grounds for derogating from this presumption, in terms of the legislature’s institutional design choices. With respect to the presumption, the majority explains that since the late 1970s, “the central rationale for applying a deferential standard of review in administrative law has been respect for the legislature’s institutional design choice to delegate certain matters to non-judicial decision makers through statute.”¹¹⁶ While other ‘sub’-rationales have also been offered to explain decisions to delegate authority to administrative decision-makers, such as expertise, efficiency, cost, and access to justice, the majority holds that those sub-rationales can all fall under the umbrella of institutional design choices. They explain, “[w]hile specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead ... it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review.”¹¹⁷

Similarly, on the *Vavilov* model, a legislature’s choice to define the relationship between an administrative actor and a reviewing court by either prescribing a standard of review or establishing a mechanism by which an administrative actor’s decisions can be appealed to the courts will be determinative of the applicable standard of review: whatever the legislature prescribes in the first instance, and the regular appellate standards in the second. These too are design choices, this time, explicit choices, about how to structure the relationship between institutions, rather than a choice to create and design a single organization.

In this sense, it seems that the *Vavilov* majority is sensitive to the significance of institutional design in administrative law and public law relationships more broadly. And indeed, this sensitivity is an advance in the law as it avoids the easily undermined reliance on expertise, expediency, or cost-effectiveness that has justified deference in the past. But in looking more deeply at the majority’s approach to institutional design in the *Vavilov* decision as a whole, we see that it too needs greater consistency, reach, and nuance. Consider a few examples.

¹¹⁶ *Ibid* at para 26.

¹¹⁷ *Ibid* at para 30 [emphasis in original].

First, the majority does not explain why the only design choices that are relevant to the new standard of review analysis are delegation, prescribed standards of review, and statutory appeal mechanisms. On the acontextual analysis that *Vavilov* demands, other design choices, and the interaction of the institutional features that flow from those choices, are irrelevant. What if, as Daly asks, an administrative actor's enabling statute includes both a privative clause and a statutory appeal?¹¹⁸ The former, which also reflects a legislative choice about institutional design, would not be considered in the choice of standard of review. Further, what about the substantive purpose or mandate bestowed upon an administrative actor? This empowering and limiting legislative statement about the role that the actor is intended to play in the public order is, on the *Vavilov* model, also irrelevant to determining standard of review. In other words, it is irrelevant to determining whether a reviewing court owes deference to the decision-maker. This would be so even if it provided a strong indicator that deference should not be shown. Again, the majority leaves us wondering why some design choices are to be prioritized over others.

Second, when it comes to applying the standard of reasonableness, the majority notes two fundamental flaws that reveal a decision's unreasonableness. One is a form of contextual analysis—a reasonable decision must be justified in light of the relevant factual and legal constraints that operate on the decision maker. Those constraints include a set of legal and factual considerations that may be accounted for in any particular decision-making context. However, when the majority lists the constraints and applies them to the facts in *Vavilov*, there is no consideration of the nature of the decision-maker or its unique and particular set of institutional features. This is so even though the majority retains the general principles from *Dunsmuir*, *Khosa*,¹¹⁹ and *Newfoundland Nurses*¹²⁰ that “the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case” and that the “review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.”¹²¹ These signals of the importance of the nature of an administrative decision-maker, its design features, and its operational realities are not, for the most part, reflected in the list of constraints that the majority goes on to identify as relevant (*i.e.* the statutory and common law applicable to the decision-maker, the principles of statutory interpretation, the evidence before the decision-maker, the submissions of the parties, the potential impact of the decision on the individual to whom it applies).

The two potential exceptions included in the majority's list are the administrative decision-maker's enabling statute and the past practices of the administrative actor. Both factors open the door to considering some institutional design features and the nature of a decision-maker in assessing what amounts to a reasonable decision in the particular decision-making context under review. That said, this potential is not particularly promising when read in conjunction with the majority's review of the Registrar's cancellation decision in *Vavilov*. That review, which is the first example of how to operationalize *Vavilov*, did not consider the nature, design, or features of the Registrar when concluding that her decision was unreasonable. The Registrar's enabling statute was examined only with respect to the principles of statutory interpretation, not in a contextual analysis of what a reasonable decision of the Registrar should or could look like.

Third and finally, the majority suggests that it is alive to the radical diversity that characterizes the administrative state in Canada. The majority writes that its new approach

¹¹⁸ Daly, *supra* note 43.

¹¹⁹ *Khosa*, *supra* note 64.

¹²⁰ *Newfoundland Nurses*, *supra* note 31.

¹²¹ *Vavilov*, *supra* note 1 at paras 89, 91.

