

*In any event the parables sometimes drawn from the Stuart period by some twentieth century judges – ‘Her Majesty’s Judges’ (a nice term), as we call the members of the state dispute-deciding department – to support decisions against the ‘Executive’ (a nasty term) are to me theology in its purest form.<sup>1</sup>*

*Is somebody being actually hurt by some actual defect in the machinery of government and, if so, what is that defect and how can it be remedied: these are the questions I should like to see asked.<sup>2</sup>*

### I Introduction

The themes of this special issue of the *University of Toronto Law Journal* are Willisian rather than Willis, general issues that arise out of Willis’s contribution to public law rather than his actual arguments. However, on rereading Willis to get a grip on the Willisian, I found Willis himself irresistible. It is not just the magnificence of his prose that attracts me, but the fact that his arguments seem as fresh and as topical today as anything that I’ve read in the last twenty years. Willis presents with the utmost clarity problems that public lawyers are grappling with today.

This rereading, however, has confirmed the view that I have held ever since my first more cursory forays into his work: Willis was unable to deal with the logic of the rule of law. He wanted rule by law, but not the rule of law;<sup>3</sup> and he was deeply sceptical about any claims that support judicial review on the ground that judges are the guardians of the ‘enduring’ or ‘fundamental’ or ‘constitutional’ values of the rule of law. In his last major essay on administrative law (1974), he described such claims as theological in nature. The ‘currently fashionable cults’ that fasten onto them do damage to ‘effective government’ if they are ‘allowed to infiltrate too deeply into the procedural part of administrative law.’ He identified the cult of ‘the individual,’ which leads to prisoners complaining of their treatment or demanding a ‘formal “right to be heard”’

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† I thank all the participants in the conference at which these papers were presented for two days of illuminating discussion.

1 John Willis, ‘Canadian Administrative Law in Retrospect’ (1974) 24 U.T.L.J. 225 at 229 [‘Retrospect’].

2 Ibid at 228.

3 I borrow this distinction from my colleague David Schneiderman.

when applying for parole; the ‘cult of “openness,”’ which leads to claims by the press ‘to the right to dig into confidential government files’; and the ‘cult of “participatory democracy,”’ which leads to claims by “concerned” busybodies to the right to take court proceedings to curb, say, alleged illegal pollution or alleged dereliction of duty by police.’<sup>4</sup>

Willis thought that the way to avoid being ‘global and theological’ was to be ‘specific and practical,’ to focus on reality, which he always claimed was his method. But he did not trust judges to adopt this focus, since they would inevitably be attracted to abstract theological questions about fundamental constitutional values. And their answers to these questions would involve their imposing ‘individualist values whose sole claim to validity is that they are lawyer’s values based, as lawyer’s values always are, on a long-dead eighteenth-century past.’<sup>5</sup>

Thus Willis argued throughout his career that one should put one’s trust in government and civil servants’ values.<sup>6</sup> The real protection against official arbitrariness was not, in fact, judicial control: the ‘real safeguards are question time in the House of Commons, the newspapers, the pressure groups and, most important of all, the good sense and decency of the administrators themselves.’<sup>7</sup> What one needed was statute law and a properly trained civil service, and problems that arose in implementing legislation could be raised in Parliament. But what Willis failed to see – or, perhaps more accurately, saw but was unwilling to take properly on board – was that one cannot have rule by law, rule by statute law, without the logic of the rule of law.

The more accurate description – that Willis saw but was unable to take on board the fact that rule by law involves the logic of the rule of law – is revealed by his own ambivalences about judicial review. In 1935, he advocated getting rid of judicial review of administrative decisions altogether.<sup>8</sup> He saw the need for an independent check on public officials because government could not be expected to guard itself, so he recommended establishing a specialized administrative court with general review authority over administrative decisions. Indeed (a point I will come back to later), he wanted this body to have a much more extensive review authority than that which the courts of that time claimed. For this essay was written in the days when judges denied themselves review authority in certain matters: for example, they would not review decisions they categorized as ‘administrative,’ but only those they consid-

4 Willis, ‘Retrospect,’ *supra* note 1 at 228.

5 *Ibid.* at 245.

6 See John Willis, ‘The McRuer Report: Lawyers’ Values and Civil Servants’ Values’ (1968) 18 U.T.L.J. 351 [‘McRuer Report’].

