

Spectrum of Possibilities: The Role of the Provincial Superior Courts in the Canadian Administrative State

G R A E M E A . B A R R Y *

I. INTRODUCTION

The relationship between the provincial superior courts and the provincial administrative tribunals has been as difficult to define in Canadian constitutional law as the relationship between provincial superior courts and Provincial Courts. The problems have emanated from the provincial superior courts' vaguely defined core jurisdiction which is founded on the judicature provisions (sections 96 to 100) of the *Constitution Act, 1867*, and the rule of law.¹ These constitutional provisions and concepts promote the independence of the judiciary and the predominantly unitary court system.² The provincial superior courts

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¹ See the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*) [*Constitution Act, 1867*], and *Re Provincial Court Judges*, [1997] 3 S.C.R. 3 at 63-64, Lamer C.J.C. [*Re Provincial Court Judges*]. The term "provincial superior courts" refers to those courts established and maintained by the provinces whose judges are federally appointed and paid. The term "Provincial Courts" refers only to those courts whose judges are provincially appointed and paid. The abbreviated reference to "courts" in this article is to the "provincial superior courts" unless indicated otherwise, and the abbreviated reference to "administrative tribunals" is to the "provincial administrative tribunals" unless indicated otherwise.

² P. H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson Limited, 1987) at 49 (predominantly unitary court system) and 81-92 (judicial independence) [Russell, *The Judiciary in Canada*]. Judicial independence of the provincial superior courts is an unwritten constitutional principle which is elaborated upon in the

possess certain adjudicative and supervisory powers that are not to be exercised by provincial administrative tribunals.³ The effort to ascertain the nature and extent of these adjudicative and supervisory functions has been an overlapping concern of Canadian constitutional and administrative law for more than a century of our legal history.

Many academics, administrators, judges, and practitioners have become ensnared in a narrow view of the intervention/deference dichotomy. The partisan stakeholders of the judicial and administrative systems are engaged in pushing the pendulum in the direction which increases their respective power. The time is past due to go beyond a narrow technocratic/bureaucratic approach, and to present a more expansive, didactic, and balanced analysis of the provincial superior courts' role in the Canadian administrative state. This pragmatic and historical synthesis draws upon elements of comparative administrative law, constitutional law, legal history, jurisprudence, and judicial politics. An interdisciplinary discourse involving law, history, and political science is essential in order to travel past preconceived notions toward a fuller understanding.

The relationship of the courts to the tribunals is a central concern because of the immense growth of the administrative state during the twentieth century.⁴ In the post-World War II era the trend of expanded government in-

written text by section 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [*Constitution Act, 1982*], and sections 96 to 100 of the *Constitution Act, 1867*, *ibid.*; see *Re Provincial Court Judges*, *ibid.* at 63–64, Lamer C.J.C. The other rationale of the judiciary provisions has been to provide a predominantly unitary court system with integrated federal and provincial participation; see *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714 at 728, Dickson J. [*Re Residential Tenancies Act*]. The analysis of judicial review in this article refers to the provincial superior courts, although certain elements may extend by necessary implication to the Federal Court of Canada.

³ It has not been determined decisively that the federally established tribunals are subject to the same section 96 restrictions as the provincial administrative tribunals. Thus the references in this article to section 96 issues apply to provincial administrative tribunals; see D. J. M. Brown and Honourable J. M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) at 13–46, and P. W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough: Carswell, 1997) at 7–31 [Hogg, *Constitutional Law of Canada*].

⁴ The first major Canadian administrative tribunal was the Board of Railway Commissioners, which was created by the federal *Railway Act* in 1903; see *An Act to Amend and Consolidate the Law Respecting Railways*, S.C. 1903, c.58; see also Law Reform Commission of Canada, *Independent Administrative Agencies*, Working Paper 25 (Ottawa: Minister of Supply and Services, 1980) at 23. An excellent historical study of Canadian railway regulation is provided by Ken Cruikshank in *Close Ties: Railways, Government, and the Board of Railway Commissioners, 1851–1933* (Montreal & Kingston: McGill-Queen's University Press, 1991). The trend of expanding governmental power was noted in the Rowell-Sirois Report; see Canada, *Report of the Royal Commission on Dominion-Provincial Relations* (Ottawa: Queen's Printer, 1954 printing) Book I, at 103; see also Law Reform Commission of Canada, *ibid.* at

fluence has been accelerated. The administrative apparatus is under the direction of the executive branch and is equipped with legislative mandates. From the perspective of the state there is almost no realm of individual behaviour that is entirely outside its control; from the perspective of the individual there are no major purposes that "can be pursued without encountering the state as an enemy or an ally, existing or potential."⁵

This transformation of the governmental system has placed the courts in an uncertain position *vis-à-vis* the administrative tribunals. It is not readily apparent what adjudicative functions the tribunals could perform without trenching on section 96 court jurisdiction. In addition, how much supervisory authority the courts should exercise over the decisions of the tribunals is contested. The governmental transformation has incited a vigorous struggle for power involving individual rights, public interests, legislative intent, judicial functions, administrative mandates, and democratic theory. In the course of this power struggle, some don the attractive mask of principle to conceal the ugly face of self-interest.

The courts have relied greatly upon the rule of law as the constitutional basis for their claim to exercise certain adjudicative and supervisory powers. The English rule of law theory formulated by A. V. Dicey⁶ contrasts sharply with the American Progressive movement's rejection of individualism and the pursuit of "a welfare-oriented humanitarianism administered by a positive state" consisting of a strong executive and an elaborate administrative apparatus.⁷ From this colossal clash, two basic styles of public law thought have emerged. These two styles are "normativism" and "functionalism."⁸

The struggle between normativism and functionalism in Canadian public law influences the definition of the relationship of the courts to the administrative tribunals. The debate regarding the establishment of a regulatory state without permitting it to become arbitrary and oppressive has focussed upon the basis and scope of judicial review. Against the backdrop of English and American influences, I shall provide an overview of the positions of six prominent Canadian legal scholars: J. C. McRuer, William Lederman, Peter Hogg, Bora

27, and D. V. Smiley, ed., *The Rowell-Sirois Report*, Book I (Toronto: McClelland and Stewart Limited, 1963, 1964 reprint) at 123.

⁵ A. C. Cairns, "The Past and Future of the Canadian Administrative State" (1990) U.T.L.J. 319 at 323.

⁶ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan & Co. Ltd., 1965) [Dicey, *Law of the Constitution*].

⁷ J. D. Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham, Maryland: Rowman & Littlefield Publishers Inc., 1996) at 14.

⁸ M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) at 59-60.

Laskin, John Willis, and H. W. Arthurs. The work of these scholars is representative of viewpoints along a wide jurisprudential and ideological Canadian spectrum which ranges from extreme normativism to extreme functionalism. This spectrum frames the current interaction of the judiciary with the administration. Lederman and Laskin have played key roles in constitutionally entrenching judicial review of provincial administrative tribunal decisions for jurisdictional error. Willis has been identified as the intellectual force behind the "functional and pragmatic approach" which determines the judicial standard of review of all administrative decisions.⁹ There is a significant danger that by endorsing the comparatively radical functionalism promulgated by the late John Willis without giving due respect to other insights along the spectrum of possibilities, the Supreme Court of Canada will damage the effort to maintain a delicate balance between administrative efficiency and legal accountability.

II. PREMISES OF DISTRUST: DICEYTES, PROGRESSIVES AND THE RULE OF LAW

Canadian administrative law has developed generally from English and American scholarship and case law. A. V. Dicey first described his formulation of the rule of law theory in *Introduction to Study of the Constitution* in 1885.¹⁰ Dicey believed that there were three distinct conceptions in the English Constitution. The first conception was that "no man [woman] is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."¹¹ The second conception was that "no man [woman] is above the law... but every man [woman]... is subject to the ordinary law of the realm..."¹² Finally, the third concept provided that "the general principles of the constitution... are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts..."¹³

⁹ Mr. Justice F. Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002) 27 *Queen's L. J.* 859 at 868 [Iacobucci, "Articulating a Rational Standard of Review Doctrine"].

¹⁰ Dicey, *Law of the Constitution*, *supra* note 6. The preface to the 1885 edition is republished at v-vii. Dicey's rule of law theory must be considered against the backdrop of parliamentary sovereignty which Dicey considered the "dominant characteristic of our political institutions" (at 39).

¹¹ *Ibid.* at 188.

¹² *Ibid.* at 193.

¹³ *Ibid.* at 195. The three concepts of the rule of law theory are summarized at 202-203.

