

PROCESS, SUBSTANCE, AND JUDICIAL REVIEW'S (A)SYMMETRY

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This article addresses an apparent asymmetry in the law of judicial review of administrative action. While procedural review is explicitly concerned with the rights of people who find themselves subject to public administrative power, rights do not figure in the prevailing account of substantive review. Instead, courts have treated substantive review as an opportunity to promote the rule of law and give effect to legislative intent. The author argues that the asymmetry is merely apparent, and that especially following Canada (Minister of Citizenship and Immigration) v Vavilov, substantive review is best understood as a rights-oriented enterprise. More specifically, substantive review vindicates a right to justification according to law held by the legal subject of an administrative decision. This account makes the legal subject visible within the law of substantive review and allows us to see the law of judicial review more generally as an integrated domain concerned with administrative law rights.

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INTRODUCTION

A striking asymmetry presents itself in contemporary Canadian administrative law. The framework that governs judicial review of administrative action is traditionally divided into two domains. The domain of procedural review, on one side, concerns the procedure that led to and followed from the making of an administrative decision.¹ It controls, for example, the provision of notice, a hearing, and reasons for a decision. The domain of substantive review, on the other, concerns the content of administrative decisions. It requires them to be justified

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¹ The leading case in this domain is *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) [*Baker*].



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according to the legal and factual constraints that bear on them.² In several ways, these two domains are presented as a single enterprise. They both form part of the law of judicial review of administrative action. They are both mobilized through the same procedure. And they both determine which exercises of administrative power are legally valid. In another way, though, they appear mismatched. This is because the law of procedural review is expressly concerned with the rights of the person subject to public administrative power. Accordingly, administrative lawyers speak naturally of the subject's right to notice, their right to a hearing, and their right to reasons for a decision.³ These rights are what procedural review cases are about. However, the legal subject drops out of our field of vision in the prevailing account of the law of substantive review. It is treated as settled that the point of substantive review is to allow the courts to supervise the exercise of administrative power to promote the rule of law and implement legislative intent.⁴ Absent in this framing of substantive review's purpose is any mention of the people subject to administrative decisions, or their rights. Thus, if all is as it seems, the law is disjointed: we have one system that concerns the rights of the legal subject, and another that does not.

This article interrogates the asymmetry. There are at least two possible strategies for doing so. The first involves developing an account that explains and justifies the apparent difference between the domains. Such an argument would vindicate the asymmetry, providing reasons why procedural review is properly understood as a rights-oriented domain, while substantive review is not. The second strategy is to challenge the asymmetry, showing that it fails to capture the law when it is put in its best light.⁵ This kind of argument would show that the asymmetry is more apparent than real, and would provide reasons to reform that part of Canada's administrative law thought and practice accordingly. In this article, I take up a version of the second strategy, arguing that the law of substantive review is best understood as a rights-oriented domain, just like its procedural counterpart. This gives us reason to revise the prevailing theory of substantive review, and to see the law of judicial review of administrative action as a more integrated field concerned with the rights of people subject to public administrative power.

² The leading case in this domain is *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

³ See e.g. *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 668 [*Knight*], referring to procedural fairness as "a general right" which is "autonomous of the operation of any statute." See also *Baker*, *supra* note 1, in which Justice L'Heureux Dubé speaks throughout of the duty of fairness and correlative participatory rights.

⁴ *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 27–33 [*Dunsmuir*], aff'd in *Vavilov*, *supra* note 2 ("[t]he revised framework [for substantive review] will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*... that judicial review functions to maintain the rule of law while giving effect to legislative intent" at para 2). See also *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] ("[t]he revised framework seeks to maintain the rule of law, while respecting a legislature's intent" at para 7).

⁵ This kind of approach would involve adopting an interpretive method. For a helpful discussion of interpretive theorizing, see Farrah Ahmed & Adam Perry, "Interpretive Theory in Public Law" in Paul Daly & Joe Tomlinson, eds, *Researching Public Law in Common Law Systems* (Cheltenham: Edward Elgar Publishing Ltd, 2023) 58. A variation on the second strategy would involve pointing to normative reasons external to the law to show that one of the domains should be reformed. As will become clear, I believe there are reasons internal to our present legal practice that suggest that substantive review should be understood as a rights-oriented domain. Accordingly, I do not appeal to this kind of external critique in this paper.

I note that putting the point in these terms suggests that the project is concerned merely with issues of interpretation, guided by a unifying impulse. This might imply a prioritization of issues of form over function that could lead some to question whether the argument is worth pursuing at all. In my view, there are several reasons to push on. First, if the argument I advance in this article goes through, it will tell us something about the identity of the law of judicial review. This is because the unity of a collection of norms is what gives an area of law its identity. Unity brings a collection of norms together, making them intelligible as a distinct area as opposed to a random jumble.⁶ Thus, the argument will be of interest as a matter of special or particular jurisprudence, to theorists interested in understanding the law of judicial review as an area of law. Second, as Canadian administrative lawyers know well, form is connected to function. Incoherence in an area of law produces tension, instability, and ultimately, dysfunction. It is for this reason that in response to dysfunction in the law of substantive review, the Supreme Court of Canada has repeatedly aimed to make the law more “coherent and workable.”⁷ Thus, we have reasons to pursue questions concerning the unity of the law of judicial review, even if we are chiefly concerned with ensuring that it functions well.

A third reason to pursue the argument is that a rights-based theory of substantive review is normatively attractive on its own terms. The argument that follows will unearth the reasons we have to be wary of a theory of substantive review that marginalizes the legal subject, and to prefer a theory that makes them visible, and indeed centres them, in the way that a rights-based theory does. Along the way, it is important to keep in mind that the people who are most substantially impacted by public administrative power are often members of socially marginalized groups. These people may be undocumented, incarcerated, unhoused, or unable to work, but they are no less people in the eyes of the law. This gives them, and all other people, a set of rights in their encounters with the administrative state that are recognized and enforced via judicial review. Our account of procedural review has managed to capture this important point, but the same cannot yet be said about substantive review. My aim is to show that we should correct this asymmetry, both to further our understanding of the law, and to better capture why it is worth having in the first place.

With that in mind, the plan for this article is as follows. I begin in Part I by drawing out the idea that substantive review is concerned with a right held by subjects of public administrative power. I do so through an analysis of the foundational case of *Roncarelli v. Duplessis*.⁸ In Part II, I argue that the idea that substantive review is concerned with rights helps to make sense of a range of contemporary issues in the law, including several of the central innovations in *Vavilov*. Part III discusses one of the practical upshots of the preceding argument, setting out what a rights-based theory of substantive review indicates about the question of deference to administrative decision-makers. Part IV concludes with some reflections on the core underlying claim of this article: that the legal subject in the law of substantive review is a rights-bearing subject.

⁶ Tarunabh Khaitain & Sandy Steel, “Areas of Law: Three Questions in Special Jurisprudence” (2023) 43:1 Oxford J Leg Stud 76 at 86–88.

⁷ *Dunsmuir*, *supra* note 4 at para 32; *Vavilov*, *supra* note 2 at para 22.

⁸ 1959 CanLII 50 (SCC) [*Roncarelli*].

I. *RONCARELLI V. DUPLESSIS* AS A RIGHTS-ORIENTED CASE

This section will begin to make the case that substantive review vindicates a right held by subjects of public administrative power. I propose to do so through an analysis of the most famous case in the Canadian administrative law canon: *Roncarelli v. Duplessis*.

There are three reasons to focus on *Roncarelli* for present purposes. First, theorizing about an area of law often becomes a relatively abstract and technical endeavour. While this is unavoidable to some extent, we should not lose sight of all that may become concretely at stake in the law. *Roncarelli* shows that public administrative power, and the law that regulates it, can be of profound significance for ordinary people. Frank Roncarelli was a successful restaurateur in Montreal. He was also a committed member of the Jehovah's Witnesses, a religious minority that was the subject of systematic efforts by the provincial government to limit their proselytizing activities. Amidst this campaign, Roncarelli repeatedly used his business to secure the bail of Witnesses charged with municipal offences that were designed to silence them. In response, then Premier of Quebec, Maurice Duplessis, ordered the chairman of the Quebec Liquor Commission to cancel Roncarelli's liquor licence permanently. The loss of the licence had a disastrous effect on the once thriving restaurant business. He was forced to shut it down just six months later. In a flash, Roncarelli's life's work, and his ongoing livelihood, were lost at the hands of an administrative official. His only recourse was before the courts, relying upon an argument that the exercise of administrative power to revoke his liquor licence was unlawful.⁹ These facts serve as a powerful reminder of the gravity of the subject matter administrative lawyers are engaged with.

The second reason to work from *Roncarelli* is that the Supreme Court of Canada's decision is thought to provide the foundation for much of modern Canadian administrative law. It is for this reason that *Roncarelli* is often the very first case taught in introductory administrative law courses.¹⁰ Holding in favour of Roncarelli, Justice Rand had the following to say about administrative decision-making:

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. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always

⁹ Some might be skeptical of reliance on *Roncarelli* for present purposes because the case was, strictly speaking, a matter of delictual liability under the Civil Code of Lower Canada. Accordingly, they might argue that *Roncarelli* should be treated as a private law case. In my view, to reject *Roncarelli*'s relevance to public law would be to ignore significant features of the judgment which are discussed below. The reality is that *Roncarelli* has private and public law dimensions that both refer to the limits of the Liquor Commissioner's legal authority, but for different purposes. Given the foundational significance of its public law dimensions to administrative law, it remains a good place to begin theorizing about substantive review.

¹⁰ See Gerard Kennedy, "Old Not Obsolete: Why *Roncarelli v Duplessis* Still Matters" (2025) *Advocates for the Rule of Law*, online: [perma.cc/2X7Q-YQA2].