7 John Willis, ‘To the Editor’ (1951) 29 Can.Bar Rev. 580 at 582 [‘To the Editor’].

8 John Willis, ‘Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional’ (1935) 1 U.T.L.J. 53 [‘Three Approaches’].

ered 'judicial' or 'quasi-judicial.' Willis regarded such categories as the product of a bad conceptualism. But while he considered conceptualism bad mainly because judges used it as a smokescreen to cover their expansion of their jurisdiction, he also saw that conceptualism could, and did, go in the other direction – that of wrongly protecting administrative decisions from independent review.

By 1974, if not well before, Willis had given up on the hope of exorcising the legal order of judicial review. He was not altogether unhappy about this, as he did think that there had been a change in the general lawyer's stance towards the administrative state, such that lawyers and judges were genuinely prepared to balance the needs of effective government against the lawyerly urge to protect individual rights at all costs. And, writing in 1961, he also suggested that administrative law was less controversial in Canada than in England and the United States because '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.'<sup>9</sup>

Perhaps Willis would not have been so sanguine had he lived through the recent conservative onslaught on government, which seems to have struck a populist chord across Canada. But my point is that he did not want to do away with independent review, whoever was doing the reviewing. While he was ever suspicious of lawyers' imperialistic ambitions, if the only game in town for independent review was judicial review, then a properly chastened judicial review had to be preserved.

A question then arises about his insistence on independent review,<sup>10</sup> especially given his thoughts about the real safeguards against official arbitrariness and also his suggestions that lawyers tend to neglect both the extent to which administrators police themselves through informal methods and the possibility for legislative stipulation of *ex ante* controls on discretion. To put it more starkly, given his trust in government, in the character of civil servants, and his faith in internal – both formal and informal – controls, why did he have any dealings at all with the idea of official arbitrariness, an idea he regarded with almost as much suspicion when it was wielded by judges as 'that slippery eel "the rule of law"?'<sup>11</sup>

One possible answer is concern for the individual. In the second epigraph to this article, Willis writes that administrative lawyers should ask these questions: 'Is somebody being actually hurt by some actual

9 John Willis, 'Administrative Law in Canada' (1961) 39 Can.Bar Rev. 251 at 253.

10 See, e.g., 'Three Approaches,' supra note 8 at 78: '[e]veryone will admit that no body empowered by statute to issue regulations or to arrive at decisions should be empowered to decide the limits of its own jurisdiction.'

11 Willis, 'McRuer Report,' supra note 7 at 35

defect in the machinery of government and, if so, what is that defect and how can it be remedied?'<sup>12</sup> I will call the principle that animates these questions the vulnerability principle, and it is clearly a candidate, perhaps the only one in Willis's work, for giving some content to the thought that one should be concerned about official arbitrariness. But it is important to note two qualifications.

First, Willis does not often mention the vulnerability principle, and its principal treatment is the scant sketch in the last 1974 essay on administrative law.<sup>13</sup> Second, in the very same essay we see him express his disdain for the cult of the individual, a consistent theme in his work. Indeed, Willis was hardly given to showing much sympathy for the subject of official power. For example, writing with apparent approval of the protection afforded to the Minister of Immigration's decisions by the privative clause in the Immigration Act, he says,

The federal government is not likely to remove the clause from the Immigration Act. It wants to preserve as far as possible its freedom of action in this area. It regards immigration as a privilege, not as a right, and wants to avoid having to disclose to a court its sources of information about the political colour of immigrants. On the other side of the ideological fence, a court, with the sweating immigrant before it, sometimes sets aside a deportation order on very flimsy grounds ...<sup>14</sup>

Even more telling, in my view, is that he approved of the majority's decision to give the executive a free hand in detention decisions in the two great wartime cases in England, *R v. Halliday*<sup>15</sup> and *Liversidge v. Anderson*.<sup>16</sup> He chose as his modern example of Coke's misadventures in common law constitutionalism Lord Shaw's dissent in World War I in *Halliday*, commenting that 'the line between the views of the majority and the dissent of Lord Shaw ... is merely that between a vivid appreciation of an emergency and a reverence for the liberty of the subject.'<sup>17</sup> And of Lord Atkin's dissent in the World War II case *Liversidge*, which likened his fellow judges' attitude to detention under Regulation 18B to that of the officials of Charles I's Star Chamber, Willis said that the issue was 'no more than a question of interpretation of a set of internment regulations' and hence no excuse for passing 'imperceptibly from the twilight of this symbolical language of the law into a Stygian fairyland peopled by the bogies of dead tyrants.'<sup>18</sup>