Dicey's rule of law theory was not an original formulation. Instead, it was a rigid synthesis of certain perceived characteristics of the English Constitution of the late nineteenth century. In particular, Dicey rejected the *droit administratif* of France.¹⁴ He opposed the idea of special bodies to deal with matters in which the government or its officials were involved. In addition, he labelled discretion the foe of law.

In the last extended introduction to *Law of the Constitution* which Dicey wrote in 1914, he reconsidered the establishment of independent and judicialized administrative bodies that could adjudicate official law. He conceded the possibility that in certain instances these bodies might be more effective than any Division of the High Court.¹⁵ In comparison to his earlier theoretical outlook, Dicey was not a pure Diceyite when making pragmatic observations regarding the growth of the English administrative state at the commencement of the twentieth century.

Modern adherents to Dicey's theory have attempted to adapt the rule of law to current governmental practices. They have been concerned with the abuse of administrative power, which has been compared and contrasted with the dangers and controls associated with judicial and legislative power. In their view, judicial review prevents abuses and preserves fairness. It is a safeguard that is compatible with efficient administration.¹⁶ Sir William Wade has praised the English judicial policy of narrowing the scope of privative clauses which attempt to limit judicial review. In this conflict between parliamentary sovereignty and the rule of law, he has accused Parliament of abuse of its legislative power in seeking to exempt a public authority from the jurisdiction of the courts.¹⁷ It is this abuse of power in the constitutional sense which has justified

¹⁴ *Ibid.* at 202.

¹⁵ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan and Co., Limited, 1915) at xlviii; see also A. V. Dicey, "The Development of Administrative Law in England" (1915) 31 *Law Q. Rev.* 148. In his later scholarship, Dicey described the three currents of public opinion which affected law in nineteenth century England: Old Toryism (1800–1830); Benthamism or Individualism (1825–1870); and Collectivism (1865–1900). He conceded that administrative proceedings were quicker and less expensive. However, they tended to exclude the ordinary courts, and were influenced by political considerations; see A. V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, 2nd ed. (London: Macmillan and Co. Ltd., 1962, originally published 1914) at xliii-xliv. The early Diceyite view of the administrative state was propagated vigorously by Lord Hewart, Lord Chief Justice of England, in *The New Despotism* (London: Ernest Benn Limited, 1929) especially at 17.

¹⁶ H. W. R. Wade, "Judicial Review - Comment" (Proceedings of the Administrative Law Conference, University of British Columbia, 18–19 October 1979) [unpublished].

¹⁷ Sir W. Wade, *Constitutional Fundamentals* (London: Stevens & Sons, 1989) starting at 83.

the judicial position against permitting Parliament to create agencies with uncontrollable authority, thus violating the rule of law.¹⁸

The English constitutional basis for judicial review of administrative action is contested. It is not established whether the *ultra vires* doctrine derives its legitimacy from legislative intent or the power of the common law to prevent administrative errors and abuses. A compromise version of the *ultra vires* doctrine contains a general presumption of legislative intent authorizing the application of common law principles.¹⁹

The Progressive movement exerted great influence in the United States in the early twentieth century culminating in the New Deal Administration of President Franklin Roosevelt.²⁰ In sharp contrast to Dicey's theory, the Progressives believed that the rise of an urban, industrialized society with an interdependent nature "rendered abstract the nineteenth-century notions of self-mastery and rights to property."²¹ They envisioned a greater role for the state in conceiving and administering programs aimed at achieving socioeconomic change. One of the leaders in the Progressive movement was the legal realist Felix Frankfurter, a Harvard law professor and future United States Supreme Court justice.²² Frankfurter's view of the judicial role in the emerging administrative state was affected by his Progressive sympathies: "He [Frankfurter] believed that unlike legislative and administrative determinations, judicial decisions in an interdependent age are inherently abstract and, therefore, dangerous: limitations of human reason and inadequacies inhering in the process of judicial fact-finding make it impossible for judges to grasp the collective experience and knowledge of an interdependent culture."²³

¹⁸ *Ibid.*

¹⁹ T. R. S. Allan, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" [2002] Cambridge L. J. 87 at 87-90.

²⁰ Hockett, *supra* note 7 at 13-14. Historian Doris Kearns Goodwin claimed that "the Roosevelt years had witnessed the most profound social revolution in the country since the Civil War - nothing less than the creation of modern America." See D. K. Goodwin, *No Ordinary Time: Franklin and Eleanor Roosevelt: The Home Front in World War II* (New York: Simon & Schuster, 1994) at 624.

²¹ Hockett, *ibid.* at 14.

²² *Ibid.* at 141 and 147; see also M. E. Parrish, *Felix Frankfurter and His Times: The Reform Years* (New York: The Free Press, 1982), and G. E. White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993) at 361.

²³ Hockett, *ibid.* at 16. As a Supreme Court associate justice (1939-1962), Frankfurter was deferential to administrative decisions. This deference was tempered only when the legislature (Congress) authorized expanded review; see Hockett, *ibid.* at 173-77.

Frankfurter's major concern was the quality of the administrators.²⁴ He knew that the administrative apparatus, like the legal system, could be no better than those who do its work. Mediocrity breeds mediocrity - or worse. Envious of superior ability and intimidated by healthy ambition, second rate administrators will not hire, retain, or promote people of merit. "A's hire A's and B's hire C's."²⁵ Unlike the Diceyites, Frankfurter did not believe that judicial review was the leading safeguard against abuses of power:

Undoubtedly ultimate protection is to be found in ourselves, our zeal for liberty, our respect for one another and for the common good - a truth so obviously accepted that its demands in practice are usually overlooked. But safeguards must also be institutionalized through machinery and processes. These safeguards largely depend on very high standards of professional service, an effective procedure (remembering that "in the development of our liberty insistence upon procedural regularity has been a large factor"), easy access to public scrutiny and a constant play of alert public criticism, especially by an informed and spirited bar.²⁶

In American legal thought the reaction to the rise of the administrative state has been a clash between the "legalist" and "scientific" approaches.²⁷ Those who follow the legalist approach are suspicious of the administrative state, whose non-judicial and collectivist focus seems contrary to Dicey's rule of law.²⁸ Those who support the scientific approach foster the belief that courts are ideologically and institutionally incapable of dealing with the regulatory problems of a modern industrial society.²⁹ Initially, there was great faith placed in the ability of experts. When the faith in experts to produce "scientific, neutral and apolitical solutions to social and legal questions" began to decline with the disillusion in the New Deal programs there was a re-emergence of procedural-

²⁴ *Ibid.* at 161.

²⁵ D. Rumsfeld, "Rumsfeld's Rules: Advice on Government, Business and Life," online: *Analects ink* <www.analects-ink.com/weekend/020308.html> ; see also D. Olive, *The Quotable Tycoon: A Treasury of Business Quotations* (Toronto: Viking Canada, 2002) at 104. Initially, bureaucracies are organized to serve social needs. Eventually, they decline and serve the desires of the bureaucrats who wield power. A steady infusion of human talent and a reaffirmation of animating principles are required to stave off decline. For an analysis of the formation and operation of bureaucracies see P. M. Blau, *Bureaucracy in Modern Society* (New York: Random House, Inc., 1956), and H. H. Gerth & C. W. Mills, *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1980) at 196-244.

²⁶ F. Frankfurter, *The Public and Its Government* (New Haven: Yale University Press, 1930) at 159.

²⁷ M. Horwitz, *The Transformation of American Law, 1870-1960* (New York: Oxford University Press, 1992) at 221.

²⁸ *Ibid.*

²⁹ *Ibid.*

ism associated with the legalist approach.³⁰ Courts began to insist upon judicial ideals of justice in the administrative adjudication of individual cases.³¹ Professor Martin Loughlin has summarized succinctly these two competing styles of public law thought:

The normativist style in public law is rooted in a belief in the ideal of the separation of powers and in the need to subordinate government to law. The style highlights law's adjudicative and control functions and therefore its rule orientation and its conceptual nature. Normativism essentially reflects an ideal of the autonomy of law. The functionalist style in public law, by contrast, views law as part of the apparatus of government. Its focus is upon law's regulatory and facilitative functions and therefore is oriented to aims and objectives and adopts an instrumentalist social policy approach. Functionalism reflects an ideal of progressive evolutionary change.³²

Canadian legal thought has been greatly affected by the gigantic clash of the Diceytes who distrust government with the Progressives who distrust the judiciary. Many of the nation's leading scholars and judges have been influenced by the English and American legal cultures in the struggle to formulate a consistent approach regarding the judicial role in the Canadian administrative state.³³

The rule of law, which the courts rely upon as the constitutional basis of their adjudicative and supervisory powers, is a fundamental postulate of the Canadian Constitution. It has three foundations. It is referred to explicitly in the preamble to the *Constitution Act, 1982*,³⁴ and is implicitly included in the preamble to the *Constitution Act, 1867*³⁵ in the phrase "a Constitution similar in principle to that of the United Kingdom." Finally, the rule of law is implicit in the nature of a constitution as the supreme law. The founders intended that there be "a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence."³⁶ The meaning to be accorded to the rule of law is inexact since the concept is both an ideal

³⁰ *Ibid.* at 233.

