

In an emotional presidential address to the Canadian Political Science Association in June 1997, Jane Jenson declared that Canadians ‘face a moment of change.’ ‘To put the matter bluntly,’ she wrote, ‘we face a choice between a *new Canada* and *no Canada*.’¹ Jenson’s address was a celebration of Canada’s post-war citizenship regime, in which the ‘state’s relationship to markets was active and pan-Canadian social programmes replaced provincial and private provision.’² ‘Large projects,’ she wrote, ‘became symbols of our modernity’ – the St. Lawrence Seaway, the Trans-Canada Pipeline, and Expo 67.³ Due to ‘pressures from, among other things, processes of globalization and ideological realignment,’ pressures we ordinarily associate with the rise of neoliberalism,⁴ that regime now was under threat. We were in a moment of transition, Jenson warned us, and it was time to face the facts. Others have been less gloomy about Canada’s prospects in the face of the integrationist pressures associated with economic globalization, in particular, those pressures emanating from Canada’s southern border.⁵ Canada remains resiliently independent, writes Daniel Drache, and continues to be able to pursue a distinctively different political and social project from that of the United States.⁶

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1 Jane Jenson, ‘Fated to Live in Interesting Times: Canada’s Changing Citizenship Regimes’ (1997) 30 *Can. J. of Pol. Sc.* 627 at 633 [‘Fated’].

2 *Ibid.* at 634.

3 *Ibid.* at 635.

4 *Ibid.* at 628.

5 Michael Adams, *Fire and Ice: The United States, Canada, and the Myth of Converging Values* (Toronto, ON: Penguin Canada, 2003). More helpfully, the complex factors resulting in both convergence and divergence are canvassed in Richard Simeon, George Hoberg, & Keith Banting, ‘Globalization, Fragmentation, and the Social Contract’ in Keith Banting, George Hoberg, & Richard Simeon, *Degrees of Freedom: Canada and the United States in a Changing World* (Montreal, QC: McGill-Queens University Press, 1997) 389.

6 Daniel Drache, ‘The Return of the Public Domain after the Triumph of Markets: Revisiting the Most Basic Fundamentals’ in Daniel Drache, ed., *The Market or the Public Domain: Global Governance and the Asymmetry of Power* (London: Routledge, 2001) 37 [‘Return’]; Daniel Drache, *Borders Matter: Homeland Security and the Search for North America* (Halifax, NS: Fernwood, 2004) at x.

Over the past two years alone, however, debates have ensued about North American security perimeters, Canada's joining the United States in war, continental missile-defence shield systems, deeper bilateral integration with the United States, common external tariffs, and the adoption of a North American – wide currency.⁷ If this is no time to be alarmist, neither is it a time to be sanguine about Canada's future.

John Willis was witness to another transition having to do with Canada's 'constitutional culture.' Despite a relatively static constitutional text up until 1982, constitutional values changed over the course of Canada's twentieth century. Willis was not the first or only legal academic to give voice to changing times. He did so in a way, however, that starkly contrasted two competing world views – between the eighteenth-century 'lawyer's values' policing innumerable legislative initiatives not 'particularly tender towards the property of others,'⁸ on the one hand, and the new administrative state, which was designed to set 'public welfare above private rights,'⁹ on the other. The 'banging of constitutional bibles' in the title of this article¹⁰ refers to the theological objections of lawyers to the ascendance of this 'new constitution.'¹¹ By reading John Willis over time, we better understand how one set of values partly, but not entirely, gave way to the other.¹²

By observing transitions in constitutional culture through Willis's work, we also can begin to speculate whether Canadian constitutional culture is undergoing another transition. As Jenson's address suggests, where she bangs a version of her constitutional bible, this one follows from the legal-integrationist push associated with economic globalization. I have in mind the web of legally enforceable investment protections found in the North American Free Trade Agreement's (NAFTA)

7 See the discussion in David Schneiderman, 'Constitutional Culture Post 9-11' [unpublished] ['9-11']. For the most recent statement on some of these matters, see Independent Task Force on the Future of North America, 'Creating a North American Community: Chairmen's Statement' (2005); online: Council on Foreign Relations <http://www.cfr.org/pub7912/independent_task_force_report/creating_a_north_american_community_chairmens_statement.php>; William F. Weld, Pedro C. Aspe, & John P. Manley, 'North America the Beautiful' *Wall Street Journal* (23 March 2005); Thomas D'Aquino, 'Beyond Missiles' *The National Post* (4 March 2005) FP19.

8 John Willis, 'Statutory Interpretation in a Nutshell' (1938) 16 *Can.Bar Rev.* 1 at 21 ['Nutshell'].

9 John Willis, 'Three Approaches to Administrative Law' (1935-6) 1 *U.T.L.J.* 53 at 59 ['Approaches'].

10 John Willis, 'Administrative Law – Statute Interpretation – Real Constitution versus Lawyer's Constitution – Form versus Substance – Courts and Public Law' (1951) 29 *Can.Bar Rev.* 572 at 572, 580 ['Administrative Law'].

11 John Willis, 'Canadian Administrative Law in Retrospect' (1974) 24 *U.T.L.J.* 225 ['Retrospect'].

12 John Willis, 'Foreign Borrowings' (1970) 20 *U.T.L.J.* 274 ['Foreign Borrowings'].

Chapter 11 and in the many bilateral investment treaties that have been signed by Canada and most states in the world, protections that are discussed in the first part of this article. The question attended to in the second part of the article is whether this regime signals the beginnings of a shift of constitutional culture in the direction of market citizenship (a phenomenon not confined, of course, to Canada alone).¹³ Or perhaps, more accurately, the question is whether this represents a return to a past where state regulation of the market was actively discouraged, if not legally constrained. If Willis's *oeuvre*¹⁴ is documentary witness to Canadian constitutional culture in transition over the last century, as a result of structural changes occurring within and beyond Canada, that culture may be undergoing further change, movement in a direction that probably would have alarmed Willis.

I

The idea of a constitutional 'culture,' admittedly, is opaque¹⁵ and not very well developed in the literature.¹⁶ What I have in mind is dominant understandings of the fundamental norms that guide relations between citizens and states (and also among institutions of the state).¹⁷ These may be represented not only in constitutional texts and court decisions (what Willis called 'lawyer's law'), but also in scholarship, the work of legislatures, media reports, and the work of social movements or non-

13 Janine Brodie, 'Meso-discourses, State Forms and the Gendering of Liberal-Democratic Citizenship' (1997) 1 *Citizenship Studies* 223.