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.¹¹

Many have remarked that these ideas are so rich foundationally that we have yet to come to grips with their full implications.¹² Since the judgment reflects many of administrative law's first principles, it provides theorists with a point of entry at the ground level — one still capable of yielding new insights about the nature of the field.

Third and finally, *Roncarelli* was decided well before the prevailing theory of the law of substantive review emerged. This is helpful for present purposes because when a theory governs an area of law like the prevailing theory has, it shapes judges' reasoning and crowds out alternative ways of thinking about the relevant problems. The Supreme Court's judgment in *Roncarelli* takes us back to a time when our thinking of substantive review was less ossified. It thus provides a clean slate to begin again from the ground up.

One puzzling feature of *Roncarelli*'s history is the shift that has occurred in how public lawyers interpret the judgment. Even before *Roncarelli* reached the Supreme Court's docket, it was understood by those close to it as a case about rights. It was argued using the rhetoric of rights, and when the Supreme Court's decision was released, it was celebrated amongst early Canadian civil libertarians as rights-protecting. What is more, it was the culminating judgment in the Supreme Court's "implied bill of rights" jurisprudence, in which judges recognized protection for fundamental rights under the *Constitution Act, 1867*,¹³ even in the absence of express provision to that effect.¹⁴ Yet, if you asked a present-day student or practitioner of Canadian public law, they would likely tell you that *Roncarelli* is not a case concerned with rights. Rather, they would say that it stands for the proposition that there is no such thing as untrammelled administrative discretion.¹⁵ Curiously, rights no longer figure in the typical story we tell about *Roncarelli*.

It is often suggested that this shift in interpretation constitutes progress in our understanding of the judgment. Eric Adams, for example, has argued that early reactions to *Roncarelli* that framed the judgment in terms of rights were a product of the historical moment when it was released. In his view, they flattened significant nuances and downplayed its *ratio decidendi*. He concludes that the contemporary interpretation of the case better captures its holdings in law.¹⁶ There is some truth in these suggestions. Frank Roncarelli had no right to the liquor licence at issue in his case. The licence itself was a privilege afforded to

¹¹ *Roncarelli*, *supra* note 8 at 140.

¹² See e.g. Geneviève Cartier, "The Legacy of *Roncarelli v. Duplessis*: 1959–2009" (2010) 55:3 McGill LJ 375 at 377, 390.

¹³ (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

¹⁴ See also *Reference Re Alberta Statutes – The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, 1938 CanLII 1 (SCC); *Boucher v The King*, 1950 CanLII 2 (SCC); *Winner v SMT(Eastern) Ltd*, 1951 CanLII 2 (SCC); *Saumur v City of Quebec*, 1953 CanLII 3 (SCC); *Chaput v Romain*, 1955 CanLII 74 (SCC); *Switzman v Elbling and AG of Quebec*, 1957 CanLII 2 (SCC). For a helpful discussion of these cases, see Lorraine E Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution" (2001) 80:1&2 Can Bar Rev 699 at 710–20.

¹⁵ See e.g. Cartier, *supra* note 12 at 377.

¹⁶ Eric M Adams, "Building a Law of Human Rights: *Roncarelli v. Duplessis* in Canadian Constitutional Culture" (2010) 55:3 McGill LJ 437 at 441.

him by the province of Quebec under the auspices of the *Alcoholic Liquor Act*. What is more, the case did not turn on claims about a purported right to post bail, or to choose a vocation, or freedoms of religion or expression, though they added colour to the judgment. Instead, in Justice Rand's view, the case turned on the fact that administrative discretion had been exercised for an improper purpose — as a reprisal for Roncarelli's assistance of the Witnesses — making the decision unlawful. However, what I will argue in the remainder of this section, is that the turn away from rights in the contemporary interpretation of *Roncarelli* is not all progress. For at the most basic level, the case turned on one of Roncarelli's rights as a subject of public administrative power.

We can begin to get a grip on this claim by considering why it was that early Canadian civil libertarians were interested in *Roncarelli*. One such figure was F.R. Scott, a poet, political activist, and law professor once described by a leading human rights advocate as “the ‘ray of light’” that allowed Canadians to see and understand how rights figure in the country's legal order.¹⁷ From the moment Scott got wind of Roncarelli's case, he saw it as concerned with rights. He was so convinced of Roncarelli's position and the case's significance for Canadian law more generally that he agreed to join his legal team. The factum that he and his co-counsel Albert Louis Stein submitted to the Supreme Court of Canada points to the two related principles that formed the core of Roncarelli's case:

- [T]he subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others;
- [P]ublic authorities (including the Crown) may do nothing but what they are authorized to do by some rule of common law or statute.¹⁸

These principles, according to Scott and Stein, are fundamental to the Canadian legal order.¹⁹ Their mutually supporting operation ensures that the relationship between the state and its subjects is, at all times, governed by law. According to these principles, individuals are presumptively free from state interference, subject to the limits provided by law. Public officials are in the exact opposite position. They are presumptively constrained and must point to an affirmative justification in law for each of their actions.²⁰ Call this set of presumptions the basic principles of legality.

¹⁷ Walter S Tamopolsky, “Frank Scott – Civil Libertarian” (1981) 27:1 McGill LJ 14 at 30.

¹⁸ *Roncarelli*, *supra* note 8 (Factum, Appellant at 49, citing Halsbury's Laws of Canada (2nd ed) vol VI, para 435).

¹⁹ *Ibid* at 48.

²⁰ For a statement of the basic principles of legality in these terms, see *R v Somerset County Council*, *ex parte Fewings*, [1995] 1 All ER 513 at 524 (QB (Eng)):

For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books.... But for public bodies the rule is the opposite.... It is that any action to be taken must be justified by positive law.”

I note that this framing is ambiguous, as there are at least two senses in which a decision may be described as justified. First, a decision may be justified because it is supported by an adequate normative case in its favour. Second, it may be justified if the decision-maker provided explanatory reasons for it. In principle, a decision may be justified in the first sense, but not the second, and vice versa. See also Hasan Dindjer, “Reasons to Give Reasons” in Geneviève Cartier and Mark D Walters, eds, *The Promise of Legality: Critical Reflections on the Work of TRS Allan* (Oxford: Hart Publishing, 2025) 341 at 350–51. The basic principles of legality are most obviously concerned with justification in the first sense.

Though Justice Rand does not quote these principles directly, they provide the backbone for his famous judgment in *Roncarelli's* favour. Affirming the first principle of legality, he wrote that "in the absence of regulation," *Roncarelli's* business would be "free and legitimate."²¹ And, affirming the second principle, he wrote: "the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only" because "there is no such thing as ... untrammelled 'discretion.'"²² There is much in this second passage that significantly enriches the idea that an official may do nothing but what is justified by law. But for now, just note that Justice Rand employs the concept of a duty. In that passage, he left open who, if anyone, the relevant duty was owed to. And admittedly, there are a range of possible answers to this question. It could be an undirected duty, the breach of which is not a wrong to anyone in particular. It could be owed to the Quebec legislature, as the body that delegated the power to the Liquor Commissioner. It could be owed to the public at large, as the beneficiaries of the regulatory scheme. Or it could be owed to *Roncarelli*, as the subject of the decision.²³ Justice Rand's answer to this question emerges a few paragraphs later. He held that by cancelling *Roncarelli's* licence unlawfully, the Premier and the Liquor Commissioner had "brought about a breach of an implied public statutory duty *toward the appellant*."²⁴ Later in his judgment, Justice Rand confirmed:

Here the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, *and a duty implied by the statute toward the victim was violated*. The existing permit was an interest for which the appellant was entitled to protection against any unauthorized interference, and the illegal destruction of which gave rise to a remedy for the damages suffered.²⁵

Thus, Justice Rand's view may be summarized as follows. The Liquor Commissioner was under a duty toward *Roncarelli* not to revoke his privilege unless the revocation could be justified according to law. The breach of that duty constituted a wrong to *Roncarelli* as the

However, as I discuss below, they also have implications for the subject's entitlement to justification in the second sense.

²¹ *Roncarelli*, *supra* note 8 at 140.

²² *Ibid.*

²³ Each of these possibilities have been defended by administrative law scholars: see, respectively, Lionel Smith, *The Law of Loyalty* (Oxford: Oxford University Press, 2023) at 335–74; Farrah Ahmed, "The Delegation Theory of Judicial Review" (2021) 84:4 Mod L Rev 772; Jason NE Varuhas, "The Reformation of English Administrative Law? 'Rights', Rhetoric and Reality" (2013) 72:2 Cambridge LJ 369; Jason NE Varuhas "Against Unification" in Hanna Wilberg & Mark Elliott, eds, *The Scope and Intensity of Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015) 91; Jason NE Varuhas, "The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications" in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 45; Joanne Murray, "Judicial Review as a Quasi-Administrative Jurisdiction" (2024) 74:4 UTLJ 355; TRS Allan, "Dworkin and Dicey: The Rule of Law as Integrity" (1988) 8:2 Oxford J Leg Stud 266 at 273. See also Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003); and for my response, see Megan Pfiffer, "Administrative Law as a Source of Rights" (2025) 88:2 Mod L Rev 366.

²⁴ *Roncarelli*, *supra* note 8 at 141 [emphasis added]. This does not rule out the possibility that the Liquor Commissioner may be bound by other duties, including duties toward the legislature and the public at large. However, it does provide an answer to the question of to whom the duty that Justice Rand believed that case turned on was owed.

²⁵ *Ibid* at 143 [emphasis added].

subject of the decision. He was entitled to stand on the right correlative to that directed duty and accordingly demand a remedy.