“accommodates all types of administrative decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy.”¹²² The majority expressly acknowledges that the diversity of decision-makers is an undeniable challenge for administrative law:

In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of “high policy” on the one hand and “pure law” on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.¹²³

The majority goes on to say that its approach to reasonableness attends to this diversity within the administrative state:

The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.¹²⁴

The majority’s acknowledgment that the administrative state comprises a diverse and sprawling set of decision-makers that differ across many metrics is an important affirmation of administrative law’s challenge—to be relevant and meaningful across this diversity. But how the majority’s approach actually accounts for this diversity is unclear. The acontextual nature of the *Vavilov* standard of review analysis now applies correctness to legal determinations by sophisticated tribunals subject to appeal, but does not account for the repeated pleas from marginalized and vulnerable communities in the corrections and immigration sectors for greater oversight of the reviewable (rather than appealable) decisions to which they are subject day-to-day.¹²⁵ Moreover, as explained above, the legal and factual constraints that are to be considered in the application of reasonableness provide little incentive or opportunity to seriously account for the institutional context in which an administrative decision is made. How then is diversity within the administrative state accounted for in practice? How would the majority’s review have been any different had it been reviewing the decision of the Minister of Citizenship rather than the

¹²² *Ibid* at paras 11, 88-90.

¹²³ *Ibid* at para 88.

¹²⁴ *Ibid* at para 90.

¹²⁵ Factum of Queen’s Prison Law Clinic and the Respondent, Alexander Vavilov (SCC File No. 37748).

Registrar or, for that matter, had it been reviewing a decision of the National Energy Board rather than the Registrar? Beyond its statement that context matters, the answers to these questions remain uncertain.

With each of these examples, we see the majority indicating that the nature and design of administrative decision-makers, both their internal design and the configuration of their relationships to other institutions, are important considerations in judicial review. These are meaningful (and correct) affirmations—administrative law must care deeply about institutional design if it can offer any guidance about the fairness or integrity of government decision-making. But in each of the ways set out above, the majority’s affirmations are revealed to be superficial and undermined either in application or when read in the context of the decision as a whole. This is so even though the Court received submissions from twenty-seven intervenors in this trilogy of cases that offered the Court perspectives from a diverse set of administrative sectors, including labour, immigration, landlord and tenant, prison administration, securities, environmental regulation, workplace health and safety, workers’ compensation, pharmacy regulation, children’s aid, government ministries, and so on. Again, we see a lack of careful attention to the questions and realities of institutional design in the administrative sphere in a case that positions itself as the major rethink of judicial review.

In effect, then, the signal the majority ultimately sends is that institutional design and the nature of decision-makers are important to understanding the work of administrative actors and defining the relationship between the courts and the administrative state, but either not sufficiently important or not sufficiently understood to be operationalized in a coherent or nuanced way across the new judicial approach to judicial review. Both reasons are consequences of the chronic inattention to structural matters in public law thinking. Thus again, by examining the majority’s approach to institutional design, we can see that *Vavilov* was an opportunity to model the kind of thinking that is needed in order to assess the significance of institutional design and the impact of design reform on institutions and their relationships, but the opportunity was missed.

Toronto (City) is a case in which we see the need for better understandings of the significance of institutional design and reform, and such modeling of structural thinking in public law cases. So far, the impugned state action in *Toronto (City)* has been framed in terms of the legislature’s redrawing of the electoral ward map and its corresponding reduction of the membership of Toronto’s City Council. The reduction in membership is framed in terms of interference with rights to effective representation and free political expression. In light of the electoral rights and free speech claims asserted by the City and affected candidates and electors, this framing, shaped by constitutional concerns, makes sense.¹²⁶ But when the BLGA is considered from an administrative law perspective, a question about institutional design arises. The administrative law perspective asks whether the BLGA’s reform of Council, which not only reduced Council’s size and membership but also meaningfully altered (that is, shrunk) Council’s statutory powers, qualitatively changed the institution to which representatives were being elected.

¹²⁶ In contrast, the majority of the Court of Appeal rejected the integrity of this framing. It concluded that the City’s claim does not genuinely engage concerns about free expression but rather deals with “essentially a political matter”—that is, dissatisfaction with the timing of the legislature’s decision to reform Council, which, the majority contends, is “undeniably within the legitimate authority of the legislature” (*supra* note 90 at para 6). Further, the majority held that the City’s success at the application stage was a function of judicial rewriting of section 2(b) of the *Charter*; such a claim could not be sustained on a proper interpretation of the constitutional text (*ibid* at para 34). Finally, the majority rejected the City’s invocation of section 3 of the *Charter*, whether as an independent claim or as an aid to understanding the scope of section 2(b) protection. Section 3 does not apply to municipal elections, the majority concluded, and so is not relevant in this case (*ibid* at para 76).

And if this is the case, administrative law asks, what are the constitutional implications of this qualitative change? At what point does statutory reform of a representative institution, mid-election or otherwise, unlawfully interfere with the principle of democracy or electoral rights? Answering this question requires a nuanced appreciation of the design of governance institutions and the impact of reform. This has been missing from the *Toronto (City)* case so far and, unfortunately, the opportunity in *Vavilov* to offer some insight into how to sensitively and rigorously account for design and reform choices was missed.