14 I have examined only part of it. Those works are cited in *supra* notes 8–12 & *infra* notes 36, 47, 49, & 80.

15 Terry Eagleton, *The Idea of Culture* (Oxford: Blackwell, 2000).

16 See, e.g., John Ferejohn, Jack N. Rakove, & Jonathan Riley, eds., *Constitutional Culture and Democratic Rule* (Cambridge, UK: Cambridge University Press, 2001); Miroslav Wyrzykowski, ed., *Constitutional Cultures* (Warsaw: Institute for Public Affairs, 2000); Bernhard Schlink, 'German Constitutional Culture in Transition' in Michael Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham, NC: Duke University Press, 1994) 197 ['German Constitutional']; Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkeley, CA: University of California Press, 1989).

17 I have discussed the idea of constitutional culture in a number of recent articles: see David Schneiderman, 'Canadian Constitutionalism, the Rule of Law, and Economic Globalization' in Patricia Hughes & Patrick A. Molinari, eds., *Participatory Justice in a Global Economy: The New Rule of Law* (Montreal, QC: Éditions Thémis, 2004) 64 ['Canadian Constitutionalism']; Schneiderman, '9-11,' *supra* note 7; David Schneiderman, 'Social Rights and Common Sense: *Gossetin* through a Media Lens' in Gwen Brodsky, Shelagh Day, & Margot Young, eds., *Social and Economic Insecurity: Rights, Social Citizenship and Governance* (Vancouver, BC: UBC Press, forthcoming) ['Social Rights']; David Schneiderman, 'Property Rights, Investor Rights, and Regulatory Innovation: Comparing Constitutional Cultures in Transition' (2004) [unpublished].

governmental organizations.¹⁸ It is in these places that understandings about constitutionalism, rights, and citizenship are formulated and articulated. These diverse resources help to locate dominant values regarding the fundamental norms associated with citizenship in a constitutional polity. Constitutional culture represents an amalgam of these basic rules: those claims that can be 'plausibly argued and forcibly maintained' in the public sphere.¹⁹ The advantage of turning to constitutional culture, as I suggested earlier, is that it assists in understanding constitutional shifts over time, beyond the more obvious constitutional amendments or shifts in judicial doctrine.

Constitutional culture may be understood as related to the idea of 'political culture.' According to Almond and Verba, the study of political culture is concerned with public attitudes that help to sustain successful political systems;²⁰ these attitudes are associated with what Alexis de Tocqueville referred to as *moeurs*.²¹ While public values and attitudes are important considerations, the study of constitutional culture attends to a narrower range of norms and institutions than those that sustain a system of politics. It might be likened to the study of 'legal culture,' referring to the values and attitudes that sustain a viable legal system.²² The study of constitutional culture, however, is less concerned with views about courts,

- 18 Francis Snyder, 'The Unfinished Constitution of the European Union: Principles, Process and Culture' in Joseph H.H. Weiler & Marlene Wind, eds., *European Constitutionalism beyond the State* (Cambridge, UK: Cambridge University Press, 2003) 55 at 69. See Schneiderman, 'Social Rights,' supra note 17 as an example of this sort of work. In some of my other work, I use constitutional culture in order to locate distinctiveness or difference in national constitutional systems. See also, Schlink, 'German Constitutional,' supra note 16, which identifies competition between judicial and academic discourse in Germany as an example of distinctiveness and a constitutional culture in transition.
- 19 J. Philip Reid, 'In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution' (1974) 49 N.Y.U.L.R. 1043 at 1087. This follows Habermas's description of 'publicity' in the constitutional state: 'Public debate was supposed to transform *voluntas* into a *ratio* that in the public competition of private arguments came into being as the consensus about what was practically necessary in the interest of all.' Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. by Thomas Burger with Frederick Lawrence (Cambridge, MA: MIT Press, 1991) at 83.
- 20 Gabriel A. Almond & Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Boston, MA: Little, Brown, 1965) at 12.
- 21 Cited by Sheldon S. Wolin, *Tocqueville between Two Worlds: The Making of a Political and Theoretical Life* (Princeton, NJ: Princeton University Press, 2001) at 33. Wolin describes *moeurs* as referring to 'the habits and customs, the transmitted experience, which human beings employ in their daily political and social life and which become engrained in their conduct': *ibid.* at 223.
- 22 Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge, MA: Harvard University Press, 1990) at 4; Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975) at 15.

law, and legal processes generally and more interested in the set of basic norms that both make and maintain a political community over time.

These norms may not be shared equally among all citizens or branches of the state – indeed, numerous subcultures may give expression to different or variable foundational rules.²³ There will be those that are predominant, however, and they will be portrayed by leading cultural agents as representing ‘shared values.’²⁴ These custodians of constitutional culture help to outline the parameters of what may be considered the dominant social consensus on pressing questions reflective of the basic rules. If the project of identifying the parameters of constitutional culture is to seek out dominant norms, we must remain attentive to the fact that such an exercise will always be partial and exclusionary.²⁵

Relatedly, constitutional culture will change over time. Culture is ‘contested, temporal and emergent’²⁶ and so is always in ‘transition.’²⁷ Constitutional culture, according to this view, is open continuously to contestation. Yet, Keenan maintains, polities require some form of closure so as to preserve a semblance of order and identity.²⁸ These very acts of closure, however, should give rise to questions about the possibilities that are foreclosed within that settled order. This, then, gives rise to counter-hegemonic acts of resistance and new forms of imagining political community. In this way, culture is more accurately, as Eisenstadt puts it, both ‘order-maintaining’ and ‘order-transforming.’²⁹ Methodologically, this suggests that we should be able to identify, with some degree of confidence, dominant views about constitutional culture in any given period. Though these views should be considered in transition, they usually will not change as suddenly as the identities of those social actors who view culture as a ‘tool kit’ with which continually to transform

23 In which case, it may be more appropriate to say that I have in mind, in this article, an English-speaking constitutional culture.

24 Stuart Hall, ‘The Rediscovery of “Ideology”: The Return of the Repressed in Media Studies’ in Michael Gurevitch, Tony Bennett, James Curran, & Janet Woollacott, eds., *Culture, Society and the Media* (London: Routledge, 1985) at 85.

25 Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002) at 8.