³¹ *Ibid.* at 222.

³² *Ibid.*

³³ R. B. Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941" (2000) 19 Dal. J. Leg. Stud. 36 at 72. Brown compares the scholarship of six Canadian functionalists during the Great Depression; see also J. Willis "Canadian Administrative Law in Retrospect" (1974) 24 U.T.L.J. 225 at 234 [Willis, "Canadian Administrative Law in Retrospect"]. Willis believed that the political roots of Canadian administrative law were from England and the social roots were from the United States.

³⁴ *Constitution Act, 1982*, *supra* note 2.

³⁵ *Constitution Act, 1867*, *supra* note 1.

³⁶ *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 750-751.

and an ideology. In the *Manitoba Language Reference*,³⁷ the Supreme Court of Canada defined the rule of law by echoing Dicey's emphasis upon established law, equality before the law of government officials and private citizens, and the preclusion of arbitrary power. In the *Secession Reference*, the Court asserted that the rule of law "provides a shield for individuals from arbitrary state action."³⁸

The abuse of discretion by public officials has been a primary concern of the judiciary as the administrative state has expanded. In *Roncarelli v. Duplessis*, Rand J. delivered a classic description of the judiciary's role in controlling arbitrary public power:

That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of the disintegration of the rule of law as a fundamental postulate of our constitutional structure.³⁹

The preceding definitions and application of the rule of law dealing with arbitrary power are consistent with the normativist style of public law, and are derived from the Diceyite approach. The functionalist style of public law eventually became more influential when issues of economic regulation were considered by the courts. Dicey's theory was articulated in the late nineteenth century when *laissez-faire* economics was more prevalent. Even Justice Rand's judicial review judgments contain an underlying tension between an expectation of propriety and a recognition of administrative expertise in forming and implementing public policy.⁴⁰ In *National Corn Growers Assn. v. Canada (Import Tribunal)*, Madam Justice Wilson discussed the greater judicial deference accorded

³⁷ *Ibid.* at 748–749; see also *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 805–806.

³⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 257.

³⁹ *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142, Rand J.

⁴⁰ D. J. Mullan, "Mr. Justice Rand: Defining the Limits of Court Control of the Administrative and Executive Process" (1980) 18 U.W.O.L. Rev. 65 at 68. Ivan C. Rand (1884–1969) received his law degree from Harvard Law School (1909–1912), and was somewhat influenced by the early development of American legal realism. The views of Louis Brandeis, a Progressive leader, future Supreme Court associate justice (1916–1939), and mentor to Felix Frankfurter, affected Rand's outlook on constitutional and administrative law; see E. M. Pollock, "Ivan Rand: The Talent is the Call" (1980) 18 U.W.O.L. Rev. 115 at 122, and R. P. H. Balcome et al., *Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland* (Toronto: Carswell, 1990) at 35. For a discussion of the relationship of Brandeis with Frankfurter in the Progressive movement see Parrish, *supra* note 22 at 2, 6, 160 and 162–163. For a detailed description of Brandeis as a Progressive advisor to President Woodrow Wilson and a Supreme Court nominee see A. Hecksher, *Woodrow Wilson: A Biography* (New York: Collier Books, 1991) at 256–257, and 396–397. For Rand's general impression of Brandeis see I. C. Rand, "Louis Brandeis" (1947) 25 Can. Bar Rev. 240.

to administrative expertise and discretion across a wide array of subject matter as the Supreme Court distanced itself from Dicey's theory:

Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power....

Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work.⁴¹

III. ON THE SHOULDERS OF GIANTS: THE CANADIAN DEBATE

It is a well-established pedagogical method to cite and build upon the ideas of others. In 1159, John of Salisbury wrote: "Bernard of Chartres used to compare us to [puny] dwarfs perched on the shoulders of giants. He pointed out that we see more and farther than our predecessors, not because we have keener vision or greater height, but because we are lifted up and borne aloft on their gigantic stature."⁴²

Influenced by the preceding English and American approaches, the judicial role in the Canadian administrative state has been the subject of continuous debate that has spanned the spectrum of possibilities from those who support constitutional entrenchment of broad review to those who advocate abandonment of the procedure. The following application of Professor Loughlin's

⁴¹ *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1336, Wilson J. In a sympathetic biography of Madam Justice Wilson, Ellen Anderson argues unconvincingly that Wilson attempted to maintain a middle position between excessive curial deference and excessive judicial intervention; see E. Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001) at 306–307. Anderson examines Wilson's *National Corn Growers* opinion noting Wilson's rejection of Dicey's rule of law theory, and her reliance upon the legal scholarship of prominent functionalist academics; see *ibid.* at 308–309 and at 436–437, n. 62. An exception to Wilson's general deference is her dissent in *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, which is discussed in D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 293.

⁴² John of Salisbury, *The Metalogicon: A Twelfth-Century Defense of the Verbal and Logical Arts of the Trivium*, D. D. McGarry, translator (Berkeley: University of California Press, 1962) at 167. Subsequently, Sir Isaac Newton employed the same metaphor in describing his contributions to the advancement of knowledge; see F. E. Manuel, *A Portrait of Isaac Newton* (Cambridge, Mass.: The Belknap Press, 1968) at 145.

general analysis to the specific views of six representative Canadian legal scholars indicates how the debate has reflected elements of the normativist and functionalist struggle with reference to constitutional and administrative law issues. Principles and philosophies are mixed with competing interests of power to produce fierce conflicts. The relationship of provincial superior courts to provincial administrative tribunals is the focus. The spectrum of legal culture and political ideology tracing the six scholars' views moves from right to left. This spectrum continues to inform judicial choice in the current case law.

Chief Justice J. C. McRuer (1890–1985) of the Ontario High Court is an example of a judge who believed fervently in normativism. His legal philosophy identified the public interest with the protection of the individual. This protection was best provided by adhering to procedures that resembled court proceedings. The greatest evidence of this philosophy are McRuer's recommendations in his report of the Royal Commission Inquiry into Civil Rights in Ontario.⁴³ He sought to judicialize administrative proceedings so as to protect individual rights and interests. In the report, Chief Justice McRuer declared that the power of the state had to be limited, monitored, and controlled by law. He specifically discussed the utility of Dicey's rule of law theory in avoiding government tyranny.⁴⁴ To McRuer, power that is not the subject of regular review is most often the object of arbitrary abuse:

Apart from its being a means of protection against the invader, the sole purpose of the democratic state is to regulate and promote the mutual rights, freedoms and liberties of the individuals under its control. State power is something in the nature of a trust conferred by the people on all those in positions of authority. While the State is an attribute of sovereignty, it is not the warden of freedom but the guardian of the right to be free. Law as the expression of the power of the State, and its enforcement, are not weapons but shields serving to protect and regulate the respective rights, freedoms and liberties of individuals *inter se*, from whom the authority of the State is derived. Excessive or unnecessary power conferred on public authorities corrupts and destroys democratic institutions and gives life to all forms of tyranny - some petty and some extreme.⁴⁵

In a comparatively less radical form of normativism, Professor William Lederman (1916–1992) contended that judicial review of administrative actions

⁴³ Ontario, *Royal Commission Inquiry Into Civil Rights* (Toronto: Queen's Printer, 1968); see also J. Batten, *Judges* (Markham, Ontario: Penguin Books Canada Ltd., 1986) at 275. In his legal career, McRuer served as a crown attorney, private practice litigator, Ontario Court of Appeal judge, and Chief Justice of the Ontario High Court.

⁴⁴ Ontario, *ibid.* at Volume I, 56–59; see also P. Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Canada: The Osgoode Society for Canadian Legal History, 1994) at 327–328. Boyer contends that McRuer embraced Dicey's theory but had a more democratic philosophy.

