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CHAPTER FOUR

Governments in Miniature: The Rule of Law in the Administrative State

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I. INTRODUCTION

If there is one concept that ties together the seemingly disparate strands of administrative law, it is surely the rule of law. This chapter discusses several attributes of the rule of law and explores their relevance for Canadian administrative law. Although it is unlikely that the rule of law will constitute a direct and complete basis for answering a law exam question, the puzzles and tensions that administrative law evokes cannot be understood without recourse to this foundational concept.

Part II presents several of the main features of the rule of law: the rule of law as a constitutional principle, the rule of law as a political ideal involving a matrix of institutional relations and competencies, and the rule of law as a distinctive political morality.[1] Part III of this chapter assesses the Canadian articulation of the rule of law in the jurisprudence of the Supreme Court of Canada. The fourth part focuses on judicial review of administrative action as a key component of the rule of law. The conclusion argues that at least for Canadian administrative law, the rule of law is best conceived as an open set of institutional practices entailing shared responsibility for upholding the content of the rule of law, a responsibility that is distributed within and among coordinate institutions.

II. THE RULE OF LAW IN THEORY

Certain philosophical concepts—for example, democracy, freedom, autonomy, equality, rights, and the rule of law—do not have a firmly agreed-upon core of meaning and therefore can be considered essentially contested.[2] Despite this uncertain state of philosophical affairs, this part suggests that the rule of law can be characterized by three interrelated features: a jurisprudential principle of legality; an activity or practice of law-making among and within an institutional arrangement of government; and a distinctive political morality. Together, these three features affirm the rule of law as an overarching normative relationship among legal subjects and the state, seeking to prevent the arbitrary use of power, and encouraging appropriate forms of responsiveness among government institutions and between these institutions and affected individuals. While this presentation may initially seem

1 By political morality, I mean principles of justice that are publicly endorsed; constitute the political relationship between the state, groups, and individuals; and inform political and legal practices. These principles justify the use of coercive state power, power that the state claims universal authority to exercise over members of a political community. Principles of justice ought to be enforced by the state in society as well as within state institutions. Political morality, because it is public, is distinguishable from various private moralities that establish relations, rights, and duties among individuals. The legal and political dimensions of a political morality come together in judicial review in, for example, how judges understand their role in upholding fidelity to the concept of the rule of law in a constitutional order. Different political moralities, for example, provide different justifications for the supervisory role of courts and the scope of judicial power.

2 For an elucidation of the nature of "essentially contested concepts" with reference to the rule of law, see Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 Law & Phil. 137. Waldron discusses how disagreements about underlying normative issues—issues such as what values the rule of law is meant to promote or what is the best understanding of the rule of law—are pervasive and predictable. Despite such ever-present disagreements, rival conceptions may in fact agree on many of the particular attributes or features that make up a complex concept. They may, however, disagree about the most important features, or what features are necessary but not sufficient, or about how the features work together in a successful application of the concept.

uncontroversial, deeply embedded within any discussion of the rule of law is a debate about the legitimate scope and content of judicial power, particularly in a democratic state.

A. The Purpose of the Rule of Law: The Non-Arbitrary Rule of Men (and Women)

Since Plato and Aristotle, the rule of law has been contrasted with the rule of men. Fundamentally, the rule of law means that government action must always be sourced in law and therefore bound by law in order to be considered both valid and legitimate. In practice, the rule of law requires that legal and political institutions and their associated practices control both overt and latent forms of arbitrariness within the exercise of public authority in modern states. The concept of arbitrariness itself admits many meanings, though law students will recognize several of these meanings as the concrete subject matter of administrative law.

Arbitrariness connotes an indifference about the procedures chosen to reach an outcome. One could, for example, either toss a coin or play a game of rock-paper-scissors to make a choice; the means do not necessarily matter for the quality of the outcome. More problematically, arbitrariness can also suggest that a decision-maker possesses unconstrained discretionary powers, such that he or she alone can decide on how to use these expansive powers; hence, arbitrariness can be associated with a unilateral mode of decision-making or one that is not fully reciprocal, consultative, or participatory. Most familiarly, arbitrariness is expressed in the idea of an untrammelled exercise of will, or the uncontrolled power, of an authority. A decision, for example, may exhibit unilateralness to a degree that becomes oppressive and will therefore be considered arbitrary or illegitimate; in other words, an abuse of power. This understanding informs familiar criticisms of majority decision-making that infringes minority rights. Finally, arbitrariness seems to suggest the opposite of a rule, although a rule can be applied arbitrarily by judges or administrators.

All branches of government—executive, legislative, judicial, administrative—can manifest arbitrary behaviour in relation to individuals, groups, or other parts of government. If a branch of government steps outside its allotted constitutional role or function, the action or decision will be considered arbitrary in the sense that it is ultra vires (that is, beyond the powers of) its jurisdictional limits. Division of powers cases in Canadian federalism provide examples of this kind of legal wrong. If a branch of government attempts to monopolize governmental power, or encroaches on the powers of another branch, this action will offend the doctrine of the separation of powers, a principle that authorizes a particular distribution of political power within a state. The action or decision will be considered not to be sourced in law and will be found invalid or void for that reason. If a decision-maker in government uses statutory discretion outside the purpose of the enabling statute, the resultant decision will be found arbitrary in the sense of being incorrect in law. In all of these examples, government action will be found invalid because it offends procedural justice (otherwise known as natural justice or fairness) or because it violates the formally authorized allocation of institutional roles and responsibilities in a constitution.

In contrast to the quality or appropriateness of the means used by a public authority, the decision itself may be arbitrary in substance because it is biased, illogical, unreasonable, or capricious. In other words, it will offend what appear to be shared standards of reasonableness, rationality, or morality. Such a decision may exhibit a lack of care, concern, or reflection

on the part of the decision-maker toward the affected individual or group. It can, instead of a justified response, show mere opinion, preference, stereotyping, or negative discrimination. Arbitrariness in the activity of decision-making therefore includes both procedural and substantive elements and necessarily involves a normative view of the affected person(s). The normativity of a legal subject fundamentally concerns the person as a bearer of rights and responsibilities as well as an individual who enjoys autonomy, dignity, and equality. In other words, the affected person is treated as if he or she has worth as an individual, a citizen, and a member of his or her political community.[3]

The ever-present political and legal problem of the arbitrary use of public power profoundly animates rule of law concerns. Before turning to administrative law, however, this part considers legal and political theory in order to identify several features of the rule of law.

B. Attributes of the Rule of Law

The rule of law has a kind of "dual residency" in legal and political theory. In law, it acts as a constitutional metaprinciple that organizes and connects a subsidiary and open set of associated principles.[4] For example, the principle of the rule of law informs the principle of legality, the principle of the separation of powers, the principle of judicial independence, the principle of access to justice, the principles of fundamental justice, the proper administration of justice, and so on.[5] If the rule of law has a core of meaning in legal theory, it is the principle of legality. The import of the principle of legality for the rule of law is that it conveys the basic intuition that law should always authorize the use of public power and constrain the risk of the arbitrary use of public power. The principle of legality restrains arbitrary power in three ways: first, it constrains the actions of public officials; second, it regulates the activity of law-making; and third, it seeks to minimize harms that may be created by law itself. The views of three prominent legal theorists—Albert V. Dicey, Lon Fuller, and Joseph Raz—illustrate how the principle of legality constrains the misuse of public power in each of these ways.

The first model was most famously articulated by Albert V. Dicey in his theory of British constitutionalism. In Dicey's view, the rule of law possessed three features:

- the absence of arbitrary authority in government, but especially in the executive branch and the administrative state;

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3 The benefits of the rule of law can extend to non-citizens who are present in Canadian territory. Evan Fox-Decent, in chapter 7, discusses how cases involving non-citizens in the immigration context have posed challenges for, and often been the source of extensions to the scope of, procedural fairness in administrative law.

4 See Friedrich A. von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978) at 205 [Hayek].

5 These norms of legality differ according to the specific area of law. The principle of legality in criminal law, for example, includes the prohibition against retroactive criminalization or *ex post facto* laws as well as the void for vagueness doctrine with respect to provisions within criminal statutes. On the relationship between the rule of law and vagueness in constitutional law, chiefly in the criminal law area, see Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: University of British Columbia Press, 2004).

- formal legal equality so that every person—including and especially public officials—in the political community is subject to the law; and
- constitutional law that forms a binding part of the ordinary law of the land.

Common-law courts, in this model, provide the institutional connection between rights and remedies and are the site for the development of the general principles of the common-law constitution. According to Dicey, judge-made law combined with an unwritten constitution represented a better mode of legal constraint than written codes and constitutions because they were less vulnerable to executive attempts to suspend or remove rights. To take away the right to individual freedom in the English constitution, Dicey wrote, would require "a thorough revolution in the institutions and manners of the nation."[6] In a common-law constitutional system like Britain's, the constitution is not the source, but the consequence, of the rights of individuals as defined and enforced by the common-law courts. Dicey argued that this particular institutional advantage of the courts meant that they were best placed not only to control the political executive in the name of the rule of law, but also to provide superior protection of fundamental values, like liberty and property, in the English polity.

In the Diceyan model, Parliament was sovereign and supreme. Parliament was the source of all ordinary law[7] and ought to be the source of all governmental power. Any power that was not authorized by Parliament, or had acted beyond the powers delegated to it, would be considered ultra vires by the courts. This meant that administrative law played a particular controlling and legitimating function. In administrative law, the ultra vires principle traditionally provided a justification for curial intervention in order to control the scope of delegated power. Such justification, however, rested on a number of grounds, including (1) the institutional role of the courts as the principal external check on executive and agency powers; (2) the specific task allocated to the courts through administrative law to constrain administrative discretion by ensuring that an administrative body did not overstep the jurisdiction that the legislature had set down in the statute; and (3) the judicial perception that a fundamental role of courts was to protect and vindicate the private autonomy of affected individuals, primarily through common-law rights derived from contract, tort, and property.[8] One key consequence of the Diceyan model was that administrative bodies were viewed with distrust as almost inherently lawless forms of governance.[9] This perception worsened when it became clear that Parliament could no longer provide proper oversight of administrative agencies in the modern state through regular legislative scrutiny or through political practices centring on ministerial responsibility.

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6 See Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Holmes Beach, FL: Gaunt, 1996) at 197.

7 Ordinary law usually means domestic law, and only international law if it has been incorporated by Parliament. This chapter focuses on domestic law. Gerald Heckman, in chapter 12, explores the relationship between international human rights norms and administrative law.

8 For a more detailed exposition of the implications of Dicey's ultra vires model, see Paul P. Craig, "The Nature and Purpose of Administrative Law" in *Administrative Law*, 5th ed. (London: Sweet & Maxwell, 2003) at 3.

9 See, for example, Hayek's characteristic overstatement: "When the administration interferes with the private sphere of the citizen … the problem of discretion becomes relevant to us; and the principle of the rule of law, in effect, means that the administrative authorities should have no discretionary powers in this respect." Hayek, *supra* note 4 at 213.

In contrast to Dicey's common-law model, which offers institutional control on forms of executive discretion through the judiciary, Lon Fuller's "inner morality" of law represents a procedural approach to understanding the principle of legality.[10] This view concerns law-making as an activity within the political community—in other words, the laws of lawfulness. If one conceives of law as the enterprise of subjecting human conduct to the governance of rules, then the purpose of the rule of law, according to Fuller, is to create and sustain a framework for successful social interaction. Compliance occurs, in part, because citizens derive benefits from following the law.[11] Lawmakers, then, have an interest in optimizing the legal conditions necessary for, and conducive to, voluntary compliance and cooperation. Fuller's eight principles of legality aim to guide lawmakers in achieving this end:

- Laws must be general. The principle of generality ensures that laws do not take the form of ad hoc or arbitrary commands.[12]
- Laws must be promulgated and public because secret laws undermine legality and frustrate the citizen's ability to know where he or she stands in relation to a system of rights, benefit distribution, and/or enforcement and punishment.
- Laws must be prospective, not retroactive. This means that laws normally should seek to control present and future behaviour, not past. One should not be punished, for example, for past conduct that was not illegal when it was undertaken.
- Laws must be non-contradictory because people will be confused about how to comply if they are pointed in two different directions. Laws should be neither in contradiction with each other nor internally within the provisions of a particular statute.
- Laws must have constancy through time. Rapid change means that people will not be able to adjust their patterns of behaviour in order to conform to the new rules. Moreover, inconstancy suggests arbitrariness in government law-making.
- Laws must be reasonably clear.[13]
- Laws must be capable of being performed. We are not obliged to obey laws commanding the impossible.
- Congruence between the rules as announced and the rules as applied must exist in order to avoid a legal system composed of arbitrary commands. This last principle deeply informs discretionary decision-making in the administrative state.