26 James Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art* (Cambridge, MA: Harvard University Press, 1988) at 19.

27 Margaret Jane Radin, *Reinterpreting Property* (Chicago, IL: University of Chicago Press, 1993); Marc R. Poirier, ‘The NAFTA Chapter 11 Expropriation Debate through the Eyes of a Property Theorist’ (2003) 33 *Envtl.L.* 851 [‘NAFTA’].

28 Alan Keenan, *Democracy in Question: Democratic Openness in a Time of Political Closure* (Stanford, CA: Stanford University Press, 2003) at 69.

29 E.N. Eisenstadt, ‘The Order-Maintaining and Order-Transforming Dimensions of Culture’ in Richard Münch & Neil J. Smelser, eds., *Theory of Culture* (Berkeley, CA: University of California Press, 1992) at 83.

themselves.³⁰ The dynamism inherent in this process makes it a difficult task to pin down constitutional culture – a task that always will be partial and incomplete.

David Dyzenhaus has helpfully resurrected the work of neglected Weimar-era legal theorist, Hermann Heller, and Heller, to my mind, understands constitutionalism along similar lines. What Heller calls the ‘normed constitution’ is made up of ‘customs, ethics, religion, tact, fashion, and so on’³¹ – the ‘whole natural and cultural milieu, the anthropological, geographic, national, economic and social normalities.’³² For Heller, the content of the constitution was not merely determined by text, or by virtue of the ‘standpoints and characteristics of legislators’ alone, but also by citizens – by the ‘characteristics of the norm addressees who observe them.’³³ In this way, Heller understands norms as an integrated system of rules developed by the ‘participants’ themselves, who cooperate in what Heller describes as a ‘multiplicity of performances.’³⁴ It is the constitutional practice of a citizenry that informs the ‘normed constitution.’³⁵

This understanding of culture, then, is a dynamic and contested one – it speaks to a system of action, something in process. The research project associated with constitutional culture should attend to these processes of change and, in particular, identify the pressure points at which constitutional culture begins noticeably to shift in one direction or another. This is one of the advantages, then, of investigating constitutional culture: as an aid to understanding shifts in constitutional values beyond the formal constitutional system of a given polity. It helps us to track not only shifts that have occurred in the past (*e.g.*, by examining Willis’s scholarship, the object of this article) but also ongoing developments precipitated by the rules and institutions of economic globalization. Locating constitutional values in the processes we associate with globalization enables us to map changes that otherwise fall under the purview of other disciplines. It is my view that processes leading to a shift in the direction of constitutional culture may be taking place in Canada at present. Before attending to contemporary shifts, let me illustrate this system of action by drawing on Willis’s work. Though much of what

30 Consider branding or piercing of the skin, for instance: John Fiske, *Understanding Popular Culture* (London: Routledge, 1989) at 28.

31 Herman Heller, ‘The Nature and Structure of the State,’ trans. by David Dyzenhaus (1996) 18 *Cardozo L.R.* 1139 at 1187.

32 *Ibid.* at 1191.

33 *Ibid.*

34 *Ibid.* at 1174. An idea familiar to readers of Martha-Marie Kleinhaus & Roderick A. Macdonald, ‘What is Critical Legal Pluralism?’ (1997) 12:2 *Can.J.Law & Soc’y* 25.

35 Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago, IL: Chicago University Press, 1999) at 39.

follows concerns debates internal to law, these debates incorporate ideas about law, legislatures, and popular opinion and so shed light on constitutional culture as a diagnostic tool.

II

Willis was witness to an ongoing 'minor revolution' in constitutional law.³⁶ Working in the new field of administrative law, Willis saw important connections between constitutional principles, operative at least since Blackstone's time and carried forward by Dicey, and the hostility to what might be called a new 'departmentalism.'³⁷ In US constitutional theory, the 'departmental' conception of judicial review rejects judicial finality and, instead, envisages all three branches of government as being assigned interpretive roles. Finality, in the departmental view, refers to constitutional practice – to 'a continued harmony of views among all three departments.'³⁸ In the early part of the twentieth century, the application, interpretation, and performance of governmental functions was spreading across a wide spectrum of institutions and actors. These, in effect, were new and legitimate branches of government being assigned interpretive authority by legislatures. At this time, the 'State had changed its character, had ceased to be soldier and policeman, and was rapidly becoming protector and nurse,' wrote Willis.³⁹ This was a period of 'transition' in which 'one would naturally expect to find new methods of legislation existing side by side with the old.'⁴⁰

Willis traced the beginnings of this movement to the early part of the twentieth century, with the crushing defeat of the Conservatives by the Liberal Party in the UK general election of 1906 (and an accompanying rise in Labour's proportion of the popular vote).⁴¹ At this time, there was not only a minor revolution in government but 'a major revolution in the expectations of every British subject.'⁴² For 'the first time in English history,' Willis wrote, 'an avowedly Socialist party was in the ascendant,

36 John Willis, *Parliamentary Powers of English Government Departments* (Cambridge, MA: Harvard University Press, 1933) at 40 [*Parliamentary Powers*].

37 *Ibid.* at 13.

38 Edwin S. Corwin, *Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government* (Princeton, NJ: Princeton University Press, 1938) at 7; John E. Finn, 'The Civic Constitution: Some Preliminaries' in Sotirios Barber & Robert P. George, eds., *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton, NJ: Princeton University Press, 2001) 41; Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004) at 105ff.

39 Willis, *Parliamentary Powers*, supra note 36 at 13.

40 *Ibid.*

41 Max Beer, *A History of British Socialism* (London: George Allen & Unwin, 1919) at 324.

42 Willis, *Parliamentary Powers*, supra note 36 at 40.

and its ideas coloured, even directed, the policy of the Liberals and the Conservatives.⁴³ At a time when a zeal for institutional reform prevailed, Lord Haldane legitimately could proclaim in 1920 that 'all parties in the State were Socialists now.' In testimony before Sankey's national coal commission, Haldane endorsed the spread of public enterprise, noting that 'public spirit and devotion to duty'⁴⁴ were as potent a motive as the 'desire to make a fortune.'⁴⁵

