DEFERENCE AND THE ADMINISTRATIVE-LEGISLATIVE PARADOX IN JUDICIAL REVIEW

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This article explores the "administrative-legislative paradox": the tendency for jurists who are least likely to defer to the executive or administrative state on administrative law grounds to be the most deferential to the legislature on constitutional grounds (and vice versa). It relies on Supreme Court of Canada jurisprudence over the past eight years to prove the existence of the paradox and tests four possible hypotheses to explain its occurrence. The article concludes that common to each hypothesis is the division of jurists into those who are philosophically "conservative" and those who are philosophically "progressive." The article underscores that while these descriptors mean different things within this context than they do in discussing partisan politics, the overlap is no coincidence.

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INTRODUCTION

In their concurrence in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[1] (admittedly one that reads as a "disguised dissent"[2]), Justices Rosalie Abella and Andromache Karakatsanis argued for the desirability of greater deference to administrative actors on legal questions, including those related to rights conceptualization. They are hardly known as the

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1 2019 SCC 65 [*Vavilov*].

2 Paul Daly, "A Consensus, If You Can Keep It: Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65" (20 December 2019), online (blog): [perma.cc/2BMJ-3EDK].

most deferential to the legislature, however, if the legislature's decisions are impugned on constitutional grounds. At the same time, many of the judges in the majority who — both before and after *Vavilov* — were least inclined to defer to the executive/administrative state on administrative law grounds have been most deferential to the legislature on constitutional law grounds. This is somewhat counterintuitive. If one truly had faith in the judiciary as an essential player to vindicate rights in our constitutional order, one might think that deference is warranted equally to both the executive/administrative state and the legislature. Yet this appears not to be case. Post-*Vavilov* case law indicates that this "administrative-legislative paradox" (the "paradox") is alive and well. This article explores why.

Part I of this article explores this paradox at a descriptive level and adds caveats to it. The remainder of the article then explores why this is the case through testing four hypotheses. The goal is descriptive — the normativity of the paradox and its explanations are left for another day. Part II asks whether the paradox could be best explained by whether one seeks internal or external coherence throughout public law.[3] Part III considers the extent to which the paradox can be explained by an emphasis on purpose instead of text in statutory or constitutional interpretation.[4] Part IV then analyzes the extent to which different conceptions of the separation of powers explain the paradox. It must be underscored that these first three hypotheses are complementary and not mutually exclusive. Part V considers assertions from critical legal studies that this paradox is merely illustrative of judges' pre-existing normative commitments. A brief conclusion suggests that these differing approaches are indeed linked to conservative or progressive psychological dispositions — which have non-coincidental overlap with, but significant difference from, their political counterparts.

I. THE PARADOX AND ITS LIMITS

The paradox this article is exploring is a divide between administrative law and constitutional law with jurists and scholars who are comparatively deferential to the legislature on constitutional matters (particularly related to rights) being much less so to the executive/administrative state (the administrative state being a subset of the executive, though these terms will largely be used as synonyms in this article), and vice versa. I am hardly the first person to have observed this trend.[5] While a complete empirical analysis is beyond the scope of this article, there is no doubt that many of the jurists on our Supreme Court in recent years — Justices Suzanne Côté, Russell Brown, and Malcolm Rowe — who have been most deferential to the legislature on rights grounds are least deferential to the executive. Many who are most deferential to the executive — Justices Rosalie Abella, Andromache Karakatsanis, and Sheilah Martin — are least deferential to the legislature. And in the main,

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3 Building on Paul Daly, "Ideology and Administrative Law" (31 August 2015), online (blog): [perma.cc/3BAG-NJVV] [Daly, "Ideology"]; Paul Daly, "Judicial Oversight and Open Justice in Administrative Proceedings" (18 May 2023), online (blog); [perma.cc/SKR4-QQQX]; Paul Daly, "Legal Certainty, Legal Coherence and Judicial Politics" (15 January 2022), online (blog): [perma.cc/VR5R-UBAA] [Daly, "Legal Certainty"].

4 Building on Vanessa MacDonnell, "Enduring Wisdom: The Purposive Approach to *Charter* Interpretation" in Howard Kislowicz, Kerri A Froc & Richard Moon, eds, *Canada's Surprising Constitution: Unexpected Interpretations of the* Constitution Act, 1982 (Vancouver: UBC Press, 2024) 369 [MacDonnell, "Enduring Wisdom"].

5 See Daly, "Ideology", *supra* note 3; see also Léonid Sirota, "A Cost/Benefit Analysis of Judicial Review" (22 September 2015), online (blog): [perma.cc/SRR5-RXHJ]; Léonid Sirota, "Consistency and Complexity in Judicial Review" (13 September 2015), online (blog): [perma.cc/TB4A-S6RL].

we find this in the academy as well. Mark Mancini[6] and Grant Huscroft[7] have argued that deference to administrative actors is generally only appropriate if prescribed by legislation, but are comparatively more inclined to defer to the legislature on constitutional grounds. The opposite can be said of David Dyzenhaus,[8] Mary Liston,[9] and Megan Pfiffer.[10]

A. SOME CAVEATS

It should be acknowledged that this analysis focuses principally on deference to executive or administrative actors being related to one's views on the standard of review, asking whether we want our administrative decision-makers on a long or short leash. There are examples of jurists arguing that deference should be given to administrative actors — only to apply the standard of review in an exacting way.[11] However, standard of review determinations can be assessed objectively (in terms of reasonableness, correctness, or deciding not to decide), while their applications in individual cases can be more challenging to categorize. Determinations on standard of review also illustrate jurists' views as a matter of principle, and it is this level of principle that this article considers.

There are complicating factors to the general view that deference on constitutional grounds is inversely related to deference on administrative law grounds. First, one certainly can find scholars who are extremely interventionist on both constitutional and administrative review. Léonid Sirota is the clearest Canadian example.[12] Similarly, there are scholars who are quite dovish on both forms of review. Adrian Vermeule and, to a lesser extent, Jeremy Waldron are high profile examples.[13] But they are exceptional. And Waldron's experience in New Zealand, where the constitutional order is notably different, may be a factor in this regard.[14] Moreover, his views on administrative law are much more implicit than those of

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6 Mark Mancini, "The New Administrative Law II: Why Defer?" (6 May 2019), online (blog): [perma.cc/GFM4-JKMF].

7 See Grant Huscroft, "Judicial Review from *CUPE* to *CUPE*: Less is Not Always More" in Grant Huscroft & Michael Taggart, eds, *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006) 296; *contra* Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the* Canadian Charter of Rights and Freedoms (Vancouver: UBC Press, 2009) 50.

8 David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 279.

9 Mary Liston, "Deference as Respect: Lost in Translation?" (2018) Can J Admin Law & Prac 47 (Special Issue); Mary Liston, "Bell is the Tell I'm Thinking Of" (29 April 2020), online (blog): [perma.cc/AK9X-QCMF]; *contra* Mary Liston, "Expanding the Parameters of Participatory Public Law: A Democratic Right to Public Participation and the State's Duty of Public Consultation" (2017) 63:2 McGill LJ 375.

10 Megan Pfiffer, "Administrative Law as a Source of Rights" (2025) 88:2 Mod L Rev 366.

11 See e.g. the dissenting reasons in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*CUPW*], discussed in Paul Daly, "Roadtesting the Vavilov Framework: Bell Canada v. Canada (Attorney General), 2019 SCC 66 and Canada Post Corp. v. Canadian Union of Postal Workers, 2019 SCC 67" (13 January 2020), online (blog): [perma.cc/6ACM-2E68]. This is arguably a post-*Vavilov* trend: Mark Mancini, "Sunday Evening Administrative Review Issue #185: New SCC case (*Pepa*), *Charter* Values, and More" (29 June 2025), online (blog): [perma.cc/YW3D-TEMT].

12 *Supra* note 5.

13 Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346; Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Cambridge, UK: Polity Press, 2022) at 55–90.

14 See Mark S Harding, *Judicializing Everything? The Clash of Constitutionalisms in Canada, New Zealand, and the United Kingdom* (Toronto: University of Toronto Press, 2022).

Vermeule, who is somewhat *sui generis*, having embarked on a completely new project of constitutional interpretation.[15]

Second, the judges who are more deferential to the legislature on rights conceptualization may be less so on federalism grounds. The opinions of Justices Côté, Brown, and Rowe illustrate this.[16] Chief Justice Laskin may indicate the reverse.[17] That is a complicating factor observed by Adrienne Stone. She may well have legitimate concerns that those who argue for judicial restraint on rights conceptualization are too sanguine about federalism review.[18] Without dismissing this concern, however, there would appear to be a difference in kind between judicial review on rights grounds and judicial review on federalism grounds. Federalism requires an arbiter lest two sovereigns give a subject contradictory commands, with such contradictory commands being anathema to the rule of law.[19] That is not required vis-à-vis rights protection in the same way. Indeed, courts in the United Kingdom, Australia, and New Zealand do not have the power to render legislation of no force and effect for failure to comply with constitutionally enshrined rights. Their legal systems are nonetheless highly functional.[20] Moreover, unlike other types of constitutional review, federalism review does not preclude a legislature achieving its policy goal or even its preferred means. It merely affects *which* legislature can do so — if the other order of government is unwilling to act, the remedy is democratic. This is complementary to the view, discussed in more depth in Part V, that jurists inclined to defer to legislatures but not administrators have greater faith in democratic accountability. As such, insofar as jurists generally inclined to defer to legislatures are less likely to do so if the basis for challenging legislation is federalism, this may be an exception that proves the rule given the underlying normative commitments that this article explores.