Justice Rand's judgment highlights that when a legal subject makes a claim for substantive review, they make that claim not seeking the court's grace, or suggesting that it would be better from some impersonal perspective if an administrator justified their decision according to law. Rather, the legal subject calls the state to account for the breach of a right they have as a legal subject. They rise in court and say: an administrative decision I have been subject to was not justified according to law, and I am therefore owed a legal remedy. The right may be triggered by a state act that impacts a right external to administrative law, including a common law, statutory, or constitutional right. However, it is not reducible to those external rights. Just like the rights that are recognized and enforced in the domain of procedural fairness,²⁶ the right to justification may be triggered in circumstances where no external rights are at stake, so long as the relevant administrative decision impacts a person's privileges or interests.²⁷ This was true in Roncarelli's case. Though he had no right to the liquor licence at issue, he was entitled to enforce his right to justification because the decision impacted his privilege (the liquor licence) and his interests (in continuing to operate his business). In this sense, Roncarelli's case turned on his right to the legally justified exercise of administrative power concerning his privilege.

Despite Justice Rand's clear recognition of a duty sounding in public law directed toward Roncarelli, and the correlative right that duty entails, the idea that substantive review is concerned with rights did not take hold. Interestingly, the legal frameworks governing procedural and substantive review were set off in divergent directions in the same year. In the 1979 case of *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*,²⁸ the Supreme Court began to dismantle a longstanding set of distinctions between kinds of public administrative acts,²⁹ and to recognize that being subject to any such decision entitles an individual to a set of basic procedural rights.³⁰ However, that same year, concerns about a trend of overzealous judicial interventionism in substantive review cases reached the Court. The debates surrounding substantive review shifted in focus away from the norms governing the relationship between administrators and their subjects, and toward the norms governing

²⁶ One of the central innovations in the modern law of procedural fairness is to recognize that an individual will benefit from procedural rights whenever an administrative decision impacts their rights, privileges, or interests: *Cardinal v Director of Kent Institution*, 1985 CanLII 23 at para 14 (SCC) [*Cardinal*].

²⁷ The idea that a person need not point to some underlying right infringed by an administrative decision to access substantive review is often relied on as proof that substantive review is not concerned with rights. For example, in her argument that the purpose of judicial review is not to vindicate the claim rights of individuals, Joanne Murray points out that "aside from human rights adjudications, the legal subject need not show a right but merely must show a 'sufficient interest' to access the Court if they have been 'directly affected by the matter in respect of which relief is sought.' The focus is not on rights but, rather, on whether the decision was exercised validly": Murray, *supra* note 23 at 359 [footnotes omitted]. Interestingly, Murray acknowledges that the same structure applies in the domain of procedural review but accepts that rights operate in that area (*ibid* at 360). In my view, this undermines the point she makes about substantive review.

²⁸ 1979 CanLII 24 (SCC).

²⁹ I am referring here to the distinctions between judicial, quasi-judicial, and administrative acts. The substance of the distinctions need not detain us here.

³⁰ This process culminated with *Cardinal*, where the Court held that "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual": *supra* note 26 at para 14. See also *Knight*, *supra* note 3; *Baker*, *supra* note 1.

the relationship between administrators and courts. As a result, in *C.U.P.E. v. New Brunswick Liquor Corp.*,³¹ the analysis in substantive review cases pivoted to questions surrounding the deference owed by courts to administrators. Over time, the legal subject dropped out of the frame entirely. Substantive review came to be treated as an enterprise focused on promoting certain principles or values as a general matter, abstracted from the people subject to administrative power.

The high watermark in this regard was the majority judgment in *Dunsmuir v. New Brunswick*,³² where the Court articulated the theory that the point of substantive review is to allow the judiciary to give effect to the rule of law and legislative intent.³³ In their view, these principles constituted the “clear, stable constitutional foundations” for the law of substantive review.³⁴ Over the course of the thirty-seven paragraphs in which Justices Bastarache and LeBel set out the majority’s account of the purpose of the law and the novel doctrinal framework, the people subject to administrative decisions are mentioned once, and only orthogonally. To justify eliminating the “patent unreasonableness” standard in favour of a more demanding “reasonableness *simpliciter*” standard, Justices Bastarache and LeBel held that “it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*.”³⁵ This statement is interesting because Justices Bastarache and LeBel appear to take it for granted that individuals have a claim against irrational treatment that resonates in administrative law. Yet it is orthogonal within the analysis as they frame it because they do not connect the unpalatability of requiring individuals to accept irrational administrative decisions to either the rule of law or legislative intent. It is presented as a free-floating concern, unmoored from the principles that give the law of substantive review its purpose. This impression is only confirmed by the sentence that follows, where they add that “[i]t is *also* inconsistent with the rule of law to retain an irrational decision.”³⁶ The crucial “also” suggests that there is no direct relationship between a concern about subjecting individuals to unreasonable decisions and the rule of law. This shows just how far the law’s centre of gravity had shifted. The principles said to drive substantive review — the rule of law and the obligation to give effect to legislative intent — were understood as matters of independent and primary concern, separate from issues surrounding the treatment, claims, and entitlements of individuals subject to public administrative power.

This gives rise to an objection. As significant as *Roncarelli* is to Canadian administrative law, it is only one case, and it was decided over half a century ago. Critics will be quick to highlight that the point I just made shows that the law has moved on since then. And so far, I have not provided any reason why a rights-based theory is relevant to the present day. In the

³¹ 1979 CanLII 23 (SCC).

³² *Supra* note 4.

³³ *Ibid* at paras 27–32.

³⁴ *Ibid* at para 32.

³⁵ *Ibid* at para 42 [emphasis in the original].

³⁶ *Ibid* [emphasis added]. The full passage reads:

Even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision.

next section, I will argue that a rights-based theory is not only relevant, it is necessary. To understand contemporary law fully, we cannot do without such a theory.

II. SUBSTANTIVE REVIEW AND THE RETURN OF THE LEGAL SUBJECT

Say someone believed, intuitively, that, even as things currently stand, a rights-based theory of substantive review captures something important about the law. What would explain this intuition? In my view, it would be due in part to the claims-based structure of substantive review. No matter how much the courts have marginalized the legal subject on the face of substantive review doctrine, these frameworks have always been mobilized through a system which requires a claimant to press their case. This claims-based structure is reinforced and refined by the law of standing, which delineates who is, and who is not, a proper claimant. By drawing these lines, the law of standing suggests that it matters not just that a claim is made, but that a claim is made *by the right person*. Where standing is denied, the law indicates that the applicant is the wrong person to pursue a claim and allows no further inquiry into whether a breach of the standards of substantive review has occurred. And crucially, it indicates that the individual with the primary standing to make a claim for substantive review is the person subject to the administrative decision.³⁷ This suggests that these people are significant to the enterprise of substantive review.³⁸

The prevailing theory of substantive review fails to provide a justification for this structure. If the point of substantive review is to allow the courts to supervise administrative authority to give effect to the values associated with the implementation of legislative intent or the rule of law, or any other abstract principle or value for that matter, why should we be concerned about *who* makes the relevant claim? Denying an application for substantive review on the basis of the standing requirement is a missed opportunity to promote the relevant principles. We could have a system in which there were no constraints on standing, so that anyone could make a claim for substantive review. We could also imagine a system in which an independent state agency,³⁹ or the courts themselves, were charged with pursuing substantive review. All of these systems are compatible with the prevailing theory, because each of them would give the courts the opportunity to promote the relevant principles. Indeed, at least at first glance, these alternatives seem better able to facilitate principles-oriented judicial supervision because they do not depend on the initiative of a distinct subset of individuals (recall: often people who live in poverty or are otherwise marginalized) who may not be adequately resourced or motivated to bring a case before the courts. Given these prima

³⁷ To have personal standing to make a claim for judicial review in Canada, an individual must be directly affected by the relevant administrative decision. Courts have cashed out this idea in various ways. Such an individual is said to have a “sufficient legally recognized interest” in the decision, or to be a “person aggrieved” by it: Angus Grant & Lorne Sossin, “Fairness in Context: Achieving Fairness Through Access to Administrative Justice” in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond Montgomery Publications, 2022) 425 at 432.

³⁸ I am drawing here on an argument I have made elsewhere. I respond in that paper to the suggestion that the claims-based structure is justified on instrumental grounds. I also address objections to a rights-based framing on the basis of public interest standing, and the discretionary nature of judicial review remedies. See generally Pfiffer, *supra* note 23.

³⁹ There is a rich literature on so called “fourth branch” or “guarantor” institutions that provides the relevant model here: see e.g. Tarunabh Khaitan, “Guarantor Institutions” (2021) 16:51 *Asian J Comp L* S40; Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge: Cambridge University Press, 2021).

facie attractive alternatives, we need an account that justifies the system that we have. The idea that substantive review is concerned with the rights of people subject to administrative decisions helps with that task. It suggests that people who are subject to administrative decisions are significant to the enterprise and have the primary standing to make substantive review claims because it is their rights that are at stake. When viewed this way, the standing requirement in the law of judicial review is no longer puzzling. It is just another instance of the familiar baseline within the common law that standing follows the right that is the subject of the dispute.⁴⁰

Beyond the basic, claims-based structure of substantive review, a rights-based theory helps to make sense of a notable trend in recent substantive review cases. Above, I mentioned that the majority judgment in *Dunsmuir* represented the high watermark for the marginalization of the legal subject within the law of substantive review. Yet in that very case, judges began to express concerns that the analysis recommended by the prevailing theory was disconnected from the claims of applicants for substantive review. Justice Binnie took the opportunity to highlight this disconnect in his concurring reasons in *Dunsmuir*. He noted that applicants for substantive review — “[p]eople who feel victimized or unjustly dealt with by the apparatus of government” — would feel justifiably frustrated that the “court’s attention [is] focussed not on their complaints, or the government’s response, but on lengthy and arcane discussions of something they are told is a pragmatic and functional test.”⁴¹ The majority of the Supreme Court picked up this line of reasoning three years later, affirming the need “to get the parties away from arguing about standard of review to arguing about the substantive merits of [their] case.”⁴² And again, Justice Abella made a similar point in *Wilson v. Atomic Energy of Canada Ltd*, where she lamented that *Dunsmuir*’s doctrinal framework left the claims of judicial review applicants “waiting in the wings for their chance to be seen and reviewed.”⁴³ This is only natural, since the analysis had been consistently directed toward the question of what courts owe to decision-makers, and the question of what decision-makers owe the people subject to their decisions was only approached through that lens, if at all. The worry was that this entailed a kind of misdirection of attention which, at the very least, unduly delayed deliberation upon what really matters in substantive review cases — the merits of the administrative decision and how they bear on the relationship between the state and its subjects.⁴⁴

⁴⁰ Benjamin Zipursky calls this the “substantive standing” rule. For an early discussion of this idea, see Benjamin C Zipursky, “Rights, Wrongs, and Recourse in the Law of Torts” (1998) 51:1 Vand L Rev 3. See also Timothy Liao, *Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts* (Oxford: Oxford University Press, 2023), ch 3. Importantly, as Liao notes, standing and the right that forms the subject of the dispute can come apart in certain circumstances, allowing one person to enforce the rights of another. In my view, this explains the grant of public interest standing in judicial review cases. For a much more developed discussion of the law of standing, see Pfiffer, *supra* note 23.