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10 See Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven & London: Yale University Press, 1969) at 33 [Fuller].

11 Hence the rule of law provides one basis for the duty to obey the law and invokes concerns about when it is morally appropriate to disobey the law. For a discussion of the relationship between the duty to obey the law and the rule of law, see *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at paras. 6-64, 90-121.

12 Generality also ensures that the law applies to all persons in the polity: general rules treat like cases alike in the application of a law or rule, thereby securing fairness, impartiality, and the lack of bias. Generality also constrains the scope of discretion in discretionary decision-making by drawing the individualized decision back toward the general or universal.

13 This feature also points to the notion of arbitrariness because lawmakers should be constrained from creating law that is unreasonable, illogical, vague, or otherwise ill-conceived. Nevertheless, this principle should not be taken to the extremes of rigidity for "[a] specious clarity can be more damaging than an honest open-ended vagueness." Fuller, *supra* note 10 at 64.

These principles act as eight standards of legality for all lawmakers in a society wishing to be governed by, and through, law. These principles guide law-making wherever it is found in the state: legislative, judicial, administrative, customary, and so on. Unlike Dicey, then, Fuller's conception of legality does not assume that administrative bodies are inherently lawless. Rather, if they follow these principles, they may be more likely to engage in lawful activity. Fuller's "internal morality" of law represents both a role morality (for example, how judges should decide cases) and an institutional morality (for example, how legislation should be enacted) that regulate whether or not legal activities are being carried out in accordance with the principles that constitute that same activity. If these activities do not, then the integrity of the institution will be severely harmed or destroyed altogether. Fuller argued that a political order committed to these principles would generate a successful legal system. A successful legal system, in turn, is itself a necessary—but not sufficient—condition for ensuring that law merits respect from both officials and citizens.

Joseph Raz provides a third well-regarded interpretation of the rule of law.[14] Though in agreement with several of Fuller's views, he believes it is possible to reduce the rule of law to one basic idea: law must be capable of guiding the behaviour of its subjects.[15] Raz further claims that most of the requirements we associate with the rule of law can be derived from this one basic idea in which the rule of law as the principle of legality acts as a practical guide for making effective law, thereby constraining the harms created by law itself. He proposes eight alternative principles, some of which overlap with Fuller's, but he also emphasizes that his theory does not enumerate all of the possible principles associated with the rule of law. As with Fuller, his principles aim to guide both the formation and application of law:

- Laws should be prospective, open, and clear.
- Laws should be relatively stable in order to help individuals with their short- and long-term planning.
- Particular laws should be informed by open, clear, stable, and general rules. These first three principles provide standards for laws to guide behaviour effectively.
- The independence of the judiciary must be guaranteed in order to preserve the rule of law. As lawmakers, the judiciary are also subject to the first three principles in order to control the exercise of their own discretionary power.
- The principles of natural justice must be observed, such as fair hearings and the absence of bias.
- Courts should have limited review powers over the implementation of other principles in parliamentary legislation and administrative decision-making in order to ensure conformity with the rule of law.
- Courts should be easily accessible.[16]

14 See also Andrei Marmor, who claims to hold a position in between those articulated by Fuller and Raz, in "The Rule of Law and Its Limits" (2004) 23 Law & Phil. 1.

15 Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 214 [Raz, *The Authority of Law*].

16 Raz offers no views on how such access should be realized in practice, and whether or not this access to the courts is a positive duty on government. Nevertheless, he writes: "Long delays or excessive costs may effectively turn the most enlightened law into a dead letter and frustrate one's ability effectively to guide oneself by the law." *Ibid.* at 217.

- The discretion of crime-preventing agencies, such as the police, should not be allowed to pervert the law. Principles four to eight ensure that the legal machinery of enforcing the law is not distorted, is capable of supervising conformity to the rule of law, and can provide effective remedies when the legal system deviates from it.[17]

The rule of law is essentially a negative value in Raz's theory and, moreover, is primarily instrumental—that is, it is primarily a means to the achievement of other goals.[18] Because law creates the danger of arbitrary power, the rule of law acts to minimize this risk, thereby minimizing harms created by law itself. Raz's theory constrains the form, production, and application of law, but it does not provide the grounds on which to judge the content of law. On his account, overbreadth, for example, is a technical deficiency of law that makes it more likely that the law will cause harm by (1) not adequately constraining the use of power; (2) not providing guidance for individual behaviour; or (3) widening the potential to infringe a specific right, such as individual liberty. Vagueness may present similar risks. A lack of generality, on the other hand, may violate legal equality or individual dignity interests because the classification or categorization may disproportionately "single out" a particular segment of the population. A lack of generality may also indicate negative discrimination on the grounds of race or sexual preference, but Raz's concept of the rule of law does not address this kind of content violation. Nevertheless, the rule of law has great moral value because conformity to it is a moral virtue, and it is a moral requirement to enable law to perform useful social functions or serve a moral purpose. The rule of law, then, fulfills an important but subservient role because conformity to the rule of law is not the ultimate goal. The idea of the rule of law stands as only one ideal for government; there are many others, and some will take priority over the rule of law.[19]

The chief reason underpinning this perspective on the rule of law is Raz's insistence on the liberal principle of state neutrality with respect to the many comprehensive conceptions of a good life that each of us holds. Though he argues that the state cannot remain morally neutral about harmful activities or beliefs, it should guarantee as far as possible the freedom of individuals to pursue their own conceptions of the good or "to choose styles and forms of life."[20] The instrumental virtue of the rule of law, then, establishes a secure framework for leading one's life, facilitates and protects the exercise of individual freedom, and is a necessary component of a state that respects human dignity. But, warns Raz, the rule of law should not be confused with the rule of *good* law.[21] On this account, for example, the guar-

17 Cristie Ford, in chapter 3, describes the variety of administrative law remedies a tribunal might impose as well as those available through judicial review.

18 Raz, *The Authority of Law*, *supra* note 15 at 223-26, 228.

19 In contrast to Fuller, Raz does not agree that deviations from the rule of law cannot be total or radical, or that there must necessarily be some moral value in a legal system committed to the rule of law.

20 Raz, *The Authority of Law*, *supra* note 15 at 220.

21 Raz, *ibid*. at 211, asserts that the rule of law is "not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law."

antee of legal equality in the rule of law helps identify apparent violations of formal equality, but it does not demand the realization of full or substantive equality.[22] Or, to take another example, a rule of law state may, in principle, be compatible with both a laissez-faire capitalist society as well as a society whose government creates redistributive programs to mitigate the pernicious effects of social and economic inequality.

How might each of these theories inform judicial understandings of their role in a rule of law order? The rule of law, for example, seems to entail an explicit role for the judiciary, but for what function? Dicey considered the courts to be the chief rule of law check on the executive in a Westminster system of government and, later, the primary means to control delegations of discretion from the executive to the administrative state. The Diceyan model therefore conceived of administrative law as the means through which the courts could control government power in order to protect individual rights. Such a view meant that courts need not defer to, or show respect for, the decisions made by administrative bodies that implicated common-law rights and interests. Courts, however, gradually became aware of the problems of legitimacy when intervening in administrative agencies and sought to set some limits to the exercise of their own discretionary powers. Although courts were wary about too overtly substituting their views for those of the agency when they held a different opinion about the merits of the decision, they could still intervene easily through their approach to statutory interpretation. Through their approach to statutory interpretation, courts could argue that intervention was justified when the legislature intended that questions of law or mixed fact and law implicated the jurisdiction of the agency, thereby requiring judicial review. Equally missing from Dicey's model are other functions of administrative law such as ensuring accountability in government by facilitating participation in the decision-making process—what the Fullerian approach endorses. Also lacking is the function of administrative law to design principles, standards, and rules in order to ensure that government performs its tasks efficiently and fairly—a view made explicit in Raz's theory.

The principle of the rule of law also requires an institutional framework, though not a specific institutional arrangement: Dicey recommends a common-law legal system, Fuller discusses law-making in general and as a shared and ideally cooperative institutional enterprise, while Raz emphasizes judicial independence as a necessary component of the rule of law. It is also clear that the idea of the rule of law suggests a role for the courts, and that this role depends on a political choice in the arrangement of institutions, as well as a political choice concerning the distribution of power among them. In political theory, the rule of law generally functions as a political ideal and suggests the need for legal institutions, a framework of positive law, and a constitutional order (with either a written or unwritten

22 For a contrary, radical argument, see Robin West, *Re-imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Aldershot: Ashgate, 2003). West, at 151, emphasizes the potential of the rule of law to advance substantive equality in society through formal legal equality: "The point of law, then, and the point of formal equality both, is to recognize the humanity of all, and their inclusion in a community constituted by mutual regard, and to extend the reach of that community well past the point by which we would be sympathetically and naturally inclined to do so: to extend it to the outmost reach of the law itself." On this view, the broadest scope of the rule of law can help create an egalitarian and inclusive community of civic equals. This community of equals is based on sympathetic engagement and concern for the well-being of others and moves the rule of law away from its usual identification with fear of others, individual self-interest, and mistrust of government power.

constitution—or both in the Canadian case).[23] Here the concept of the rule of law organizes other institutional matters, such as the doctrine of the separation of powers, the process of appointing judges, institutional checks and balances, and the fundamental precept that no one in a rule of law regime is above the law, particularly political actors in government.

The doctrine of the separation of powers provides a rationale for an institutional arrangement that effectively functions to check arbitrary power.[24] This doctrine, for example, makes explicit the separate function of courts in securing a political community committed to political moderation, the maintenance of order, political liberty, and the prevention of the abuse of power by all branches of government. Canada's Westminster system of government, however, cannot be characterized by bright-line distinctions between the three branches. A certain fluidity is endemic to this system, particularly among the executive, Cabinet, and bureaucracy, with significant implications for the legislature.[25] Nevertheless, one implication of the separation of powers is that the judiciary should have some measure of independence—but what is the nature of this independence and how much independence do judges need? Moreover, how is judicial independence related to the independence of persons appointed to administrative bodies such as tribunals? As discussed by Laverne Jacobs in chapter 6, the Supreme Court has identified three objective conditions necessary to guarantee functional independence: security of tenure, financial security, and administrative control.[26]

These three features informing the principle of judicial independence also apply to adjudicators in the administrative state who engage in more judicial-like decision-making in tribunal settings. Though the rationale for judicial independence does not exactly map onto the requirements for independence in the administrative state—given executive control of administrative bodies—strong analogies exist. But just as courts cannot treat administrative

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23 Canada, as a former British colony, not only possesses a written constitution, but has also inherited the "unwritten" British constitution. In Britain, the constitution is said to be unwritten because no single constitutional document defines its constitutional system. Instead, a collection of statutes, decrees, conventions, customs or traditions, and royal prerogatives comprise the constitution. Seen from this perspective, it would be a mistake to think that a single document, even if comprehensive, could ever capture an entire constitution. For most countries, a constitution is a mix of written and unwritten sources. In Canada, as will be considered in more detail in part III, several of the most important constitutional principles are implicit and unwritten.

24 For discussion of the separation of powers in constitutional jurisprudence, see *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 38; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 [*Cooper*]; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 [*Wells*]; and *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 [*Operation Dismantle*].

25 As the Supreme Court writes in *Wells*, *supra* note 24 at paras. 52, 54: "The doctrine of separation of powers is an essential feature of our constitution. It maintains a separation of powers between the judiciary and the other two branches, legislature and the executive, and to some extent between the legislature and the executive. … The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature."