Willis's early writing documented the emergence of the new administrative state and the reactionary devices used by lawyers and courts to subvert the aims of this new departmentalism. At this time, Willis's thoughts turned to Canada, as he began mapping out the consequences of this transition for Canadians. Canada, Willis rightly observed, sat uneasily between England and the United States. Having abandoned British social and cultural influences, Canada retained a connection only with British parliamentary institutions. In its place, Canadians now embraced US influences. England and the United States 'are at once familiar and strange.' Though 'the British North America Act has given us "a constitution similar in principle to that of the United Kingdom," ... socially, economically, and culturally we are almost a part of the United States,' Willis observed.⁴⁶

Canadian constitutional law also sat uneasily in the shadow of these influences. Unlike in the United States, there was no penchant in Canada for writing down a list of rights. Canadians 'have never shared the American legalistic passion for debasing general precepts of decency into detailed paper rules,' wrote Willis.⁴⁷ Hence, there was no judicial 'finality' in English and Canadian constitutional law. Following Diceyan precepts, no rights were so fundamental, 'in England and Canada that they cannot be taken away by Parliament.'⁴⁸ Despite 'the belief of some Canadians that their constitution bears no resemblance to that of the United States,'⁴⁹ the common law presumptions against the taking away of

43 Ibid.

44 R.B. Haldane, *The Problem of Nationalization* (London: George Allen & Unwin, 1921) at 20.

45 Harold J. Laski, *A Grammar of Politics* (London: George Allen & Unwin, 1948) at 215. Haldane's testimony was so applauded by Laski & Tawney that they subsequently arranged to have it published in *The Problem of Nationalization* (1921): *ibid.* Martin Loughlin writes about the period in Martin Loughlin, 'The Functionalist Style in Public Law' 55 U.T.L.J. 361.

46 John Willis, 'Administrative Law in Canada' (1961) 39 Can.Bar Rev. 251 at 254 ['Canada']; Willis, 'Foreign Borrowings,' *supra* note 12 at 280; Willis, 'Retrospect,' *supra* note 11 at 234.

47 Willis, 'Canada,' *supra* note 46 at 264.

48 Willis, 'Approaches,' *supra* note 9 at 60.

49 John Willis, 'Administrative Law and the British North America Act' (1939) 53 Harv. L. Rev. 251 at 254 ['Admin Law and BNA'].

property, interfering with personal liberty, or barring access to the courts amounted to 'an ideal constitution' for Canada.⁵⁰ Together with the unwritten principles of the separation of powers and Dicey's 'rule of law,' they took the place 'of a fundamental written law like the bill of rights in the United States without importing an unreal rigidity into the constitution.'⁵¹ In the *Harvard Law Review*, Willis likened these common law presumptions to the United States due process clause and to a 'pseudo Bill of Rights.'⁵²

Willis, here, made his most significant contribution to our understanding of post-Confederation Canadian constitutional law. Structurally speaking, the Constitution Act, 1867 placed few impediments – the powers of reservation and disallowance, federalism, and a mild version of the separation of powers, come to mind – in the way of energetic government. The Canadian framers envisaged a plan whereby private property would be secure and economic productivity promoted by the exercise of legislative power. With the superb confidence of the Victorians,⁵³ they believed that liberty and property could be secured through the enactment of 'good laws' and that this required the wise and beneficent use of state power.⁵⁴ Willis rightly emphasized this aspect of Canadian constitutional culture: 'Canada has never been, is not and never could be a laissez faire state; it depends for its continued national existence on government action and Canadians have had to accept government regulation as one of the facts of life.'⁵⁵ Judicial interpretation of the constitution more often than not reinforced this interpretation of constitutional culture. The maxim was summed up by A.H.F. Lefroy, in *The Law of Legislative Power in Canada*: once a law is passed by the appropriate level of government, 'it is not competent for any Court to pronounce the Act invalid because it may affect injuriously private rights ... If the subject be within the legislative jurisdiction of the Parliament, or of the Provincial Legislatures, respectively ... effect must be given to it in all Courts of the Dominion, however private rights may be affected.'⁵⁶

Though tending to reinforce this model of 'energetic federalism,' judicial anxieties about unbounded legislative power made themselves heard in various ways: in Lord Watson's narrowing of the federal power

50 Willis, 'Approaches,' supra note 9 at 60.

51 Ibid. at 71.

52 Willis, 'Admin Law and BNA,' supra note 49 at 274 & 281.

53 Edward P. Thompson, 'The Peculiarities of the English' in *The Poverty of Theory and Other Essays* (London: Merlin Press, 1978) 35 at 264.

54 Philip Resnick, 'Jacobin Strains in Canada' in *The Masks of Proteus: Canadian Reflections on the State* (Kingston, ON: McGill-Queen's University Press, 1990) 38 at 45.

55 Willis, 'Canada,' supra note 46 at 253.

56 Augustus H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto, ON: Toronto Law Book, 1897–8) at 279.

to regulate, but not to prohibit, trade and commerce,⁵⁷ for example; or in Chief Justice Ritchie's holding that federal power over fisheries authorized only the enactment of 'general laws' concerning the fishery and not laws that impaired private property rights.⁵⁸ This reading down of federal legislative power was accompanied, in the years 1867 to 1893, by the federal executive's use of the power to disallow provincial enactments that went too far in impairing private property rights. There was a certain 'consistency of purpose,' W.P.M. Kennedy observed, in using the power to disallow 'legislation which appeared to hurt private property, to invalidate contracts, or to be contrary to what were known as "sound principles of legislation."' ⁵⁹ Kennedy detected a parallel between the constitutional power of disallowance and the American design of constitutional limits. The power 'was consistently used during these years,' argues Kennedy, 'to protect those spheres of provincial civil life which are protected explicitly or by implication in the constitution of the United States.'⁶⁰ Willis's contribution to Canadian constitutional law was to build on Kennedy's insights by tracing judicial use of common law presumptions in the twentieth century to achieve similar objectives as had the power of disallowance in the late nineteenth century and the United States due process clause in the late nineteenth and early twentieth centuries. The work reached its zenith in the now modern Canadian classic, 'Statute Interpretation in a Nutshell.'⁶¹

A reading of Willis's work over time reveals how 'lawyers' law' came to tolerate departmentalism of a sort in Canadian constitutional culture. The exchange of letters precipitated by Willis's 1951 comment on the *Nolan* case⁶² in the *Canadian Bar Review* represents well this instance of transition. The case concerned an American barley dealer's constitutional challenge to legislation controlling the price of barley purchased while the government was artificially deflating the cost. In order to forestall 'fortuitous profits' to those who had stored their barley through the lean war years, all barley that was in the hands of commercial dealers in 1947 was vested in the Canadian Wheat Board by executive 'order in

57 *Ontario [A.G.] v. Canada [A.G.]*, [1896] A.C. 348 (P.C.); David Schneiderman, 'A.V. Dicey, Lord Watson and the Law of the Canadian Constitution in the Late Nineteenth Century' (1998) 16 *Law & Hist. Rev.* 495.