Third, much of the paradox may not apply to criminal law review, particularly criminal procedure constitutional review. Justice Brown, for instance, was known to be quite protective of the procedural rights of accused persons.[21] Several judges in the purported "centre" of the Supreme Court — Chief Justice Wagner and Justices Moldaver and O'Bonsawin — are in some ways the most "tough on crime."[22] Justice L'Heureux-Dubé, a progressive icon on rights conception, was also famously sympathetic to the prosecution in criminal matters.[23] It may be that the nature of the stakes in criminal law cause many jurists

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15 Vermeule, *supra* note 13.

16 See the analysis below, *contra* their positions in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

17 See *Re: Anti-Inflation Act*, 1976 CanLII 16 (SCC), *contra Morgentaler v The Queen*, 1975 CanLII 8 (SCC). See also Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005).

18 Adrienne Stone, "Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law" (2010) 60:1 UTLJ 109.

19 The doctrine of federal paramountcy exists to address this: see e.g. *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at paras 16–29.

20 Harding, *supra* note 14.

21 See e.g. *R v JJ*, 2022 SCC 28 at paras 197–320; *R v Tessier*, 2022 SCC 35 at paras 113–214; *R v Goforth*, 2022 SCC 25 at paras 61–68.

22 Gerard J Kennedy, "Why 'Liberal' and 'Conservative' are Unhelpful Terms in Canadian Courts" (21 January 2022), online: [perma.cc/PRP6-J5X6] [Kennedy, "Why 'Liberal and 'Conservative' are Unhelpful Terms"]; *R v Vu*, 2024 SCC 1, where O'Bonsawin J dissented in an extremely rare acquittal for sexual assault at the Supreme Court: Sean Fine, "Supreme Court of Canada Upholds Acquittal in Sex Assault Case Revolving Around Consent", *The Globe and Mail* (27 January 2024).

23 See e.g. *R v O'Connor*, 1995 CanLII 51 (SCC). See also Constance Backhouse, *Claire L'Heureux-Dubé: A Life* (Vancouver: UBC Press, 2017).

to have different perceptions of their task. This is a genuine phenomenon worthy of greater exploration, though is beyond the scope of this article.

B. THE GENERAL PHENOMENON EXISTS

With these caveats and counterexamples acknowledged, however, none undermines the fact that, in the main, deference to the legislature on constitutional grounds, at least on rights matters, is inversely related to one's likelihood to defer to the administrative state on similar questions. The Supreme Court of Canada will be used to illustrate this, through cases in recent years. This is apparent in at least four high-profile administrative law cases post-*Vavilov* where the Supreme Court was not unanimous (*Pepa v. Canada (Citizenship and Immigration)*[24] is excluded because the divisions in the case did not concern determining the standard of review, but rather related to remedy and how to apply the reasonableness standard):

- *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*:[25] the majority of the Court (per Justice Rowe, also writing for Chief Justice Wagner and Justices Moldaver, Côté, Kasirer, and Jamal) held that an additional category of correctness review should be recognized, despite the vociferous disagreement of the minority (Justice Karakatsanis, also writing for Justice Martin);

- *Mason v. Canada (Citizenship and Immigration)*:[26] the majority of the Court (per Justice Jamal, also writing for Chief Justice Wagner, and Justices Karakatsanis, Rowe, Martin, Kasirer, and O'Bonsawin) declined to recognize an additional category of correctness review, over Justice Côté's disagreement;

- *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*:[27] the majority of the Court (per Justice Karakatsanis, also writing for Chief Justice Wagner and Justices Rowe, Martin, Jamal, and O'Bonsawin) declined to decide whether the scope of cabinet privilege was a central question of importance to the legal system, warranting correctness review. Justice Côté held doing so was necessary, and that the standard of review was correctness. Questions from Justices Rowe and Jamal[28] during the hearing implied that they were skeptical of the Attorney General of Ontario's concession that reasonableness was the standard of review, despite ultimately signing onto the majority opinion that did not decide the issue; and

- *York Region District School Board v. Elementary Teachers' Federation of Ontario*:[29] the majority of the Court (once again, per Justice Rowe also writing for Chief Justice Wagner and Justices Côté, Kasirer, and Jamal) held that the standard

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24 2025 SCC 21 [*Pepa*].
25 2022 SCC 30 [*Society of Composers*].
26 2023 SCC 21 [*Mason*].
27 2024 SCC 4 [*OPIC*].
28 *Ibid*; Supreme Court of Canada, "*Attorney General for Ontario v. Information and Privacy Commissioner of Ontario, et al.*: Webcasts: Hearing on 2023-04-18" online (video): [perma.cc/2SK3-9S7J].
29 2024 SCC 22 [*York Region*].

of review for a labour arbitrator's decision concerning constitutional law was correctness, despite the minority (again, per Justices Karakatsanis and Martin) disagreeing in part.

- An additional case from the year preceding *Vavilov* also demonstrates this phenomenon. In *Law Society of British Columbia v. Trinity Western University*,[30] Justices Abella, Moldaver, Karakatsanis, Wagner, and Gascon demonstrated significant deference to an administrative actor in terms of its jurisdiction and its balancing of constitutional "values." Chief Justice McLachlin and Justice Rowe demonstrated less deference and Justices Côté and Brown even less. One could go back further to find similar divisions[31] but, to keep the sample manageable and recognizing a complete empirical analysis is beyond the scope of this article, 2018 will be a "cut-off" year for this analysis.

Similar divisions have also been apparent in at least nine high profile post-*Vavilov* constitutional rights decisions, such as:

- *Fraser v. Canada (Attorney General)*:[32] Justice Abella, writing for the majority of the Court (Chief Justice Wagner and Justices Moldaver, Karakatsanis, Martin, and Kasirer) held that a statutory regime that resulted in women disproportionately having pensions of lesser value than men offended section 15(1) of the *Canadian Charter of Rights and Freedoms*, [33] with Justices Brown, Rowe, and Côté holding that the regime did not offend section 15(1) given its purposes and incidental interaction with pre-existing inequalities in society;

- *Quebec (Attorney General) v. 9147-0732 Québec inc.*:[34] Justices Brown and Rowe, writing for a majority of the Court (Justice Wagner and Justices Moldaver and Côté) underscored the primacy of text in constitutional interpretation, and the modest role of international law in constitutional interpretation, while the concurrence (Justice Abella, also writing for Justices Karakatsanis and Martin) held that purpose was "central" to constitutional interpretation and that international and comparative law is "indispensable" in constitutional interpretation,[35] with Justice Kasirer not deciding these matters;

- *Toronto (City) v. Ontario (Attorney General)*:[36] the majority (Chief Justice Wagner and Justice Brown, also writing for Justices Moldaver, Côté, and Rowe) held that mid-election interference in a municipal election by provincial legislation did not offend section 2(b) of the *Charter* and that unwritten constitutional principles could not invalidate legislation with Justice Abella, writing for the dissent (Justices Karakatsanis, Martin, and Kasirer) disagreeing on the section 2(b) analysis and

30 2018 SCC 32 [*TWU*] (see e.g. *ibid* at para 41).
31 See e.g. *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47.
32 2020 SCC 28 [*Fraser*].
33 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
34 2020 SCC 32 at paras 80, 100 [*Québec inc*].
35 *Ibid* at paras 80, 99–100.
36 2021 SCC 34 [*City of Toronto*].

suggesting that unwritten constitutional principles could exceptionally lead to legislation being invalidated;

- *R. v. Sharma*:[37] The majority (Justices Brown and Rowe, also writing for Chief Justice Wagner and Justices Moldaver and Côté) upheld the constitutionality of a sentencing regime as a legitimate and constitutional policy choice despite disparate impact on Indigenous offenders, over a strong dissent (per Justice Karakatsanis, also writing for Justices Martin, Kasirer, and Jamal);

- *Dickson v. Vuntut Gwitchin First Nation*:[38] In a case considering whether section 25 of the *Charter* prohibited giving effect to a woman's claim that her self-governing Indigenous nation's decision to mandate that councillors live on the traditional territory violated her section 15 rights, Justices Kasirer and Jamal (also writing for Chief Justice Wagner and Justice Côté) charted a middle path, holding that the *Charter* applied, but section 25 of the *Charter* precluded giving effect to her rights, while Justice Rowe argued for a clear rule of the Charter's non-applicability to the decisions of the Indigenous nation (in the absence of that nation's consent) and Justices Martin and O'Bonsawin held that the *Charter* applied and was offended by the impugned law;

- *Canada (Attorney General) v. Power*:[39] The majority (Chief Justice Wagner and Justice Karakatsanis, also writing for Justices Martin, O'Bonsawin, and Moreau) held that parliamentary privilege is not a complete bar to the review of the legislative process for compliance with the *Charter*, and that damages can exceptionally be an appropriate remedy for both the legislative process and the enactment of legislation that does not comply with the *Charter*, over a partial dissent by Justice Jamal (also writing for Justice Kasirer) and a dissent by Justice Rowe (also writing for Justice Côté);

- *Ontario (Attorney General) v. Working Families Coalition (Canada) Inc*:[40] Justice Karakatsanis, for a majority of the Court (Justices Martin, Kasirer, Jamal, and O'Bonsawin) held that restrictions on election advertising offended section 3 of the *Charter*, over a dissent of Chief Justice Wagner and Justice Moreau and an even stronger dissent of Justices Côté and Rowe; and

- *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*:[41] Chief Justice Wagner, for a majority of the Court (Justices Karakatsanis, Martin, Kasirer, O'Bonsawin, and Moreau) overturned precedent to extend section 11 procedural protection to certain prison disciplinary decisions, over Justice Côté's dissent (also writing for Justices Rowe and Jamal).