26 Cases that specify these three conditions include *R. v. Valente*, [1985] 2 S.C.R. 673; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; and *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286.

bodies as they do lower courts in the hierarchy of legal institutions, courts cannot understand administrative independence as an exact analogy. In chapter 6, Laverne Jacobs more thoroughly treats the complexities involved in tribunal independence, including the appointments and removal processes, the guarantees of impartiality and lack of bias, and whether or not explicit and implicit constitutional guarantees apply.[27] She discusses how courts traditionally distrusted administrative agencies, partly due to the blurred lines of accountability, which seemingly violated the doctrine of the separation of powers. In other words, because they are hybrid bodies, or "governments in miniature,"[28] administrative agencies and tribunals possess differing combinations of policy-making, rule-making, and adjudication, which make their purposes and functions difficult to separate.[29] Even now, the Supreme Court describes administrative tribunals as creatures of statute that "span the constitutional divide between the judiciary and the executive"[30] and that have a significant policy-making role. Moreover, and in contrast to courts, one vital function of tribunals is the greater opportunity for participation by those affected by the decision-making process. Once again, a certain flexibility and attentiveness to context inheres in the rule of law relationship between courts and administrative bodies in the doctrine of the separation of powers.

III. THE SUPREME COURT OF CANADA ON THE RULE OF LAW'S SIGNIFICANCE

Legal and political theories constitute the often unstated background assumptions that inform judicial understandings of the rule of law that appear jurisprudentially in case-by-case development. The Supreme Court of Canada has articulated various features of the rule of law, but the Court has not (and perhaps never should) set out a comprehensive statement containing a fully articulated conception of the rule of law.

A. The Heart of the Canadian Rule of Law

The marked difference between formal and substantive approaches to the rule of law can be seen in an early Supreme Court case concerning the ability of courts to control the abuse of power in the administrative state. The case of *Roncarelli v. Duplessis*[31] contains several examples of arbitrary power: the existence of unlimited discretionary powers in an agency; a decision-maker acting in bad faith; inappropriate responsiveness to an individual situation where important interests are at stake; consideration of irrelevant factors in the decision;

27 See, in particular, Jacobs's discussion of *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372, a case concerning procedural fairness, tribunal independence, the rule of law, and the dismissal of a residential tenancy arbitrator for arbitrary reasons. Online: <http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc1372/2006bcsc1372.pdf>.

28 I borrow this phrase from John Willis, an important early Canadian public law scholar. See "Three Approaches to Administrative Law: The Judicial, the Conceptual and the Functional" (1935) U.T.L.J. 53 at 73. See also Mary Liston, "Willis, 'Theology,' and the Rule of Law" (2005) 55 U.T.L.J. 767.

29 In chapter 2, Bill Bogart outlines the many regulatory functions and tools in the administrative state.

30 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 at para. 24.

31 [1959] S.C.R. 121 [*Roncarelli*].

disregard of the purpose of a statute; and dictation of the decision by an external and unauthorized person. *Roncarelli* illustrates one of the primary functions of the rule of law: the control of executive arbitrariness.[32]

Frank Roncarelli owned a Montreal restaurant and was a Jehovah's Witness. At that time, the Quebec government and the Catholic Church joined forces to persecute Jehovah's Witnesses, whom they viewed as dangerous to the established order, seditious, and anti-Catholic. Hundreds of Jehovah's Witnesses were jailed for distributing religious pamphlets in violation of municipal bylaws. Roncarelli posted bail for fellow Witnesses. Premier Duplessis publicly warned Roncarelli to stop posting bail, and, when Roncarelli continued, Duplessis ordered that the liquor board cancel Roncarelli's permit to sell alcohol. The cancellation of the liquor licence forced Roncarelli to shut down his restaurant.

The Supreme Court examined the actions of Maurice Duplessis, who acted as both premier and attorney general, and found them invalid. Invoking the unwritten principle of the rule of law, the Court held that no public official is above the law. Duplessis had stepped outside the authorized bounds of his power as attorney general by ordering the revocation of Roncarelli's licence. He also inappropriately exercised the power that was properly given to the chairperson of the Quebec Liquor Commission by the enabling statute, *An Act Respecting Alcoholic Liquor*. Last, regardless of who actually was the decision-maker, the decision offended the rule of law because the substance of the decision was incompatible with the purpose of the statute. Being a Jehovah's Witness was irrelevant to a decision concerning the continuation of a liquor licence for operating a restaurant. The true nature of the decision was to punish Roncarelli for exercising his civil right to post bail.

There are two ways to understand the use of the principle of the rule of law in this judgment: the formal Diceyan model, discussed in part II, above; and a more value-laden substantive constitutionalism, or what David Dyzenhaus calls the unwritten "constitution of legality."[33] On the Diceyan model, the Supreme Court held that Chairman Edouard Archambault of the Quebec Liquor Commission had not made a decision at all because Duplessis had substituted his decision for that of the proper authority, thus exercising his power arbitrarily. The case confirmed that Premier Duplessis had overstepped his jurisdiction as attorney general by, in effect, telling Chairman Archambault to cancel Roncarelli's liquor licence "forever" so that his restaurant would go out of business. Under the terms of the governing statute, however, this power had been delegated to Chairman Archambault, not to the attorney general who, at most, could only provide advice on the matter.[34] The legal wrong committed against the rule of law here was the violation of the legal principle of validity, which affirms that "every official act must be justified by law" or be found ultra vires: the decision was not valid because the power to cancel licences was not given to either the premier or the attorney general.[35] As

32 For a detailed exposition of the relation between the rule of law and the administrative state in administrative law, see David Mullan *et al.*, "Chapter One: The Administrative State and the Rule of Law" in *Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond Montgomery, 2003).

33 See David Dyzenhaus, "The Deep Structure of Roncarelli v. Duplessis" (2004) 53 U.N.B.L.J. 111 at 124.

34 Alternatively, and to paraphrase Don Corleone in *The Godfather*, Duplessis provided "advice," the nature of which Archambault could not refuse.

35 This is the view taken by Peter Hogg, *Constitutional Law of Canada: 2001 Student Edition* (Toronto: Carswell, 2001) at 634 [Hogg].

Dyzenhaus points out, the problem with this line of argument is that had Archambault not consulted Duplessis, his decision would have been found valid, particularly because the enabling statute granted Archambault seemingly unfettered discretion.[36] Indeed, the relevant provision of the statute, s. 34, simply and broadly stated that the Commission "may refuse to grant any permit." On this basis, only when an administrative authority acts beyond the power given to it by Parliament can the courts legitimately enforce the rule of law or reaffirm the separation of powers.

By contrast, Rand J., writing in a concurring judgment for the majority, stated that public authorities, especially those with broad discretionary powers, are always constrained by the unwritten constitutional principle of the rule of law, even when the legislation contains no explicit or written constraints:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. … "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.[37]

Even if Archambault had acted on his own in cancelling Roncarelli's licence, he would have used his discretionary powers inappropriately according to Rand J. because his decision contradicted the substantive content of the rule of law:

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served," which makes the strictest observance of equal responsibility to all of even greater importance.[38]

Conventionally in public law, the rule of law's constraints on government actors seeks to prevent such "[virtual] vocation outlawry" through enforcement of the purpose of the statute and good faith decision-making achieved through the use of fair procedures.[39] Rand J. added more content: the administrative tribunal violated Roncarelli's rights as a citizen—freedom of religion, freedom of expression, freedom to pursue his livelihood—thereby damaging the normative relationship between the state and the citizen.

On the formalist account, administrative law concerns the written statutes, rules, and principles that govern public decision-makers, encompassing the relationships among all

36 *Supra* note 33 at 125.

37 *Roncarelli*, *supra* note 31 at 140.

38 *Ibid*. at 142.

39 *Ibid*. at 141.

branches of government as well as the relationships between branches of government and the groups, constituencies, corporations, and individuals with whom they interact and over whom they exercise power. Public decision-makers must not act outside their authority, must not abuse their authority, and must be seen not to do so either. Administrative law establishes the legal parameters of power that exist by virtue of statutes (such as delegated discretionary powers given to administrators) or because of royal prerogative—prerogative that is now mostly exercised by the executive in the name of the Crown. Judicial scrutiny within administrative law focuses on the limits on the authority given to decision-makers by statute or prerogative. On the substantive account, such authority is bounded by the purpose and terms of the statute, by regulations and guidelines, by the constitution, and by both written and unwritten legal principles. Formally valid exercises of discretion can offend the rule of law and can subsequently be determined to be a legal wrong as an abuse of power. *Roncarelli* still stands as a paradigmatic example of the deeper principled and purposive approach to understanding how the rule of law animates administrative law.

B. A Foundational Principle, but an "Unwritten" One

As a constitutional principle, the rule of law is both part of the written and (so-called) unwritten constitution. A constitution is more than the positive law: it includes customary law, conventions, judge-made or common-law, a civil code, and unwritten principles in addition to legislation and written constitutional documents.[40] As an implicit constitutional principle, the rule of law appears in the preamble to the *Constitution Act, 1867*, where it states that Canada will have a "Constitution similar in principle to that of the United Kingdom."[41] The rule of law also appears as an explicit principle in the preamble to the *Constitution Act, 1982*: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."[42] Whether implicit or explicit, then, the principle of the rule of law applies to the entire constitutional order and every part of government. The deepest and broadest reflection on the unwritten principle of the rule of law in the Canadian order appears in two reference cases:[43] the *Manitoba Language Rights Reference*[44] and the *Secession Reference*.[45]

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40 For further discussion of written and unwritten constitutions, see *supra* note 23 and accompanying text.

41 Preamble to the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

42 Preamble to the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

43 Reference cases constitute another institutional practice that blurs the bright-line distinction between law and politics. They have allowed Canadian courts to articulate, from a legal perspective, their understanding of the constitutional architecture and its normative underpinnings—a perspective that usually remains implicit and underspecified in ordinary judgments. Because the reference function is advisory, it is also non-judicial, and thus upsets the traditional understanding of the separation of powers doctrine. Mitigating this potential doctrinal disruption is the fact that a court's answer is neither binding nor of the same precedential weight as an opinion in an actual legal judgment. Nevertheless, there are no reported examples of an opinion being disregarded by the parties, which suggests that references are treated like other opinions. The key distinction between reference opinions and other judicial opinions is the limited range of remedies that are available to the judiciary in reference cases. See Hogg, *supra* note 35 at 8.6(d).

44 *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitutional Act, 1867*, [1985] 1 S.C.R. 721 [*Manitoba Language Rights Reference*].

45 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*].

In *Manitoba Language Rights Reference*, the Supreme Court described the rule of law as a "highly textured expression … conveying … a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority."[46] The Court also recognized the rule of law as a "fundamental postulate of our constitutional structure"[47] whose constitutional status was beyond question. In coming to this understanding, the Court considered several features of the rule of law including the principle of legality, the institutional arrangements entailed by the idea of the rule of law, and its broader connection with Canadian political culture. Throughout the judgment, the Court characterized the rule of law as the principle of legality. This principle was understood in two ways. First, it meant that the law is supreme over government officials as well as private individuals and therefore excludes the influence and operation of arbitrary power.[48] Second, it meant that law and order are indispensable elements of civilized life within a political community. The rule of law therefore required "the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life."[49] For the Court, Canada must be thought of as a "society of legal order and normative structure"[50] in which the rule of law was embedded as both an implicit and explicit constitutional principle. As an expression of a commitment to peace, order, and good government over war, anarchy, and arbitrary power, the rule of law, to the Court's mind, represented a "philosophical view of society" that "in the Western tradition is linked with basic democratic notions."[51]

How the principle of legality is linked to basic democratic notions was not spelled out fully in the *Manitoba Language Rights Reference*. Nevertheless, the Court stated that the constitution is deeply intertwined with the principle of parliamentary sovereignty, for the constitution "is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of legislature and government."[52] In Canada, the people have elected to be governed through a democracy, its institutional forms, and its political ideals. Democracy and parliamentary sovereignty, then, are related but not synonymous. Moreover, Canadians have also embraced government under the concept of the rule of law. The interconnectedness of the principles of democracy, parliamentary sovereignty, and the rule of law inform general understandings of what good or responsible government means. In the *Manitoba Language Rights Reference*, the Court invoked the rule of law to conclude that the Manitoba government's repeated failure to respect the mandatory constitutional requirements of bilingualism exhibited a failure to comply with the manner and form of the legislative enactment and therefore rendered the legislative product invalid. By failing to adhere to the terms of the province's constitutional document, Manitoba had acted without legal authority, had acted

46 *Manitoba Language Rights Reference*, *supra* note 44 at para. 62.