12 Willis, 'Retrospect,' supra note 1 at 228.

13 There is also a brief reference in 'McRuer Report,' supra note 7 at 357.

14 Willis, 'Administrative Law in Canada,' supra note 9 at 258.

15 [1917] A.C. 260.

16 [1942] A.C. 206.

17 Willis, 'Three Approaches,' supra note 8 at 60.

18 John Willis, 'Case and Comment: Administrative Law – Statute Interpretation – Real

Moreover, Willis in fact liked the comparison between the discretionary authority delegated to twentieth-century public administration and the methods of Henry VIII and the Stuarts. Writing in the mid-1930s, he notes that Henry VIII, ‘to cope with the emergencies which continually arose from the rivalry of his barons, obtained from Parliament the Statute of Proclamations, 1539, “the Act that Proclamations made by the King should be obeyed.”’ In Willis’s view, the statutes enacted in the 1930s in England and Canada to delegate authority to government to deal with the economic emergency of the time were similar in spirit, permitting government to prevent the courts of common law from impeding the recognition of interests that the ‘prevailing social philosophy’ has accorded to the subject.<sup>19</sup>

In sum, Willis’s articulation of the vulnerability principle might be the best candidate for explaining a concern with official arbitrariness, but he was, at the least, ambivalent about this principle. This ambivalence, I will argue, stems from his perception that from this principle unfolds the logic of the rule of law, which gives judges a special place as guardians of fundamental values. I will also suggest that the ambivalence goes even deeper: it is an ambivalence about law. Willis was not only profoundly unimpressed by the supposed contrast between the virtuous rule of law and the arbitrary rule of men; to the extent that he valued law, it was only because law, under conditions of social complexity, gives us the rule of men. And ‘men’ here does not mean rule by the citizenry. It means rule by the right men – expert civil servants – so that for Willis democracy, like law, has a purely instrumental role.

Moreover, as I will show, the ambivalence about the rule of law continues to plague scholars of what I will call the ‘legal left’ as they try to make sense of legal order. Here my foil will be Harry Arthurs’s classic essay, ‘Rethinking Administrative Law: A Slightly Dicey Business.’<sup>20</sup> I will first set up the problem via a rather detailed analysis of a case comment by Willis, as well as his response to two overheated critiques of his comment. Willis was not given to tempering his arguments, but my sense is that in this highly polemical exchange, more of his position comes to the surface than in anything else I have read.

## II *A spat in the Canadian Bar Review*

In 1951 Willis commented on the Supreme Court of Canada’s decision in *The Canadian Wheat Board v. Hallet and Carey Ltd. and Jeremiah J. Nolan*<sup>21</sup> in

Constitution versus Lawyers’ Constitution – Form versus Substance – Courts and Public Law’ (1951) 29 Can.Bar Rev. 296 at 300 [‘Case and Comment’].

19 Willis, ‘Three Approaches,’ supra note 8 at 53–4.

20 Harry Arthurs, ‘Rethinking Administrative Law: A Slightly Dicey Business’ (1979) 17 Osgoode Hall L.J. 1 [‘Rethinking Administrative Law’].

21 [1951] D.L.R. 466 [*Nolan*].

the pages of the *Canadian Bar Review*.<sup>22</sup> This comment provoked a heated exchange between Willis and two practising lawyers W. Kent Power and W.P. Fillmore. Power suggested that the upshot of Willis's comment was that we should 'abolish parliament, superannuate all our judges, burn our law books and install a politburo at once.'<sup>23</sup>