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37 2022 SCC 39 [*Sharma*].
38 2024 SCC 10 [*Dickson*].
39 2024 SCC 26 [*Power*]. See also Gerard J Kennedy, "Power Over Parliament: The Status and Future of the Justiciability of the Legislative Process" (2024) 18:3 JPPL 557 [Kennedy, "Power"].
40 2025 SCC 5 [*Working Families*].
41 2025 SCC 6 [*John Howard Society*].

The divisions in these cases are consistent with the pre-*Vavilov* duty to consult decision in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, which revealed similar divisions on the Supreme Court on the question of whether the duty to consult in administrative law also applied to the legislative process.[42] Justice Abella (also joined by Justice Martin) took the most interventionist view regarding reviewing the legislative process. Justice Brown (with Justices Moldaver, Côté, and Rowe) was the most deferential to the legislative process. Justice Karakatsanis (joined by Chief Justice Wagner and Justice Gascon) took a middle path.

In sum, despite caveats and recognizing that a comprehensive empirical analysis must be left for another day, there is no doubt that there is considerable truth to the observation that those with the most deferential views to the executive on administrative law are least deferential to the legislature on constitutional law. The following charts illustrate how the Supreme Court of Canada judges decided these high profile cases:[43]

42 2018 SCC 40 [*Mikisew Cree*].

43 These charts count different approaches as polar opposites, unless a middle path is explicitly stated, such as *OPIC*, *supra* note 27.

TABLE 1:
DEGREE OF DEFERENCE TO LEGISLATURE IN HIGH PROFILE NON-FEDERALISM, NON-CRIMINAL CONSTITUTIONAL CASES, 2018-2024

	Comparatively Interventionist	**Middle Path**	**Comparatively Deferential**
Wagner CJ	*Power* *Fraser* *John Howard Society*	*Mikisew Cree* *Dickson* *Working Families*	*Sharma* *City of Toronto* *Québec inc*
Abella J	*Mikisew Cree* *Fraser* *Québec inc* *City of Toronto*		
Moldaver J	*Fraser*		*Mikisew Cree* *Québec inc* *City of Toronto* *Sharma*
Karakatsanis J	*Québec inc* *Fraser* *City of Toronto* *Sharma* *Power* *Working Families* *John Howard Society*	*Mikisew Cree*	
Gascon J		*Mikisew Cree*	
Côté J		*Dickson*	*Mikisew Cree* *Fraser* *Québec inc* *City of Toronto* *Sharma* *Power* *Working Families* *John Howard Society*
Brown J			*Mikisew Cree* *Fraser* *Québec inc* *City of Toronto* *Sharma*
Rowe J			*Mikisew Cree* *Fraser* *City of Toronto* *Québec inc* *Sharma* *Power* *Working Families* *John Howard Society*
Martin J	*Mikisew Cree* *Fraser* *City of Toronto* *Québec inc* *Sharma* *Dickson* *Power* *Working Families* *John Howard Society*		
Kasirer J	*Fraser* *City of Toronto* *Sharma* *Working Families* *John Howard Society*	*Québec inc* *Dickson* *Power*	
Jamal J	*Sharma* *Working Families*	*Dickson* *Power*	*John Howard Society*
O'Bonsawin J	*Dickson* *Power* *Working Families* *John Howard Society*		

TABLE 2:
DEGREE OF DEFERENCE TO ADMINISTRATIVE STATE, 2018-2024

	Comparatively Interventionist	**Middle Path**	**Comparatively Deferential**
McLachlin CJ		*TWU*	
Wagner CJ	*Vavilov* *Society of Composers* *Mason* *York Region*	*OPIC*	*TWU*
Abella J			*TWU* *Vavilov*
Moldaver J	*Vavilov* *Society of Composers*		*TWU*
Karakatsanis J		*OPIC*	*TWU* *Vavilov* *Society of Composers* *Mason* *York Region*
Gascon J	*Vavilov*		*TWU*
Côté J	*TWU* *Vavilov* *Society of Composers* *Mason* *OPIC* *York Region*		
Brown J	*TWU* *Vavilov* *Society of Composers*		
Rowe J	*Vavilov* *Society of Composers* *York Region*	*TWU* *OPIC*	*Mason*
Martin J	*Vavilov*	*OPIC*	*TWU* *Society of Composers* *Mason* *York Region*
Kasirer J	*Society of Composers* *York Region*	*OPIC*	*Mason*
Jamal J	*Society of Composers* *York Region*	*OPIC*	*Mason*
O'Bonsawin J		*OPIC*	*Mason*

The inverse relationship between judges' willingness to defer to the administrative state and the legislature is clear throughout these cases: Justices Martin, Karakatsanis, and Abella are least likely to defer to legislatures on constitutional law matters (thus their tendency to be on the left of Table 1) but most likely to prescribe deference to administrative actors (thus their tendency to be on the right of Table 2). Justices Côté, Brown, Rowe, and to a lesser extent Justice Moldaver have the opposite track record. Other judges straddle these camps. Chief Justice Wagner appears in all columns depending on the issue. Justices Kasirer and Jamal appear very similar to each other (indeed, they have agreed in all but one case where they have sat together), being slightly closer to the interventionist side on both tables. The sample sizes are too small for the remaining judges to draw conclusions. To be sure, judges

are not theorists, and may not have adverted to the theoretical questions underlying this paradox in depth in every case. So gleaning theoretical commitments from the outcome of their decisions will never tell the whole story. But the general phenomenon is clear. The remainder of this article will explore possible reasons for it.

II. THE FIRST HYPOTHESIS: THE SEARCH FOR EXTERNAL OR INTERNAL COHERENCE

The first hypothesis for why the general phenomenon is true builds on a blog post of Paul Daly's, who has also taken note of the paradox in Canadian public law.[44] Daly posits that jurists who are deferential to administrators but not legislators seek "coherence" throughout law, while those deferential to legislatures but not administrators seek "predictability."[45] To put it another way, this conceptualization posits that the paradox is explained by jurists' views on whether the purpose of public law is to ensure that actors have *ex ante* knowledge of their rights and responsibilities so they can make decisions and order their affairs *or* to attempt to achieve broader purposes in all cases.[46]

There is much to be said for this potential explanation for the paradox, even if it should be underscored that this reflects how to balance competing virtues rather than a binary emphasis on one to the exclusion of the other.[47] Bearing that in mind, if administrative actors are given a long leash by courts, individuals are unable to know what is expected of them in their lives. They do not know what their obligations are until the administrator has made its decision post hoc to the underlying events. Predictability is undermined. If, however, one believes that the purpose of public law is to ensure that abstract purposes, such as "fairness" or "justice" or "equality" are accounted for, or even more specific if vague[48] purposes, such as "unfair labour practices" or "public interest in the regulation of the legal profession," one will desire to give administrative actors more space in which to act.[49]

Those valuing predictability, however, are less likely to think it desirable for the judiciary to overturn specific decisions of the legislature. This can create a legal vacuum and uncertainty regarding the ability to rely on legislative promulgation after the messy trade-offs in legislating.[50] Paradoxically, if one is more concerned about normative coherence throughout the law, if the legislature has done something deeply normatively objectionable, declaring that law of no force and effect is eminently justifiable, especially considering the generally open-ended language of constitutional provisions in general and the *Charter* in particular (as is discussed in more detail in Part IV).

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44 Daly, "Legal Certainty", *supra* note 3.

45 *Ibid*.

46 Also addressed in Kennedy, "Power", *supra* note 39.

47 Mark P Mancini, "Two Uses of Purpose in Statutory Interpretation" (2024) 45:2 Stat L Rev 1 [Mancini, "Two Uses"].

48 In this sense, "ambiguity" and "vagueness" are different concepts that raise different constitutional issues: Michael J Zydney Mannheimer, "Vagueness as Impossibility" (2020) 98:6 Tex L Rev 1049 at 1100–02.