⁴¹ *Dunsmuir*, *supra* note 4 at para 133.

⁴² *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 at para 38. See also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 (where the Supreme Court held that it had been pursuing this goal “for years” at para 27), cited approvingly in *Vavilov*, *supra* note 2 at para 22.

⁴³ 2016 SCC 29 at para 25.

⁴⁴ Some reasoning in substantive review cases indicates that the problem is not mere delay. Consider Justice Bastarache’s analysis of the difference between procedural and substantive review in *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 5 [CUPE]:

Note that despite how often this worry has been expressed, it is not obvious that the prevailing theory of substantive review provides the resources to make it intelligible. If, as that theory suggests, the point of substantive review is to allow courts to supervise administrators to promote relevant principles, including the rule of law and legislative intent, it is not clear why courts should be concerned about attending to the people making claims for substantive review in this way. At best, within the prevailing theory, these people's claims are valuable instrumentally, as tools that might highlight departures from the relevant principles. Yet the worry does not sound in an instrumental register. Rather, the underlying conviction seems to be that the people subject to public administrative power, and the claims they make in substantive review cases, have a more fundamental, non-instrumental significance within the enterprise, and they are deserving of attention in that light.⁴⁵

It is perhaps this basic intuition that prompted the Supreme Court to change course dramatically. In 2018, it concluded that *Dunsmuir's* doctrinal framework had proven unworkable and set out to reformulate the law in *Canada (Minister of Citizenship and Immigration) v. Vavilov*. The majority was up front about its ambition to ensure that the new framework flowed from *Dunsmuir's* theoretical commitments, holding that “[t]he revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick* ... that judicial review functions to maintain the rule of law while giving effect to legislative intent.”⁴⁶ And yet, *Vavilov* was filled with innovation. Most importantly for present purposes, the entitlements of the legal subject re-emerged as a central concern. In contrast to *Dunsmuir's* exclusive focus on the relationship between public administrators and courts, the majority in *Vavilov* held that the law of substantive review “seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society.”⁴⁷ It held further that to withstand substantive review, “the exercise of public power must be justified, intelligible and transparent, *not in the abstract, but to the individuals subject to it*.”⁴⁸ Central to realizing this ideal are *Vavilov's* novel requirements that administrators address the submissions made by the person subject to the decision, and offer a “responsive justification” which is commensurate to the impact that the decision has on them.⁴⁹ Thus, following *Vavilov*, we

[T]he two inquiries proceed separately and serve different objectives. The content of the duty of procedural fairness seeks to ensure the appropriate relationship between the citizen and the administrative decision maker. In contrast, the standard of review speaks to the relationship between the administrative decision maker and the judiciary.”

And for the same point made much more recently by the Federal Court of Appeal, see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 55. The way procedural and substantive review are respectively framed prevents these judges from seeing that like procedural review, substantive review regulates the relationship between administrative decision-makers and their subjects.

⁴⁵ Emily Kidd White helpfully distinguishes between two kinds of reasons for judges to fix their attention on a rights-claimant. The first are epistemic reasons — they concern the capture of relevant information from the claimant that is necessary to determine their case. The second are reasons that derive from the status or significance the claimant possesses under the law. My claim here is that the worry about the disconnect is underpinned by the second kind of reasons: Emily Kidd White, “On Emotions and the Politics of Attention in Judicial Reasoning” in Amalia Amaya & Maksimilian Del Mar, eds, *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Oxford: Hart Publishing, 2020) 101 at 104.

⁴⁶ *Vavilov*, *supra* note 2 at para 2 [citations omitted].

⁴⁷ *Ibid* at para 4 [emphasis added].

⁴⁸ *Ibid* at para 95 [emphasis added].

⁴⁹ *Ibid* at paras 127–28, 133–35.

have a framework for substantive review that gives the subject of the relevant administrative decision the primary standing to make claims for substantive review, on the basis of norms that require administrators to justify their decisions to them, in a manner that is responsive to the stakes for them. In all these ways, substantive review is now explicitly oriented toward the legal subject.

This novel orientation was exemplified in the recent case of *Pepa v. Canada (Citizenship and Immigration)*.⁵⁰ At the age of 20, Dorinela Pepa had travelled to Canada from Albania with her father, aiming to start a new life. She had been approved for a permanent resident visa as a dependent child prior to her departure. However, when she arrived, she disclosed to immigration officials that she had very recently married, not knowing that this rendered her ineligible for the visa she had obtained. She was admitted to Canada for further examination, but her visa expired prior to the determination of her admissibility because her medical documentation had reached its “valid to” date.⁵¹ Shortly thereafter, she was subject to a removal order. For Pepa, this meant a requirement to return to a country where she had no support network or prospects for a decent life.⁵² She sought to appeal the decision to the Immigration Appeal Division (IAD) under section 63(2) of the *Immigration and Refugee Protection Act*.⁵³ However, the IAD held that it had no jurisdiction because the section provides a right of appeal to “[a] foreign national who holds a permanent resident visa.” In the IAD’s view, since Pepa’s visa had expired prior to when the removal order was made, she had no right of appeal.

In a decision that foregrounded Pepa’s story, the majority of the Supreme Court of Canada held that the decision was unreasonable. In its view, the IAD had relied on precedents that were not sufficiently material or binding, and had failed to conduct an adequate statutory interpretation analysis. This led to a decision that undermined Parliament’s intention to provide a right of appeal to people who had successfully obtained a permanent resident visa, with the absurd and arbitrary result of depriving Pepa and others like her of an appeal before their admissibility was even determined. This result was unacceptable, particularly given the decision’s significant consequences for Pepa. The Supreme Court affirmed *Vavilov*’s holding that “concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh.”⁵⁴ It explained that “administrative decision makers wield significant power over people’s lives, including those most vulnerable, and with this power comes a heightened duty ‘to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.’”⁵⁵ In the case at bar, the IAD had failed to offer reasons strong enough to justify the impact of the decision on Pepa, and accordingly it could not withstand substantive review. This kind of reasoning is emblematic of *Vavilov*’s shift toward the legal subject.

⁵⁰ 2025 SCC 21 [*Pepa*]. Another good example is Justice Jamal’s judgment in *Mason*, *supra* note 4.

⁵¹ *Pepa*, *supra* note 50 at para 21.

⁵² *Ibid* at para 118.

⁵³ SC 2001, c 27.

⁵⁴ *Pepa*, *supra* note 50 at para 116, citing *Vavilov*, *supra* note 2 at para 134.

⁵⁵ *Pepa*, *supra* note 50 at para 116, citing *Vavilov*, *supra* note 2 at para 135.

Given *Vavilov*'s explicit commitment to *Dunsmuir*'s theory of substantive review, this shift is mysterious. The Supreme Court has not provided an explanation for why the subjects of administrative decisions, who received virtually no acknowledgment in *Dunsmuir*'s substantive review framework, are suddenly treated as a central concern. If the theory underlying the law of substantive review was truly continuous between *Dunsmuir* and *Vavilov*, one would expect the legal subject to remain in the shadows. The shift could be due in part to the claims-based structure of judicial review. For, no matter how much the Supreme Court marginalized the subjects of administrative power in its theory of substantive review, the claims-based structure preserved their visibility. In virtue of this structure, their names appeared on court documents and in case names, their claims were expressed in facta, and they and their representatives appeared in courtrooms. The felt presence of the legal subject, facilitated by the claims-based structure of judicial review, may have prompted the recognition of their significance, and the reform of the law in that light.

Another possible explanation is the influence of the idea of “a culture of justification” on the Supreme Court. The idea has recently exploded in popularity in both academic and judicial circles.⁵⁶ The Court in *Vavilov* went so far as to “affirm the need to develop and strengthen a culture of justification in administrative decision making.”⁵⁷ A culture of justification is one “in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command.”⁵⁸ Now is not the moment for a full discussion of the idea of a culture of justification or the debates surrounding it. But note that the idea was formulated by Etienne Mureinik, an administrative lawyer whose work was inspired by the South African constitution. In the article in which he first laid out the idea, he argued that “[i]f the [c]onstitution is to be a bridge [toward a culture of justification] it is plain that [a] Bill of Rights must be its chief strut.”⁵⁹ In his view, the central purpose of a bill of rights was to “[empower] citizens affected by laws or decisions to demand justification”⁶⁰ and thereby to “requir[e] governors to account to people governed by their decisions.”⁶¹ The Bill of Rights expressly provided rights to procedural fairness and justification according to law in administrative justice, which Mureinik argued “gives a lead which, if properly followed, would put South Africa at the frontiers of the search for a culture of justification.”⁶² It thus makes sense that, in trying to realize such a culture in Canadian administrative law, the Supreme Court would foreground rights-oriented reasoning in its novel substantive review framework.