58 *R. v. Robertson*, [1882] 6 S.C.R. 52 at 120-1.

59 W.P.M. Kennedy, 'The Nature of Canadian Federalism' in W.P.M. Kennedy, ed., *Essays in Constitutional Law* (London: Oxford University Press, 1934) 25 at 49.

60 *Ibid.* at 49.

61 Willis, 'Nutshell,' *supra* note 8.

62 *The Canadian Wheat Board v. Hallet and Carey Limited and Jeremiah J. Nolan*, [1951] 1 D.L.R. 466 (S.C.C.) [*Nolan*]. David Dyzenhaus examines the case and the exchange of letters in greater detail in 'The Logic of the Rule of Law: Lessons from Willis' 55 *U.T.L.J.* 691 ['Logic'].

council.' That barley then was resold to dealers at the new price, and the price differential accrued to public coffers – the 'layman's "Government."'”⁶³ Mr. Nolan of Chicago, however, 'stood by the lawyer's constitution' and challenged the constitutional authority of the executive to take his property.⁶⁴ The Supreme Court of Canada (4:3), using familiar techniques of statutory interpretation, affirmed lower court rulings that the order in council was not authorized by the statutory authority of the National Emergency Transitional Powers Act 1946. The Transitional Powers Act supplanted the War Measures Act, though many wartime regulations continued in force. The War Measures Act explicitly authorized the 'appropriation ... forfeiture and disposition of property'; the Transitional Powers Act did not expressly do so.⁶⁵ The majority justices applied the old common law maxim, holding that the Act did not authorize the executive to 'compulsorily appropriate private property and arbitrarily fix the compensation to be paid' unless '[its] language makes that intention abundantly clear.'⁶⁶ Justice Cartwright expressed his outrage at the 'outright expropriation' of property, with a 'consequent loss ... in return for what was wholly inadequate compensation.'⁶⁷ Justice Rand contrasted this rhetoric of despotism 'over which individuals may wax lyrical,' with the reality that the transaction was a 'minor item of a vast, complex and consistent administration.'⁶⁸ Justice Rand, nevertheless, ruled that the appropriation of title was not authorized by the Act. The majority (Justice Rand excepted), Willis wrote, 'read that socialistic act of 1946 in the light of a free enterprise canon of legislative intent enunciated by judges of 1880 ... this is to read measures implementing the twentieth century constitution through the spectacles of the nineteenth century constitution.'⁶⁹

Willis's case note precipitated two outraged replies from senior lawyers W. Kent Power of Calgary and W.P. Fillmore of Winnipeg (also counsel to Nolan) in the subsequent number of the *Canadian Bar Review*. Power's hyperbolic reply likened Willis's views to 'Hitlerism' and 'Stalinism.'⁷⁰ Fillmore's letter, as if to prove Willis's point, claimed that 'freedom in thought and speech must go hand in hand with a free economy in which

63 Willis, 'Administrative Law,' supra note 10 at 299.

64 Ibid. at 297.

65 *War Measures Act*, R.S.C. 1927, c. 206, ss. 3(1), 7. The act referred to 'maintaining, controlling and regulating supplies ... use and occupation of property' and to 'continuing or discontinuing' measures adopted during wartime (s. 2[1][e][e]). See also *National Emergency Transitional Powers Act*, S.C. 1945, c. 25, s. 2(1).

66 *Nolan*, supra note 62 at 477 & 491.

67 Ibid. at 493.

68 Ibid. at 481.

69 Willis, 'Administrative Law,' supra note 10 at 302. See Dyzenhaus, 'Logic,' supra note 62, for a discussion of how Willis misread Rand's concurrence.

70 In Willis, 'Administrative Law,' ibid. at 573.

the citizen is at liberty to buy and sell with a view to a profit and in which there is some respect for private property.⁷¹ Willis, in his subsequent rejoinder, pleaded with his correspondents and to the 'many lawyers [in general] to make an effort to understand what is going on and to refrain from demanding that the twentieth century constitution conform to the ideologies of a late seventeenth century constitution which is to be found only in law books.'⁷² Willis's rejoinder took note of the tilt in the direction of constitutional culture. 'Whether we like it or not,' Willis wrote, 'the balance of power has shifted and courts and lawyers are going to have to learn to live with public law and a government which is not going to be less powerful but more powerful.'⁷³ 'I believe and have believed for years,' he wrote, 'that our constitution is changing and that no banging of constitutional bibles is going to stop it.'⁷⁴ Two decades later, Willis satisfyingly observed that 'the world [had] turn[ed] over in its sleep.'⁷⁵ 'In the Canada of 1973, what may be called "the new constitution" [has been] accepted, however grudgingly,' Willis proclaimed.⁷⁶

I will not attempt here to identify all of the factors that precipitated this movement, but one significant factor must have been the perseverance of successive Canadian federal and provincial governments in expanding the role of the administrative arm of the state (departmentalism at work).⁷⁷ The desire of dominant public opinion to achieve these aims through the election returns would have been another, although public opinion, insofar as Willis could discern it, appeared to be ambivalent about this shift. The 'ordinary Canadian,' wrote Willis, deeply respects judges 'and likes to assign to them, as far as possible, the decision of issues arising between citizen and the state.' The 'common man ... learns at his mothers knee that it is from courts that you get "justice."⁷⁸ The Canadian constitutional 'tradition,' however, demands that judges not 'meddle in policy or interfere unduly with the business of government.'⁷⁹ Canadians, he astutely observed, were torn between this tradition and their faith in courts. Nevertheless, Willis wrote, Canadians have not been 'infected with the American disease of court worship.'⁸⁰ Instead,

71 Ibid. at 578.

72 Ibid. at 581.

73 Ibid. at 583.

74 Ibid. at 585.

75 Willis, 'Retrospect,' supra note 11 at 225.

76 Ibid. at 234.

77 Alan C. Cairns, 'The Other Crisis of Canadian Federalism' in Douglas E. Williams, ed., *Constitution, Government, and Society in Canada: Selected Essays by Alan C. Cairns* (Toronto, ON: McClelland & Stewart, 1988) 171.