III. CONCLUSION: VISIONS OF THE ADMINISTRATIVE STATE AND THE BOUNDARIES OF PUBLIC LAW

In *Toronto (City)*, Miller JA began his majority opinion with the observation that the Toronto City Council is “a creature of provincial legislation. Provincial legislation governs everything from its composition to the scope of its jurisdiction.”¹²⁷ With this observation, Justice Miller was making the point that Toronto City Council (the “Council”) lacks independent constitutional status. Its mandate and authority, indeed the Council’s very existence, depends entirely on exercises of provincial legislative power.

Justice Miller’s observation foreshadowed the constitutional analysis that followed and the majority’s rejection of the City’s claims for constitutional protection of municipal power against provincial intrusion. The observation also reflects a familiar conception of the administrative state. By highlighting the Council’s statutory status and character, Miller JA positions the Council as ordinary and dependent. As just another administrative actor, the Council sits alongside countless boards, tribunals, agencies, and other public actors that may play important roles in the delivery of public programs, but which are at the mercy of executive and legislative agendas on delegation.¹²⁸

This view is familiar and before *Vavilov*, I would have argued that Justice Miller’s comments do not account for the possibility that describing administrative actors as merely creatures of statute might be too simplistic and out-dated in a constitutional order in which administrative agencies are the principal settings in which individuals interact with the legal system, have their rights interpreted and implemented, and seek to access justice in their daily lives. Nor does it account for diversity within the administrative state and how the idiosyncratic features of a particular administrative actor might be relevant to assessing the place of that actor in the constitutional order.¹²⁹ Indeed, I would have argued that the example of municipal councils highlights the need to consider whether Miller JA’s blanket account of the nature of administrative actors is at odds with realities on the ground.

Enabling statutes are just one feature of municipal councils, albeit significant ones. But the nature of municipal power is unique. Councils are administrative institutions made up of elected officials who are directly accountable to their constituencies. They exercise legislative and executive functions that replicate those of the provincial and federal governments. And their jurisdiction captures the most local aspects of life such that their potential for impact on the daily lives of individuals, whether for good or ill, is tremendous. Indeed, it is because of the unique features of municipal councils—their democratic mandate, the nature of their powers, and the significance of their effect—that the courts have often shown a high degree of deference to council

¹²⁷ *Toronto (City)*, *supra* note 21 at para 1.

¹²⁸ *Catalyst Paper*, *supra* note 64 at para 15.

¹²⁹ Consider *e.g.* Berger, “The Constitution,” *supra* note 5.

decision-making. While municipal councils do not have *carte blanche* when acting within their jurisdiction and while they remain subject to their enabling legislation, the Supreme Court has held that a municipal bylaw will be quashed on judicial review only if it is “one no reasonable body informed by [the wide variety of factors that could be relevant to municipal councils] could have taken.”¹³⁰ Indeed, municipal bylaws tend to be upheld on judicial review unless they were found to be “aberrant,” “overwhelming,” or unadoptable by any reasonable body.¹³¹ The threshold for unreasonableness is high.¹³² All of these features cry out for a constitutional analysis that appreciates the unique and essential character of municipalities in the public order and that understands the constitutional status of municipalities accordingly.¹³³

Vavilov raises questions about claims for constitutional status by downplaying the unique features of administrative bodies in its account of the roles and relationships at play in judicial review. This seems to flip the switch on the *Dunsmuir* era of context-dependent analysis and administrative strength without an account of why or how to proceed, and without acknowledging the resulting constitutional shift. In this way, *Vavilov* participates in the chronic problem in administrative law that this article aims to expose, a problem that is witnessed in other public law cases, cases like *Toronto (City)*, that lie at the intersection of constitutional and administrative law. The problem is insufficient attention to the constitutional questions, and more specifically, the questions of structural and administrative constitutionalism at stake.¹³⁴ Whereas *Vavilov* represents a missed opportunity to respond to this problem, perhaps hope lies with *Toronto (City)*.

¹³⁰ *Catalyst Paper*, *supra* note 64 at para 24.

¹³¹ *Ibid* at para 20, citing *Kruse v Johnson*, [1898] 2 QB 91 (Div Ct); *Associated Provincial Picture Houses, Ltd v Wednesbury Corp*, [1948] 1 KB 223 (CA); *Lehndorff United Properties (Canada) Ltd v Edmonton (City)* (1993), 146 AR 37 (QB), *aff'd* (1994), 157 AR 169 (CA).

¹³² *Catalyst Paper*, *supra* note 64 at para 20.

¹³³ Berger, “The Constitutional Status,” *supra* note 83.

¹³⁴ For different conceptions of the administrative state and the constitution, see *e.g.* Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* (Cambridge: Harvard University Press, 2016); Harry Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985), and see generally, the literature cited, *supra* note 14.