⁴⁵ Ontario, *ibid.* at Vol. I, 2–3.

at least in relation to jurisdictional questions is part of the guaranteed core of superior court jurisdiction which is constitutionally supported by the judicature provisions.⁴⁶ Lederman believed that the provincial superior courts possessed an “irreducible core of substantive jurisdiction assured to them.”⁴⁷ Part of this jurisdiction was the historical right to review the actions of inferior tribunals. Specifically, he described how superior courts should deal with privative clauses which seek to oust their jurisdiction:

[T]he disregard by superior courts of privative clauses in provincial statutes is constitutionally sound, for the clauses would deny their guaranteed reviewing or appellate jurisdiction. On this view, the provinces cannot deny to the superior courts power to review and determine finally the scope of statutory and common-law powers conferred on provincial government officials or on minor courts or non-curial tribunals.⁴⁸

Lederman asserted that the superior courts were appropriate institutions for having the final word on the distribution of governmental powers. It was “historically characteristic” of superior courts that they determined even the limits of their own jurisdiction.⁴⁹

Lederman’s minority view of provincial superior court core jurisdiction has become part of the governing case law. The constitutional validity of jurisdictional grants to inferior courts and provincial administrative tribunals is determined by the modified *Residential Tenancies*⁵⁰ tripartite test supplemented by the guarantee of a provincial superior court core jurisdiction. Even if an exclusive grant of jurisdiction to the inferior court or tribunal satisfies the modified

⁴⁶ W. R. Lederman, “The Independence of the Judiciary” in W. R. Lederman, ed., *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 109. This is a republication of Lederman’s seminal article in (1956) 34 Can. Bar Rev. 769–809, 1139–1179. William Lederman taught in the Faculties of Law at the University of Saskatchewan and Dalhousie University before becoming Dean of Law at Queen’s University (1958–1968) and remaining as a professor. Professor Lederman’s abilities were particularly respected by Dickson C.J.C. since both were high school classmates in Regina, Saskatchewan. Lederman was the academic leader of the class; see Batten, *supra* note 43 at 331; see also Mr. Justice R. J. Sharpe & K. Roach, *Brian Dickson: A Judge’s Journey* (Toronto: University of Toronto Press, 2003) at 37–38, and M. A. MacPherson, “About Brian, Bill and Me: Regina Collegiate” in D. J. Guth, ed., *Brian Dickson at the Supreme Court of Canada, 1973–1990* (Manitoba: Canadian Legal History Project, 1998) at 6–7.

⁴⁷ Lederman, *ibid.* at 166.

⁴⁸ *Ibid.* at 169.

⁴⁹ *Ibid.*

⁵⁰ *Re Residential Tenancies Act*, *supra* note 2. Elements of the test have been refined subsequently in several cases including *Yeomans et al. v. Sobey’s Stores Ltd.*, [1989] 1 S.C.R. 238; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 [*Residential Tenancies (N.S.)*]; and *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725 [*MacMillan Bloedel*]; see also Hogg, *Constitutional Law of Canada*, *supra* note 3 at 7–29.

Residential Tenancies test, it is still necessary to ascertain if the grant detracts from the provincial superior court core jurisdiction. The persuasive logic underlying the core jurisdiction theory is that the interrelated constitutional guarantees of judicial independence “are meaningful so long as judges carry out meaningful tasks.”⁵¹ If the crucial elements that compose the core jurisdiction were to be taken away, the provincial superior courts would be rendered “empty institutional shells.”⁵²

In *MacMillan Bloedel v. Simpson*,⁵³ a slim five-member majority of the Supreme Court of Canada endorsed an incomplete definition of the core jurisdiction. In addition to the provincial superior court’s power to control its process, Lamer C.J.C. alluded to judicial review for jurisdictional error over provincial administrative tribunals, and the constitutional review of federal statutes.⁵⁴ The majority preferred to develop the content of the core on a case-by-case basis.

In a moderate version of normativism, Professor Peter Hogg has acknowledged the need for judicial review of administrative actions by the superior courts for jurisdictional errors, but not for errors of law.⁵⁵ In limiting the grounds of review, Hogg has sought to balance the utility of the courts in upholding general values of the legal system (validity principle) with the expertise of the tribunal (comparative qualifications principle).⁵⁶ He recognizes that a specialized administrative appeal tribunal may lack the general detachment from the administrative process which a legitimate review would require, or would

⁵¹ P. H. Russell, “Constitutional Reform of the Canadian Judiciary” (1967) 7 *Alberta L. R.* 103 at 108 [“Constitutional Reform of the Canadian Judiciary”].

⁵² Lederman, *supra* note 46 at 167.

⁵³ *MacMillan Bloedel*, *supra* note 50. The provincial superior courts’ core jurisdiction concept has been reiterated in: *Re Provincial Court Judges*, *supra* note 1; *Noël v. Société d’énergie de la Baie James*, [2001] 2 S.C.R. 207; *Lac d’Amiante du Québec Ltée. v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743; and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

⁵⁴ *MacMillan Bloedel*, *ibid.* at 743. Lamer C.J.C. made the reinforcement of judicial independence one of the five main objectives of his tenure as a judge and chief justice; see A. Lamer, “Allocution du très honorable Antonio Lamer, c.p., juge en chef du Canada” (Farewell Address, Supreme Court of Canada, 17 December 1999) [unpublished]. The difficulty of defining the provincial superior courts’ core jurisdiction has been acknowledged in *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3.

⁵⁵ P. W. Hogg, “Judicial Review: How Much Do We Need?” (1974) 20 *McGill L. J.* 157 at 161–162; see also a reiteration of Hogg’s views regarding the scope of judicial review in “The Supreme Court of Canada and Administrative Law, 1949–1971” (1973) 11 *Osgoode Hall L. J.* 187 at 188–191. Peter W. Hogg was a professor at Osgoode Hall Law School of York University (1970–2004), and Dean of the Faculty (1998–2003).

⁵⁶ *Ibid.* at 167.

place more confidence in its own expertise rather than deferring to the autonomy of the initial decision-maker.⁵⁷ Hogg points to the security of tenure and independence of the superior court judges as the reasons for the ordinary court's suitability in performing the reviewing function. Unlike Lederman, Hogg would not rely upon the judicature provisions which promote these very reasons as the constitutional basis for judicial review.⁵⁸

In 1976 Professor Hogg wrote: "For my part, I do not believe that it would ever be wise for a legislature to exclude judicial review of agency decisions altogether. But one must not confuse what is unwise with what is unconstitutional, and in my view section 96 is too frail a foundation to support the building of a constitutionally-guaranteed administrative law."⁵⁹ Over a quarter century later, Hogg still does not believe that the provincial superior courts should possess a constitutionally guaranteed core jurisdiction.⁶⁰

Arguably, the most influential academic and judge involved in the Canadian debate was Bora Laskin (1912–1984), whose opinions regarding the basis and scope of judicial review changed over time. Laskin remained a functionalist in deferring to the expertise of administrative tribunals, but he also ensured a normativist power of judicial review concerning jurisdictional matters. In 1940 Laskin commenced his twenty-five year career as a law professor.⁶¹ He also worked periodically as a labour arbitrator.⁶² He served subsequently as an Ontario Court of Appeal judge (1965–1970), a Supreme Court of Canada judge (1970–1973), and Chief Justice of Canada (1973–1984).⁶³

⁵⁷ *Ibid.* at 166.

⁵⁸ *Ibid.* at 165–166.

⁵⁹ P. W. Hogg, "Is Judicial Review of Administrative Action Guaranteed by the British North America Act?" (1976) 54 Can. Bar Rev. 716 at 730. Political science Professor Peter Russell disagreed with Professor Hogg's opposition to the core concept: "Canadian jurists are not unreasonable in inferring that a limited separation of powers in the form of a guaranteed jurisdiction for tribunals manned by constitutionally protected judges is a necessary corollary of the constitutional guarantee of judicial independence." See Russell, "Constitutional Reform of the Canadian Judiciary," *supra* note 51 at 108.

⁶⁰ Hogg, *Constitutional Law of Canada*, *supra* note 3 at 7–38; 7–39.

⁶¹ J. G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 217.

⁶² *Ibid.*

⁶³ *Ibid.* at 217–218 and 224–225. For accounts of Laskin's academic and judicial careers see Justices of the Court, "The Right Honourable Bora Laskin, P.C.," online: Supreme Court of Canada <http://www.scc-csc.gc.ca/aboutcourt/judges/laskin/index_e.html> , and Anon., "Bora Laskin: Chief Justice Brought Liberal Flavor to Highest Court" *The Globe and Mail* (27 March 1984) A4.