49 This latter concern divided the majority and dissent in *TWU*, *supra* note 30.

50 This is why all purposes are not relevant to all provisions in a statute: see Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 Alta L Rev 919 [Mancini, "Purpose"], cited in *Piekut v MNR*, 2025 SCC 13 at para 110 [*Piekut*].

This clearly has force. However, there would appear to be limits. (To be sure, given that he raised this hypothesis in a blog post, Daly was not purporting to comprehensively analyze this matter.) Some concerns relate to terminology. Specifically, the jurists whom Daly suggests privilege predictability would *also* appear to be very much concerned with the normative coherence of law, albeit perhaps not with the purposive normativity of the jurists he identifies as privileging normative coherence. The values of predictability, and, as will be addressed in Part V, the separation of powers are themselves indicia of normative coherence. The jurists tending to defer to legislatures but not administrators could also be said to be exercising the passive virtue of humility by deferring to the legislature (which more obviously represents the populace) regarding what the normative values of society are[51] and are unlikely to think it is the role of the judiciary to be "the final adjudicator of which contested values in a society should triumph."[52]

Instead, it is suggested that the group deferential to legislatures but not administrators is concerned with a coherence *internal to law*, based on text (addressed in Part III) and respecting the separation of powers (addressed in Part V). As Mancini has noted, *Vavilovian* reasonableness review "is not about whether the decision is 'reasonable' in a broad sense: it is 'reasonableness within legal constraints.'"[53] Predictability is a happy and non-coincidental by-product, but not all that is to be valued. The fact that these jurists will defer to administrators if legislation clearly instructs them to do so, even at the cost of legal predictability,[54] indicates that they do not view predictability as a sacred value and there are instead other normative commitments at stake. In fact, in *Vavilov* itself, the majority acknowledged that it was departing from precedent (undermining predictability) "in order to bring coherence and conceptual balance to the standard of review analysis and [this departure] is justified by a weighing of the values of certainty and correctness."[55]

This distinction between internal and external context against which coherence must be sought was recently made by Justice Colin Feasby of the Alberta Court of King's Bench. Justice Feasby appears to be a judge who would not easily be classified on either end of the paradox given the diversity and originality of many of his decisions.[56] In *Clearview AI Inc v. Alberta (Information and Privacy Commissioner)*, he wrote:

> The distinction between context internal to a statute and context external to a statute is important but sometimes overlooked in Canada. The idea that citizens with the aid of legal advisors should be able to know the law by looking at a statute without resort to sources of meaning beyond the statute is essential to

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51 Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (New Haven: Yale University Press, 1986) at 111–98.

52 Rosalie Abella, "An Attack on the Independence of a Court Anywhere is an Attack on All Courts", *The Globe and Mail* (26 October 2018).

53 Mark Mancini, "Sunday Evening Administrative Review Issue #179: Clearview AI Case, Non-Delegation, Ostriches & Reasonableness" (18 May 2025), online (blog): [perma.cc/EM4D-HZ9W] [Mancini, "Issue #179"], citing *McCargar v Metis Settlements General Council*, 2025 ABCA 33 at para 8.

54 See e.g. Justice Rowe in *CUPW*, *supra* note 11 at para 45ff, interpreting the *Canada Labour Code*, RSC 1985, c L-2, including section 122(1).

55 *Vavilov*, *supra* note 1 at para 38.

56 See e.g. interesting decisions surrounding the role of applications judges in civil procedure (*Lesenko v Wild Rose Ready Mix Ltd*, 2024 ABKB 333), the new tort of harassment (*Alberta Health Services v Johnston*, 2023 ABKB 209), and standing and medical assistance in dying (*WV v MV*, 2024 ABKB 174).

> the concept of the rule of law. This is because the law must be accessible and clear so that it may guide the conduct of those charged with enforcing the law and the public alike.[57]

This demonstrates the overlap between internal coherence and predictability.

But whatever terminology we use, it is clear that this difference between seeking legal coherence internal or external to law is a partial explanation for the paradox. Further evidence for this is the reliance on experts external to the judiciary — and often external to law — by jurists inclined to defer to administrators and not legislatures. In *Vavilov*, for instance, the majority (comparatively non-deferential to administrators and emphasizing the importance of legislative intent) underscored that administrators' expertise (which is not necessarily present in any event in their view) is not in itself a reason to defer to an administrator; though it may well be why the legislature created the administrator and is consequentially baked into a presumption of deference.[58] This accords with Justice Scalia, formerly of the U.S. Supreme Court, noting that an administrator may be superior "*de facto*" but the court is superior "ex officio,"[59] at least in the absence of the legislature declaring otherwise. The concurrence vociferously disagreed with this, underscoring that expertise is a central reason for deference to administrators. The concurrence was unpersuaded by the facts that administrative decisions-makers are not judges, often not lawyers, and frequently not subject matters experts. Sophisticated labour boards with genuine subject matter experts may in fact be the exception, rather than the norm, of administrative decision-making, where many adjudicators are per diem government appointees.[60] The concurrence instead emphasized their view that administrators possess *institutional* expertise even if all members do not have *individual* expertise.[61] If one privileges the importance of internal coherence of law, however, one is likely to find this unpersuasive. As Justice Rowe noted in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*:

> [H]ow does "working day to day" give greater insight into statutory interpretation, including the scope of jurisdiction, which is a matter of legal analysis? The answer is that it does not. This is one of the myths of expertise that now exist in administrative law.[62]

Justice Rowe's views are also in line with a respect for the legislature and its design choices, and not experts or the courts determining the values that should triumph in society.[63] This will be returned to in Part V.

The jurists who underscore deference to administrators but not necessarily legislatures also appear to particularly privilege the *Charter* and its "values" over other elements of our constitutional order,[64] notwithstanding the fact that *Charter* values are not explicitly found in

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57 2025 ABKB 287 at para 67. Explained in Mancini, "Issue #179", *supra* note 53.

58 *Vavilov*, *supra* note 1 at para 31.

59 Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law" (1989) 3 Duke LJ 511 at 514.

60 See e.g. the regime discussed in *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 25ff.

61 *Vavilov*, *supra* note 1 at para 232.

62 2018 SCC 22 at para 129 [*West Fraser*].

63 *Contra* Justice Abella, *supra* note 52.

64 See e.g. *Doré v Barreau du Québec*, 2012 SCC 12; *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31.

positive law, as will be addressed further in Part V. But this reliance on external considerations can be justified if one is seeking normative coherence in light of these underlying values,[65] such as particularly influential Rawlsian non-lawyer philosophies of justice,[66] or Dworkinian arguments to create the best law that can be justified, admittedly within the constraints of "fit."[67] So semantics aside, this internal-external coherence hypothesis is certainly a partial explanation for the paradox. It also has overlap with the concept of purpose, as will now be addressed.

III. THE SECOND HYPOTHESIS: AN EMPHASIS ON TEXT OR PURPOSE

The next possible basis for distinction concerns whether one privileges text or purpose in constitutional interpretation. Vanessa MacDonnell has identified this as a significant source of controversy specifically in the context of constitutional interpretation after *Québec inc*.[68] But it is easy to map her concerns onto administrative law. If one privileges purpose over text, one is logically going to give administrators more space[69] to fulfil legislation's purposes and many *Vavilovian* constraints on administrative powers will seem inappropriate. The negative consequences of limited deference or "Diceyan" formalism (even if not always originating with A.V. Dicey himself[70]) identified by the minority in *Vavilov*[71] will seem salient to such a purposive approach to public law. Thoughtful critics of judicial review of administrative action, such as Harry Arthurs, have made these arguments for decades.[72] At the same time, this emphasis on purpose is likely to lead one to interpret the *Charter* as a delegation *to the judiciary* to fulfil the broad purposes of the *Charter*'s provisions. Admittedly, as Peter Hogg noted, purpose constrains the provisions' broad wording,[73] but the judiciary is still required to implement the purposes.

If, however, one is a legal formalist[74] who privileges the specific choices of drafters of positive law, one is going to privilege the *text* that they used and be wary of falling into the "purpose error" in statutory interpretation, lest the administrator seek to achieve the purpose

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65 With "purposes" being Daly's less problematic alternative language: Paul Daly, "The *Charter* in Administrative Decision-Making: Defending the Duty to Take *Charter* Values (or Purposes) Into Account" (24 October 2024), online (pdf): [perma.cc/8KZP-N8QS] [Daly, "The *Charter*"].

66 See e.g. John Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press, 1971).

67 See e.g. Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986) at 110, 410.

68 MacDonnell, "Enduring Wisdom", *supra* note 4.

69 Different from "weight": see Peter L Strauss, "'Deference' is Too Confusing – Let's Call Them '*Chevron* Space' and '*Skidmore* Weight'" (2012) 112:3 Colum L Rev 1143; Gerard J Kennedy, "*De Jure* Submission and *De Facto* Courteous Regard: Places for Two Types of 'Deference' Post-*Vavilov*" (2022) 106 SCLR (2d) 383.

70 See Mark D Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge, England: Cambridge University Press, 2021); Malcolm Rowe, "A.V. Dicey: What His Introduction to the Study of Constitutional Law Says Today" (Delivered at the Runnymede Society's University of Ottawa Student Chapter, 3 April 2025) [unpublished].