47 *Ibid*. at para. 63.

48 *Ibid*. at para. 59.

49 *Ibid*. at para. 60.

50 *Ibid*. at para. 64.

51 *Ibid*. at para. 61.

52 *Ibid*. at para. 48.

arbitrarily, and had allowed its officials to act outside the law. The Court concluded that these actions constituted a complete transgression of the principle of legality. The remedial force of the rule of law compelled bilingual enactment of all unilingual provincial laws.

In the *Secession Reference*, the Court more clearly articulated the constitutional principle of the rule of law in the context of questions about the legal validity of a potential unilateral act of secession from Canada by the province of Quebec. In this judgment, the Court identified four unwritten principles that animate the Canadian constitutional order: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. These principles do not, said the Court, stand alone; rather, they are highly interrelated and permeate every part of the Canadian order. They act as organizing principles of the state as well as aspirational ideals that the Canadian polity has sought, and continues to pursue and make real.

In its analysis of the constitutional requirements for secession, the Supreme Court considered the written constitution, unwritten norms, and the global system of rules and principles—in sum, the "vital unstated assumptions" that govern the exercise of constitutional authority. These four underlying principles, the judges said, are the "lifeblood" of the constitution and therefore mutually support every part of the Canadian state.[53] They do not function as trumps over one another. In addition to their highly persuasive interpretive import, these principles can have "*full legal force*" in certain circumstances.[54] This means that they are binding upon courts, can give rise to substantive legal obligations (both general and specific), and may function as real constraints on government action.[55] It would be impossible, the Court averred, to understand the Canadian constitutional order without these architectonic and organic principles.

In the context of a threat of unilateral secession by the province of Quebec, the Court wrote that the four fundamental principles mandate a rejection of unilateralism and a need for principled negotiation as the default position in the Canadian legal and political order.[56] On this understanding, sovereign power in a Westminster-style democracy also cannot be understood as an unrestrained will acting unilaterally. Rather, a democratic rule of law requires that sovereign power be lawful, responsive, and moderate in its actions. Along with the principle of democracy, the other three unwritten principles will also distinctively shape and constrain the exercise of sovereign authority. This conception of sovereign power, for example, ideally constrains the federal sovereign from dominating provincial sovereigns within federalism. It also constrains majorities from oppressing or discriminating against minorities within a democratic regime. The principle of the rule of law within institutional dialogue guarantees the existence of formal conduits and processes for dialogue to occur, and obliges institutions comprising the legal and political system to engage in moderate politics in order to realize these substantive constitutional commitments. The Court underscores this point in the *Secession Reference* when it declares that democracy cannot exist without the rule of law:

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53 *Secession Reference*, *supra* note 45 at paras. 50-51.

54 *Ibid*. at paras. 51-54 (emphasis added).

55 *Ibid*. at para. 54.

56 *Ibid*. at paras. 84, 97.

> To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. … Our law's claim to legitimacy also rests on an appeal to moral values, many of which are embedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.[57]

The unwritten principle of the rule of law therefore constrains the principle of parliamentary sovereignty from its tendency to define democracy merely as a set of formal institutional arrangements. But it also constrains courts from unilaterally, arbitrarily, and anti-democratically substituting their views for Parliament's in constitutional matters.

C. The New Minimalist Rule of Law

Perhaps not surprisingly, Supreme Court judges also disagree about the scope and content of the principle of the rule of law. In a trilogy of recent cases—*Imperial Tobacco*,[58] *Charkaoui*,[59] and *Christie*[60]—the Supreme Court has considerably narrowed the scope and effect of this principle within Canadian law. In Canada's constitutional house, the current decor is sleek and spare.

The Supreme Court continues to affirm the unwritten constitutional principle of the rule of law by asserting its status as a foundational principle at the root of our system of governance, implicit in the very concept of a constitution. According to the Court, the rule of law incorporates a number of familiar themes and embraces at least four principles: (1) it is supreme over private individuals as well as over government officials, who are required to exercise their authority non-arbitrarily and according to law; (2) it requires the creation and maintenance of a positive order of laws; (3) it requires the relationship between the state and the individual to be regulated by law; and (4) it is linked to the principle of judicial independence.[61] These four subsidiary attributes clearly conform to the general discussion of the rule of law presented in part II, "The Rule of Law in Theory," above.

Although the rule of law may possess additional principles, there is, however, one key attribute that the principle of the rule of law does not possess: the ability to strike down legislation based on its content.[62] The rule of law, then, does not speak "directly" to the terms of legislation (or provisions of statutes). This does not mean that the rule of law has no normative force at all, says the Court, but simply that the government action it is able to

57 *Ibid*. at paras. 67, 68.

58 *British Columbia v. Imperial Tobacco Canada Ltd*., [2005] 2 S.C.R. 473 [*Imperial Tobacco*].

59 *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*].

60 *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 [*Christie*].

61 *Imperial Tobacco*, *supra* note 58 at para. 58; *Charkaoui*, *supra* note 59 at para. 134; *Christie*, *supra* note 60 at para. 20.

62 *Imperial Tobacco*, *supra* note 58 at para. 59.

constrain is usually that of the executive and administrative branches. Legislatures are constrained by "manner and form" requirements in the processes of enacting, amending, or repealing legislation.[63] This is because the principles of democracy, constitutionalism, and judicial independence favour the validity of legislation that conforms to the express terms of the constitution, or those that follow as necessary implications from the express terms.[64] Nevertheless, the normative force of the rule of law on this understanding does appear to have been significantly curtailed[65] and the Court has minimized reference to substantive rule-of-law values.

The *Charkaoui* decision declared unconstitutional the detention review hearings process set out in the *Immigration and Refugee Protection Act* (IRPA). The Court held that the statutory scheme violated s. 7 principles of fundamental justice, ss. 9 and 10 guarantees against arbitrary detention, and the protection against cruel and unusual treatment in s. 12. The Court, however, could not actually review the reasonableness of security certificates (certificates issued jointly by the Ministers of Public Security and Immigration) because they are not subject to review or appeal. The Court also addressed arguments relating to the rule of law, and s. 15 of the Charter as it applies to foreign nationals, but did not consider these arguments relevant for the decision. The Court held that the use of secret evidence and the likelihood of indefinite detention without meaningful and timely review for non-citizens clearly violated due process rights. To guarantee a fair hearing under the Charter, a different procedure should be created—one that does not so greatly infringe Charter rights. But the rule of law did not support a right to appeal from the Federal Court judge's determination of the reasonableness of the certificate, nor could it prohibit automatic detention or detention on the basis of executive or ministerial decision-making.[66] While the *Charkaoui* decision should be celebrated for upholding s. 7's requirement of a fair procedure for determining an issue of vital importance to a detainee, the Court's reliance on a formal conception of the rule of law comes at a cost: it inhibits the purchase of rule-of-law values implicit in the unwritten or common-law constitution. Consideration of substantive rule-of-law values, like those found in the *Roncarelli* decision, would provide a toehold for judicial scrutiny of the failure to provide a right of appeal from the reasonableness of a security certificate, as well as the power of detention given to executive actors under IRPA.

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63 But see *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, both for troubling insights into how an executive-controlled government can manipulate and avoid the manner and form requirements of enacting legislation, and for a tragic example of a systemic failure of accountability.

64 *Imperial Tobacco*, *supra* note 58 at para. 66.

65 This is clear in the *Charkaoui* decision where express provisions of the Charter were used to strike down the security certificate process under the *Immigration and Refugee Protection Act* (IRPA), but the rule of law argument against the certificate provisions in the IRPA was relegated to the margins. Craig Forcese, in chapter 11, discusses the truncated reach of the *Charkaoui* decision, which will be of little assistance in administrative proceedings where s. 7 of the Charter is not triggered. As he and other commentators emphasize, in a state built on the rule of law, no public power should lie beyond the reach of law. If judicial review of cases concerning national security is too deferential, alternative institutional forms of accountability must be devised.

66 The Court noted that the Federal Court is a superior court, not an administrative tribunal—such a right could be said to flow from a decision made in the administrative context. The legality of the process, according to the Court, is nevertheless reinforced because the Federal Court of Appeal can circumvent the privative clause where the constitutionality of the legislation is challenged or where the individual alleges bias on the part of the judge. *Charkaoui*, *supra* note 59 at paras. 136, 137.

The *Christie* case involved a constitutional challenge brought by Dugald Christie, a litigation lawyer, who claimed that British Columbia's 7 percent legal service tax made it impossible for some of his low-income clients to retain him to pursue their claims. The Court affirmed that one purpose of the rule of law is to ensure access to justice—an issue that is the focus of chapter 15 by Lorne Sossin. The Court noted that, when rights and obligations are at stake, individual access to justice can often only happen through lawyers whose role is to bring citizens' complaints about unlawful or abusive private or state action to courts or administrative tribunals. As a component of the rule of law, access to justice may guarantee a right to legal services, such as a right to counsel in some circumstances (particularly in the criminal context). But the rule of law does not underwrite a general right to legal services, to legal assistance, or to counsel in relation to court and tribunal proceedings.[67] It therefore also cannot constitutionalize a particular type of access to justice, such as a specific institutional form of legal aid. Although the argument against the use of the rule of law in this case does not foreclose the possibility that a right to counsel may be found in other circumstances, a general right to counsel could not be found. Because sufficient evidence did not exist to prove that low-income persons were prevented from accessing legal services, the provincial tax paid by all users of legal services, regardless of their income status, was found constitutional. The Court, however, suggested that an adequate evidentiary record in a different case might provide grounds for judicial gap-filling by finding a constitutional entitlement to legal services in relation to proceedings in courts and tribunals dealing with rights and obligations. Once again, the Court emphasized that the principle of the rule of law could not be used to strike down otherwise valid legislation.[68]

As Lorne Sossin discusses in chapter 15, the relationship between the unwritten principles of the rule of law and "access to justice" remains underspecified in Canadian law, although his chapter concretizes several factors that inform the quality of access to justice. The tensions among the rule of law, fairness, equality, and efficiency remain particularly acute in administrative law because many tribunals were established to provide access for low-income or otherwise vulnerable individuals; however, these tribunals may fail to do so and, for reasons concerning the separation of powers, recourse to the courts may not provide a remedy. Recalling the concepts of the rule of law advanced by the three theorists in part II, above, all suggested some degree of access to the legal system.[69] Each theory

67 *Christie*, *supra* note 60 at paras. 23-27.

68 The lack of congruence between the stated purpose of the tax and its actual effect in this case is troubling, though. The stated purpose of the tax was to fund legal aid in British Columbia, but instead the money went into general revenue. The Court could not determine how much—if any—of the tax actually went to fund legal aid.

69 Access to justice appears in Dicey's conception of the rule of law by necessity in his common-law model, in Fuller's procedural understanding of the rule of law, and explicitly as one of Raz's principles. Yet none of these theories dictates a particular institutional arrangement facilitating or guaranteeing access to justice. Dicey's theory relies on a common-law constitutionalism driven by private law rights of property and contract, not one oriented toward democratic access by all, including the disadvantaged. Raz's functionalist account suggests that courts should be easily accessible—but he does not specify whether this relative openness is constrained by justiciability or fiscal limits. Because Raz relies on a formal view of legal equality within the rule of law, access to justice cannot be equated with equal access to legal services by all as a democratic right. Fuller's aspirational theory is consistent with the common-law openness of Dicey's and

therefore comports with the fundamental conviction that individuals should have access to due process when their rights and interests have been affected by government action. Each also supports some measure of access within a rule of law state, but again none explicitly argues for effective equal access for all legal subjects.[70] Indeed, of all the theorists considered in this chapter, only Ronald Dworkin explicitly considers access to be a matter of fairness that benefits the least well off and satisfies the demands of legal equality in the rule of law.