⁵⁶ For a small sample of the growing literature: see e.g. David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14:1 SAJHR 11; David Dyzenhaus, “Dignity in Administrative Law: Judicial Deference in a Culture of Justification” (2012) 17:1 Rev Const Stud 87; Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013); Kai Möller, “Justifying the Culture of Justification” (2019) 17:4 Intl J Constitutional L 1078; Janina Boughey, “The Culture of Justification in Administrative Law: Rationales and Consequences” (2021) 54:2 UBC L Rev 403; Paul Daly, *A Culture of Justification: Vavilov and the Future of Canadian Administrative Law* (Vancouver: UBC Press, 2024).

⁵⁷ *Vavilov*, *supra* note 2 at para 2.

⁵⁸ Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10:1 SAJHR 31 at 32.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* [footnotes omitted].

⁶¹ *Ibid.*

⁶² *Ibid* at 38.

Finally, the Court stated explicitly that it was influenced in its development of *Vavilov*'s novel substantive review framework by the law of procedural review. It held:

It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes.⁶³

What the Supreme Court makes plain here is that it understood the novel requirement of responsive justification to be a natural extension of the idea, which has firm roots in the law of procedural review, that an individual's entitlements as a legal subject are responsive to the nature and extent of the decision's impact on them.⁶⁴ By incorporating this idea into the law of substantive review, the Supreme Court intentionally harmonized the logic of the law across the procedural/substantive review divide. And since procedural review is expressly concerned with the rights of the legal subject, it is no surprise that *Vavilov* contains the core building blocks of a rights-based framework for substantive review.

This may or may not be a complete explanation for *Vavilov*'s shift toward the legal subject. Whatever the complete story is, the larger point is that the orientation of substantive review analysis toward the legal subject in *Vavilov* should prompt us to question whether the prevailing theory provides an adequate account of the law as it currently stands.⁶⁵ To be clear, in making the claim that we should revise the prevailing theory, I am neither denying the value of the rule of law or the implementation of legislative intent, nor am I saying that these principles have nothing to do with substantive review. Indeed, the idea that public officials may do nothing but what is authorized by law has been acknowledged by the Supreme Court of Canada to be a key component of the rule of law. As the Supreme Court explained in *Reference re Secession of Quebec*, "[a] third aspect of the rule of law is ... that 'the exercise of all public power must find its ultimate source in a legal rule'. Put another way, the relationship between the state and the individual must be regulated by law."⁶⁶ And, since legislative intent contributes to the content of the law in Canada,⁶⁷ it will influence what can be justified according to law. My point is that especially given the innovations in *Vavilov*, applications for substantive review can no longer be understood merely as opportunities for

⁶³ *Vavilov*, *supra* note 2 at para 133.

⁶⁴ See generally *Baker*, *supra* note 1 at para 25.

⁶⁵ For other arguments in favour of revisiting the theoretical foundations of the law, see Megan Pfiffer, "What's the Problem with Substantive Review?" (2024) 69:3 McGill LJ 325.

⁶⁶ *Reference re Secession of Quebec*, 1998 CanLII 793 at para 71 (SCC), citing *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 at para 10 (SCC). See also *Dunsmuir*, *supra* note 4 ("[b]y virtue of the rule of law principle, all exercises of public authority must find their source in law" at para 28).

⁶⁷ The canonical formulation of the modern approach to statutory interpretation states that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 at para 21 (SCC), citing Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

courts to promote certain relevant principles. Instead, we should see them as instances in which courts enforce the rights of subjects of public administrative power.

Some readers might wonder whether it is possible to capture all that I have discussed without employing the concept of a right. I doubt it. If a theory adequately captures the elements of constraint, directedness, and accountability to the legal subject, it will end up referring to something that very much resembles a right, even if the word is not used. For example, in a recent article, Joanne Murray argues that courts conducting judicial review of administrative decisions are not resolving bilateral disputes concerning the rights of people subject to public administrative power.⁶⁸ Instead, they utilize a quasi-administrative jurisdiction to aid in and advise on the execution of public administration in the public interest.⁶⁹ However, to capture the subject's role in the proceedings and in the law following *Vavilov*, Murray suggests that the legal subject advances a "claim of recognition"⁷⁰ which is "indicative of a relationship of accountability, in which the official is to provide an account of how their power tracks the statute's purpose and the interests of the legal subject, and the legal subject is entitled to object if they believe it does not."⁷¹ This is the right I have been describing all but in name. We have no need for novel concepts like a "claim of recognition," given that our well-established concept of a right fits the bill. And this, in turn, suggests that a rights-based theory of substantive review is worth pursuing further.

III. JUDICIAL DEFERENCE AND THE RIGHT TO JUSTIFICATION

One step along the way to developing a rights-based theory of substantive review is to attend to the question of judicial deference. As I mentioned above, the doctrinal framework for substantive review has long been focused on the deference courts owe to administrators when they conduct substantive review. This feature of the doctrine is said to flow from the prevailing theory, as courts have held that giving effect to legislative intent requires them to adopt a deferential approach, while the rule of law often counsels stringent review. Apart from its relationship to the prevailing theory, the commitment to deference responds to the fact that the administrative state could not function if courts determined the issues in each substantive review case *de novo*. Since 1979, the question of deference has been addressed through a familiar two-step formula.⁷² First, the reviewing court identifies the appropriate standard of review, ranging from a correctness standard under which a court is permitted to engage in *de novo* analysis, and some type of deferential reasonableness standard. Second, the reviewing court applies that standard to the decision before it. Deference is so entrenched in the law that some might go so far as to suggest that a theory that fails to make room for it fails as a theory of the law of substantive review. To be sure, a theory of an area of law need not necessarily fit each feature of existing doctrine. A properly developed theory will have a critical edge, showing when doctrine departs from its logic and recommending reform. But, either way, it is fair to ask: what role can judicial deference play in a rights-based theory of substantive review?

⁶⁸ Murray, *supra* note 23.

⁶⁹ I respond to the arguments that Murray marshals in favour of this thesis in Pfiffer, *supra* note 23.

⁷⁰ Murray, *supra* note 23 at 357.

⁷¹ *Ibid* at 382.

⁷² See generally CUPE, *supra* note 44.

T.R.S. Allan has offered one possible response to this question. Over the course of several articles and books, Allan has argued that doctrines of deference can play no legitimate role in rights-based public law adjudication.⁷³ At its strongest, his position is captured in the following passage:

A doctrine of judicial deference ... is empty if it purports to implement a separation of powers between the courts and other branches of government; that separation is independently secured by the proper application of legal principles defining the scope of individual rights or the limits of public powers. A doctrine of deference is pernicious if, forsaking the separation of powers, correctly conceived, it permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong. In its latter manifestation, judicial deference amounts to the abandonment of impartiality between citizens and state: in acceding to the supposedly superior wisdom of the public agency (or of Parliament), the court is co-opted into the executive (or the legislature), leaving the claimant without any independent means of redress for an arguable violation of rights. A judge who allows his own view on the merits of any aspect of the case to be displaced by the contrary view of public officials—bowing to their greater expertise or experience or democratic credentials—forfeits the neutrality that underpins the legitimacy of [public law] adjudication.⁷⁴

Allan's claims can be summarized as follows: if judges do their jobs properly and simply determine whether the decision before them is justified according to the legal norms relevant to it, a doctrine of deference will have no effect on the resolution of a dispute. In these circumstances, a doctrine of deference will reveal itself as empty. On the other hand, if a doctrine of deference has an effect, it will render the judge partial to the executive and thus corrupt the judge's neutral role in determining whether the claimant's rights were violated.⁷⁵ In my view, we should take Allan's critique seriously. It is central to the judicial role in administrative law for judges to stand between the executive and the people subject to its power, neutrally arbitrating disputes over the latter's administrative law rights.⁷⁶ If it really is

⁷³ TRS Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65:3 Cambridge LJ at 675–76 [Allan, "A Critique of Due Deference"]. See also TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003) at 161–200; TRS Allan, "Common Law Reason and the Limits of Judicial Deference" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 289; TRS Allan, "Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory" (2011) 127 Law Q Rev 96; Trevor Allan, *The Sovereignty of Law: Freedom, Constitution and the Common Law* (Oxford: Oxford University Press, 2013) at 241–85 [Allan, *Sovereignty of Law*].

⁷⁴ Allan, "A Critique of Due Deference" *supra* note 73 at 675–76.

⁷⁵ Notice the echoes here of Lord Atkin's famous dissenting opinion in *Liversidge v Anderson*, where he admonished the majority of the House of Lords for being "more executive minded than the executive" and urged that judges must "stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law": *Liversidge v Anderson*, [1942] AC 206 at 244.

⁷⁶ Why should courts play a neutral role in judicial review proceedings, rather than being systematically biased against administrative decision-makers and toward the subjects of administrative decisions? Though I cannot exhaust the matter here, one reason in favour of neutrality emerges from the democratic legitimacy of administrative schemes. Legislative choices to delegate authority to administrators would be undermined if courts were systematically biased against administrators. Another reason emerges from accounts of the normative function of the administrative state. Several authors have argued that the administrative state vindicates public rights that are necessary to a liberal democratic legal order: see e.g. Jacob Weinrib, "Maitland's Challenge for Administrative Legal Theory" (2021) 84:2 Mod L Rev 207; Blake Emerson, "Vindicating Public Rights" (2024) 26:6 U PA J Const L 1424. These accounts provide powerful reasons against administrative state retrenchment, and any practice that

the case that all doctrines of deference are either empty or incompatible with this kind of neutrality, we should abandon them. The crucial question becomes: is Allan right?