The case arose because J.J. Nolan, a barley dealer in the United States, had in 1943 bought barley in Canada under the system of strict price controls established by the Canadian government under the very explicit authority of the War Measures Act.<sup>24</sup> Nolan stored this barley in Canada until 1947, when the government raised the ceiling price of barley from sixty-five cents a bushel to ninety cents. The government then decided to prevent dealers from making a 'fortuitous' profit by requiring them to sell to the Wheat Board the barley they had stockpiled at the old ceiling price, a policy announced on 17 March 1947, which declared midnight of that day as the time when the barley would be deemed to have been sold. This policy was made an Order in Council on 3 April 1947, under the authority of the National Emergency Transitional Powers Act, 1945<sup>25</sup> (the NETP Act), the statute enacted by Parliament to deal with post-war instability. The order vested in the Wheat Board all the barley in the hands of commercial dealers at midnight on 17 March at the old price. The Board then offered the barley to the former owners at the new price, thus itself seeking to appropriate the profit. Nolan was the only dealer who chose to contest the order, choosing, as Willis put it, to stand by the 'lawyer's constitution.'<sup>26</sup>

Willis's contrast here is between the real constitution, or 'substance,' and 'form,' or the symbolic language of the lawyer's constitution. In elaborating this distinction, he writes,

Closely allied with the touching faith which some judges have in the kind of folklore I have just set out<sup>27</sup> is the excessive preference of many courts for form over substance. In public law ... the form is the Minister, the substance is the Civil Service; the form is the Governor-in-Council, the substance is the Cabinet; the form is legislation by Parliament, the substance is legislation by the Civil Service, approved by Cabinet and rubber-stamped by the House of Commons.<sup>28</sup>

22 Willis, 'Case and Comment,' supra note 18.

23 W. Kent Power, 'To the Editor' (1951) 29 Can.Bar Rev. 572 at 573. See also W.P. Fillmore, 'To the Editor' (1951) 29 Can.Bar Rev. 573. Fillmore represented Hallet and Carey Ltd.

24 R.S.C. 1927, c. 206.

25 S.C. 1945, c. 25.

26 Willis, 'Case and Comment,' supra note 18 at 297.

27 Willis is referring to his analysis of *Liversidge*, quoted above.

28 Willis, 'Case and Comment,' supra note 18 at 300-1.

Thus, as Willis describes the situation in *Nolan*, what had happened was that the Wheat Board had made the substantive decision to appropriate the profits but, when its decision was ignored by the dealers, found itself obliged to take on the form of the lawyer's constitution, a step which then gave Nolan's lawyers the hook to persuade the courts to interfere with substance.<sup>29</sup> It was not, however, that the hook provided by legal form produced an inexorable line of reasoning that led to the result. Two of the judges dissented from the majority's view that the NETP Act did not authorize the Order in Council.

As Willis saw it, the case presented a 'pure question of statutory interpretation,' whether the provisions of the order in council were *intra vires* the NETP Act.<sup>30</sup> Section 2(1) provided as follows:

2(1) The Governor in Council may ... make from time to time such ... regulations as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan deem necessary or advisable for the purpose of

(c) maintaining, controlling and regulating ... prices; or  
[...]

(e) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war.

According to Willis, and the two dissenting judges (Kerwin and Estey JJ.), these statutory provisions gave the government, not the Court, the complete authority to decide the appropriate methods of 'controlling ... prices.'<sup>31</sup> But, as he also points out, matters were complicated by the fact that the War Measures Act expressly gave the power to make regulations for 'appropriation, control, forfeiture and disposal of property,' while the NETP Act did not; by the fact that the preamble to the NETP Act made it clear that while it was necessary to have a statute responding to an ongoing emergency, this was not a wartime emergency, and so it 'was preferable that such transitional powers be exercised hereafter under special authority in that behalf conferred by Parliament instead of being exercised under the War Measures Act';<sup>32</sup> and by the fact that the War Measures Act was couched in very broad terms, while the NETP Act limited the powers it conferred to specified, though broad, purposes.<sup>33</sup>

29 Ibid. at 297.

30 Ibid.

31 Ibid. at 298–9.

32 Although, as Willis also pointed out, the NETP Act stated in the preamble that it was 'essential that the Governor in Council be authorized to ... make such ... regulations as he may deem necessary or advisable by reason of the emergency....' Ibid. at 298.