Clearly, the Court has become anxious about the risks of its own forms of arbitrariness through recourse to unwritten principles and is attempting to constrain the use of these principles by judges and litigants. Because unwritten principles do not have content fixed in advance, they appear transcendent, and their articulation and use look like an unconstrained form of judicial law-making. Fears about undemocratic judicial activism arise because it could appear that the judiciary is usurping the legislative role by engaging in subjective and arbitrary decision-making. Unwritten principles therefore challenge the idea of a bright-line conception of the separation of powers.[71] This has led the Court to move to what Peter Hogg and Cara Zwibel define as the "middle" ground that, for them, is occupied by thinkers like themselves and Raz, where unwritten principles like the rule of law have no direct legal effect, but are merely influential "constitutional values."[72]

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the institutional openness of Raz's. But it is not clear whether or not his theory would underwrite greater access to justice because citizens play a role in the maintenance of the legal system through litigation. Given the polycentric nature of public law cases, Fuller's theory could also support more limited grounds of justiciability.

70 The procedural devices available to judges by virtue of the rule of law—procedural due process (rights to representation, cross-examine witnesses, etc.), habeas corpus, the right to appeal an adverse decision, standing to raise constitutional issues—ensure that judges play a large role in Fuller's theory. Nevertheless, litigation alone is an unsatisfactory method of ensuring access to justice because "haphazard and fluctuating principles concerning this matter [standing] can produce a broken and arbitrary pattern of correspondence between the Constitution and its realization in practice." Serious disadvantages of relying solely on the courts as a bulwark against the "lawless administration of the law" include the willingness and financial ability of the affected party to litigate, the inability of the courts to properly constrain police lawlessness, and the ability of courts to make things much worse by departing from principles, not articulating reasonably clear general rules, issuing contradictory rulings, changing direction frequently or suddenly, and aggravating the already vexed problem of interpretation. Fuller, *supra* note 10 at 81-82.

71 In an important article, David Dyzenhaus illustrates how the Supreme Court's use of unwritten principles in administrative law cases is incompatible with their prior reliance on a formal conception of the doctrine of the separation of powers. Instead of a formal understanding, which he views as inherently unstable, Dyzenhaus underscores the significance of judgments like *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*] and *Cooper*, supra note 24, that express a vision of democratic constitutionalism which respects the legitimacy of the administrative state. This vision of Canadian constitutionalism relies on a democratic interpretation of the separation of powers and therefore recognizes the appropriate role of administrative tribunals—particularly human rights tribunals—in determining fundamental legal values. See in particular section I, "The Separation of Powers and the Administrative State" in "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's L.J. 445 at 453-87 ["Constituting Fundamental Values"].

72 Peter W. Hogg & Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 53 U.T.L.J. 716 at 718. Like Raz, they suggest that the claim that the rule of law requires our laws to "respect equality, human dignity, and other good moral values is really just natural law in disguise. The rule of law is not a protection against laws that are bad." Remedies for bad laws are to be found in the written constitution and democratic

Fears of arbitrariness are also related to the contested status of the rule of law. The Court took its clearest stance concerning the power of and limits on the unwritten principle of the rule of law in *Imperial Tobacco*. *Imperial Tobacco* concerned a statute enacted by the province of British Columbia, the *Tobacco Damages and Health Care Costs Recovery Act*, which allowed the province to sue manufacturers of tobacco products for compensation of tobacco-related health care costs incurred by individuals exposed to tobacco products.[73] The provincial government argued that tobacco companies were liable for these health care costs because they breached a duty of care to persons in British Columbia by producing products that could reasonably be expected to cause harm. One effect of the Act was to permit not only the recovery of current and future costs, but also to recover costs retroactively from the past 50 years. The tobacco companies challenged the validity of the statute on three constitutional grounds: extra-territoriality, judicial independence, and the rule of law. Major J., writing for the Court in *Imperial Tobacco*, focused on the debates concerning the meaning of the rule of law and what principles it might incorporate, noting with approval Strayer J.A.'s dictum in *Singh v. Canada (Attorney General)*,[74] that: "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be."[75] The Court affirmed that the rule of law does not require that legislation be prospective (except in criminal law) or general. It also does not prohibit the conferral of special privileges on the government, except where necessary for effective governance.[76] Lastly, it does not ensure a fair civil trial.[77] The Court claimed that to affirm these features constitutionally, as the tobacco companies had argued, would be tantamount to endorsing one particular conception of the rule of law, thereby seriously undermining the legitimacy of judicial review. The written constitution has primacy, such that the attributes of the rule of law are simply broader versions of the rights already contained in the Charter.[78] Protection from unjust or unfair legislation "properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box."[79] When legislatures use their powers validly but arbitrarily, and the content of such legislation does not engage an express constitutional provision, then citizens must look to internal forms of government responsibility and the democratic process of elections for accountability and correction, not to the courts.[80]

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institutions. *Ibid*. For a sophisticated, contrary argument, see Mark D. Walters, "'Common Public Law in the Age of Legislation': David Mullan and the Unwritten Constitution" in Grant Huscroft & Michael Taggart, eds., *Inside and Outside Canadian Administrative Law* (Toronto: University of Toronto Press, 2006) at 421.

73 *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30.

74 [2000] 3 F.C. 185 (C.A.).

75 *Imperial Tobacco*, *supra* note 58 at para. 33.

76 The statute also changed rules of civil procedure in order to counter the systemic advantages that tobacco manufacturers enjoy in private law litigation by shifting the onus of proof from the government to the tobacco manufacturers. Tobacco companies had to prove, on a balance of probabilities, that their products did not and do not cause harm to affected persons in British Columbia. The tobacco companies argued that the shift of the evidentiary burden interfered both with the guarantee of a fair trial and the ability of judges to assess and weigh the relevant evidence.

77 *Imperial Tobacco*, *supra* note 58 at para. 63.

78 *Ibid*. at para. 65.

79 *Ibid*. at para. 66.

80 See *Bacon v. Saskatchewan Crop Insurance Corp*. (1999), 180 Sask. R. 20 at paras. 30, 36 (C.A.).

D. Lower Court Unruliness?

Though the Court has not completely shut down the legal and normative force of the unwritten principle of the rule of law, it has signalled a marked unwillingness to engage in any such "gap-filling" through the use of unwritten principles.[81] Such a conclusion cuts against the grain of the earlier jurisprudence concerning unwritten constitutional principles. Those who wish to see robust use of unwritten principles must look to lower court decisions where the unwritten principle of the rule of law, in conjunction with other unwritten principles, has supplemented the written constitutional text and provided grounds for invalidating legislation based on its content.[82]

Unwritten principles have also provided the justification for judicial intervention in discretionary decision-making. In *Lalonde*, for example, the Ontario Court of Appeal[83] reviewed a discretionary decision made by the Health Services Restructuring Commission to close the sole francophone hospital in Ontario, a decision allegedly made in the public interest. The statute stipulated that a right to receive French language services could only be limited if all reasonable and necessary measures to comply with the statute had been exhausted.[84] Montfort was explicitly designated as a francophone hospital for the Ottawa-Carleton community and the decision to restructure it was a shift in policy for which no explanation was given. While the Commission could exercise discretion to change and even limit the provision of these services, "it cannot simply invoke administrative convenience and vague funding concerns as the reasons for doing so."[85] The Health Services Commission forfeited its entitlement to deference by providing no justificatory policy for impinging on fundamental constitutional values. Because the Commission failed to give serious weight to the linguistic and cultural significance of the Montfort Hospital to the Franco-Ontarian minority, it acted in a contrary manner to the normative and legal import of the unwritten constitutional principle of respect for and protection of minorities; the decision was therefore quashed.

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81 This seems to be the conclusion despite some tension with McLachlin C.J.'s public remarks: "I will suggest that actually quite a lot is going on, and that it is important. What is going on is the idea that there exist fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts, whether or not they find expression in constitutional texts. And the idea is important, going to the core of just governance and how we define the respective roles of Parliament, the executive and the judiciary." "Remarks of the Right Honourable Beverley McLachlin, P.C.," given at the 2005 Lord Cooke Lecture in Wellington, New Zealand, December 1, 2005, online: <http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/UnwrittenPrinciples_e.asp>.

82 See, for example, the discussion by the majority in the Court of Appeal of British Columbia of the principle of the rule of law in relation to the principle of access to justice. *Christie v. British Columbia*, 2005 BCCA 63. The Supreme Court rejected this line of argument in its decision discussed above.

83 *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (Ont. C.A.) [*Lalonde*]. In chapter 7, Evan Fox-Decent discusses unwritten principles in the relationship of procedural fairness to legislation. He notes that judges have imposed duties to give reasons where an unwritten constitutional principle was at stake and the relevant legislation was silent on the issue. In *Lalonde*, for example, the principle of the protection of minorities led to the imposition of a duty to give reasons.

84 The normative force of unwritten constitutional principles therefore animated a large and liberal interpretation of the relevant provincial statute, the *French Language Services Act*, R.S.O. 1990, c. F.32, and motivated the Court's less deferential attitude toward the Commission's decision.

85 *Lalonde*, *supra* note 83 at para. 168.

As a public law decision, *Lalonde* coheres with the lineage of *Roncarelli*. These decisions illustrate how judges can craft a decision that is grounded in the written constitution, but also further a distinctive Canadian political morality using principles of justice drawn from administrative and constitutional law. Approaching language rights purposively, the Ontario court identified several underlying constitutional principles which it used to interpret the boundaries within which the Ontario government could act. The Ontario Court of Appeal held that a fundamental unwritten principle of the constitutional order, protection of minorities, served to protect Ontario's sole francophone hospital from both closure and a substantial reduction in services. The Commission's directions were quashed because they failed to take into account the importance of francophone institutions and the preservation of Franco-Ontarian culture. In this case, the Court of Appeal relied on the Supreme Court of Canada's decision in *Baker*[86] to conclude that "the review of discretionary decisions on the basis of fundamental Canadian constitutional and societal values"[87] is possible and, despite being accorded a large degree of deference, such discretionary decisions are not immune from judicial scrutiny.

IV. ADMINISTERING THE RULE OF LAW

A. A Complex Institutional Relationship

All of the authors in this text allude to the lengthy and complex history in relations among the administrative state, democracy, and the rule of law. As discussed earlier, at the beginning of the 20th century the emerging administrative state was often seen as a threat both to parliamentary sovereignty and to the rule of law because delegated powers from the political executive operated outside legislative scrutiny. Not only did these new administrative bodies possess substantial powers to restrict freedom, redistribute property, and make decisions on matters relating to individual rights, but they also handled many more cases than courts did. Governments—and the executive in particular—could control these new bodies through the appointments process and had significant influence over delegated policy areas. The growth of regulatory law also meant an expanded scope of discretion for government officials in interpreting standards and defining goals in various statutory schemes and executive regulations. This development was extremely worrisome for those concerned with accountability, because Parliament, the responsible minister, and the courts together could not provide full oversight, given their lack of specialized policy knowledge and the sheer quantity of cases that the administrative state generated.

As a result of the expansion of the administrative state, and well before the Charter, administrative law had to struggle to construct a relationship with the modern state that respected the expertise and policy choices of various administrative agencies and boards while simultaneously recognizing the legitimacy and effectiveness of parallel bodies of justice such as administrative tribunals. Administrative law therefore served a crucial function by establishing, over time, a relationship between courts and government departments as one requiring reciprocal legal and political recognition. Because so many of these

86 *Baker*, *supra* note 71.

87 *Ibid*. at para. 177.

administrative bodies—labour and marketing boards, for example—were created to respond to political pressures and regulatory problems, courts, through administrative law, had to rethink their posture in relation to them in the postwar era. This posture was usually characterized by the term "deference." More important, the courts' view of the state had to change as well. The older and classical liberal view of the minimal state no longer matched reality, and courts had to change their institutional practices to acknowledge the legitimacy of the welfare state. Finally, administrative law served as an important pre-Charter vehicle to challenge government policy and to secure rule of law restraints on discretionary decision-making in social and economic policy, a role that contained both positive and negative features, depending on one's political perspective and the particular issue at play.