In 1936–1937 Laskin studied for his Master of Laws degree at Harvard Law School where his graduate supervisor was Felix Frankfurter.⁶⁴ As recounted previously, Frankfurter was a member of the Progressive intelligentsia who favoured judicial tolerance of state experiments in socioeconomic regulation. He was a close informal adviser to President Franklin Roosevelt concerning the legislative programs of the New Deal.⁶⁵ Frankfurter was very active in securing government appointments for several of his more talented students, and he urged Laskin to remain in the United States and work for the New Deal.⁶⁶

In his 1937 graduate thesis entitled *The Ontario Municipal Board*, Laskin examined several aspects of the relationship of section 96 courts with provincial administrative tribunals.⁶⁷ Quoting frequently from Frankfurter's writings, Laskin favoured the mixture of legislative, executive, and judicial powers in an administrative agency. Administrative agencies had to be given the discretion to decide based on their expertise in order to vindicate their usefulness.⁶⁸ As a convinced functionalist, Laskin insisted that administrators have the power to adjudicate.⁶⁹

⁶⁴ B. Laskin, *The Ontario Municipal Board* (LL.M. Thesis, Harvard Law School, June, 1937) [unpublished] [Laskin, *The Ontario Municipal Board*]. Mr. Justice John Laskin of the Ontario Court of Appeal, son of Bora Laskin, confirmed that Frankfurter served as his father's thesis supervisor, but maintained little contact after Bora Laskin became a law professor; see Letter from Mr. Justice John Laskin to Graeme Barry (9 February 1995) [unpublished]. Bora Laskin's functionalism was also inspired by the views of Professor W. P. M. Kennedy at the University of Toronto; see W. P. M. Kennedy, "Aspects of Administrative Law in Canada" (1934) 46 *Juridical Review* 203, and Brown, *supra* note 33 at 53. Kennedy's conversion to legal realism during the Great Depression is traced by R. C. B. Risk in "The Many Minds of W. P. M. Kennedy" (1998) 48 *U.T.L.J.* 353.

⁶⁵ M. Freedman, *Roosevelt and Frankfurter: Their Correspondence, 1928–1945* (Boston: Little, Brown and Company, 1967) especially at 19; see also Hockett, *supra* note 7 at 162–164.

⁶⁶ I. Abella, "The Making of a Chief Justice: Bora Laskin, The Early Years" in F. E. McArdle, ed., *The Cambridge Lectures*, 1989 (Montreal: Les Editions Yvon Blais Inc., 1990) 159 at 165.

⁶⁷ Laskin, *The Ontario Municipal Board*, *supra* note 64.

⁶⁸ *Ibid.* at 214.

⁶⁹ *Ibid.* at 226. Consistent with his Harvard thesis, Laskin C.J.C. upheld the statutory power of the Ontario Municipal Board (OMB) to settle doubts as to the vesting of assets and liabilities respecting competing claims of the city and municipality in *City of Mississauga v. Municipality of Peel*, [1979] 2 S.C.R. 244. A recent book that critically assesses the modern role of the OMB is J. G. Chipman, *A Law Unto Itself: How the Ontario Municipal Board Has Developed and Applied Land-Use Planning Policy* (Toronto: University of Toronto Press, 2002); see also the book review by Professor David Siegel at (2003) 36 *Canadian Journal of Political Science* 1087.

In a 1952 article, Professor Laskin rejected the constitutional basis of judicial review in the presence of a privative clause because of deference to legislative supremacy.⁷⁰ He declared emphatically: "At the threshold of this inquiry it may be well to make the assertion that there is no constitutional principle on which courts can rest any claim to review administrative board decisions."⁷¹

Professor Laskin also refused to recognize the functional implications which the superior courts had attributed to section 96 of the *Constitution Act, 1867*. In a 1955 article he wrote: "The terms of the B.N.A. Act and such history as there is do not support the thesis (which much of the case-law so far upholds) that function is the dominating feature of the federal appointing power."⁷² In the third edition of *Canadian Constitutional Law* (1966), Laskin J.A., as he then was, did note descriptively that there had been "a series of holdings that deny to a legislature in Canada power to preclude curial review of administrative board action or decision alleged to be taken or given without or in excess of statutory jurisdiction."⁷³

By 1977, Chief Justice Laskin's own outlook regarding judicial review resembled the note in his constitutional law casebook. In an article concerning the separation of powers, the Chief Justice stated that although an agency could make determinations of law, such decisions were not unreviewable, nor were determinations regarding the limits of the agency's jurisdiction.⁷⁴ The legal basis for curial review was not a strict separation of powers doctrine, but "accepted conceptions of administrative law."⁷⁵ By 1981, the Chief Justice's *Crevier* decision on behalf of a unanimous Supreme Court indicated his belief in a constitutionally based review power over provincial tribunals on jurisdictional questions.⁷⁶ In addition, the Chief Justice implicitly repudiated his earlier opinion,

⁷⁰ B. Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30 Can. Bar Rev. 986 at 989-990.

⁷¹ *Ibid.* at 989.

⁷² B. Laskin, "Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case" (1955) 33 Can. Bar Rev. 993 at 1000. In a 1963 case comment, Professor Laskin continued to express concern regarding the use of section 96 to restrict the powers of provincial administrative tribunals; see B. Laskin, "Provincial Administrative Tribunals and Judicial Power - The Exaggeration of Section 96 of the British North America Act - Authority of Provincial Labour Relations Boards" (1963) 41 Can. Bar Rev. 446.

⁷³ Mr. Justice B. Laskin, *Canadian Constitutional Law*, Third Edition (Toronto: Carswell, 1966) at 789.

⁷⁴ Rt. Hon. B. Laskin, "Comparative Constitutional Law - Common Problems: Australia, Canada, United States of America" (1977) 51 A.L.J. 450 at 457.

⁷⁵ *Ibid.*

⁷⁶ *Crevier v. A.G. (Quebec)*, [1981] 2 S.C.R. 220 [*Crevier*].

and stated that it would make a "mockery" of section 96 "to treat it in non-functional formal terms as a mere appointing power...."⁷⁷ As previously noted, the *Crevier* decision has been judicially entrenched as part of the core jurisdiction concept in *MacMillan Bloedel*.⁷⁸

The changes in Laskin's views are perplexing. The radical functionalism of his academic and labour arbitration backgrounds was tempered by the moderate normativism of his judicial office. A similar transformation occurred in the career of Sir Edward Coke who served as Chief Justice of the Court of Common Pleas (1606-1613), and then as Chief Justice of the King's Bench (1613-1616).⁷⁹ As Attorney General, Coke had advocated expansion of the King's power. As a judge, he attempted aggressively to restrain that same power. Plucknett's astute insight regarding Coke may also apply to Laskin:

Just as the soldier and courtier, Thomas Becket, became transformed into a churchman of the sternest school on becoming Archbishop of Canterbury, so Coke, once the upholder of prerogative, discovered a new point of view from the bench at Westminster. Perhaps it was a tendency of his character to idealise whatever position he happened to be in; as a Crown lawyer he magnified the prerogative; as the head of the common law system he exalted law to almost mystical heights.... Coke now transferred to the common law, of which he had become the oracle, that supremacy and pre-eminence which he had ascribed to the Crown while he was Attorney-General.⁸⁰

The intellectual evolution of Chief Justice Laskin's views culminating in the *Crevier* decision reveals a desire to strike a balance between extensive judicial intervention in the administrative system, which would undermine the efficacy of the process, and the inherent dangers of unreviewable administrative power.⁸¹ He perceived the constitutional struggle between the rule of law and legislative sovereignty concealed behind the statutory interpretation technique

⁷⁷ *Ibid.* at 237. In the subsequent case of *Re B.C. Family Relations Act*, [1982] 1 S.C.R. 62 at 72, Laskin C.J.C., dissenting in part, reiterated his belief in the functional approach to section 96: "It is not for this Court, by deploring the presence in the Canadian Constitution of such an anomalous provision as s. 96, to reduce it to an absurdity through an interpretation which takes it literally as an appointing power without functional implications." See also *Tomko v. Labour Relations Board (N.S.)*, [1977] 1 S.C.R. 112 at 120, Laskin C.J.C. [*Tomko*]. Laskin also sought to prevent encroachment upon provincial superior court jurisdiction by the Federal Court of Canada; see R. W. Pound, *Chief Justice W. R. Jaccett: By the Law of the Land* (Canada: McGill-Queen's University Press, 1999) at 264.

⁷⁸ *MacMillan Bloedel*, *supra* note 50.

⁷⁹ M. H. Ogilvie, *Historical Introduction to Legal Studies* (Toronto: The Carswell Company Limited, 1982) at 227.

⁸⁰ T. F. T. Plucknett, *A Concise History of the Common Law*, Fourth Edition (Great Britain: Butterworth & Co., Publishers Ltd., 1948) at 230.