To answer this question, we need to get clearer on what deference entails. Careful attention to the evolution of the law and the literature surrounding deference suggests that it has multiple possible meanings. So-called “functionalist” scholars of administrative law were early advocates of one kind of judicial deference toward administrative decision-makers. Their aim was to ensure that government functions are assigned to the actors best suited to fulfill them.⁷⁷ The most well-known Canadian functionalists were social democratic in their political orientation. They championed the modern administrative state for its deployment of expertise and efficiency in its pursuit of progressive and egalitarian aims. When early functionalists engaged in debates on administrative law, they were often reacting to others who espoused a view of law attributed to A.V. Dicey.⁷⁸ This view included a commitment to the exclusive jurisdiction of judges to interpret and apply the law, and the priority of private law ordering. The extension of these ideas suggested that administrators have no claim to legal authority, and thus that judges should engage in *de novo* analysis when conducting judicial review. In addition, they suggested that judges should be particularly ready to intervene upon administrative decisions that infringed private law rights. Functionalists rightly saw that this approach to judicial review was a threat to the modern administrative state. Crucially, instead of arguing against the Diceyan view of law, they insisted that the benefits of administrative governance justified loosening the legal reins upon public administrators. Functionalists thus urged courts to reduce the scrutiny with which they assess administrative decisions so the public could enjoy those benefits.

The functionalist position is clearly vulnerable to the second prong of Allan’s critique. Reducing the degree of scrutiny courts apply on judicial review entails a form of partiality toward administrative decision-makers. It is incompatible with neutral, rights-oriented review because while expertise and efficiency may lead administrators to make decisions that are often justified according to law, no decision-maker, no matter how expert, is perfect. The subject’s rights receive inadequate protection under functionalist deference because the approach entails applying a reduced standard of scrutiny on the basis of generalized features of administrative decision-makers that may not have produced a justified result in each individual case. An individual who questions whether a decision they were subject to was justified according to law can take no comfort in these generalized features. They can acknowledge that the decision-maker was an expert on the subject matter of their dispute and

would systematically undermine its function, including anti-administrative-state bias in judicial review proceedings.

⁷⁷ John Willis, the leading Canadian functionalist, described his approach to administrative law as follows: “The problem put is, how shall the powers of government be divided up? The problem is neither one of law nor of formal logic, but of expediency”: John Willis, “Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional” (1935) 1:1 UTLJ 53 at 75. Willis was famously of the view that the judiciary was the “least important arm” in modern government: John Willis, “Correspondence: More on the Nolan Case” (1951) 29 Can Bar Rev at 584–85. See also Michael Taggart, “Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law” (2005) 43:3 Osgoode Hall LJ at 259.

⁷⁸ I note that this interpretation of Dicey’s work is contested. It is not my intention to enter the debate. For my purposes, it is enough that this interpretation of Dicey’s work prevailed historically and continues to influence our legal culture. For an illuminating alternative interpretation, see Mark D Walters, *AV Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge: Cambridge University Press, 2020).

still legitimately wonder: was the decision justified in my case? At bottom, the functionalist position involves a prioritization of the aggregated and collective benefits of administrative governance, including the relevant democratic and egalitarian aims, as well as expertise and overall efficiency.⁷⁹ This prioritization is straightforwardly justifiable on their view precisely because they do not recognize individual rights in administrative justice. If they did, the calculus would look radically different, because the considerations they prioritize are precisely the kind that rights, as rights, are normally resistant to. Thus, functionalist deference is incompatible with a rights-based theory of substantive review.⁸⁰ But importantly, this is not where the story of deference ends.

The cases and literature on substantive review reveal another form of deference. “Deference as respect” responds directly to the proposition, attributed to Dicey, that the courts have exclusive jurisdiction to interpret and apply the law. It requires courts to treat administrators as capable of making legally justified decisions, and thus to give “respectful attention”⁸¹ to the reasons provided by the administrative decision-maker. According to David Dyzenhaus’s original formulation, “[t]he issue for the court is not ... what decision it might have reached had the tribunal not pronounced, but whether the reasons offered by the tribunal justify its decision.”⁸² This form of deference differs from the functionalist’s kind. This is because deference as respect is not best described as a reduction in the degree of scrutiny a court applies to an administrative decision. It is better understood as a method combined with a distinctive attitude. The method requires courts to attend to the administrative decision and consider whether the reasons offered justify it,⁸³ as opposed to simply considering the issue in abstraction from the relevant administrative decision and imposing their own view of how the case should be resolved. This method is combined with an attitude of humility,⁸⁴ underpinned by the idea that judges do not have exclusive access to the law. Giving this kind of respect does not require courts to take a hands-off approach to administrative decisions. Quite the contrary — careful engagement is a sign of respect.⁸⁵ At

⁷⁹ Functionalists are therefore vulnerable to a famous objection made by John Rawls against utilitarianism: that their view “does not take seriously the distinction between persons”: See John Rawls, *A Theory of Justice*, revised ed (Cambridge: Harvard University Press, 1999) at 24.

⁸⁰ This is no real surprise, as functionalists were skeptical about rights more broadly, and preferred a collectivist outlook over the individualism associated with rights. See generally, Martin Loughlin, “The Functionalist Style in Public Law” (2005) 55:3 UTLJ 361.

⁸¹ David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed, *The Province of Administrative Law* (London: Hart Publishing, 1997) 279 at 286 [Dyzenhaus, “Politics of Deference”].

⁸² *Ibid* at 303.

⁸³ *Ibid*.

⁸⁴ For a discussion of the kind of humility I have in mind, see e.g. C Thi Nguyen, “Self-Trust and Epistemic Humility” in Jennifer Cole Wright, ed, *Humility* (Oxford: Oxford University Press, 2019) 325. Nguyen helpfully distinguishes between epistemic humility and epistemic subservience, the latter of which involves “giving up on all attempts at reasoning and understanding and submitting our will to another” (*ibid* at 328). He writes: “While there is something wrong with total intellectual subservience, responding with epistemic humility in the face of disagreement is not actually a form of intellectual subservience. It is, instead, a distinct and active intellectual process, part of our epistemically responsible procedure for checking the functioning of our own cognitive abilities” (*ibid*).

⁸⁵ For a discussion on this point, see David Dyzenhaus & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v Canada*” (2001) 53:1 UTLJ 193 at 197–205. Dyzenhaus and Fox-Decent show that a common move of scholars and judges who reject the legitimacy of the administrative state is to take a hands-off approach, on the basis that administrators exercise a merely political or lawless form of discretion. Those who accept the administrative state and integrate it within

the same time, under this approach, courts are not permitted to intervene whenever the decision under review departs from how they would have decided the case, because they are not permitted to engage in *de novo* analysis.

This form of deference tracks the scope of the right at issue in substantive review. The very point of creating an administrative scheme is to ensure the performance of functions whose subject matter is not amenable to resolution through completely determinate rules. Instead, legislatures establish more open-ended schemes and delegate discretion to administrative officials to apply the law in particular cases. These schemes will very frequently provide them a measure of room to maneuver, making multiple options justifiable according to law. Even when administrative schemes are interpreted against the backdrop of the norms of the broader legal system, it cannot seriously be suggested that they always yield a single correct answer to each dispute to which judges have unique access.⁸⁶ Within the theory I have been advancing in this article, the legal subject has a right to a decision which is justified according to law. This is not a right to a particular outcome, or to a decision made by a judge. The duty correlative to that right is incumbent upon the administrative official, requiring them to make a decision that is justified according to the legal norms that bear on it. And the role of a reviewing court within this framework is to assess whether or not the administrator has complied with that duty. The kind of attention to the decision made and the reasons offered by the decision-maker required by deference as respect is the natural way to complete that task.

Have we now run headlong into the first prong of Allan's objection, proving him right that doctrines of deference which are compatible with a court's neutral reviewing role are essentially redundant? We have not. To see why, recall that this prong of Allan's objection rests on the premise that the appropriate approach to judicial review "is independently secured by the proper application of legal principles defining the scope of individual rights or the limits of public powers."⁸⁷ The beginnings of a response to the emptiness objection emerge once we notice that a judge's approach to a judicial review case, and to the principles relevant to it, may be distorted by the legal culture in which they are embedded. And, recall that the legal-cultural context in which deference emerged as a central administrative law commitment in Canada gave administrators no claim to legal authority, and was hostile to administrative schemes which upset private law ordering. In short, within that legal culture, disrespect toward the administrative state was the norm. A doctrine of deference as respect can influence the resolution of judicial review cases in this kind of legal culture by acting as a corrective without requiring courts to abandon their role as impartial scrutineers where people's public law rights are at stake.⁸⁸ Such a doctrine keeps courts focused on the question

their account of legal order have taken a more hands-on approach on the basis that administrators exercise legal authority and are therefore subject to legal standards. Dyzenhaus has called this somewhat unintuitive outcome "the paradox of the recognition of rationality": Dyzenhaus, "Politics of Deference", *supra* note 81 at 286.

⁸⁶ I note that this claim is supported by the law. The Supreme Court has held that cases where only a single outcome is justifiable are the exception: *Vavilov*, *supra* note 2 at paras 141-42.

⁸⁷ Allan, "A Critique of Due Deference" *supra* note 71 at 675.

⁸⁸ Some might find it helpful here to consider three possible judicial postures toward administrative decisions: an antagonistic posture, a neutral posture, and a partial posture. My claim in this section is that Diceyan thinking has made and sometimes continues to make judges antagonistic to the administrative state and that a doctrine of deference as respect responds by requiring them to take on a neutral posture. Functionalist deference can then be understood as an *overcorrection* to Diceyan

of whether the administrator has made a decision that satisfies the subject's right to justification, and prevents them from going further by imposing their own view on how the case should be resolved. It thereby supports their impartial stance, assisting them with "the proper application of legal principles defining the scope of individual rights or the limits of public powers."⁸⁹ We can now see that contrary to Allan's objection, one kind of doctrine of deference fits systematically within a rights-based approach to substantive review.