33 Ibid.

Willis, of course, recognized that the contrast between the two statutes provided a basis for the argument made by the five majority judges that the legislative history manifested an implicit intent not to give the Cabinet an authority to appropriate. But he objected most to what he describes as the 'appalling air of unreality which hovers over some of the judgments.'<sup>34</sup> In particular, he regarded this argument as window-dressing for the real premise, 'a free enterprise canon' taken from the nineteenth century and imposed on a twentieth century 'socialistic' piece of legislation, that no statutes are to be construed as 'authorizing the taking away of property rights of the subject unless their language makes that intention abundantly clear.'<sup>35</sup> He thought that in this as in other cases, judges deliberately rejected the only method of discovering the actual intention of the legislature: looking to government statements during legislative debates.<sup>36</sup>

It is interesting that the only judge Willis had any kind words for was one of the judges in the majority, Justice Rand, of whom he said, 'of all the seven judges it is only Mr. Justice Rand who treats the action of the Government as what it was – a now familiar incident in the administration of price control.'<sup>37</sup> But this comment does not quite describe Rand J.'s reasoning.

Rand J. did point out that, under the War Measures Act and the various Orders in Council made under its authority, appropriation of profits by the government from the sale of commodities was both authorized and, in his view, justified. But this appropriation took place under conditions of emergency where the interest of the individual 'must be subordinated: and so long as he is dealt with on the basis of a rationally justifiable principle, he has no ground to object on moral, much less, legal considerations.'<sup>38</sup> He also thought it significant that the NETP Act failed to authorize explicitly appropriation of profits. But more significant, in his view, was that the War Measures Act submitted the question of compensation for appropriated property to the courts in the case of disagreements between the government and the affected parties.<sup>39</sup>

This provision showed, Rand J. thought, that there were two different situations. In the first, compensation was provided because the government was absolutely appropriating a beneficial interest for its own objects. In the second, appropriation was simply a 'device for effecting an object validly incidental to price control.'<sup>40</sup> Rand J. had no doubt that the

34 *Ibid.* at 299.

35 *Ibid.* at 299 and 302.

36 *Ibid.* at 303–4.

37 *Ibid.* at 299.

38 *Nolan*, *supra* note 21 at 481.

39 *Ibid.* at 478–9.

40 *Ibid.* at 479.

second kind of measure could be considered to be within the scope of the price control measures for which the NETP Act explicitly provided. What he objected to was the government's claim that the Order in Council was not limited to that purpose and that title was taken absolutely, so that there was no obligation to 'do more than pay the maximum price then established ...: such a step is not ... authorized by the [NETP] ... Act and was ultra vires of the Governor in Council.'<sup>41</sup>

Willis fails to mention the issue of compensation and so does not really address Rand J.'s more nuanced interpretation. This rather weakens his response to his critics that there was 'nothing in the language' of the NETP Act that compelled the Supreme Court to adopt its interpretation of the act, and thus also the general maxim of statutory interpretation that he then states:

No court should, unless forced to do so by the language of the legislation, invalidate an order in council issued by the same government, and probably the same group of civil servants, that issued the legislation. All the court ever achieves by invalidating delegated legislation is an amendment to the Act at the next session.<sup>42</sup>

While it is literally true that there was nothing in the statute that compelled Rand J.'s reasoning, or that of the other judges in the majority, the issue is not compulsion but how best to interpret the statute. One can with equal justice say that there is an 'appalling air of unreality' hovering over Willis's analysis and his claim that 'decontrol profiteering' should not be frustrated by the 'slip-up (if slip-up there was) of a draftsman.'<sup>43</sup> That the NETP Act was enacted explicitly to deal with a context considered less dramatic than wartime emergency and provided as a result for less drastic measures was arguably significant, as long, as we have seen Rand J. suggest, as that government was under an obligation to provide those who challenged its decisions with 'a rationally justifiable principle' and, moreover, a justification according to law.