⁸¹ H. N. Janisch, "Bora Laskin and Administrative Law: An Unfinished Journey" (1985) 35 U.T.L.J. 557 at 559 [Janisch, "Bora Laskin and Administrative Law"].

that narrowed the scope of privative clauses. Although Laskin recognized that jurisprudence prior to *Crevier* had not addressed the constitutional question directly, he discerned indications "that the constitutional issue was in the background."⁸² Laskin parted company with his mentor, Felix Frankfurter, regarding the concept of jurisdiction. Frankfurter J. had avoided jurisdiction "as one of the most deceptive of legal pitfalls" and as "a verbal coat of too many colors."⁸³ Laskin J.A. was aware of the last reference for he repeated it with slight inaccuracy in *Regina v. Botting*.⁸⁴ The reason for Laskin's difference with Frankfurter was that Laskin operated in a judicial environment with a closer tie to the English system, parliamentary supremacy, and a less constitutionally entrenched judiciary. In accordance with a dominant view of the *ultra vires* doctrine, the judiciary had to show that it was obeying the will of a legislative body in order to justify its interventions.⁸⁵

Professor John Willis (1907–1997), an academic contemporary of Laskin, remained a comparatively radical functionalist throughout his professional career. Like Laskin, Willis was influenced by the legal realism of Felix Frankfurter when he enrolled in some courses at Harvard Law School (1930–1932).⁸⁶ Willis was amazed that the appointment provision of section 96 of the *Constitution Act, 1867* should be permitted to develop into the foundation of a separation of powers doctrine which hindered the creation and operation of provincial administrative agencies.⁸⁷ Like the Progressive movement of which

⁸² *Crevier*, *supra* note 76 at 236.

⁸³ H. N. Janisch, "Towards a More General Theory of Judicial Review in Administrative Law" (1989) 53 Sask. L. Rev. 327 at 334 [Janisch, "Towards a More General Theory"]; see also *City of Yonkers v. United States*, 320 U.S. 685 at 695 (1944), and *United States v. L. A. Tucker Truck Lines Inc.*, 344 U.S. 33 at 39 (1952).

⁸⁴ *Regina v. Botting*, [1966] 2 O.R. 121, (Ont C.A.) at 136; cited in Janisch, "Towards a More General Theory", *ibid.* at 334. Laskin J.A. referred inaccurately to Frankfurter's description of jurisdiction as "Joseph's coat of many colours."

⁸⁵ H. W. R. Wade, *Administrative Law*, Fourth Edition (Oxford: Clarendon Press, 1977) at 256–257; see also Janisch, "Towards a More General Theory", *ibid.* at 332–333.

⁸⁶ R. C. B. Risk, "John Willis - A Tribute" (1985) 9 Dal. L. J. 521 at 521 and 526. Willis taught law at Dalhousie University, Osgoode Hall Law School, the University of British Columbia, and the University of Toronto from 1933 until his retirement in 1980; see R. C. B. Risk, "In Memoriam: John Willis" (1997) 47 U.T.L.J. 301 at 301 [Risk, "In Memoriam: John Willis"].

⁸⁷ J. Willis, "Administrative Law and the British North America Act" [1939] 53 Harv. L. Rev. 251 at 264-71; see also J. Willis, "Section 96 of the British North America Act" (1940) 18 Can. Bar Rev. 517, and J. Willis, "Administrative Law in Canada" (1961) 39 Can. Bar Rev. 251 at 256. Morris Shumiatcher also noted the difficulty caused by s.96 jurisprudence for provincial governments facing problems that required their intervention; see M. C. Shu-

Frankfurter was an adherent, Willis wanted the expertise of the administrators to ameliorate the economic problems of the state, especially during the Great Depression, and not to be obstructed by legalism. Professor Willis described his form of functionalism as follows:

The problem is neither one of law nor of formal logic, but of expediency. The functional approach examines, first, the existing functions of existing governmental bodies in order to discover what kind of work each has in the past done best, and assigns the new work to the body which experience has shown best fitted to perform work of that type. If there is no body, a new one is created *ad hoc*.⁸⁸

In his critical review of the McRuer report concerning civil rights in Ontario, Professor Willis launched a radical functionalist attack upon McRuer's extreme normativist approach. Willis noted that the report reflected a lawyer-centered viewpoint without enough emphasis upon the administration.⁸⁹ As a result, it was abstract. He disapproved of the further legalization of the administrative process and its subjection to more judicial review. Willis stated that the question as to who should have the authority to overturn decisions should be answered in the circumstances of each case according to a "principle of uniqueness."⁹⁰

In opposition to Laskin's view, Willis sided with Frankfurter in his condemnation of jurisdiction as a "weasel" word describing a concept that was too open to judicial manipulation for the purposes of intervention.⁹¹ He identified similarities with Professor Hogg's deference to administrative tribunal decisions in his own views, but advocated the abolition of the general supervisory power

miatcher, "Section 96 of the British North America Act Re-examined" (1949) 27 Can. Bar Rev. 131.

⁸⁸ J. Willis, "Three Approaches to Administrative Law: The Judicial, The Conceptual, and the Functional" (1935) 1 U.T.L.J. 53 at 75. This quotation describing Willis' form of functionalism contains unmistakable echoes of Holmes' empiricism: "The life of the law has not been logic: it has been experience. The felt necessities of the time, prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men [and women], have had a good deal more to do than the syllogism in determining the rules by which men [and women] should be governed." See O. W. Holmes, Jr., *The Common Law* (Boston: Little, Brown and Company, 1923) at 1.

⁸⁹ J. Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 U.T.L.J. 351 at 353.

⁹⁰ *Ibid.* at 359.

⁹¹ Willis, "Canadian Administrative Law in Retrospect", *supra* note 33 at 244.

of the courts.⁹² Willis preferred specific provisions that defined for each tribunal those issues which were appealable.⁹³

The great weakness of Willis' functionalism was his excessive faith in government and expertise which he had acquired in the Great Depression. Willis had described himself as "a 'what actually happens' man."⁹⁴ Although he was sensitive to the effective operation of the administration, he did not give adequate attention to the human propensity to abuse power. This pivotal point is not mere "theology,"⁹⁵ but historical experience that cannot be downplayed in administrative law without serious consequences for individual lives and governmental legitimacy.⁹⁶

The radical functionalist views of Professor H. W. Arthurs are very similar to those of Professor Willis and to the "scientific" approach in American legal thought which endorsed a distrust of the courts and a reliance on expertise theories. Professor Arthurs has contrasted "legal centralism" with "legal pluralism."⁹⁷ Legal centralism, which is similar to the legalist approach or normativ-

⁹² *Ibid.*

⁹³ *Ibid.* In his earlier work, Willis had favoured the creation of specialized administrative courts to correct administrative errors and abuses; see Brown, *supra* note 33 at 48–49, 69.

⁹⁴ Willis, "Canadian Administrative Law in Retrospect", *supra* note 33 at 225.

⁹⁵ *Ibid.* at 244.

⁹⁶ Throughout history many have warned wisely about the abuse of power. No generation escapes this reality of human existence. The best safeguard lies in designing systems which reduce the ever present danger. Aristotle observed that "he [she] who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men [women]." (See Aristotle, *The Politics*, T. A. Sinclair, translator, revised by T. J. Saunders (New York: Penguin Books, 1981) at 226.) United States President John Adams (1797–1801) believed that "[r]eligion, superstition, oaths, education, laws, all give way before passions, interest, and power." (See D. McCullough, *John Adams* (New York: Simon & Schuster, 2001) at 377.) Lord Acton's warning in 1887 continues to resound: "Power tends to corrupt and absolute power corrupts absolutely." (See Lord Acton, *Essays on Freedom* (Gloucester, Mass.: Peter Smith, 1972) at 335–336.) Senator Sam Ervin, who led the Congressional investigation of the Watergate scandal in the United States in the early nineteen-seventies, observed that because law is not self-executing it sometimes is in the hands of those who are faithless to its precepts. (See S. J. Ervin, Jr., *The Whole Truth: The Watergate Conspiracy* (New York: Random House, 1980) at 312.)

⁹⁷ H. W. Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985). Arthurs objected to the imposition of common law values on statutory schemes; see Allan, *supra* note 19 at 110–111; see also L. K. Wroth, "Pluralism and Uniformity in the Common Law Legal Tradition" (1988) 37 U.N.B.L.J. 76 at 76. Professor Arthurs has been a professor and Dean (1972–1977) of Osgoode Hall Law School of York University. He was President of York University (1985–1992). In 1995 he was appointed University Professor of Law and Political Science at York University.

ism, focuses on a uniform legal system which authoritatively articulates, interprets, and applies law. Legal pluralism accepts that law takes many forms and can be administered by varied and decentralized tribunals.⁹⁸ Professor Arthurs has shown that legal pluralism existed in English legal history, and that elements of it continue to exist in modern administrative agencies.⁹⁹ He believes that these elements should be encouraged, and that judicial review should be narrowed significantly to three functions. The courts should ensure that tribunals perform tasks which are “generically confided in them,” protect “transcendent constitutional values,” and enforce fidelity to the distinctive “law” of the tribunal.¹⁰⁰ These guidelines are vague, although they are to be construed with the objective of maximizing the tribunal’s autonomy.