78 Willis, 'Foreign Borrowings,' supra note 12 at 275.

79 Willis, 'Canada,' supra note 46 at 255.

80 John Willis, 'Civil Rights: A Fresh Viewpoint' [1965] Chitty's L.J. 224 at 227.

they have looked to courts for nothing more than ‘an assurance that [they] will be listened to.’⁸¹ Lawyers, fuelling this public faith in courts, still were ‘inclined to tip the balance too far in the direction of the individual,’ wrote Willis.⁸² The lawyerly class, nevertheless, had by now relented somewhat in the face of an implacable cultural shift.

III

Are we now witness to a transition in another, but familiar, direction, one precipitated by powerful forces (both states and non-state actors) promoting the rules and processes we ordinarily associate with economic globalization? It could be said that Canadian constitutional culture, particularly as regards state capacity to initiate new measures to regulate the market, has remained static in some respects.⁸³ The *Authorson* case⁸⁴ evinces this stagnation. The pension funds of disabled veterans that were administered by the Department of Veterans Affairs had not accrued interest for a significant length of time. The Department only began paying interest in 1990. At that time, Parliament (regrettably) sought to limit liability by prohibiting any claims for interest owed. Authorson and others claimed that they had been deprived of their property without due process of law, contrary to the Canadian Bill of Rights (1960).⁸⁵ The Supreme Court of Canada held that no procedural rights were abridged, either in Parliament or before a court or tribunal; nor was there a substantive denial of property rights. The Canadian Bill of Rights, wrote Justice Major, ‘does not protect against the expropriation of property by the passage of unambiguous legislation.’⁸⁶ The Bill of Rights’ property protections merely gave expression to the common law presumption, the very same one applied by the Court in *Nolan*⁸⁷ and caustically ridiculed by Willis. Parliament was constitutionally entitled to take property without the provision of just compensation, so long as Parliament’s intention to do so was made ‘clear and unambiguous,’ as it was in this instance.⁸⁸ The common law rule thereby swallowed whole the Bill of Rights property guarantee.

Some will view the advent of the Charter as having dramatically changed Canada’s constitutional course. An examination of the structure

81 Willis, ‘Foreign Borrowings,’ supra note 12 at 281.

82 In this, they may only be ‘following what, to judge from the newspapers, is the feeling prevalent in the community generally’: Willis, ‘Retrospect,’ supra note 11 at 234.

83 Drache, ‘Return,’ supra note 6.

84 *Authorson v. Canada (Attorney General)* [2003] 2 S.C.R. 40 [*Authorson*].

85 *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(a).

86 *Ibid.* at para. 51.

87 *Supra* note 62.

88 *Authorson*, supra note 84 at para. 14.

and text of the Charter, however, reveals that there remains a significant degree of legislative room to manoeuvre as regards socio-economic subjects. Property rights, of course, were left out of the Charter at the behest of the provincial premiers.⁸⁹ Other, so-called 'pure' economic rights – such as the inability to interfere with the obligation of contracts – also are absent from the Charter. What remains is a residue of what might be called 'indirect' economic rights, like freedom of expression and mobility rights. I have argued elsewhere that the Supreme Court of Canada, in these kinds of indirect economic rights cases, effectively has conscripted constitutional interpretation as a vehicle for the promotion of market values – a model that valorizes market relations of free individuals through mutual exchange.⁹⁰ In this way, the Court has strayed from the Charter's textual signals in ways that surely would have worried Willis.⁹¹ The Charter, most certainly, has helped to boost the trajectory in constitutional culture that I am describing here.

So these judicial developments are no mere isolated events.⁹² Rather, they complement the global push – represented institutionally by the World Trade Organization (WTO), World Bank, and International Monetary Fund (IMF) – aimed at removing impediments to the free movement of goods, persons, and services across national borders.⁹³ Unconstrained exercises of democratic self-government, represented well by Canadian constitutional culture in the post-war period, are viewed as untrustworthy in this new environment. The rules and institutions we associate with economic globalization have the objective of isolating markets from politics by limiting, through legal means, the capacity of self-governing communities to take measures for the common weal. Limitations on government action through legally enforceable mechanisms are viewed as the preferred means for safeguarding gains made toward global free markets. This does not sit well with the understanding of Canadian constitutional culture promoted by Willis.

The transnational legal framework for the protection and promotion of foreign investment best represents this privileging of free markets. I am speaking of an interlocking network of rules for the liberalization of Foreign Direct Investment (FDI). These rules can be found in more than 2 099 bilateral investment treaties (BITs), to which over 175 countries are

89 Alexander Alvaro, 'Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms' (1991) 24 Can.J.Pol.Sci. 309 at 319–21.

90 Gerald Garvey, *Constitutional Bricolage* (Princeton, NJ: Princeton University Press, 1971).

91 David Schneiderman, 'Exchanging Constitutions: Constitutional Bricolage in Canada' (2002) 40 Osgoode Hall L.J. 401.

92 Schneiderman, 'Canadian Constitutionalism,' *supra* note 17.

93 Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (The Hague: Kluwer Law International, 2002) ['Recharacterizing'].

parties, as well as in regional trade agreements like NAFTA. In other work, I have argued that this investment-rules regime exhibits constitution-like features.⁹⁴ The rules and institutions comprise a strategy of pre-commitment that binds future generations to certain, predetermined institutional forms through which exercises of self-government are channelled, constraining the possibilities for political practice. Like constitutions, these agreements are difficult to amend, include binding enforcement mechanisms together with judicial review, and mirror the language and principles of national constitutions. Tantamount to a bill of rights for investors, the regime entitles investors to sue state parties before international trade tribunals for damages due to violations of investor protections.