It is this idea that I think that Willis rejected above all, though this rejection does not sit well with his claim that the case presented a 'pure question' of statutory interpretation. He dismissed indignantly Kent Power's claim that he wished to get rid of judicial control of administrative action, despite the fact that, as we have seen, Willis argued for precisely that position before the war. And while, as we have also seen, he claimed that the real safeguards of freedom lay in places other than the judiciary, he was 'absolutely sure that he did not want to get rid of the

41 Ibid. at 482.

42 Willis, 'To the Editor,' supra note 7 at 582.

43 Ibid. at 580.

doctrine of ultra vires.<sup>44</sup> He goes on, in a passage he liked enough to quote in his 1974 essay,<sup>45</sup>

The judges in administering the law of ultra vires [should] exercise this exceedingly delicate power with understanding and restraint; for it is the power to interfere with the normal functioning of a government system of which in these democratic days they are the least important arm.<sup>46</sup>

And part of what he conceived restraint to be was that the judges 'are not now – and never should be – allowed to set aside that action on the ground of reasonableness; their sole concern must be with intra vires or ultra vires.'<sup>47</sup>

As I understand it, positively speaking, the prohibition on review for reasonableness is supposed to keep judges focused on what the statute actually says, informed, if possible, by what the government that enacted it said the statute says. Negatively speaking, it is supposed to keep judges from making any value-based assessment of administrative action, because such an assessment will lead to their interference in substance through reliance on some more or less archaic idea of constitutional values.

Notice that, on this understanding of judicial review, Rand J. was wrong and the majority was right in an earlier decision about the NETP Act, *Reference re: Persons of Japanese Race*.<sup>48</sup> Indeed, as we will now see, since the decision turned on an interpretation of the more draconian War Measures Act, he would have had even more reason to hold this view.

At issue were the Orders in Council that gave the government the authority to 'repatriate' individuals of Japanese descent to Japan who had 'agreed' to such repatriation during the war when asked in internment camps whether they preferred relocation to the east, where they knew that they would not be well received, or 'agreeing' to be 'repatriated' to Japan. The Orders in Council were made under the War Measures Act, but the NETP Act declared that the orders made under the War Measures Act would continue to have the force of law 'as the Governor General may prescribe.' Ten thousand three hundred forty-seven Japanese Canadians, three-quarters of them Canadian citizens and half of them born in Canada, were subject to this order, which Prime Minister Mackenzie King justified by claiming that their 'agreement' to 'repatriation' proved their disloyalty to Canada. It took until 1947 for Mackenzie King to relent, by which time almost 4 000 people had been deported.

44 Ibid. at 584–5.

45 'Retrospect,' supra note 1 at 245.

46 Willis, 'To the Editor,' supra note 7 at 585.

47 'Retrospect,' supra note 1 at 582.

48 [1946] S.C.R. 249. I rely heavily here on Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin & Co., 1982) at 114–8.

The majority of the Supreme Court held that the War Measures Act, as continued by the NETP Act, conferred on the government the authority to take such measures. Chief Justice Rinfret, joined by two of the majority judges, reasoned that since the Orders in Council could have been adopted by Parliament, and since the War Measures Act authorized the Governor in Council to adopt any measures that Parliament could have adopted, and since the Governor in Council was the 'sole judge of the necessity or advisability of these measures,' it was 'not competent to any Court to canvass the considerations which may have led the Governor in Council to deem such orders necessary or advisable for the objectives set forth.'<sup>49</sup> Rand J. was one of two judges who dissented, saying that he could not conclude that the War Measures Act gave the government authority to deal with Japanese Canadians who had been born in Canada, or who had been naturalized as Canadians, in this way any more than it could deal with Francophone Canadians or Canadians of Irish descent who supported figures abroad of whom government disapproved. Moreover, he said, Parliament

must have contemplated, as a fundamental assumption underlying the statute, the delegation of legislative power of a strictly legal character only, and must have intended to restrict the Governor in Council to measures or actions in which full juridical quality would inhere: that power without recognized legal character would be excluded. What is proposed here is not juridical: it is an act envisaging the violation of the sovereign rights of another state by an invasion of its territory and an affront to its dignity as represented by the occupying power. This quality, of course, is not present in the case of an alien: there the authority of expulsion is a necessary corollary to that of the right to exclude ... : but the fundamental distinction between the two cases is, I think, unquestionable. As a further illustration of the principle invoked, I mention the presumption against the power to make retroactive orders, which I suggest would bind the Governor in Council, though there is no such restriction on Parliament.<sup>50</sup>

Rand J.'s dissent in this case differs both in tone and in content from his judgment in *Nolan* because in the latter he did not regard the appropriation of the profit as a despotic act, given the general context of price controls in an emergency situation. But in the *Reference*, he clearly regards the government measure not only as legally unauthorized but also as despotic. And the judgement of despotism is not what we might think of a naked moral judgement, one based only on one's moral intuitions. As Rand J.'s judgments in the 1950s were to make plain, his theory of judicial review was based on his understanding of the way in which the common law protects the rights of the citizen, although he nested that theory

49 *Reference re: Persons of Japanese Race*, *ibid.* at 277.