Like Felix Frankfurter’s idealized bureaucratic model, this conception of the administrative state exalts integration over independence in the reviewing process. Despite conscientious efforts to design procedures which will minimize errors and abuses, it is probable that both will occur in this human endeavor. In the correction of fundamental errors or the control of abuses of power, great emphasis is placed on the internal mechanisms of the same administration which initially committed the errors or abuses of power. In the nation’s many smaller jurisdictions, the separation between the administrative tribunal personnel and those appeal tribunal administrators which could promote independence will not be great. Personal relationships could impair professional judgments. The concern that aggrieved individuals may be deprived of recourse because of the narrowing of judicial review is characterized by Professor Arthurs as “pathology.”¹⁰¹ The hope is expressed that there will be “greater justice for more people.”¹⁰²

Following the *Crevier* decision, Arthurs criticized the structure of judicial review as “largely incoherent” and beyond reorganization through “diligent scholarship.”¹⁰³ He declared that he favoured limitations upon judicial review, if not its “virtual abandonment.”¹⁰⁴ Arthurs’ categorical segregation of individual-

⁹⁸ Wroth, *ibid.* at 76–77.

⁹⁹ *Ibid.* at 79.

¹⁰⁰ H. W. Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 *Osgoode Hall L. J.* 1 at 44–45 [Arthurs, “Rethinking Administrative Law”]. Judicial review was effective to correct abuses of natural justice, “total irrationality,” or action beyond the competence of the tribunal (at 42).

¹⁰¹ *Ibid.* at 44.

¹⁰² *Ibid.*

¹⁰³ H. W. Arthurs, “Protection Against Judicial Review” (1983) 43 *R. du B.* 277 at 284.

¹⁰⁴ *Ibid.*

istic values attributed to the courts (normativism) from the collectivist values attributed to agencies (functionalism) has been described as a “recipe for irreconcilable conflict.”¹⁰⁵

Against the backdrop of the spectrum of possibilities, the Supreme Court of Canada has developed a test during the last quarter century to ascertain the standard of review which incorporates elements of the functionalist style of public law. A “pragmatic and functional analysis” is employed to review all impugned administrative decisions which creates a “spectrum” of three fixed standards: correctness to reasonableness *simpliciter* to patent unreasonableness.¹⁰⁶ In order to determine the standard of review, the court considers: (1) the presence and strength of a privative clause or a statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court concerning the issue in question; (3) the purpose of the legislation and of the particular provision; and (4) whether the nature of the problem is a question of law, fact, or mixed law and fact.¹⁰⁷

Justice Iacobucci, a leading architect of the judicial review spectrum, has traced the movement away from Dicey in Canadian administrative law to the

¹⁰⁵ Janisch, “Bora Laskin and Administrative Law”, *supra* note 81 at 578–579.

¹⁰⁶ The “pragmatic or functional” analysis was first described by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 [Bibeault]. The “patently unreasonable” standard of review was first formulated by Dickson J., as he then was, in *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227 [C.U.P.E.]. The “reasonableness simpliciter” standard was articulated by Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 [Southam].

¹⁰⁷ The factors to determine the level of deference have been stated consistently by the Supreme Court of Canada in numerous cases including: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539; *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727; and *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152.

In a potentially significant development, Justices LeBel and Deschamps have recently questioned the continued usefulness of the patently unreasonable standard, and suggested the possibility of a two standard system of judicial review; see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, and *Voice Construction Ltd. v. Construction & General Workers' Union*, Local 92, [2004] 1 S.C.R. 609.

adoption of Professor Willis' brand of functionalism: "Fifty years after Professor Willis proposed the functional approach to administrative law in general, the Supreme Court of Canada had come to embrace it on the crucial issue of judicial review."¹⁰⁸ Near the end of his career, Professor Willis had believed that his views were "doomed to oblivion."¹⁰⁹ Professor Arthurs had referred to his comparatively radical version of functionalism as containing "heresies."¹¹⁰ Considering Iacobucci J.'s declaration, heresy has become orthodoxy, and orthodoxy has become heresy.

IV. ORGANIZED CONFUSION: DISTURBING THE DELICATE BALANCE

Although Justice Iacobucci has recently retired from the Supreme Court of Canada, his enthusiastic endorsement of functionalism will continue to influence administrative law jurisprudence.¹¹¹ In a speech to the Conference of Ontario Boards and Agencies, he declared:

In my ten years as a judge, I have come to admire and respect administrative boards, agencies and tribunals, as I have trial judges....

The judicial expression of this respect and admiration is the doctrine of judicial deference. The amount of deference a reviewing court is willing to grant to a decision of an administrative body determines the standard of review to be applied by the Court.¹¹²

In a subsequent law journal article, Iacobucci J. also stated that his former academic colleague, the late John Willis, is "[o]ne of ...[his] legal heroes" whose vision of judicial deference to administrative action is now being fulfilled by the

¹⁰⁸ Iacobucci, "Articulating a Rational Standard of Review Doctrine", *supra* note 9 at 868.

¹⁰⁹ Willis, "Canadian Administrative Law in Retrospect", *supra* note 33 at 244.

¹¹⁰ Arthurs, "Rethinking Administrative Law", *supra* note 100 at 1.

¹¹¹ Mr. Justice Iacobucci retired from the Supreme Court of Canada on 30 June 2004; see Supreme Court of Canada, News Release (22 March 2004) <<http://www.lexum.umontreal.ca/csc-scc/en/com/2004/html/04-03-22.wpd.html>>.

¹¹² Mr. Justice F. Iacobucci, "Judicial Deference: Notes for Remarks by the Honourable Mr. Justice Frank Iacobucci," online: Society of Ontario Adjudicators and Regulators <http://www.soar.on.ca/COBA%20Papers/COBA-98_Iacobucci.pdf> [Iacobucci, "Judicial Deference"]. Iacobucci J. cites Justice William O. Douglas of the United States Supreme Court (1939–1975) as stating that the Supreme Court was not a Supreme Legislature. It is strange that Douglas, generally a judicial activist, is cited counselling judicial deference. For a description of Douglas' judicial approach see J. F. Simon, *Independent Journey: The Life of William O. Douglas* (New York: Harper & Row, Publishers, 1980).

courts.¹¹³ Other scholars have described Willis as the “most important proponent of the dissenting tradition” against normativism,¹¹⁴ and “one of the most zealous proponents of the administrative state.”¹¹⁵ The spectrum of scholarship traced in this article clearly identifies Willis as a radical functionalist. Willis described himself as follows: “Beware of the lecturer; he is not detached; he has a platform, a point of view, which colours everything he says. He is a ‘government man,’ a ‘legislation man,’ and a ‘what actually happens’ man.”¹¹⁶ An embrace of Willis’ brand of functionalism distorts the compromises contained in the Supreme Court’s pragmatic and functional approach, could constrain the judicial perspective, and potentially diminishes the judicial function in preventing and controlling abuses of public power.

Iacobucci J. traced the C.U.P.E. decision and the adoption of the pragmatic and functional approach in *Bibeault* to Willis’ scholarship.¹¹⁷ Justice John Evans, a committed functionalist did not perceive such a neat connection. He believed that Justice Dickson was engaged in “doctrinal hedging” in C.U.P.E. which Dickson “may have contrived in order to secure unanimity on the Court....”¹¹⁸ Two of Dickson’s recent biographers assert that C.U.P.E. was “a halfway house” which encouraged judicial deference, but not judicial abdication.¹¹⁹ Cognizant of the judicial politics associated with the fierce struggle between normativism and functionalism, perhaps Dickson J. realized that “the height of political artistry is the concealment of shifts in policy behind a façade