As between functionalist deference and deference as respect, which kind of deference has the Supreme Court endorsed? A cursory review of the leading cases might lead to the conclusion that deference as respect has been fully embraced since the 1999 case of *Baker v. Canada (Minister of Citizenship and Immigration)*.⁹⁰ The Supreme Court has repeatedly cited Dyzenhaus's work, and has held that when applying the deferential reasonableness standard, reviewing courts should give the relevant decision "respectful attention," beginning the inquiry with the reasons provided, and seeking to determine whether the decision is justified based on the legal and factual constraints relevant to it.⁹¹ This approach contrasts with correctness review, in which the reviewing court is permitted to undertake its own analysis of the issues relevant to the decision, in abstraction from the decision under review.⁹² However, careful attention to the cases reveals some messaging more in line with functionalist deference. The Supreme Court has, for example, often spoken of the degrees of deference owed to administrative decision makers, or higher or lower standards of review to be met. It only makes sense to reference degrees, or higher or lower standards, if one is applying functionalist deference. While functionalist deference involves modulating the intensity of review and so naturally comes in degrees, language that evokes gradations sits awkwardly with deference as respect, because again, the latter kind of deference is not best understood as a gradable reduction in scrutiny. The allure of administrative expertise has also drawn some judges toward functionalist deference. The Supreme Court has held that administrative decision makers are often better equipped than courts to make the decisions delegated to them, and that individualized inquiry into whether expertise contributed to the justification in the case under review is unnecessary.⁹³ These positions lead naturally to the conclusion that courts should reduce the scrutiny they apply on judicial review, proceeding instead on faith in administrators' expert capacities. Finally, the Supreme Court has at times suggested that in the name of deference, reviewing courts should make efforts to look past

antagonism that renders judges partial to the administrative state and imperils the neutral resolution of judicial review cases.

⁸⁹ Allan, "A Critique of Due Deference", *supra* note 73 at 675. Why did Allan overlook this possibility? My view is that his commitment to the autonomy of law may have prevented him from acknowledging that legal culture can influence judges' interpretation of existing principles, and that separate doctrines of deference may be necessary to achieve a cultural corrective. What is more, Allan's worldview is itself influenced by Diceyan thinking. Though he has at times cautioned against judicial overreach, his writing reveals a skepticism toward administrative agencies, and a preference for judicial dispute resolution: see e.g. Allan, *Sovereignty of Law*, *supra* note 73 at 96, 234. Finally, Allan is significantly influenced by Ronald Dworkin — indeed, in his early work, his explicit aim was to articulate a "Dworkinian elaboration of administrative law." See Allan, "Dworkin and Dicey" *supra* note 23 at 274. Dworkin famously defended the "one right answer" thesis and thus would not accept the claim that more than one answer may be justified according to law. In my view, it is for these reasons that he would not acknowledge this kind of justification for doctrines of deference.

⁹⁰ *Supra* note 1 at para 65.

⁹¹ See e.g. *Dunsmuir*, *supra* note 4 at paras 47–49; *Vavilov*, *supra* note 2 at paras 83–86.

⁹² See e.g. *Dunsmuir*, *supra* note 4 at para 50.

⁹³ See e.g. *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 33.

potential holes and bolster the reasons offered for an administrative decision, effectively reducing the standard of justification that administrators are required to meet themselves.⁹⁴ Accordingly, both deference as respect and functionalist deference are represented in modern substantive review jurisprudence.

Several aspects of the majority's judgment in *Vavilov* move the governing framework away from functionalist deference and toward deference as respect, and thus can be explained and justified by a rights-based theory of substantive review. The Supreme Court helpfully clarified that deferential reasonableness review is "methodologically distinct"⁹⁵ from correctness review, and that "[w]hat distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it."⁹⁶ It acknowledged that this approach is appropriate given judges' reviewing role: "[t]he role of courts in these circumstances is to review"⁹⁷ and accordingly, "a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem."⁹⁸ In line with this same point, reviewing courts were advised not to supplement deficient reasons in an effort to uphold them. This "would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion."⁹⁹ The Supreme Court also affirmed that "reasonableness [is] a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court."¹⁰⁰ Both these points make clearer that reasonableness review is a distinctive method rather than a gradable modulation of the degree of scrutiny applied to a decision.

All of the points just discussed were rather uncontroversial revisions to the applicable doctrine. However, some of the revisions made by the majority to the governing framework were the subject of intense debate. Perhaps most controversially, the majority departed from a generalized presumption that administrative decision-makers are experts. Instead, the Court preferred analysis attuned to "demonstrated expertise."¹⁰¹ It held that "[i]n conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons." This means that under *Vavilov*, reviewing courts can no longer assume that an administrator's general expertise was realized in the decision under review. From the perspective of a rights-based theory, this is a welcome shift, because it ensures consistent analysis of whether expertise was actually brought to bear on the particular decision before the court, contributing to its justification to the person

⁹⁴ See e.g. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 12–15 [*Newfoundland Nurses*]. Note, however, that the Court subsequently rejected this interpretation of *Newfoundland Nurses*: see *Vavilov*, *supra* note 2 at paras 96–97.

⁹⁵ *Vavilov*, *supra* note 2 at para 12.

⁹⁶ *Ibid* at para 15.

⁹⁷ *Ibid* at para 83 [emphasis in original].

⁹⁸ *Ibid*.

⁹⁹ *Ibid* at para 96.

¹⁰⁰ *Ibid* at para 89.

¹⁰¹ *Ibid* at para 93.

subject to it. This is the kind of individualized analysis required to preserve the subject's right to justification.

A rights-based theory of substantive review thus provides a reply to a challenge raised in the concurring judgment to the majority in *Vavilov*. Though they agreed on the disposition of the appeal, Justices Abella and Karakatsanis wrote separately to voice their deep concerns about the majority's revisions to the applicable doctrine. In their view, debate surrounding the appropriate approach to substantive review is "[a]t its core ... a debate over two distinct philosophies of administrative law."¹⁰² The first is a "court-centric" philosophy based on the received Diceyan view of law,¹⁰³ bent on preserving the exclusive authority of the judiciary over the development and application of the law. The second is a functionalist philosophy built around administrative agencies, motivated by their egalitarian aims, specialized expertise, efficiency, and accessibility.¹⁰⁴ According to Justices Abella and Karakatsanis, the "story of modern Canadian administrative law" has been a progressive shift from the first philosophy to the second.¹⁰⁵ They worried that several of the changes the majority made to the substantive review framework represented a regression along this trajectory, back to the court-centric approach of the past. But this is not necessarily accurate if there is an alternative, overlooked philosophy of judicial review capable of explaining and justifying these changes. The rights-based theory I have outlined in this article provides such an alternative. In contrast to the Diceyan focus on the authority of the courts, and the functionalist focus on the collective benefits of administrative governance, the rights-based view is focused on the entitlements of individuals as subjects of administrative power. It thus gives us an account of why we should endorse one of *Vavilov*'s controversial innovations that is not aptly criticized as "court-centric." If anything, it is "subject-centric," in that it is based upon a concern to ensure the kind of individualized assessment that is necessary to determine whether the subject's right to justification has been respected.¹⁰⁶ To the extent that that this move reflects a return to a philosophy of the past, that philosophy is not Dicey's but Rand's.¹⁰⁷

The innovation of the Randian, rights-based philosophy of administrative law is its reconciliation of the administrative state with legal order. The received Diceyan philosophy was based on a vision of legal order that was actively hostile to the modern administrative state. In response, functionalists advanced a vision of the administrative state subject to diminished legal constraints. The Randian philosophy responds by negating the Diceyan hostility toward the administrative state. At the same time, it preserves legal order by

¹⁰² *Ibid* at para 205 (per Abella and Karakatsanis JJ, concurring).

¹⁰³ *Ibid* at paras 198, 206, 240–41 (per Abella and Karakatsanis JJ, concurring).

¹⁰⁴ Justices Abella and Karakatsanis did not explicitly describe this second philosophy as a functionalist one, but there are reasons to ascribe this label to the views they set out in their judgment: see generally Paul Daly, "The Autonomy of Administration" (2023) 73 Supplement 2 UTLJ 202.

¹⁰⁵ *Vavilov*, *supra* note 2 at paras 206, 210–11.

¹⁰⁶ Even this formulation is not quite right because it is centred around the subject and their relationship with the state.

¹⁰⁷ This is not to say that nothing in *Vavilov*'s majority judgment reflects a court-centric philosophy of administrative law. Indeed, elsewhere I have made efforts to draw out the various theoretical currents and countercurrents in the majority's analysis, one of which is certainly court-centric: see generally, Pfiffer, *supra* note 65.

recognizing that individuals subject to public power have a right to justification according to law. It thereby provides guidance in debates that have plagued Canadian law for decades.

The debates over deference highlight a significant normative reason to prefer a rights-based theory of substantive review. It is no coincidence that the rise of practices of functionalist deference came hand in hand with a theory of substantive review that marginalizes the legal subject. It is much easier to justify practices of functionalist deference if our theory of substantive review fails to make apparent that there is a person at the end of an exercise of administrative power. Where these people are rendered invisible, judges' defences of robust and individualized substantive review look like nothing but self-serving efforts to cling to power. On these terms, the debate is stacked in favour of functionalists, who can dismiss these efforts as egoistic and are relieved of the burden of acknowledging, let alone defending, the sacrifice their position entails to the entitlements of each person who finds themselves subject to public administrative power. By centring the legal subject, the rights-based theory reminds us that in each substantive review case, something has happened to a person, and their relationship with the state. It disrupts the dynamic caused by a functionalist theory of substantive review and thus helps us see the stakes surrounding deference more clearly.