71 *Supra* note 1 at para 206.

72 Harry W Arthurs, "Protection Against Judicial Review" (1983) 43:2 RB 277, cited by the concurrence in *Vavilov*, *ibid* at para 233.

73 Peter W Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28:4 Osgoode Hall LJ 817.

74 This term is frequently used as a criticism from both the left (see e.g. Peter H Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61:2 Sask L Rev 247 at 258) and the right (see e.g. Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good and Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const Forum Const 39), but it is being used here as a descriptive.

in ways that the legislature did not authorize.[75] After all, that "purpose error" is likely to give administrators too much leeway to fulfil abstract purposes when particular provisions prescribe realizing the abstract purpose in much more specific ways after legislators have debated the trade-offs in doing so.[76]

Much like the first hypothesis to explain the paradox, this purpose-text hypothesis likely has truth to it as a descriptive. It is probably not coincidental that an emphasis on purpose will lead one to value subject matter experts likelier to fulfil purposes. Expertise aside, this also explains disputes in statutory interpretation even beyond traditional constitutional or administrative law. For instance, in *Piekut v. Canada*,[77] Justice Jamal, for a majority of the Supreme Court (Chief Justice Wagner and Justices Côté, Rowe, Kasirer, and O'Bonsawin) held that broad purpose in the *Bankruptcy and Insolvency Act*[78] concerning a "fresh start" does not infuse every provision in the *BIA* in the same way, with particular provisions having narrower purposes revealed through their text. Justice Karakatsanis (also writing for Justices Martin and Moreau) disagreed on this point, taking a more purpose-infused approach to interpreting the relevant statutory scheme in line with many of their views on administrative law.[79]

While acknowledging that this purpose-text dichotomy is partially explanatory, it cannot explain everything. Because, as will now be illustrated, text is clearly supreme insofar as it forecloses certain outcomes that would advance a provision's purpose.

The purpose of section 3 of the *Charter* is to ensure "effective representation" in a democracy.[80] As discussed above, *City of Toronto* involved the mid-election interference with a municipal election by a provincial government that imposed ward boundaries that clearly reduced effective representation. When a challenge was made to that provincial government's decision, however, none of the 17 judges who addressed the challenge relied on section 3. Indeed, no serious argument was advanced that section 3 was violated. Why? Because section 3's text is clear that the provision applies only to federal and provincial elections. By being textually constrained to federal and provincial elections, the purpose of the provision cannot migrate outside this context.[81]

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75 Mancini, "Purpose", *supra* note 50.

76 *Ibid*. See also Benjamin J Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms" (2015) 65:3 UTLJ 239; Lon L Fuller, "The Case of the Speluncean Explorers" (1949) 62:4 Harv L Rev 616; *Piekut*, *supra* note 50; and the discussion between Justices Stephen Breyer and Antonin Scalia in "A Conversation on the Constitution with Supreme Court Justices Stephen Breyer and Antonin Scalia" (Debate organized the Federalist Society and The American Constitution Society, conducted at the Capital Hilton Ballroom, Washington, DC, 5 December 2006) [unpublished] online (video): [perma.cc/ 7HHR-SBCZ].

77 *Supra* note 50 at paras 28, 108–11. See also the pre-*Vavilov* case of *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62, exposing similar divisions.

78 RSC 1985, c B-3 [*BIA*].

79 *Piekut*, *supra* note 50 at paras 123–71.

80 *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 183.

81 See *Ontario (Attorney General) v Toronto (City)*, 2019 ONCA 732, aff'd *supra* note 36. Colin Feasby (prior to his appointment to the bench) disagreed with this, but no judge at any level of court during the saga adopted his reasoning: "City of Toronto v Ontario and Fixing the Problem with Section 3 of the Charter", *ABLawg* (28 September 2018), online: [perma.cc/83LL-689F].

The purpose of section 15 of the *Charter* is to ensure "substantive equality."[82] Ontario funds Catholic religious schools, but not the schools of any other faith. This would appear to manifestly conflict with the purpose of section 15. Yet a majority of the Supreme Court has continually held this interpretation not to be possible, notably in *Adler v. Ontario*,[83] despite the purpose of section 15 and this status quo sitting uncomfortably when contrasted to modern notions of equality.[84] Why? Because section 93 of the *Constitution Act, 1867*[85] guarantees denominational school rights and section 29 of the *Charter* clearly protects this.[86] This is consistent with a general principle in statutory and constitutional interpretation that specific provisions trump general ones.[87] The specificity of these texts precludes giving effect to the purpose of section 15.

Though the purpose of *Charter* provisions would have been furthered by allowing the claims in *City of Toronto* and *Adler*, text foreclosed them.[88] This is another reason that endless indeterminacy is not a reasonable way to conceptualize law.[89]

In this vein, Mancini has intriguingly posited that constitutional interpretation is not different in kind but rather only in degree from statutory interpretation.[90] Many constitutional provisions, and most *Charter* provisions, are not worded with the specificity of section 29 of the *Charter*, section 93 of the *Constitution Act, 1867*, or sections 4, 5, and (to a lesser extent) 3 of the *Charter*. The only way to interpret a provision such as section 12's prohibition of cruel and unusual punishment may be as a delegation to the judiciary to implement the provision's purpose.[91] That purpose is, however, revealed through text. And the fact that a provision is quite open-ended is similarly revealed through text. To give another example, section 8's purpose of protecting privacy[92] is constrained by its requirement for a "search" or a "seizure," with section 32 mandating that the state be the source of the search or seizure.[93] Clearly, individuals' privacy interests are limited in circumstances where section 8 simply cannot provide protection, its purpose notwithstanding.

Statutory provisions, in practice, are not as likely to be as open-ended as sections 7 or 12 of the *Charter*. However, this is always case-specific: there are statutory provisions that are

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82 See e.g. *Vriend v Alberta*, 1998 CanLII 816 at para 82 (SCC).

83 1996 CanLII 148 (SCC).

84 *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, 1987 CanLII 65 (SCC).

85 (UK), 30 & 31 Vict, c 3 [*Constitution Act, 1867*].

86 *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15; Kevin P Feehan, QC, "How Catholic Education Rights Have Shaped the History of Canada" (Paper delivered at Theory and Praxis in Catholic School Administration, CSA 573, Newman Theological College, 9 October 2009) [unpublished].

87 *R v Greenwood* (1992), 7 OR (3d) 1 (CA), citing *R v Greenshields*, 1958 CanLII 36 (SCC) and *York (Township) v North York (Township)* (1925), 57 OLR 644 (SC(AD)), citing *Lancashire Asylums Board v Manchester Corporation*, [1900] 1 QB 458 (CA (UK)) and *Barker v Edgar*, [1898] AC 748 (JCPC).

88 Even Mark Tushnet acknowledges that this is possible: see "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction" (1984) 36:1&2 Stan L Rev 623 at 646.

89 Lawrence B Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54:2 U Chicago L Rev 462.

90 See Mancini, "Two Uses", *supra* note 47.

91 This is explored against the concept of "originalism" in Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42:1 Queen's LJ 107; see e.g. *ibid* at 128, 149.

92 See *Hunter et al v Southam Inc*, 1984 CanLII 33 at 159 (SCC) [*Hunter*].

93 *Charter*, *supra* note 33, ss 8, 32.

so open-ended. And there are constitutional provisions that are much more closed.[94] Mancini's views on constitutional and statutory interpretation should not necessarily be accepted without reservation. The difficulty in amending a constitution and the need for it to function in all circumstances must, at the very least, be a practical consideration in interpreting it.[95] Even the most textualist of jurists acknowledge that "absurd" interpretations must be avoided.[96]

Therefore, the text-purpose conflict is to some extent explanatory of the paradox explored in this article. MacDonnell, in other words, is identifying a real phenomenon, despite text clearly, at some level, being supreme. It is posited that the actual controversy, however, is how clear one seeks statutory or constitutional text to be to preclude an outcome that would give effect to a provision's purpose. So despite the limits of concentrating on the purpose/text contrast to explain the paradox, it can help us.

This has overlap with the first hypothesis. Valuing of predictability or internal coherence is likely to lead to greater emphasis on text. A greater emphasis on purpose is likely to seek guidance from sources external to law to discern how best to fulfil purposes in all cases. It is suggested, however, that neither of these hypotheses completely explains the paradox, leading to the third hypothesis.

IV. THE THIRD HYPOTHESIS: THE WEIGHT GIVEN TO THE SEPARATION OF POWERS

The third hypothesis for the paradox does not centre normative commitments (whether to predictability/internal coherence or external coherence) or the alleged contrast between purpose and text per se. Rather, it asks how much one values the separation of powers in Canada's constitutional order, and how (comparatively) strict one seeks the separation of powers to be.

Canada, to be sure, has never had a separation of powers that is strict, like found in the United States.[97] Members of the executive branch such as the Prime Minister are also part of the legislative branch. It is also clearly permissible for the legislature to delegate the executive authority to make subordinate legislation, through very broad language. Indeed, it is even possible for the legislature to delegate the power to the executive to amend legislation through "Henry VIII" clauses.[98]

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94 Mancini, "Two Uses", *supra* note 90; see also Stéphane Beaulac, "Constitutional Interpretation: On Issues of Ontology and of Interlegality" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 867.