B. The Rule of Law and Post-Charter Administrative Law: Deference as Respect

While the rule of law traditionally serves as a bulwark against the executive branch of government and supports judicial oversight of broad statutory grants of discretion, this role becomes more complicated in the modern administrative state. With legislatively delegated powers to different kinds of administrative bodies, the role of courts can be understood in two contrasting ways. On the one hand, courts provide an essential accountability function by policing the exercise of delegated discretionary powers to ensure that they are confined to terms and purposes specified by the authorizing statute. On the other hand, courts are conscious of the separation of powers and, given their lack of expertise in determining the merits of certain policy-making exercises, are themselves under rule of law constraints to respect legislative and executive branches. The history of the relations between the courts and the other branches of government in administrative law began as a bipolar relationship: courts showed greater deference to executive decision-making and prerogative powers, as well as to legislation, but were highly antagonistic toward decisions made by actual administrative bodies, bodies that were not seen as credible or competent decision-makers on questions of law. The relationship of courts to other branches now aspires to a kind of respectful deference[88] (where merited) characterized by an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship.[89] Despite this new normative underpinning, the relationship among administrative bodies and courts encounters recurring problems arising from privative clauses, unwritten

88 Dyzenhaus, "Constituting Fundamental Values," *supra* note 71 at 489-502. See also David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Oxford University Press, 1997) where the original phrase occurs at 286. Dyzenhaus contrasts the principle of "deference as respect" to the traditional principle of judicial deference. He labels the traditional approach a Diceyan "deference as submission" where judges must submit to the intention of the legislature because of the overriding principle of parliamentary sovereignty. Deference as respect is the opposite of deference as submission. It should also be distinguished from the Dworkinian model, which places judges at the apex of the legal order and whose role is to enforce individualistic common-law values against the state.

89 See Geneviève Cartier's conception of discretion as dialogue versus discretion as power in chapter 10. See also Bill Bogart's analysis of "new governance" in chapter 2, in which negotiation, persuasion, and enabling skills have displaced command and control as a mode of regulation and public management.

principles, ministerial discretion in the national security context, statutory interpretation, and the choice of standard of review.

C. An Example of Deference as Respect: National Corn Growers

Contrasting approaches to the intensity of judicial scrutiny of agency decisions inform the substance of the differing opinions written by Gonthier J. and Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*.[90] The Canadian Import Tribunal conducted an inquiry into the importation of corn grain from the United States into Canada, an inquiry authorized under s. 42 of the *Special Import Measures Act* (SIMA),[91] and determined that continued importation of grain had already caused, or in the future would likely cause, injury to Canadian producers of corn grain. This decision reaffirmed the deputy minister's prior preliminary conclusions that material injury existed and, thus, provided support for his decision to impose a provisional duty on American corn in order to protect Canadian corn growers. The *Federal Court Act*,[92] however, allowed for judicial review if a board, commission, or tribunal had, among other grounds, "based its decision or order on an erroneous finding of fact that it made in a *perverse or capricious manner* or *without regard for the material before it*."[93] Because the Tribunal's decision was based on a factual finding of harm informed by its expertise, and because the Act also contained a privative clause (s. 76(1)) stating that "every order or finding of the Tribunal is final and conclusive," this meant that the decision would be assessed on the standard of patent unreasonableness so that courts could best respect legislative intent. Review turned on whether or not it was patently unreasonable for the tribunal to refer to the *General Agreement on Tariffs and Trade* (GATT)[94] in interpreting the SIMA, whether the tribunal's interpretation of s. 42 in its constitutive legislation was unreasonable, and whether the tribunal reached its decision without any cogent evidence to support its determination of material injury.

In a concurring judgment, Wilson J. evoked the *CUPE* case[95] to caution the majority (and other like-minded judges) about the effects of engaging in a probing examination of a decision. Wilson J. believed that such a detailed examination sanctioned judicial intervention rather than the restraint represented by *CUPE*. *CUPE* was a landmark case that signalled the beginning of the end of the Diceyan model for administrative law. It concerned a labour relations tribunal, the Public Service Staff Relations Board of New Brunswick,

90 [1990] 2 S.C.R. 1324 [*National Corn Growers*], online: <http://www.canlii.org/en/ca/scc/doc/1990/1990canlii49/1990canlii49.pdf>.

91 S.C. 1984, s. 25.

92 R.S.C. 1970, c. 10.

93 *Ibid*., s. 28.1(c). Emphasis added. Readers will recall that these are familiar expressions connoting arbitrariness in decision-making.

94 The General Agreement on Tariffs and Trade was an international agreement, originally negotiated in 1947, governing trade in goods. The GATT aimed to increase international trade by reducing tariffs and other trade barriers hindering the free flow of goods across national borders. The GATT was succeeded by the World Trade Organization in 1995.

95 *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*., [1979] 2 S.C.R. 227 [*CUPE*]. In chapter 8, Audrey Macklin describes *CUPE*'s "blockbuster" effect on the standard of review in Canadian administrative law.

which had to interpret a poorly worded provision in its enabling statute concerning the meaning of the word "employee." The legislation stated that the employer could not replace striking employees with other employees; moreover, other parts of the statute excluded management from the definition of employee. The representative union, the Canadian Union of Public Employees, complained to the Board that the employer was replacing striking employees with management personnel, contrary to the statute. The Board examined the enabling statute, provided an interpretation of the ambiguous provision, and ordered the employer not to use management to replace striking workers. The Board's decisions were protected by a privative clause. On review, the Supreme Court held that deference was owed to the tribunal based on its expertise, the privative clause, and the reasonableness of its determination. In cases of statutory ambiguity, and where there are multiple interpretations that are reasonable, a reviewing court should defer to the interpretation of the expert tribunal.

According to Wilson J., *CUPE*'s approach to the standard of review, particularly with respect to patent unreasonableness, entailed a relationship between courts and administrative agencies where the courts should recognize that (1) administrative agencies, not courts, bear primary statutory responsibility for their legislative mandate in the area of regulation; (2) administrative agencies possess expertise, experience, and contextual knowledge about which the courts know very little; and (3) statutory provisions, such as those found in *National Corn Growers*, do not admit to one uniquely correct interpretation but, rather, can sustain a variety of reasonable interpretations. Though concurring with the result reached, Wilson J. clearly feared that such a wide-ranging and probing examination of both the agency's interpretation of its enabling statute and the reasonableness of its conclusions risked reintroducing the correctness standard under the guise of reasonableness and displacing the patently unreasonable standard.[96] In other words, this approach would likely gut the hard-won jurisprudential ground symbolized by the *CUPE* decision.

Wilson J. underscored what she believed to be the appropriate institutional attitude or posture. In the face of a privative clause, courts must not engage in a wide-ranging review concerning whether or not the tribunal's conclusions are unreasonable. The merits of a tribunal's interpretation of international obligations, such as the GATT, are for the legislature to address by amending the terms of the statute if interpretive disagreement exists between institutions. And, most important, meticulous analysis of a tribunal's reasoning concerning the evidence should not become the norm. As she tersely wrote:

> Faced with the highly charged world of international trade and a clear legislative decision to create a tribunal to dispose of disputes that arise in that context, it is highly inappropriate for courts to take it upon themselves to assess the merits of the Tribunal's conclusions about when the government may respond to another country's use of subsidies. If courts were to take it upon themselves to conduct detailed reviews of these decisions on a regular basis, the Tribunal's effectiveness and authority would soon be effectively undermined.[97]

The conclusions advanced by Wilson J. explicitly rejected the older Diceyan model in which the rule of law provided the justification for judicial control of administrative agencies and

96 This worry surfaces in the discussion of the so-called intermediate standard of review, reasonableness *simpliciter*, as discussed by Audrey Macklin in chapter 8 and Sheila Wildeman in chapter 9.

97 *National Corn Growers*, *supra* note 90 at 59.

their interpretations, to be replaced by a new model where the rule of law buttressed the "pragmatic and functional" methodological approach to determine the appropriate standard of review. Instead of an unreasonable administrative body whose straitjacket laces are ever more tightly pulled by the courts, the modern judicial approach to the administrative state ought to be informed by a more flexible, respectful, and contextualized methodology that recognizes different exercises of legitimate power by competent institutional partners.

The majority decision written by Gonthier J. also concluded that the tribunal was not unreasonable with respect to any of these three matters. To reach this result, Gonthier J. delved deeply into both how the tribunal came to the decision as well as the decision's merits. In the face of criticism from the concurring judgment written by Wilson J., Gonthier J. responded: "With respect, I do not understand how a conclusion can be reached as to the reasonableness of a tribunal's interpretation of its enabling statute without considering the reasoning underlying it, and I would be surprised if that were the effect of this Court's decision in *C.U.P.E.*"[98] Gonthier J., however, did not believe that his more probing approach repudiated *CUPE*; instead, he continued to see his method of review as more respectful and deferential than that found in the traditional Diceyan model. The effect of this more probing inquiry, however, seemed to move the standard of review away from patently unreasonable and closer to correctness.

National Corn Growers illustrates how different theoretical models can help explain how judges understand their institutional role as well as how these models shed light on the underlying rationale behind the judicial choice of the standard of review. Dicey envisions the judiciary as guardians of private-law checks—in his words, "regular law"—on the arbitrary power of the executive and its delegates. In matters of agency interpretation, his theory of the rule of law argues for the primacy of a correctness standard of review. Fuller's theory, on the other hand, clearly incorporates rule of law concerns in relation to the administrative state and judicial review of administrative decisions and envisages a collaborative, cooperative endeavour among state actors and institutions to maintain the rule of law. In the confines of the case, the fact that the tribunal had not abused its discretion and had exhibited its expertise suggest that his perspective would support the more respectful approach articulated by Wilson J. Indeed, Fuller's concern for the problems that polycentricity—defined as complex networks of relationships—poses for public law underscores the importance of this conclusion.[99] On his view, the presence of polycentricity in a case means that where a reasonable range of policy choices exists, or when multiple reasonable interpretations of an ambiguous statutory term are possible, or when a decision involves balancing multiple sets of competing interests, then these functions are best left with the expert tribunal. Raz narrows the reach of the rule of law to correction for the harms created by law itself. His theory does not provide enough details concerning a role for the rule of law as a

98 *Ibid.* at 40-41.

99 In "The Form and Limits of Adjudication," Fuller controversially claimed that polycentric disputes are inherently unsuitable for adjudication and should therefore be considered non-justiciable. According to Fuller, polycentricity is both pervasive and a matter of degree. Private law disputes, by contrast, take the familiar form of a bipolar encounter between plaintiff and defendant, and will likely have few polycentric elements. The problem Fuller identified is that of knowing when polycentric elements have become so significant that the proper limits of adjudication have been reached such that these disputes should be resolved in the legislature or by the market. (1978) 92 Harv. L. Rev. 353.

check on the arbitrary use of political power exercised in "non-legal" ways, such as decision-making power within the administrative state.[100] This omission, however, points to some support for Gonthier's approach as the best way to control harms created by the administrative state, but perhaps less so for the risks created by judicial oversight. A different case might produce a different alignment. If, for example, the third standard of review—reasonableness—had been available at the time of *National Corn Growers*, a unanimous decision on the appropriateness of this standard might have been reached. As with so many aspects of administrative law, context matters greatly, though your own tendencies concerning the appropriate ways that the rule of law constrains judges and administrative decision-makers might reflect one approach more than another.

D. Two Problems for Deference as Respect: Privative Clauses and the Choice of the Standard of Review

1. Privative Clauses

As seen in the *National Corn Growers* case discussed above, privative or ouster clauses historically posed challenges for the rule of law. Several types of privative clauses exist, but the general form is a statutory provision protecting the decisions made by public officials in boards, tribunals, and ministries either from further dispute internally (that is, a finality clause) or from judicial review (that is, an ouster clause).[101] The powers conferred on administrative agencies through privative clauses were often conferred in absolute terms and, therefore, decisions were meant to be final. The conundrum for courts was that the statute prescribed limits on delegated power but, at the same time, authorized officials to act with seemingly unfettered discretion within those broad confines. The risk to the accountability function of the rule of law was that these officials could behave as a law unto themselves because they would be the sole judges of the substantive validity of their own acts. The institutional result of privative clauses was a system of competing and irreconcilable supremacies between the legislative and judicial branches of government. Those who supported the development of the administrative state, meanwhile, worried about the growth of administrative law and the consequent judicial review of administrative decisions, seeing judicial scrutiny as an altogether too constraining legalism that would hinder the flexible regulation needed in a complex industrialized society.[102]

Courts approached privative clauses in several different ways: reading them out of the statute if a jurisdictional error was implicated in the case, or deferring completely to Parliament's intent to oust judicial oversight. Finally, and later, they developed methods of statutory interpretation grounded in the common-law presumption that Parliament always intends

100 This is not an argument that his theory cannot incorporate discretionary decision-making.

101 For a discussion of privative clauses in administrative law, see Audrey Macklin, chapter 8, and Sheila Wildeman, chapter 9. For a detailed analysis of the history, types, and constitutional effects of privative clauses, see David Dyzenhaus, "Disobeying Parliament? Privative Clauses and the Rule of Law" in Richard W. Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) at 499.