Among the investor rights included in the typical investment treaty is the prohibition on expropriations and nationalizations, both direct and indirect, and measures tantamount to expropriation and nationalization. The rule's intended targets are outright takings of title to property by the state, but these have greatly diminished in number and pose little threat to current investment. Rather, what is of concern are 'creeping' expropriations (measures that cumulatively amount to expropriation), 'regulatory' expropriations (measures that so impact on an investment interest that they are equivalent to a taking), and 'partial' expropriations (measures that take only part of an investment interest). Regulatory changes that 'go too far,' in Holmes J.'s famous words,⁹⁵ are intended to be caught by this rule. Though this may be denied by international trade lawyers, there is little doubt that the rule is informed by US constitutional experience under the fifth and fourteenth amendments. Debates in Congress over the granting of 'trade promotion authority' to President George W. Bush confirm this, at least from a US perspective.⁹⁶ As investment treaties capture a greater range of interests, they impose an even broader set of constraints on state behaviour than does the US local rule.⁹⁷ This fact precipitated, in Congress, a rolling back of the scope of the treaty rule in the Trade Promotion Authority Act, 2002. The modification of the takings rule requires that foreign investors receive no greater entitlement under investment rules than do US investors under

94 David Schneiderman, 'Investment Rules and the New Constitutionalism' (2000) 25 *Law & Soc. Inquiry* 757.

95 *Pennsylvania Coal v. Mahon*, 438 U.S. 393 (1922).

96 David Schneiderman, 'Congress and Empire: Taking Investment Rules Global' (2005) [unpublished].

97 Vicky Been & Joel C. Beauvais, 'The Global Fifth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine' (2003) 78 *N.Y.U.L.R.* 30 ['Global'].

US constitutional law.⁹⁸ Canada now has followed suit, revising its model foreign investment protection treaty along similar lines by setting out criteria not very dissimilar from the US ones.⁹⁹

The strictures of NAFTA and BITs signal a movement away from the robust and energetic state to one inhibited by the strictures of neoliberal ideology. Economic success is to be achieved only via policy instruments falling within an acceptable range of regulatory initiatives. These may be facilitative of markets, as in earlier times,¹⁰⁰ but not so interventionist as to deviate from the hegemonic norm represented by contemporary US experience.¹⁰¹ The conditions thereby imposed on states denies to them access to the very tools that precipitated economic success in the past.¹⁰² The consequence, as David Kennedy notes, is to narrow the 'ideological range': 'Political choices fade from view – as do choices among different economic ideas about how development happens or what it implies for social, political, and economic life.'¹⁰³ Rather than expanding the range of policy options, the investment-rules regime checks state action, and in more stringent ways than did the common law presumptions of the last century.

This is because investors can directly seek damages, from tens to hundreds of millions of dollars, from international trade tribunals. Threatened and pending NAFTA suits reinforce the potential impact of these new investor rights. Foreign enterprises have invoked the prohibition (or its earlier incarnation in the Canada–US Free Trade Agreement) to undermine a variety of policy options, including Ontario's proposed public auto insurance plan, the cancellation of contracts to transfer public property into private hands at Toronto's Pearson Airport, and Canadian federal government proposals that would have mandated the plain packaging of all cigarettes sold in Canada.¹⁰⁴ Ethyl Corporation's

98 US, *Cong. Rec.*, vol 148, 60, at S4267 (13 May 2002); Poirier, 'NAFTA,' supra note 27.

99 Canada, Department of Foreign Affairs and International Trade, *Canada's FIPA Model* (Ottawa, ON: DFAIT, 2003), online: <<http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf>>.

100 David Sugarman & G.R. Rubin, 'Towards a New History of Law and Material Society in England, 1750–1914' in G.R. Rubin & David Sugarman, eds., *Law, Economy and Society, 1750–1914: Essays in the History of English Law* (Oxford: Professional Books, 1984) 1.

101 Daniel K. Tarullo, 'Beyond Normalcy in the Regulation of International Trade' (1987) 100 *Harv. L. Rev.* 547.

102 Dani Rodrik, 'Development Strategies for the 21st Century' in Boris Pleskovic & Nicholas Stern, eds., *The Annual World Bank Conference on Development Economics 2000* (Washington, DC: World Bank, 2001) 85.

103 David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004) at 155; Rittich, 'Recharacterizing,' supra note 93 at 96.

104 David Schneiderman, 'NAFTA's Takings Rule: American Constitutionalism Comes to Canada' (1996) 46 *U.T.L.J.* 499.

challenge of a Canadian ban on the import and export of the toxic gasoline additive MMT, for some complicated reasons,¹⁰⁵ was settled with the payment of US\$13 million. In a reverse-Ethyl case, Vancouver-based Methanex sued for losses suffered by the phasing out of the gasoline additive MTBE in the state of California. As a result of a preliminary panel decision, the Methanex claim has largely been confined to a 'national treatment' argument that Methanex was targeted by former Governor Gray Davis in favour of ethanol producers in the state of California.¹⁰⁶

This potential shift in culture is exhibited by debates in New Brunswick over public auto insurance.¹⁰⁷ The exorbitant rates paid to private auto insurers was a principal election issue and, so as to craft an appropriate policy response, Premier Bernard Lord struck an all-party committee to look into alternatives. In its final report, the committee recommended that the province adopt a public auto insurance scheme.¹⁰⁸ The committee bravely suggested proceeding, despite evidence from the Insurance Bureau of Canada (IBC) and a legal opinion that US-based private auto insurers could seek compensation under NAFTA's Chapter 11 for the taking of their investment interests.¹⁰⁹ The government decided to pursue an alternative course of action; a government-run monopoly, the premier said – although without reference to NAFTA's potential chilling effects – was 'not the right decision for New Brunswick.'¹¹⁰ Prior to the decision, IBC General Counsel Randy Bundus issued a poignant warning: '[t]he world is a different place than it was back in the 1970s when Manitoba and British Columbia took action [over auto insurance] – now we have NAFTA and GATT.'¹¹¹

105 David Schneiderman, 'MMT Promises: How the Ethyl Corporation Beat the Federal Ban' *Encompass Magazine* 3:3 (February 1999) 12.

106 The takings claim appears to have no legs. The panel heard arguments from the parties in early June 2004 in ICSID proceedings held in Washington that, for the very first time, were open to the public.

107 See Steven Shrybman & Scott Sinclair, 'Public Auto Insurance and Trade Treaties' (2004) 5:1 *Briefing Paper*, online: <http://www.policyalternatives.ca/documents/National_Office_Pubs/brief5-1.pdf>.

108 New Brunswick, Select Committee on Public Automobile Insurance, *Final Report on Public Automobile Insurance in Ontario* (New Brunswick: The Committee, 2004), online: Government of New Brunswick, online: <<http://www.gnb.ca/legis/business/committees/reports/2004auto/report-e.asp>>.