95 See e.g. *Hunter*, *supra* note 92 at 155; *Reference re Secession of Quebec*, 1998 CanLII 793 at para 145 (SCC); *Reference re Manitoba Language Rights*, 1984 CanLII 33 at para 68 (SCC).

96 See e.g. Antonin Scalia & Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul, MN: Thomson/West, 2012) at 237–38.

97 Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Carswell, 2019) (loose-leaf updated July 2024, release 1), § 7:15.

98 *In Re George Edwin Gray*, 1918 CanLII 533 (SCC); *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 85. This is controversial: see Stephen Armstrong, "Henry VIII Clauses and the Constitution" (2022) 106 SCLR (2d) 349.

But while no reasonable observer disputes that the separation of powers — particularly between the legislature and the executive — is not strict in Canada, nor does any reasonable observer dispute that there is a separation of powers in Canada, as has been emphasized increasingly in recent years.[99] Legislatures, as representatives of the people, have the primary role in law-creating. Executive officials have the primary role in enforcing. And judges have the primary role in interpreting other sources of law, despite the possibility of dialogue between courts and legislatures in this regard.[100]

An element of the separation of powers is the judiciary's role in policing the boundaries between the three branches of the state. At the risk of oversimplification, all power in England was historically the prerogative of the King.[101] Over centuries, a common law emerged to govern the relationship of private parties *inter se*. Judges worked out this doctrine, providing stability and order over decades if not centuries.[102] The King also became in legal relationship to Parliament, with his power being constrained by Parliament. This was put beyond all doubt after the Glorious Revolution of 1688–1689,[103] and the enshrinement of the *English Bill of Rights*,[104] constraining, at the very least, executive power. (It is possible to be agnostic as to whether that also confined legislative power for purposes of this argument.[105]) But there has been no doubt for centuries that the King cannot simply send his messengers into a person's home to search his materials, at least in the absence of authorization from Parliament, often via the judiciary.[106] An arbiter is necessary to enforce these limits. In our constitutional tradition, that has been the courts.

This became even more important after the expansion of the administrative state after World War II, as vast swaths of individuals' lives are governed by regulation and administrative discretion.[107] Legislatures, to be sure, have set up various executive bodies for a host of valid reasons. But even if one believes the government does too much in society,[108]

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99 See *City of Toronto*, *supra* note 36; Warren J Newman, "The Rule of Law, the Separation of Powers and Judicial Independence in Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 1257; Malcolm Rowe, Chris Puskas & Allyse Cruise, "The Separation of Powers in Canada" (2024) 1 SCLR (3d) 323.

100 Described in Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001). Though defensible, this is obviously controversial: see Harding, *supra* note 14. FL Morton has famously described this "dialogue" as "usually a monologue, with judges doing most of the talking and legislatures most of the listening": FL Morton, "Dialogue or Monologue?" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 111 at 117.

101 See e.g. Marie-France Fortin, *The King Can Do No Wrong: Constitutional Fundamentals, Common Law History, and Crown Liability* (Oxford: Oxford University Press, 2024), chs 5–6.

102 JH Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press, 2002) at 137. See also David Stratas, "Reflections on the Decline of Legal Doctrine" (keynote address at Canadian Constitution Foundation's Law & Freedom Conference, 8 January 2016), online (YouTube): [perma.cc/PR52-Y9KA].

103 See e.g. Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queen's University Press, 2020).

104 [1688] 1 Will & Mar Sess 2, c 2.

105 See Ryan Alford, *Parliamentary Sovereignty under Constitutional Supremacy* (Montreal: McGill-Queen's University Press, 2026) [forthcoming].

106 The quintessential case of *Entick v Carrington* (1765), 95 ER 807 (KB (UK)).

107 Paul Daly, "Executive Power in the United Kingdom" (2021), University of Ottawa Faculty of Law, Working Paper, No 2021-20, online (pdf): [perma.cc/QFU5-BJNQ].

108 Sirota thinks it is desirable to abolish the administrative state, though Mancini considers this impractical: Léonid Sirota & Mark Mancini, "Against Administrative Supremacy" (4 May 2020), online (blog):

there is no question that the administrative state does exist, and it is certainly helpful for efficiency. However, these bureaucracies have an inherent incentive to expand their own mandate: to some extent, this is basic theory of the firm.[109] In our constitutional order, the courts ensure that administrative actors act within the confines of the discretion that legislatures actually gave them. This prevents labour boards or human rights tribunals or Citizenship and Immigration Canada making decisions that, had elected officials known would have been made, the bureaucracies never would have been allowed to make. This traditional conception of the separation of powers explains why a judge inclined to defer to legislatures — recognizing them as the primary law-making authority in our constitutional order — would be less inclined to defer to administrators, and think it necessary to have courts police administrative boundaries, to ensure that they act within the confines of the powers legislatures gave them.[110] As Justice Rowe recently noted, *Vavilov* did not abolish the concept of "jurisdiction" but instead held that questions concerning jurisdiction are to be evaluated on a reasonableness standard of review.[111]

If, however, one puts less emphasis on the separation of powers, believing that purposes behind laws need to be fulfilled in every case (channeling the second hypothesis), and is more concerned about an *external* coherence of law (channeling the first), one will think it desirable to give these executive/administrative decision-makers more leeway. Parliament, after all, can be dysfunctional and prone to populism.[112] A less strict conception of the separation of powers enables realizing these purposive goals, even at the cost of unpredictability. This emphasis on predictability, or the lack thereof (or law's internal or external coherence), unites the separation of powers concerns with the concerns identified in the first hypothesis.

Arthurs, cited by the minority in *Vavilov*, illustrates many of these concerns:

> There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.[113]

If one values the separation of powers, however, it may not matter that the administrator is superior *de facto*: the judge is superior ex officio.[114] And, to be sure, the majority in *Vavilov*

[perma.cc/UVF3-PW3V]. They take their terminology from Jeffrey A Pojanowski, "Neoclassical Administrative Law" (2020) 133:3 Harv L Rev 852.

109 RH Coase, "The Nature of the Firm" (1937) 4:16 Economica 386.

110 See, clearly, in *Anisminic Ltd v Foreign Compensation Commission* (1968), [1969] 2 WLR 163 (HL).

111 *Pepa*, *supra* note 24 at paras 133–40.

112 John D Whyte, "On Not Standing for Notwithstanding" (1990) 28:2 Alta L Rev 347 at 355 recounts Canadian history in this regard.

113 Arthurs, *supra* note 72 at 289, cited in *Vavilov*, *supra* note 1 at para 233.

114 Scalia, *supra* note 59.

suggested that these concerns were pragmatic *de facto*, rather than *de jure*, reasons for deference,[115] indicating no small degree of practicality in this regard. This is consistent with Justice Rowe's concern in *West Fraser* that the expertise rationale identified by Arthurs is not present in many administrative contexts, though it is certainly present in some contexts.[116]

The concern about the separation of powers is also complementary to the concern about the comparative weight to be given to purpose compared to text. As Justice La Forest wrote in his dissenting reasons in the *Judges Reference*, for judicial review to be legitimate in light of our separation of powers, it must be based on a super-ordinate instrument: the *text* of the legal instruments that the judges review.[117] If one is more concerned about purpose, the separation of powers can impede that, explaining why the majority in that case downplayed the importance of text. Similarly, the majority in *Québec inc.* underscored the importance of the separation of powers in terms of the role of international law in constitutional interpretation (notably, the need for domestic implementing legislation for international treaties to become binding on Canada) while also privileging text in constitutional interpretation. The minority, not coincidentally, downplayed both the separation of powers and the role of text compared to purpose.[118]

This emphasis on the separation of powers also explains why scholars and jurists who are often hawkish on judicial review of administrative action are more skeptical of judicial review of prerogative powers.[119] Prerogative powers are vestiges of the King's powers that remain in the executive and have not been restricted by statute.[120] They address matters such as foreign affairs,[121] honours,[122] and prorogation[123] and dissolution[124] of Parliament. If one considers text to demarcate the judiciary's proper role in reviewing the exercise of executive power, there may be nothing to review with respect to the exercise of a prerogative power: the prerogative remains the executive's.[125] Mancini, generally comfortable with judicial

115 *Vavilov*, *supra* note 1 at para 93.

116 *West Fraser*, *supra* note 62 at para 129.

117 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 at paras 314–15 (SCC) [*Judges Reference*].

118 *Québec inc*, *supra* note 34 at paras 61–87, 97–124.

119 See e.g. the dissenting reasons of Justice Nadon in *Khadr v Canada (Prime Minister)*, 2009 FCA 246, rev'd 2010 SCC 3 [*Khadr* SCC].

120 Patrick F Baud, "The Crown's Prerogatives and the Constitution of Canada" (2021) 3:1 J Commonwealth L 219.

121 *Khadr* SCC, *supra* note 119.