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- ¹¹³ Iacobucci, “Articulating a Rational Standard of Review Doctrine”, *supra* note 9 at 860, 865. Following his retirement from the Supreme Court of Canada, Honourable Frank Iacobucci repeated his praise for Willis’ approach, and stated that “[c]ourts should provide guidance, not supervision.” (See John Jaffey, “Iacobucci Lectures at Labour Law Conference in London” *The Lawyers Weekly* (5 November 2004) 3 at 13.)
- ¹¹⁴ J. M. Evans *et al.*, *Administrative Law: Cases, Text, and Materials*, 4th ed. (Toronto: Emond Montgomey Publications Limited, 1995) at 29.
- ¹¹⁵ Brown, *supra* note 33 at 45.
- ¹¹⁶ Willis, “Canadian Administrative Law in Retrospect”, *supra* note 33 at 225.
- ¹¹⁷ Iacobucci, “Articulating a Rational Standard of Review Doctrine”, *supra* note 9 at 865–868.
- ¹¹⁸ Mr. Justice J. M. Evans & T. Knight, “Cory on Administrative Law: A Contextual Study” in P. J. Monahan & S. A. Forbes, eds., *Peter Cory at the Supreme Court of Canada 1989–1999* (Manitoba: Canadian Legal History Project, 2001) 71 at 77.
- ¹¹⁹ Sharpe & Roach, *supra* note 46 at 174. In C.U.P.E., *supra* note 106, Dickson J. articulated a very deferential standard of review. However, he also included a similar list of nullifying errors contained in *Anismic Ltd. v. Foreign Compensation Commission et al.*, [1969] 2 A.C. 147, which he had referred to in *Service Employees’ International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382. This list of errors could be used to justify judicial intervention.

of adherence to immutable principles."¹²⁰ Evans J.A. described *Bibeault* not as an endorsement of Willis' ideas, but as a "judicial compromise" between the functionalists and the normativists camouflaged by Willis' label.¹²¹

In addition to glossing over the complicated compromises in the case law, an unabashed endorsement of extreme functionalism could narrow the judicial outlook. Iacobucci J. was a professional colleague and admirer of John Willis who took a strong stand limiting judicial review. In several previous positions, Iacobucci J. acquired extensive administrative experience.¹²² The members of the judiciary must struggle daily against a personal "stream of tendency" or "outlook on life" acquired before their judicial service which affects the judgment process if a high level of impartiality is ever to be attained.¹²³ Impartiality does not necessitate that a judge have no opinions, but it does require that he or she be "free to entertain and act upon different points of view with an

¹²⁰ N. Miller, *FDR: An Intimate History* (Lanham, Maryland: Madison Books, 1983) at 352. Miller was comparing the political methods of twentieth century United States President Franklin Roosevelt with those of nineteenth century British Prime Minister Benjamin Disraeli.

¹²¹ Evans & Knight, *supra* note 118 at 76.

¹²² Iacobucci J. has served as a university administrator (Dean of Law and University Vice-President), Ontario Securities Commission member (1982–1985), and federal Deputy Attorney General; see Supreme Court of Canada, "The Honourable Mr. Justice Frank Iacobucci," online: Supreme Court of Canada <http://www.scc-csc.gc.ca/aboutcourt/judges/iacobucci/index_e.asp>. Shortly following his retirement from the Supreme Court of Canada, Honourable Frank Iacobucci was appointed the Interim President of the University of Toronto; see University of Toronto Governing Council, "Appointment of Interim President," online: University of Toronto Governing Council <<http://www.utoronto.ca/govcncl/interim-president.html>> , and Jane Stirling, "Iacobucci Named Interim President," *University of Toronto Bulletin* (23 August 2004) 1. Honourable Peter Cory, another retired Supreme Court of Canada judge, serves as the Chancellor of York University, which is a comparatively symbolic position; see Michael Todd, "A Justice For All" *York U* 1:5 (Summer, 2004) 18.

Andrew Roman has noted that most commentators in Canadian administrative law have been "heavily influenced" by Willis, Laskin, and Arthurs who have taken an anti-judicial review position; see A. Roman, "The Pendulum Swings Back: Case Comment: *W. W. Lester (1978) Ltd. v. U.A., Local 740*" (1991) 48 Admin. L. R. 274 at 276.

¹²³ B. N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921, reprinted 1946) at 12; see also I. C. Rand, "The Role of An Independent Judiciary in Preserving Freedom" (1951–1952) 9 U.T.L.J. 1 at 6–7 [Rand, "The Role of An Independent Judiciary"].

open mind."¹²⁴ A national appellate court must strive to maintain a broad perspective.

Finally, Willis' conception of judicial review, which has become fashionable, leans too far in the direction of trusting the administrators. There is a pressing need for a more balanced viewpoint. Both deference and intervention must be based on careful reason, not ideological reflex. Although judicial imperialism is to be avoided, courts can still play a significant role in preventing and controlling abuses of public power. Contemplating the interacting dynamics of the executive and judicial branches in modern government, Justice Rand's observations still resonate in the twenty-first century:

The centuries have brought changes in roles and institutions, but the primal instincts remain.... Great executives, by the nature of their gifts and their internal compulsions, drift to domination. They are now essential to government; democracy must avail itself of their abilities; but it must, at the same time, maintain counterbalancing agencies against their tendency. The most immediate of these is the court in its duty to keep executive action within the boundaries of the country's laws.¹²⁵

V. CONCLUSION

The expansion of the Canadian administrative state during the past one hundred years has placed the provincial superior courts in an uncertain position in relation to the provincial administrative tribunals. It is not apparent what adjudicative functions and how much supervisory power the courts should possess as part of their core jurisdiction, which is based on the judicature provisions of the *Constitution Act, 1867*, and the rule of law concept.

A. V. Dicey's rule of law theory provided for equality before the law and the preclusion of arbitrary power. The Progressives opposed the Diceyite faith in judicial review, and envisioned a greater role for the state in administering government programs aimed at achieving socioeconomic change. Professor Frankfurter was a leading proponent of this approach. Two styles of public law thought emerged from the clash of the Diceytes and the Progressives. These two models are "normativism" and "functionalism." In the definition of the rule of law contained in the Canadian Constitution, the Supreme Court of Canada has adopted the Diceyite view found in normativism. However, the functional-

¹²⁴ *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484 at 504, L'Heureux-Dubé and McLachlan JJ. *R.D.S.* is quoted with approval in Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at 31.

¹²⁵ Rand, "The Role of An Independent Judiciary", *supra* note 123 at 9-10. In a recent speech, McLachlin C.J.C. quoted Dicey with approval in declaring that courts "stand as a bulwark to ensure that the government acts within its lawful powers." See Right Honourable Beverley McLachlin, "The Role of the Courts," online: University of Western Ontario Faculty of Law <<http://www.law.uwo.ca/mainSite/info-news/Chiefspeech.htm>>.

ist corrective of *laissez-faire* economics has been accorded significant validity. There has been judicial deference to administrative decisions regarding economic regulation, and this deference has been expanded to multiple areas of administrative expertise.

The examination of the views of six Canadian scholars, spanning almost seventy years, outlines the spectrum of possibilities moving ideologically from right to left and jurisprudentially from nomativism to functionalism. A wide-ranging analysis of the provincial superior courts' role involves an overlap of comparative administrative law, constitutional law, legal history, jurisprudence, and judicial politics. This synthesis contains a broader, didactic, and more balanced approach than the advocacy scholarship of the self-interested parties involved in the administrative law system.

Chief Justice J. C. McRuer's legal philosophy was strongly normativist. Professor Lederman adhered to a less dogmatic normativism that allowed for a larger degree of administrative autonomy. Unlike Lederman, Professor Hogg opposes a constitutionally entrenched core of provincial superior court jurisdiction. Bora Laskin commenced his professional career as a committed functionalist, but then tempered his views of administrative autonomy with the normativist requirement to structure administrative discretion. Professor Willis remained an ardent functionalist who believed that more effort should be devoted to building the administrative system, rather than emphasizing the value of judicial review. Professor Arthurs follows a similar course. Both Laskin and Willis were directly affected by Frankfurter's teachings.

A consideration of the two prevailing juridical tests determining the basis and scope of judicial review reveals the influence of the normativist-functionalism struggle. Lederman and Laskin were instrumental in constitutionally entrenching judicial review of provincial administrative decisions for jurisdictional error. Willis' version of functionalism has affected the scope of review pursuant to the "functional and pragmatic approach." The endorsement of Willis' radical functionalism by the Supreme Court could disturb the delicate balance between administrative efficacy and legal requirements.

Finally, this expansive and didactic examination is demonstrative of two overarching analytical concepts. First, the history of social, political, and economic forces plays a major role in the gradual formation of law. Law is rarely written on a *tabula rasa*.¹²⁶ Second, the agents of change that transform the legal landscape are continually forming, disintegrating and reforming. The advantage belongs to those who can identify these forces, and distinguish between what is

¹²⁶ Holmes, *supra* note 88 at 5. For a comment regarding Holmes' historicist approach to law see White, *supra* note 22 at 149.

passing and what is enduring. For “[o]ften do the spirits of great events stride on before the events, and in to-day already walks to-morrow.”¹²⁷

¹²⁷ S. T. Coleridge, “Wallenstein” in J. C. C. Mays, ed., *The Collected Works of Samuel Taylor Coleridge, Poetical Works, Volume III, Plays: Part I* (Princeton, New Jersey: Princeton University Press, 2001) 622 at 887.