Before concluding, a few words on correctness review are in order. I have argued that the approach to judicial review required by deference as respect flows naturally from a rights-based theory of substantive review. If the role of the courts within such a framework is to determine whether an administrator has satisfied their duty toward the legal subject to justify their decision according to law, it is the *de novo* analysis and associated disconnection from the decision made by the administrator that stands in need of special justification.¹⁰⁸ This tracks the structure of the existing doctrine, insofar as the Supreme Court affirmed a presumption of reasonableness review that can only be rebutted if one of two kinds of special justification applies: where correctness review is required to fulfill the legislature's intent, or where it is necessary to preserve the rule of law. I will not quarrel with the first special justification. If the legislature decides that courts should engage in *de novo* determination, it has the authority to legislate to displace the default common law position and substitute it for correctness review. However, the second justification is questionable, even on the Supreme Court's own terms. It held that correctness review will be justified by the rule of law for certain categories of questions, including constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies. In its view, correctness review is required in these cases to respect the "unique role" of the judiciary in interpreting the constitution, and to allow courts to have the last word on questions where the rule of law requires it. I and others have argued that this position conflicts with the Supreme Court's own reasoning later in the judgment, where it held that reasonableness review for questions that engage the outer boundaries of an administrator's jurisdiction was no threat to the rule of

¹⁰⁸ The Court appeared to acknowledge this tension when it held in *Vavilov* that although courts are "ultimately empowered to come to [their] own conclusions on the question" when conducting correctness review, they nonetheless "should take the administrative decision maker's reasoning into account": *Vavilov*, *supra* note 2 at para 54. This way of addressing the tension reduces the distance between the two approaches to substantive review, calling into question whether both standards are necessary components of the legal landscape.

law.¹⁰⁹ If it is the case that reasonableness review is sufficient to address rule of law concerns for true questions of jurisdiction, it is not clear why it cannot also address those concerns for any other category of question.¹¹⁰

What is more, the positions that the rule of law requires the preservation of the judiciary's "unique role" in interpreting the constitution, and that certain categories of questions require courts to have the last word, clearly derive from the received Diceyan view of law.¹¹¹ At bottom, they are aimed at preserving the courts' exclusive jurisdiction over pockets of the law. This kind of reasoning undermines long-standing efforts to dislodge court-centric thinking within the law of substantive review through a commitment to deference as respect. And since, as I have argued, the approach to judicial review entailed by deference as respect emerges as necessary within a rights-based framework, the theory I have advocated for throughout this article recommends abandoning these positions. We could then embrace a common law baseline where judges have no need to engage in a standard of review analysis in substantive review proceedings, and could instead turn directly to the question of whether the relevant administrator satisfied its duty to justify their decision to the person subject to it.

IV. CONCLUSION

This article began with the apparent asymmetry between the domains of procedural and substantive review. Its purpose has been to demonstrate that the asymmetry is merely apparent, and that substantive review is best understood as concerned with the rights of people subject to public administrative power, just like its procedural counterpart.

One reason why the arguments in this article are significant is because they highlight a set of previously unrecognized continuities between these two areas of the law. Scholars have long sought to challenge the claim that there is a deep and theoretically significant divide between procedural and substantive review.¹¹² To date, their focus has largely been on highlighting how the content of the norms in the domains of procedural and substantive review are intertwined in a way that calls the ostensible divide into question. Some have argued that procedural review often entails at least a minimal form of substantive review.¹¹³ For example, the duty to provide a hearing implies a requirement to consider and be responsive to the submissions made by the legal subject. Courts will thus turn naturally to the content of an administrative decision to determine whether the duty to provide a hearing has been satisfied. Similarly, whenever a decision-maker is required as a matter of procedural

¹⁰⁹ The Court held that "[a] proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority": *Vavilov*, *supra* note 2 at para 67.

¹¹⁰ See Pfiffer, *supra* note 65 at 355. See also Richard Stacey, "A Unified Model of Public Law: Charter Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338 at 373–74.

¹¹¹ See Pfiffer, *supra* note 65 at 353. See also Mark Mancini, "*Vavilov*'s Rule of Law: A Diceyan Model and Its Implications" (2020) 33:2 Can J Admin L & Prac 179.

¹¹² See e.g. Dyzenhaus & Fox-Decent, *supra* note 85; Paul Daly, "Canada's Bipolar Administrative Law: Time for Fusion" (2014) 40:1 Queen's LJ 213; Kevin Bouchard & Monica Popescu, "La substance et la procédure : l'effritement d'une distinction classique et ses conséquences pour le contrôle judiciaire" (2024) 65:4 C de D 789; Mariana Mota Prado & Ivy Tengge Xu, "Deference as Informed Respect: *Vavilov*'s Implications for Procedural Review of Delegated Legislation" (2025) 75:2 UTLJ 147.

¹¹³ On this point, see e.g. Dyzenhaus & Fox-Decent, *supra* note 85 at 196, 216–18, 241–42.

fairness to give reasons, courts will inevitably need to assess the content of those reasons, at least to a minimal extent.¹¹⁴ In both these kinds of cases, attention to the content of administrative decisions is required to prevent sham procedures from surviving review. Scholars have also highlighted how substantive review is dependent upon procedural requirements.¹¹⁵ Courts will be unable to conduct meaningful review of the substance of a decision where a decision-maker is not required to disclose the record surrounding a decision or provide reasons for it. Process brings the reasons for an administrative decision to light, facilitating substantive review.

What the arguments in this article contribute to this existing literature is the idea that there are also significant continuities in the form of the norms in each domain. And so the image that emerges is a set of integrated and mutually supportive rights that govern the relationship between the state and each subject of public administrative power. These rights are vindicated through the same procedure — an application for judicial review. They are triggered in the same circumstances — whenever an administrative decision impacts the rights, privileges, or interests of an individual. And importantly, following *Baker* and *Vavilov*, their content is responsive to the nature and extent of the administrative decision's impact on that individual.¹¹⁶ In my view, these points of symmetry reflect the maturation of the law of judicial review through the common law's iterative method.¹¹⁷ To be sure, we are still very much working out the kinks. But this is to be expected in a field whose modern manifestation only emerged over the last century.

An upshot of the argument in this article is that the legal subject in the law of substantive review is a rights-bearing subject. What difference does this make for the people who are subject to administrative power? Recall that the prevailing theory suggests that the purpose of substantive review is to give effect to the rule of law and legislative intent. As I have argued, this theory fails even to make the legal subject visible, let alone to mark them out as a distinct locus of normative concern. Within this theory, legal subjects' claims can only have significance instrumentally, as tools to highlight reasons that emerge from the rule of law or legislative intent. They do not have a more fundamental normative significance. And so the prevailing theory implicitly suggests that the legal subject could be substituted within judicial review proceedings by anyone in a position effectively to draw the courts' attention to deviations from the relevant principles. Things look different within a rights-based theory. The legal subject does not suggest that it would be better as a general matter for administrators to justify their decisions according to law. Instead, they make a claim or demand that they have distinctive standing to make as the subject of the relevant decision. These claims hold

¹¹⁴ I note, however, that the Supreme Court has rejected this argument, treating the provision and adequacy of reasons as separate issues: *Newfoundland Nurses*, *supra* note 94 at paras 20–22. In my view, this is not a sustainable position. There is a point at which reasons will be so inadequate that they fail to constitute reasons at all for the purposes of procedural review.

¹¹⁵ See e.g. Prado and Xu, *supra* note 112. The Court acknowledged this relationship in *Vavilov*, holding that “the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision maker to give reasons for its decision — will impact how a court conducts reasonableness review”: *supra* note 2 at para 76.

¹¹⁶ *Baker*, *supra* note 1 at para 25; *Vavilov*, *supra* note 2 at paras 133–35.

¹¹⁷ To be sure, some asymmetries remain. Most notably, Supreme Court precedent still suggests that correctness review applies to questions of procedural fairness, while the presumptive standard within the domain of substantive review is reasonableness. But for an argument that following *Vavilov*, deference should apply to procedural review, see Bouchard & Popescu, *supra* note 112.

administrators accountable to their rights, and thus to them. They are thereby acknowledged to have a measure of authority over the substance of administrative decisions that impact their rights, privileges, and interests. Substantive review has thus caught up to its procedural counterpart in recognizing that individuals subject to public administrative power are not merely acted upon by the state. Rather, they are active subjects who are sources of valid claims in their encounters with public administrative power.

In my view, this is an attractive picture in its own right. It shows the significance of a rights-based theory to anyone who finds themselves subject to administrative power. But it becomes all the more persuasive when we consider the particular people who are most substantially impacted by that power. In the introduction of this article, I noted that we should keep in mind that these are often members of socially marginalized and otherwise disadvantaged groups. They are people living in or close to poverty, who rely on social benefits or disability support payments to meet their basic needs. They are immigrants to Canada who have built lives here but do not have the security of citizenship. And they are inmates in prisons whose every move is subject to the discretion of a corrections official. Scholars of social equality have shown that the subordination that these people experience consists in disparities in esteem, consideration, power, and authority across a wide range of contexts.¹¹⁸ Practically, this means that they are often ignored, or worse, when they make efforts to stand up for their entitlements. The prevailing theory of substantive review risks perpetuating this injustice by rendering these people invisible, and thereby allowing courts too easily to justify practices that dilute their entitlements as legal subjects. By contrast, a rights-based theory promises to recognize them as individuals whose claims regarding the justification of the public administrative decisions they are subject to must be listened to, taken seriously, considered, and responded to. This is an achievement of the law that is worth embracing.¹¹⁹ It points toward a final response to those who reject talk of rights in administrative law in favour of the democratic and egalitarian aims of the modern administrative state. There are democratic and egalitarian considerations on both sides of the ledger — supporting both the functions that the administrative state performs and the legal rights that constrain its operation. In a world in which we can realize both, we should not sacrifice one in favour of another.

¹¹⁸ See e.g. Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford: Oxford University Press, 2020) at 62.

¹¹⁹ A complete treatment of the relationship between administrative law and social equality will have to wait for another day. To be sure, I am not suggesting that administrative law rights provide the linchpin for achieving social equality. They cannot on their own render deeply unjust laws perfectly just. And they cannot resolve disparities in access to justice which prevent members of socially subordinated groups from asserting their rights in court. In my view, though, they can make a contribution to the achievement of social equality that is worth investigating in future work.