122 See e.g. *Black v Canada (Prime Minister)*, 2001 CanLII 8537 (ONCA).

123 *MacKinnon v Canada (AG)*, 2025 FC 422.

124 This had to be reinstated in the United Kingdom despite being abolished by statute due to the inability to dissolve dysfunctional parliaments: see Mark Elliott, "Repealing the Fixed-term Parliaments Act" (2 December 2020), online (blog): [perma.cc/F947-PLND].

125 No one would seem to dispute that courts must determine the existence and scope of a prerogative power: *R (Miller) v The Prime Minister*, [2019] UKSC 41 [*Miller*]. But while everyone accepts this in the abstract, *Miller* can be criticized for placing a "merits assessment" within the purported scope: see e.g. Paul Daly, "A Critical Analysis of the *Case of Prorogations*" (2021) 7 Can J Comp & Contemporary L 256; John Finnis, "The Unconstitutionality of the Supreme Court's Prorogation Judgment" (28 September 2019), online (pdf): [perma.cc/ M923-RLCC]; Emmett Macfarlane, "Dissecting the Federal Court's Decision on Prorogation" (7 March 2025), online (blog): [perma.cc/WDT2-WU5V]. Even so, if the labour board purports to prorogue Parliament, something would have to be done about that. And in Canada, there is a written constitutional requirement that Parliament must meet every year. A prorogation that ran afoul of that would clearly be unconstitutional and a court can and should say so. But these examples are textually based in either the labour board's legislation or section 5 of the *Charter*. Allowing judicial review of prerogative powers risks "judicializing everything," to channel Harding, *supra* note 14. In this vein, the view that there is little the legislature does that is not judicially reviewable does not reflect the fact that

review of administrative action for compliance with statutory grants of authority, has expressed reservations about the review of prerogative powers.[126] Lorne Sossin was much more skeptical about prerogative powers being immune from judicial review[127] despite at other times arguing that significant deference should be given to administrative actors.[128] Daly, writing about judicial review of prerogative powers, has suggested that the better approach is to "review deferentially than not at all."[129] MacDonnell, advocating for the purposive approach to constitutional interpretation,[130] has views more similar to Daly's.[131] This is not surprising. If one places comparatively less emphasis on text or the separation of powers, and more emphasis on the purposes underlying public law, this can be understood as a predictable wrinkle to the general paradox, with the notion of a zone where the judiciary has no role at all becoming anathema.[132] Those who place greater emphasis on the text of legal instruments, the internal coherence of laws, and the separation of powers are likelier to come to the view that courts have no role in reviewing the exercise of prerogative powers. In this vein, somewhat like the wrinkle concerning federalism discussed in Part II.A, differing views on the reviewability of the exercise of prerogative powers can be understood as an exception that proves the rule.

Centering concerns about the separation of powers as a reason for the paradox also reflects views about where accountability for suboptimal outcomes lies in our constitutional order. For one who has faith in the democratic process and the wisdom of crowds to ultimately yield better, or at least more stable and accepted,[133] outcomes, judicial review of executive action — for compliance with statutory text — respects the will of our democratic institutions. After all, most administrative/executive officials are not subject to democratic accountability. It also enables legislatures to amend statutes if they support the original administrative action that the judiciary overturns. Judicial review of legislation precludes this.[134] If one has greater faith in experts who are not democratically accountable — some of whom are not democratically accountable for good reason[135] — one is likely to support

there is a vast area of life to which law does not speak: see *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 35.

126 Mark Mancini, "The Sunday Evening Administrative Review Issue #170: Prorogation, Another *Auer* Example" (9 March 2025), online (blog): [perma.cc/L3A6-SKL7].

127 Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002) 47:2 McGill LJ 435.

128 Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 SCLR (2d) 391.

129 Paul Daly, "A Lawful Prorogation: *MacKinnon v. Canada (Attorney General)*, 2025 FC 422" (7 March 2025), online (blog): [perma.cc/FLW4-JDLU].

130 *Supra* note 4.

131 Vanessa MacDonnell, "The Federal Court Rules in *MacKinnon*" (7 March 2025), online (blog): [perma.cc/3ZNZ-62WX].

132 This was apparent in the dissent of Justices Martin and O'Bonsawin in *Dickson*, and its concern about "*Charter*-free zones": *supra* note 38; see e.g. *ibid* at para 234.

133 See Waldron, *supra* note 13.

134 Consider the Supreme Court's decision in *R v Bissonnette*, 2022 SCC 23 and reactions thereto, such as Pierre Poilievre, Jean Charest, and Patrick Brown all promising to use s 33 of the *Charter* within 24 hours to re-instate the law that was struck down: Gerard J Kennedy, "Different Ways to Get to 'Everything'?", Book Review of *Judicializing Everything? The Clash of Constitutionalisms in Canada, New Zealand, and the United Kingdom* by Mark S. Harding, (2023) 54:1 Ottawa L Rev 153, n 40.

135 Consider the ability of Chief Public Health Officers to impose significant limits on individual liberties. This became very apparent during the COVID-19 pandemic. Though justifiable to ensure experts are making decisions, this can be critiqued due to the experts' tendency to be myopic through concentrating only on those matters within the area of their expertise: see Joanna Baron & Christine Van Geyn, *Pandemic*

greater deference to administrators than legislatures, and consider it reasonable for the judiciary to preclude certain legislative outcomes. In other words, direct democratic accountability can be sacrificed for the advantages of managerial expertise. This is yet more evidence that these three hypotheses are linked.

The emphasis on the separation of powers is likely also going to lead those who value it to defer to legislatures — but not administrators — considering the need to have non-partisan courts. Having courts invalidate legislation — or condone decisions it does not appear that the legislature condoned — risks bringing our courts into the realm of clearly partisan politics by foreclosing certain policy preferences or, at least, means of achieving those policy preferences. Sometimes that is indeed what the constitution does. Denominational schools are an example. But most cases are hardly so clear. And even if the courts think they are not making the decisions for partisan reasons — and virtually all judges would be trying to make these decisions for non-partisan reasons — there is an inevitable risk that they will be *perceived* to be making these decisions for partisan reasons, especially in the absence of textual anchors that give judicial review its legitimacy.[136] And that will lead to the courts being less respected in society, which is corrosive to the rule of law.

To be sure, MacDonnell suggests that there are other ways to consider these separation of powers concerns, such as section 1 of the *Charter* or even deferring to the legislature in interpreting rights themselves.[137] But if one values legal predictability (or internal coherence) and the separation of powers, one is likely to seek firmer rules to avoid these more contested standards.[138]

These three concerns — related to what we expect of legal coherence, the importance of text compared to purpose, and the separation of powers — are also reflected in divisions over "*Charter* values." *Charter* rights were enshrined through the patriation of the constitution in 1982. The judiciary did not volunteer for the new responsibilities that it was given through entrenchment of the *Charter*.[139] Though this requires judicial enforcement of the *Charter* — not any particular approach to interpreting it. As such, if one places great emphasis on legislatures as ultimately the sources of our law, one is going to seek to honour their specific textual choices (which "*Charter* values" expand[140]) as both more predictable and reflective of the balance struck in 1982. This accords with being inclined to defer to legislatures but not administrators. While this concern is mitigated if one reconceives of "*Charter* values" as "*Charter* purposes,"[141] it still indicates that the first three hypotheses are complementary to each other. Because even using the language "*Charter* purposes," we go beyond the text to

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Panic: How Canadian Government Responses to Covid-19 Changed Civil Liberties Forever (Toronto: Optimum Publishing International, 2023).

136 See the comments of Alykhan Velshi, "DeepDive: Federalism Without Permission: Are Conservatives Wasting Their Time on Federal Politics?", *The Hub* (15 May 2025), online: [perma.cc/B8VR-QC6W] (writing "[t]he judiciary—most notably the Supreme Court—has evolved into an engine of liberal jurisprudence, increasingly shaping the Constitution in activist and interpretive ways under the guise of neutral legal reasoning." Whether this is true or not, the perception is itself problematic).

137 MacDonnell, "Enduring Wisdom", *supra* note 4.

138 See e.g. Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175.

139 Justice La Forest notes this evolving responsibility in his dissenting reasons in the *Judges Reference*, *supra* note 117, beginning at para 296. See also Bertha Wilson, "We Didn't Volunteer" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 73.

140 See e.g. Peter D Lauwers, "What Could Go Wrong with *Charter* Values?" (2019) 91 SCLR (2d) 1.

141 Daly, "The *Charter*", *supra* note 65.

apply purposes in ways that the text and structure of the *Charter* do not clearly support.[142] Of course, this may be better suited to achieving purposes and external coherence, if at the cost of predictability, text, and the separation of powers — again, indicating that these three hypotheses are linked.