50 *Ibid.* at 290-1.

within an account of legal order that recognized not only the necessity of the administrative state but also, as one can already discern from his judgment in *Nolan*, its legitimacy.<sup>51</sup>

We saw that Willis commended Rand J. for the reality of his judgment in *Nolan*, though he doubtless thought mistaken Rand J.'s claim that a judge was entitled to decide that certain kinds of official interventions were not incidental to price control, as illustrated by the more detailed provisions of the War Measures Act. But Willis would have considered Rand J.'s dissent in the *Reference* an example of the 'appalling air of unreality' of the other judgments in *Nolan*.

On Willis's analysis, Rand J. mistook form for substance by regarding the statute as intended to respect constitutional values, in this matter the right of citizens not to be deported. In Willis's view, this is simply another example of a judge imposing archaic values on modern government, invoking – his coinage – a 'common-law Bill of Rights.'<sup>52</sup> Such judges invoke their preferred maxims of statutory interpretation 'not as a means of discovering an unexpressed intent but as means of controlling an expressed intent of which they happen to disapprove,'<sup>53</sup> seeking thereby to create, Willis's preferred term, a 'Pseudo Bill of Rights.'<sup>54</sup> In the next section, I will explore the theory that lies behind Willis's analysis.

### III *For it is here that the constitutional shoe pinches*

The title of this section is a line from Willis's first major publication, *The Parliamentary Powers of English Government Departments* (1933).<sup>55</sup> He used it against judges, in particular Lord Hewart for the views expressed in *The New Despotism*,<sup>56</sup> which Willis thought tried to force the actual constitution of England into the mould of the lawyers' constitution. But, as I will show, Willis is no less pinched.

In an early essay on administrative law, Willis outlines three approaches to the subject. He rejects the first two, the judicial approach because of its inherent hostility towards the administrative state and the conceptual approach both because its reliance on abstractions like the rule of law or the separation of powers tend to distort reality and because it is susceptible to abuse by judges. His preferred approach he calls functionalism, which, he says, always asks the following questions: '(i)

51 See David Dyzenhaus, 'The Deep Structure of *Roncarelli v Duplessis*' (2004) 53 U.N.B.L.J. 111 ['Deep Structure'].

52 John Willis, 'Administrative Law and the British North America Act' (1939) 53 Harv.L.Rev. 251 at 274 ['Administrative Law and the BNA Act'].

53 Ibid. at 276.

54 Ibid at 281.

55 John Willis, *The Parliamentary Powers of English Government Departments* (Cambridge: Harvard University Press, 1933) 4[*Parliamentary Powers*].

56 Lord Hewart, *The New Despotism* (London: Ernest Benn, 1929).

who is best fitted to exercise a discretion upon a question of this nature; and (ii) to what extent and by what type of persons shall the exercise of the discretion be supervised?'<sup>57</sup> And he sets out what he took to be the three characteristics of the discretionary powers delegated to public officials:

(a) they are the creatures of statute law; (b) their purpose is the fulfilment of a social philosophy which sets public welfare above private rights; (c) they are vested in bodies other than Parliament or the courts.<sup>58</sup>

Willis claims that his functionalist questions are designed to elicit the facts about the matter and suggests that his definition of discretion simply describes the world as it is. But the first claim is vacuous until one specifies what one means by 'best.' That specification happens in the second characteristic Willis attributes to discretionary powers. However, his claim about that characteristic is tendentious. If it is the case that the tasks of public officials are those delegated to them by Parliament, then whether or not the purposes of their discretionary powers will be the 'fulfilment of a social philosophy which sets public welfare above private rights' is to a large extent contingent. We are all now more than familiar with the experience of legislatures delegating powers to public officials to dismantle the achievements of the welfare state, and we are also familiar with legislatures delegating authority to administrative officials to implement statutory bills of rights, a phenomenon not easily captured by a dichotomy between public welfare and private right.<sup>59</sup> In addition, this second characteristic stipulatively excludes the idea Willis finds antithetical: the idea that Parliament, in enacting a statute, intends more than that government will implement its terms; it also intends that government will abide by the rule of law. My point, though, is not that Willis fails to provide a basis for that exclusion, only that the basis does not reside in any facts of the matter. Moreover, that basis reveals that Willis could attempt this exclusion only because neither law nor parliament, nor, I suspect, the mechanisms of democratic government, was of more than instrumental importance to him.