109 Memorandum from Riyaz Dattu, John W. Boscarriol, & Orlando E. Silva, McCarthy Tétrault, Counsel, to Ed. Cramm, Secretary, Council of Atlantic Premiers (9 September 2003), online: The Council of Atlantic Premiers <<http://www.cap-cpma.ca/images/worddocuments/Memo%20re%20International%20Trade.doc>>.

110 New Brunswick, 'Auto Insurance Reforms to Lower Rates, Increase Choice, Help First-Time Drivers' (29 June 2004), online: Government of New Brunswick <<http://www.gnb.ca/cnb/news/jus/2004e0750ju.htm>> [news release].

111 Luke Eric Peterson, 'International Treaty Implications Color Canadian Province's Debate over Public Auto Insurance' *INVEST-SD* (11 May 2004), online: International

NAFTA panel rulings have underscored these constitution-like effects.¹¹² Non-discriminatory regulations (measures that do not target foreign investors but that are facially neutral) and even (oddly) measures falling 'within an exercise of a state's so-called police powers'¹¹³ can rise to the level of a taking. Measures, however, must be 'substantial enough'¹¹⁴ or 'sufficiently restrictive'¹¹⁵ to give rise to the requirement of compensation (as Holmes J. had insisted). NAFTA's rule will catch not only instances of outright seizure of property (the easiest case) but also 'incidental interference' with an investment that has the effect of depriving owners of a 'significant part' of the 'use or reasonably-to-be-expected economic benefit of property.'¹¹⁶ Compensable expropriations must amount to a 'lasting deprivation of the ability of an owner to make use of its economic rights,' although the deprivation may even be 'partial or temporary.'¹¹⁷

The problem with investor rights, then, as under the US Bill of Rights, is that they render difficult local measures for societal self-protection.¹¹⁸ New social policy initiatives – whether they concern the economy, labour, or the environment – are imperilled under the roaming normativism of investor rights. Of concern to a democratic polity seeking to 'help insulate domestic groups from [the] excessive market risks' associated with economic globalization¹¹⁹ is the effect stringent application of the takings rule may have on regulatory innovation.

If Willis were to look to public opinion on these matters, he would find a kind of ambivalence, similar to that he discerned over the performance of judicial functions. Jenson, in her presidential address, astutely notes that neoliberalism reinforces conceptions of liberal individualism 'which have always been at the heart of the pan-Canadian regime.'¹²⁰ Neoliberal ideology exploits precisely that aspect of public opinion that

Institute for Sustainable Development <http://www.iisd.org/pdf/2004/investment_investsd_may11_2004.pdf>.

112 I discuss these in more detail in David Schneiderman, 'Taking Investments Too Far: Expropriations in the Semi-Periphery' in Marjorie Griffin Cohen & Stephen Clarkson, eds., *Governing under Stress: Middle Powers and the Challenges of Globalization* (London: Zed Books, 2004) 218. Been and Beauvais note that these NAFTA panel rulings have interpreted investor rights in ways that 'significantly exceed US takings protections' and 'threaten(s) to take on a life of [their] own': 'Global,' supra note 97 at 37.

113 *Pope & Talbot, Inc. and the Government of Canada (Interim Award)* (2001), 13:4 W.T.A.M. 19 at para. 96.

114 *Ibid.*

115 *Ibid.* at para. 102.

116 *Metalclad Corporation and the United Mexican States*, (2001) 13:1 W.T.A.M. 47 at para. 103.

117 *S.D. Myers, Inc. v. Government of Canada*, (2001) 40 LL.M. 1408 at para. 283.

118 Karl Polanyi, *The Great Transformation* (Boston, MA: Beacon Press, 1957) at 76.

119 Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, DC: Institute for International Economics, 1997) at 6.

120 Jenson, 'Fated,' supra note 1 at 643.

rankled Willis – that side which looks to courts and judges, exclusively, to enforce the ‘rule of law’ and ‘justice.’¹²¹ At the same time, this dominant ideology celebrates market relations and delegitimizes local initiatives that deviate from the hegemonic norm.

Polling data from March 2003 reinforce this ambivalence. A significant majority of those polled (61 per cent) favoured closer social and cultural ties with the United States, but support is more mixed for deeper North American economic integration (48 per cent).¹²² The authors of this study conclude that ‘there is fertile ground among Canadians’ should Ottawa wish to initiate talks leading to closer economic integration with the United States. Public opinion, however, would have to be ‘carefully cultivated in advance to mobilize the necessary support.’¹²³

IV

If, in Willis’s time, ‘government control (usually called interference in business)’¹²⁴ was on the rise, constitutional culture may now be in transition in the opposite direction. It may be too early to tell for certain, but as the discourse of ‘trade-related market-friendly human rights’¹²⁵ takes hold, we may be moving towards a more disabled politics, where redistributive functions are minimized and policing functions, to ensure the smooth operation of the market, are maximized.¹²⁶ I fear that there are too few of Willis’s sort to do the necessary intellectual work to counter these developments.

Let me close by returning to the constitutional culture project. If we envisage constitutionalism as being a ‘practice,’ as being beyond text and beyond the sole purview of lawyers and judges, we should embrace constitutionalism understood as culture. The project aims to map constitutional practice within a given polity and over time. It is a framework of analysis that accommodates changes of the sort that Willis documented – a change in attitude, among the judges and the lawyerly class, about the management of the relations between state and individual – where no formal constitutional amendment is required. Dissident and transgressive views are incorporated into the model, for they help to explain culture shifts over time. Similarly, this model helps to analyse more recent developments precipitated by the rules and institutions of

121 Willis, ‘Foreign Borrowings,’ *supra* note 12 at 275.

122 Alan S. Alexandroff & Don Guy, ‘What Canadians Have to Say about Relations with the United States’ *C.D. Howe Institute Commentary: The Border Papers* 73 (July 2003) 1 at 9.

123 *Ibid.* at 11.

124 Willis, ‘Admin Law and BNA,’ *supra* note 49 at 257.

125 Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002) at 149–51.

126 Zygmunt Bauman, *In Search of Politics* (Palo Alto, CA: Stanford University Press, 1999).

economic globalization, where, again, no formal amendment to the Canadian constitution expressly has been contemplated. Locating constitutional values in processes of globalization enables the mapping of a potential shift in culture that may have profound effects on the way in which we imagine the possibilities of acting together and for each other.¹²⁷

127 Homi K. Bhabha, 'Editor's Introduction: Minority Maneuvers and Unsettled Negotiations' (1997) 23 *Critical Inquiry* 431 at 452.