V. THE FOURTH HYPOTHESIS: THIS IS DISGUISED POLICY-MAKING

Finally, we should consider whether the paradox is explained by critical legal studies' claim that jurists decide cases in accordance with what is otherwise their political inclination.[143] This is complementary to the related view that, if one believes that law is indeterminate, consistent with the "indeterminacy" thesis that one often finds in the American critical legal studies movement,[144] one is not going to feel constrained by sources of positive law to dispense one's own perception of justice. Jurists who are inclined to favour government interventions to respond to social problems are likelier to value "civil servants' values" to "lawyers' values" on micro-level problems addressed by the administrative state.[145] Jurists who are less likely to favour such government responses are going to want administrators more constrained. Jurists in the former camp, which could fairly be called on the political left,[146] are likely to lack faith in legislatures, which are populist and unlikely to respect minority rights.[147] This may also explain why jurists who are deferential to legislatures on rights grounds may be less so on federalism grounds, particularly if federalizing produces centralization.[148]

Like much of critical legal studies, there are no doubt kernels of truth in this explanation for the paradox. Justice Jamal, in his application to the Supreme Court, noted that a judge's sense of the justice of a case is going to affect his decisions at some level.[149] This can be dangerous when it causes judges to privilege the plight of persons directly affected in a case, even when it causes judges to lose sight of the interests of unknown masses also sure to be affected.[150] Even so, consideration and even privileging of the interests of the persons directly

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142 Clearly the case in *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31. Whether this is normatively desirable is of course a separate question.

143 See e.g. David Kairys, "Law and Politics" (1984) 52:2 Geo Wash L Rev 243.

144 *Ibid*, 258, n 6. See also Duncan Kennedy, "Form and Substance in Private Law Litigation" (1976) 89:8 Harv L Rev 1685.

145 John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18:3 UTLJ 351.

146 *Ibid*.

147 Whyte, *supra* note 112.

148 Consider Stone, *supra* note 18.

149 House of Commons Standing Committee on Justice and Human Rights, *The Honourable Mahmud Jamal's Questionnaire*, (Supreme Court Questionnaire), (Government of Canada, 21 October 2021) online: [perma.cc/ZU6H-ET8B].

150 Discussed in Bradley W Miller, "Proportionality's Blind Spot: 'Neutrality' and Political Philosophy" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 370; see e.g. *ibid* at 379, 393. Though Miller discussed *Canada (Attorney General) v Bedford*, 2013 SCC 72 as an example of this, this may also be a consequence of *Carter v Canada (Attorney General)*, 2015 SCC 5, with Canada's experience with euthanasia now being viewed as a cautionary tale throughout much of the Western world: see, e.g., David Brooks, "The Outer Limits of Liberalism", *The Atlantic* (4 May 2023), online: [perma.cc/6AVP-2JB6]; Lauren Sproule, "U.K. MPs Vote to Legalize Assisted Dying, but Critics Point to Canada as Cautionary Tale", *CBC News* (28 November 2024), online: [perma.cc/R9MK-3WBX].

affected is inevitable and even normative to some extent — given that we *know* how they will be affected, unlike the persons out of sight identified by Bradley W. Miller. Criminal sentencing[151] and costs orders[152] are two very different areas of law where we not only tolerate but celebrate this within reason.[153]

But, like much of critical legal studies, suggesting that this is an all-encompassing theory of everything also does not hold up to scrutiny and, in its extreme form, becomes "nihilistic."[154] Myriad jurists have come to results that one strongly suspects, and in some cases they acknowledge publicly, are not what they would desire should they be designing our society from scratch.[155] Modern political science recognizes this. For instance, Cindy Ostberg and Matthew Wetstein,[156] building on work of Jeffrey Segal and Harold Spaeth,[157] have sought to explain judicial behaviour against the particular political attitudes of judges. Ostberg and Wetstein, somewhat similarly to Christopher Manfredi,[158] suggest that judges may maximize policy preferences but with consideration and respect for the preferences of other judges, courts, and external institutional constraints. This fits to some extent with the "internal" constraints identified in legal formalism without denying the judges' individual preferences. In other words, judges know that their role is constrained and take their judicial oath to apply the law qua law very seriously. As noted above, it is beyond doubt that legal instruments foreclose certain outcomes. Moreover, almost all jurists jealously guard their independence from partisan politics, recognizing that there is a distinction between law and politics.[159] The fact that the other three hypotheses are much more normatively satisfying than this final one should caution us against putting too much weight on it, unless caveated by the understanding of scholars such as Manfredi. While one can define "political" to include all legal matters, it becomes such a broad definition to essentially lose meaning.[160]

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151 Benjamin L Berger, "Judicial Discretion and the Rise of Individualization: The Canadian Sentencing Approach" in Kai Ambos, ed, *Sentencing: Anglo-American and German Insights* (Göttingen: Göttingen University Press, 2020) 249.

152 *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27.

153 For a critique, see the decisions of Justice Wakeling in: *R v Yellowknee*, 2017 ABCA 60; *R v Cabrera*, 2021 ABCA 291; *R v Sheppard*, 2023 ABCA 381; *Pillar Resource Services Inc v PrimeWest Energy Inc*, 2017 ABCA 19.

154 Solum, *supra* note 89; Mark Mancini, "Linguistic Nihilism" (2 November 2020), online (blog): [perma.cc/X97J-JV6R].

155 Consider Justice Scalia's comments concerning flag-burning: Scott Bomboy, "Justice Antonin Scalia Rails Again About Flag-Burning 'Weirdoes'" (12 November 2015), online (blog): [perma.cc/M8V3-GSKZ].

156 CL Ostberg and Matthew E Wetstein, "The Enduring Significance of Nuanced Ideological Voting in the Supreme Court of Canada" (2023) Osgoode Legal Studies Research Paper No 4644820, online (pdf): [perma.cc/8G37-TFEH].

157 Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993); see also Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).

158 See e.g., Christopher P Manfredi, "Judicial Power and the *Charter*: Three Myths and a Political Analysis" (2001) 14 SCLR (2d) 331; Christopher P Manfredi, "Adjudication, Policy-Making and the Supreme Court of Canada: Lessons from the Experience of the United States" (1989) 22:2 Can J Political Science 313; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Norman: University of Oklahoma Press, 1993).

159 Consider *Judges Reference*, *supra* note 117.

160 David Andrew Price, "Taking Rights Cynically: A Review of Critical Legal Studies" (1989) 48:2 Cambridge LJ 271 at 271, 276; Michael C Dorf, "Is There a Distinction Between Law and Politics? Yes, and the *Bush v. Gore* Decision Proves It" (27 December 2000), online (blog): [perma.cc/7HTK-9VTJ].

VI. CONCLUSION: OVERLAPPING BUT DISTINCT HYPOTHESES, WITH NON-COINCIDENTAL OVERLAP TO (A LACK OF) CONSERVATIVE DISPOSITION

I have thus far resisted using the words "conservative" or "progressive" to describe the two sides of the legislative-administrative paradox. Such descriptions are excessively — even dangerously — simplistic.[161] But that does not mean that there is not some truth in these descriptions, particularly when we consider them as philosophical/dispositional descriptors rather than political descriptors.[162]

It is a characteristic of conservative philosophy/disposition (if not necessarily politics) to value predictability and borders between conceptions.[163] This is reflected in the first hypothesis, in terms of emphasizing predictability and coherence internal to law, even at the cost of broader normative values. This is also reflected in the second hypothesis, which treats a search for "purpose," which is inherently more subjective, more skeptically. And the separation of powers is also likelier to be of greater import to those naturally inclined to "conserve" the status quo, reflected in our constitutional history.[164] That reflects why judges are trained as lawyers, rather than moral philosophers.[165] This worldview logically considers the appropriate forum to ground our society's philosophy to be the legislature, with judges having a duty to ensure that those with delegated power exercise such power in accordance with the legislature's "institutional design choices."[166]

The flip considerations relate to a more progressive philosophy/disposition. If conservatives, in the main, value order and predictability, progressives tend to be more open to experience,[167] and value specialized knowledge coming through expertise. This leads to a de-emphasis on the separation of powers, a concern that strictures such as text impede realization of values, and there being no reason to ground normative coherence internal to law.[168]

As noted above, "conservative" and "progressive" mean different things in this context than they do in discussing partisan politics, but the words are still explanatory, and unite related hypotheses for the legislative-administrative paradox. This confluence of factors helps explain disagreements between jurists and scholars in public law. The normativity of these explanations can be left for another day. But the explanations are valuable in themselves.

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161 See Kennedy, "Why 'Liberal and 'Conservative' are Unhelpful Terms", *supra* note 22.

162 Though there is non-coincidental overlap between them: Jonathan Haidt, "Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence" (2013) 64:4 Alta L Rev 867.

163 Russell Kirk, "Ten Conservative Principles", online: [perma.cc/RER4-CCC3]; Jer Clifton, "Many Differences Between Liberals and Conservatives May Boil Down to One Belief", *Scientific American* (1 March 2023), online: [perma.cc/FHT4-NT7S].

164 Edmund Burke, *Reflections on the Revolution in France* (Oxford: Oxford University Press, 1999) at 96–97.

165 The influence of philosophy into legal scholarship and legal education may be growing, however, considering the influence of, e.g., Dworkin, *supra* note 67, Dyzenhaus, *supra* note 8.

166 *Vavilov*, *supra* note 1 at para 24.

167 Haidt, *supra* note 162.

168 The dispute in *Québec inc*, *supra* note 34.