102 As Audrey Macklin points out in chapter 8, the motive behind privative clauses was not to oust judicial meddling (or not primarily), but to provide efficient resolution of disputes and allocate scarce judicial resources by restricting access to the courts.

to respect procedural fairness, even with respect to statutorily delegated powers with broad scope.[103] This last approach laid the basis for deference as respect, found in the *CUPE* decision, in which the privative clause came to be viewed as a communication from the legislature that courts should recognize the interpretive authority of the tribunal within its area of expertise, but that judges could exercise their rule of law powers of oversight on constitutional and jurisdictional matters. Nevertheless, the modern development of deference and respect for administrative tribunals is both an ongoing and vulnerable achievement.

Finally, privative clauses and unwritten principles uncannily mirror each other. As discussed in part III, above, judges seem to have an interpretive monopoly on unwritten principles, thereby "ousting" interpretations from other branches of government. Robust use of unwritten principles—and ironically the rule of law itself—risks entrenching the elitist rule of judges and opens the door to judicial arbitrariness, the obverse of legislatively sanctioned administrative arbitrariness due to the power of privative clauses. This points to a conception of the rule of law, which recognizes that all branches of government have a duty to realize a rule of law state and that all branches can fail to do so in their distinctive ways.

2. The Choice of the Standard of Review

We have also seen that pre-Charter administrative law was limited to the review of questions of law, jurisdiction, and procedural fairness in order to determine whether or not decision-makers acted in excess of jurisdiction, without authority, or had otherwise abused their discretion on unreasonable grounds. Reviewing courts were not to examine the full merits of the decision, save on exceptional grounds, so that they would be constrained from substituting their preferred policy outcome for that of authorized decision-makers. Judicial interpretation of the rule of law and other legal principles, such as the separation of powers, animated the level of deference shown to administrative bodies. This deference was most fully exhibited in the choice of the standard of review—correctness and patent unreasonableness (with reasonableness as a post-Charter development)—that were applied in order to analyze a particular administrative decision. The standard of review therefore functioned as a prime rule-of-law constraint on judges in administrative law.

As an ideal then, the standard of review indicates a court's understanding of independence and expertise within these administrative bodies, regulates the contours of the administrative state and its exercises of power, and controls the discretionary features within the exercise of judicial review. Whether the ideal succeeds in practice, however, is the subject of several chapters in this book.[104] And, as we have seen in *National Corn Growers*, the contemporary approach to the standard of review reflects concerns about judicial legitimacy within a democratic state—a state that has wielded a democratic mandate to create administrative and policy frameworks. The pragmatic and functional approach used to weigh the criteria involved in the choice of the standard of review illustrated courts' attempts to grapple with the sheer variety of administrative bodies, while also affirming the legitimacy of review of the multiplicity of decisions and rulings. The pragmatic

103 See Evan Fox-Decent, chapter 7, for his discussion of privative clauses and procedural fairness.

104 See in particular the two chapters on the standard of review: chapter 8 by Audrey Macklin and chapter 9 by Sheila Wildeman. On Wildeman's account, this author tends toward a romantic reading of the development of the standards of review.

and functional approach responds both to the nature of the tribunal as well as the nature of the issue that is subject to appeal. Deference will be shown when a match exists between tribunal expertise and the issue. Review on the correctness standard allows courts to show very little to no deference to agency decision-making: the decision is either right or wrong. This standard is applied when the agency has very little expertise or when the issue involves the interpretation of general law or constitutional matters. Patent unreasonableness is the most deferential or respectful standard and is considered appropriate when review involves a polycentric, complex question concerning the regulation of activities within the mandate of a highly specialized agency. The court will only intervene when it is blatantly evident that the agency has made an error of law or of fact. Reasonableness, the intermediate standard, reflects a justified degree of judicial deference or respect for the challenged decision or action.

The tensions among the rule of law, deference, the standard of review, and the administrative state were forcefully made in the *Baker* case,[105] which involved the review of an immigration officer's biased decision in the context of a humanitarian and compassionate grounds application by an illegal immigrant.[106] On some accounts, *Baker* represents an instance of judicial creativity in the crafting of a context-specific duty to give reasons, particularly in the immigration sphere. Courts normally show a large degree of deference in this policy area, given the expertise of the decision-maker in immigration cases.[107] Instead, the treatment of one individual at the hands of the administrative state precipitated the expansion of the content of the duty of fairness, a vital component of the rule of law, in an area usually demanding correctness.[108] On this point, L'Heureux-Dubé J. for the majority wrote:

> The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.[109]

According to the Court, the administrative decision in *Baker* displayed arbitrariness: it did not exhibit a mind that was attuned to the humanitarian and compassionate requirements stipulated in the department's own guidelines; it showed a lack of regard for the per-

105 *Baker*, *supra* note 71.

106 The facts of *Baker* are described more fully by Grant Huscroft in chapter 5.

107 On the one hand, the fact-specific nature of the inquiry, the role of a humanitarian and compassionate grounds application within the statutory scheme as an exception, the fact that the decision-maker is the minister, and the considerable discretion evidenced by the statutory language suggest that a large degree of deference would be appropriate. On the other hand, the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court, and the individual rather than polycentric nature of the decision, argued against patent unreasonableness as the proper standard. "Reasonableness," the intermediate standard, was therefore chosen.

108 Grant Huscroft provides a more detailed examination of the scope and content of the duty of fairness in chapter 5. Historically, the duty of fairness was a jurisdictional question and therefore required correctness. Privative clauses could not protect procedural errors.

109 *Baker*, *supra* note 71 at para. 56.

son affected; and it gave the impression that important factors, such as the best interests of the children, were outweighed by discriminatory biases. The decision therefore did not meet the threshold of reasonableness that could "command respect" from the reviewers. Mavis Baker and her counsel were lucky to gain access to the "reasons" for the negative decision in her case. In order to control for the arbitrariness of luck, the Court imposed a duty to give reasons on statutory and prerogative decision-makers in certain administrative contexts where important individual interests are at stake. Despite the fact that this is not a general duty for all decision-makers in the state, it nevertheless still stands as a substantive procedural protection. Ideally, the duty to give reasons has the potential to advance both restraint and respect, thereby facilitating rule of law concerns and administrative legitimacy. Reasons stand as an opportunity for the agency to show both its expertise and its concern for affected individuals by observing procedural fairness. Judicial recognition of reasons—that is, acknowledgment that the reasons are justified and justifiable—constrains reweighing the factors and affirms specific instances of non-arbitrary decision-making. On this account, deference does not occur simply because the statute has a privative clause ordering courts not to intervene; rather, deference is the result of institutional competence, expertise, and mutual respect for the rule of law.

As others in this casebook will discuss, no *a priori* answer exists within the pragmatic and functional approach to discerning the proper scope of deference. General tendencies based on institutional history—labour boards, for example—may exist, but a "one size fits all" approach to bodies and types of decision-making should be avoided.[110] Those who appreciate certainty as a rule of law value, however, will find the lack of predictability concerning when a court will or will not recognize agency expertise both frustrating and troubling.

Despite the continuing problem of the standard of review, *Baker* nevertheless represents an important link in the rule-of-law narrative that can be traced back to *Roncarelli*. Like *Roncarelli*, *Baker* discloses that administrative and constitutional law are attuned to underlying fundamental values such as basic concerns for human dignity, the vindication of rights, and the effects of political power on individuals. Public law, on this account, discovers its normative aim in the need to find justification for all exercises of public power. Yet this awareness does not necessarily translate into judicial supremacy. Instead, courts ought to respect institutional partners that justify their use of public power as reasonable and commit to the values that underpin the exercise of that public power. Discretion, therefore, is always structured and constrained. *Baker* confirms the shift to a value-centric approach to the rule of law in a modern constitutional democracy.[111]

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110 Colleen Flood and Lorne Sossin, for example, argue that the myriad number of delegated powers favours the perspective that a spectrum of possibilities exists within the three standards of review. The methodology should therefore mirror the approach to procedural fairness where instead of three standards, courts would look to a wide range of factors in order to determine the degree of deference using one comprehensive standard. See Lorne Sossin & Colleen M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 U.T.L.J. 581.

111 See Mary Liston, "'Alert, Alive and Sensitive': *Baker*, the Duty to Give Reasons and the Ethos of Justification in Canadian Public Law" for this understanding of *Baker* in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004). This collection of essays offers a multi-perspectival examination of a public law culture of justification through the lens of *Baker*.

E. Constraining the Charter

The Charter now provides many express grounds by which courts may review the exercise of statutory or discretionary powers. A recent development in the relationship between the Charter and administrative bodies is the judicial finding that an administrative tribunal may have the jurisdiction to consider Charter challenges to its enabling legislation.[112] This determination represents a major shift in the earlier approach, which arrogated the power to determine questions of law to courts, while leaving administrative bodies the power to interpret and apply their enabling legislation. Originally, only administrative tribunals that structurally and purposively mirrored courts possessed the jurisdiction to hear Charter claims. Now, sometimes the enabling legislation will empower an administrative tribunal to interpret and apply all law, including the Charter, while at other times the statutory scheme as a whole will confer an implicit jurisdiction. These changes are grounded in concerns for access to justice and a recognition of the competence and capacity of such tribunals as legal bodies to review legislation. On this understanding, jurisdiction to apply the Charter to enabling legislation is given by the legislature in the statute and does not arise solely from the constitutional text. Certain rule of law considerations stemming from the separation of powers will flow from this more restrained mandate: the scope of the remedies that an administrative tribunal can grant will be limited; the particular decision will not be binding authority as precedent for future cases; and, in subsequent judicial review, the decision will be subject to a standard of correctness, ensuring that it receives little or no curial deference.

The Charter can significantly constrain delegations of broad discretionary powers where Charter rights and freedoms are directly or indirectly implicated, or which may not be sufficiently confined by the terms of the enabling statute in question. So, while the existence of broad discretionary powers is not suspect in itself, courts could be more demanding in cases that involve broad delegations of power by ensuring that discretion is structured or confined within the parameters of the Charter. Where Charter rights and freedoms are not at issue, courts may tolerate broad discretionary powers, but they may also attend to the effects of this power in individual cases.

The ability of administrative agencies to question unconstitutional enabling provisions not only provides an economical and efficient resolution of a rights dispute (avoiding the need to go to court), but also conforms to the emerging "institutional dialogue" or "deference as respect" institutional model. This democratically informed perspective emerged clearly in the dissent written by McLachlin J. (as she then was) and L'Heureux-Dubé J. in the case *Cooper v. Canada (Human Rights Commission)*. This case concerned the fundamental question of whether or not human rights tribunals have the authority to determine the constitutionality of provisions in their enabling statutes. In *Cooper*, they wrote a resounding affirmation:

> The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception.

112 See Evan Fox-Decent, chapter 7, for a discussion of the difficulties in the relationship between the Charter and administrative law, including agency jurisdiction over the Charter and the recent trilogy of cases affirming tribunal authority to consider questions of law.

> Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.[113]

The institutional aspiration underlying this vision is to create a constitutional democracy that reconciles the formerly competing sovereignties and reinforces institutional competencies for the benefit of citizens.

F. Institutional Dialogue and the Canadian Rule of Law

Political and legal theories differ in their characterization of the relationship between democracy and the rule of law, but most allude to various tensions in that relationship. Such tensions come to a head when the rule of law is associated mainly with the courts in what comes to be seen as an antagonistic relationship of judges against the legislature and democratic will formation.

As we have seen, the Diceyan conception of the rule of law supported parliamentary democracy but employed administrative law, judicially enforced in ordinary courts, to control the policy-making branches of the state—that is, the executive and the bureaucracy. But, while institutional and policy differentiation characterizes the modern state, the Diceyan rule of law authorized judges to enforce constitutional fundamentals and institutional coherence uniformly throughout the state. Principles derived from private law controlled public bodies and Dicey rejected the notion that a separate branch of public law should develop in the British system.

A similar, but different, antagonism plays out in judicial review of legislation under a written bill of rights like the Charter in cases where individual rights and public goods directly conflict. Section II.A on the legal control of substantive arbitrariness above alluded to the normativity of the legal subject animating individual rights against the state as well as the duties with which the state must comply. This normativity potentially authorizes a greater intervention, not just in the decision-making procedures, but in the very heart or substance of a public authority's decision that affects important individual interests.

A current and prominent proponent of this approach to judicial review can be found in the philosophy of Ronald Dworkin.[114] Dworkin's legal subject is an individual bearer of rights who is entitled to demand the resolution of disputes over the content of these rights through the legal system—specifically through courts, which he calls the "independent forum of principle."[115] Dworkin's theory therefore grounds a vision of a constitutionalized

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113 *Cooper*, *supra* note 24 at para. 70.

114 Two significant texts for this argument are Dworkin's *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) and *Law's Empire* (Cambridge, MA: Harvard University Press, 1986). As a legal philosopher, Dworkin participates in a branch of philosophy called deontological liberalism, a liberalism popularized by the work of John Rawls. Deontological liberalism holds that the purpose of politics is to allow people who possess many different conceptions of value to pursue their individual ends to the greatest degree possible. This form of liberalism adheres to a theory of equality that "supposes that political decisions must be, so far as it is possible, independent of any particular conception of the good life." Ronald Dworkin, "Liberalism" in *A Matter of Principle* at 191.

115 See *A Matter of Principle*, *ibid.* at 30-32 and chapter 2, "The Forum of Principle."

public morality that he calls the "rights conception of the rule of law."[116] For Dworkin, the rule of law necessarily entails the judicial determination of rights through principled interpretation in hard cases where a legal answer must be crafted by judges rather than "given" by existing legal sources. Principled interpretation is based on rules, principles, the concomitant interpretation of how these rules and principles appropriately fit with positive law, and, importantly, how a judicial decision expresses its compatibility with selected principles from a larger political morality. Government respect for individual freedom and the autonomy of non-governmental spheres of authority, for example, would be requirements of a Dworkinian political morality.

Dworkin's theory of adjudication advances a strong political morality because it has as its central focus a concept of justice designed to further political principles of autonomy, dignity, equality, and liberty for all individuals in the political community. Politics, on his account, should be held to a higher standard than pragmatism or consequentialism would allow because the political system ought to place the pursuit of justice higher than the maintenance of political power, stability, or general welfare. Liberalism, his primary political morality, takes precedence over the political morality associated with democracy, such as majority decision-making embodied in legislation, or the focus on the common good from communitarianism. One consequence of Dworkin's theory is that judges, not legislators, are ultimately charged with guarding the moral integrity of the political order because, as the chief political actors in the form of principle, they possess the knowledge and the skills—honed through their unique access to the interpretation of the law—to be the better articulators of a constitutionalized public morality.

Nevertheless, if courts should respect pluralism as a political fact, and ideological pluralism in particular, their job is not to endorse wholeheartedly one particular substantive political morality: that, many critics of Dworkin argue, is typically seen as the role of the political sphere.[117] But, when confronted with conflicting demands, courts should seek to construct a principled balance among competing goods or reconcile conflicting rights as the appropriate remedy. The interpretive role of the courts in public law means that they must construct in their rulings a reasonable normative and narrative coherence to explain the nature of the conflict and the appropriateness of the decision in favour of one balance over another. Government justification of limitations on rights and the possibility of legislative response either through reply legislation or the notwithstanding clause represent crucial institutional restraints on this form of judicial power in the Canadian order.[118] Taken together,

116 *Ibid*. at 11-12.

117 Many democratic theorists have attacked Dworkin's theory of adjudication and his conception of the rule of law. See, for example, the collection of essays in Allan C. Hutchinson and Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987); Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Toronto: Oxford University Press, 2001); and Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

118 See, for example, Wilson J.'s characterization of s. 1 of the *Canadian Charter of Rights and Freedoms* (the Charter) Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 in her dissent in *Operation Dismantle*, *supra* note 24 at para. 104: "Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that

these three aspects of the rule of law—the principle of legality, institutional practices, and a distinctive political morality—argue for an understanding of the political order as a joint effort in governance on the part of institutions and citizens. In Canada, this joint effort in upholding the rule of law is often described as an "institutional dialogue."[119]

The specific nature of this joint effort in governance is controversial. Though liberal democratic theory emphasizes that no branch of government should possess complete control of sovereignty, disputes rage about whether public power should be shared equally among the state institutions or whether one branch should retain overall supremacy.[120] In Canada's pre-Charter Westminster system of government, for example, the principle of parliamentary sovereignty traditionally meant that Parliament could pass laws on any subject, and that no institution or person could override or strike down these laws. The rule of law required that statutes meet the "manner and form" criteria of enactment: that is, the legislature must be identified as the proper source of law and the proper legislative procedure must be used. Existence of these two factors sufficed in order to recognize a statute as valid or "prescribed by law," and this recognition should be considered legitimate by all institutions and persons, including the judiciary. In the pre-Charter world of public law, the authority of legislatures was not constrained by courts, but rather by political sanctions. Political sanctions manifested themselves through regular elections as well as political conventions such as ministerial responsibility in which Cabinet ministers faced demands for accountability by way of scrutiny in question period.

The enactment of the Charter has altered the principle of parliamentary sovereignty. Constitutional rights can be limited subject to the government satisfying the justificatory requirements of s. 1 in the Charter. As well, legislatures can theoretically respond to judicial rulings by using the s. 33 notwithstanding clause to override decisions temporarily. In this way, Canada continues to endorse the principle of parliamentary sovereignty, but reconciles it with the principle of the rule of law as manifested in judicial review. However, the legitimacy of judicial decision-making in matters of political controversy and policy remains in dispute, a debate that has been exacerbated by the Charter. At times, the judicial

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come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a 'political questions' doctrine and permits the Court to deal with what might be termed 'prudential' considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review."

119 Noteworthy articles from the voluminous literature on institutional dialogue include T.R.S. Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 Oxford J. Legal Stud. 563; Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49 Am. J. Comp. L. 707; Peter W. Hogg & Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; Christopher P. Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003" (2004) 23 Sup. Ct. L. Rev. (2d) 105; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); and Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislatures" (2004) 23 Sup. Ct. L. Rev. (2d) 7.

120 See Jürgen Habermas for an argument supporting co-equal status between the principles of democracy and the rule of law: Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles" (2001) 29 Pol. Theory 766, and "On the Internal Relation Between the Rule of Law and Democracy" in Patrick Hayden, ed., *Philosophical Perspectives on Law and Politics* (New York: Peter Lang, 1999) 327.

role goes beyond applying the rule of law understood as the principle of legality to an activity that appears more legislative or discretionary in nature—that is, the ability to make law or intervene in policy development. The litmus test for this debate is whether or not one believes that in a reasonably democratic society with functioning legislatures, where its citizens disagree about the scope and content of rights, judicial review of legislation constitutes an inappropriate mode of final decision-making.[121] In administrative law, this kind of activity is particularly controversial if it means judges can, in certain cases and with a constrained approach, "reweigh" the factors that administrative decision-makers use based on their expertise and experiential knowledge, if such decisions violate constitutional values.[122] Those who support this conclusion argue that the Charter reinforces the constitutional commitment that all persons—individuals, corporations, and state actors—must adhere to the rule of law and respect fundamental constitutional values.

G. Other Routes to Accountability in the Administrative State

Just as a "one size fits all" approach does not exist in the courts, so too in the state.[123] Judicial review represents an important, but not the sole, route to securing administrative accountability. Courts should be seen as merely one among the many means by which we hold government to account. Moreover, it will be better for the legitimacy of courts if we recognize them as one among a "family" of legitimate routes to securing accountability within a liberal democratic state: public inquiries, task forces, departmental investigations, and ombudsmen. The rule of law will also inform the various institutional alternatives to judicial review of government action.[124]

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121 See Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale L.J. 1346. Although Waldron is discussing the role of the judiciary in the United States, his argument finds purchase in Canada with critics who bemoan the growth of judicial activism and the inability of legislatures to use the notwithstanding clause to advance a different interpretation of a constitutional matter for fear of political backlash. The abeyance of s. 33, they argue, gives judges the de facto last word and ensures that the courts remain supreme over other branches of government.

122 David Dyzenhaus argues that if one recognizes a judicial role for preserving constitutional values, then judicial review of legislative and governmental decisions is premised on this role recognition and on ensuring that decision-making takes into account the content of those values. The executive and the legislature face the onus of justifying their decisions by reference to these values either within legislation, or within the arguments they make under s. 1 of the Charter. See David Dyzenhaus, "The Legitimacy of the Rule of Law" in *2005 New York University School of Law Colloquium in Legal, Political, and Social Philosophy*, online: NYU <http://www.law.nyu.edu/clppt/program2005/readings/legallegit2.pdf>; and "Constituting Fundamental Values," *supra* note 71.

123 Similarly, the principle of federalism militates in favour of provincial experimentation with institutional design. Though higher and lower courts are compelled to work toward unified standards, there need not be concordance between federal and provincial approaches to regulation and administration.

124 See Peter Carver, chapter 14, for a discussion of administrative law in relation to public inquiries.

V. CONCLUSION: A DEMOCRATIC RULE OF LAW IN THE ADMINISTRATIVE STATE?

This chapter has explained how the concept of the rule of law and its associated legal and political principles are fundamental to understanding the relationship between courts and administrative bodies. The realization of the rule of law within a democratic culture can not only legitimate the sharing of public power among courts, the executive, legislatures, and administrative bodies, but also facilitate the creation of multiple routes for citizens (and non-citizens) to secure accountability for the use of public power. All parts of and persons in the state participate in the creation and maintenance of the rule of law. The multiplicity of institutional environments, however, means that the rule of law will require different responsibilities and restraints for different institutional actors and practices. Though this makes administrative law a difficult field of study and provides unending complications for judicial review of administrative decision-making, one positive reading of such complexity suggests that this is a necessary consequence of the interaction between the rule of law and democracy. The simple system suggested by both legal and political theory, then, is capable of infinite variations and complexity in the design of institutions and their constraints. These permutations must nevertheless continue to adhere to the substance and procedures of legality—a process in which courts play an important role through legal interpretation of abstract principles and oversight of administrative practices.[125]

How a judge understands the rule of law, and his or her role in upholding it, will necessarily shape how he or she approaches the review of decisions made by an administrative tribunal. Judicial temperament is not completely predictable: judges may conceive of themselves as the Diceyan defenders of the rule of law against the administrative state; or they may view themselves the Dworkinian legal guardians of the constitution, committed to upholding the rights conception of the rule of law; or perhaps they may see their role as the Fullerian cooperative partner who recognizes democratic initiatives, but still maintains institutional fidelity to rule-of-law principles. Institutional dialogue and deference as respect stand as distinctive forms of the commitment to judicial restraint in Canadian administrative law—a restraint that simultaneously attempts to ensure judicial accountability and larger public law accountability.

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125 In a new and significant case, the Supreme Court invoked rule-of-law values and attributes to justify restructuring the standard of review. *Dunsmuir v. New Brunswick*, 2008 SCC 9 illustrates judicial efforts to introduce greater clarity, fairness, consistency, and simplicity into administrative law by reducing the standards of review from three to two—correctness and reasonableness—and by rebranding the pragmatic and functional approach as a simpler "standard of review analysis" (para. 63). These efforts were informed by a conception of the rule of law that explicitly acknowledges the tension between judicial review and democracy. According to the Court, judicial review upholds the rule of law by ensuring that all exercises of public authority are lawful, reasonable, and fair. But judicial review also respects legislative supremacy through the proper approach to the standard of review; recognizing effective limits on judicial discretion such as legislative intent, privative clauses, and agency expertise; and by rejecting a "court-centric" conception of the rule of law (paras. 27-33). On this account, administrative agencies as constitutional partners do exhibit rule-of-law attributes, have embraced rule-of-law values, and can facilitate access to justice. The Court's goal in this judgment was to provide greater guidance for reviewing courts, counsel, litigants, and decision-makers in administrative law. The postscript in chapter 8 and the accompanying website further consider these recent developments.

SUGGESTED ADDITIONAL READINGS

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