Here it is important to note that when Willis accused judges of misunderstanding the constitution, he faulted them as much for taking statutes and Parliament seriously as for their tendency to interpret

57 Willis, 'Three Approaches,' *supra* note 8 at 59

58 *Ibid.*

59 It is, of course, understandable that an essay written in the mid-1930s did not envisage an administrative tribunal designed to implement a human rights statute. But even in his last major essay on administrative law, written well into the human rights era and thus the era when Canadian administrative tribunals were charged with the task of implementing human rights, Willis has not changed his understanding of the administrative state, although he does note the existence of human rights tribunals. 'Retrospect,' *supra* note 1 at 233.

statutes in light of their understanding of the values of the common law. His book on parliamentary powers of government departments set the stage for his later essays on administrative law by saying that Parliament had conquered the royal prerogative only for the 'wheel to come full circle.' Government departments 'lay claim to powers as great as those once exercised under the prerogative, but this time they shelter from the courts behind the cloak of Parliament.'<sup>60</sup>

In this stance, Willis is unlike the majority of left critics of judicial review today, who wish to wrest legal authority away from judges in order, as they see it, to restore it to the legislature and thus to the people through their elected representatives. As we have seen, Willis thought little of statutes or of the body that enacts them. His is a theory of governmental power and not of the virtuous democratic legislature. Statutes are merely the form of the substance that is created either by the cabinet or by those charged with implementing the statutes, and the best guide to what legislation means is the utterances of the cabinet or the policy and the decisions of the administration. Moreover, government has an advantage over the king in the heyday of royal prerogative, since it can disguise its power in the legal garb of statute.

Thus, the idea of the citizen and the citizen as participant in public life was unimportant to Willis. While he accused others of various cults around the individual, his cult was of expertise located in government. It was government that should be trusted to determine the social philosophy of the day and government that should be trusted to implement that philosophy. His overarching political theory, which has to be intuited because he never really articulated it, is the kind of uncompromising utilitarianism where, in the calculation of overall social welfare, persons 'do not count as individuals ... any more than individual petrol tanks do in the analysis of the national consumption of petroleum.'<sup>61</sup>

In line with this theory, Willis disapproved not only of common law bills of rights but of entrenched bills of rights. When drawing a comparison between the way in which judges in England and Canada have used their techniques of statutory interpretation to achieve the same sorts of results as judges in the United States have done in relying on the due process provision of the Bill of Rights, he writes that American judges have followed 'a more normal road' in contrast with the 'spurious technique' of the judges in England and Canada.<sup>62</sup> But it is clear that 'more normal' is not equivalent to 'legitimate,' in Willis's eyes. One

60 *Parliamentary Powers*, supra note 53 at 4.

61 Amartya Sen & Bernard Williams, 'Utilitarianism and Beyond' in Amartya Sen & Bernard Williams, eds., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1983) 1 at 4.

62 Willis, 'Administrative Law and the BNA Act,' supra note 50 at 252.

would not say that the achievement he describes of English and Canadian judges 'reeks of the "natural law" of which the American Bill of Rights is the constitutional expression'<sup>63</sup> unless one thought that the Bill of Rights stank in its own right.

Willis's cult of expertise goes further than making the central features of political theory across the spectrum into instrumental considerations. It also does away with the central feature of legal theory, again across the spectrum. It is not only, as Martin Loughlin puts it, that functionalism of Willis's sort fails to account for 'the normative character of law',<sup>64</sup> functionalism has no interest in law, if by law we mean a distinct mode of political ordering. For, and I take this point to be consistent with Loughlin's argument, to understand law is to understand it as a normative enterprise.

Willis's understanding of law was, in fact, a stripped-down version of the legal positivist model developed by the great utilitarian thinkers Jeremy Bentham and John Austin. Law is simply an instrument of the social policy of the powerful. The only analytical apparatus one needs to understand law is a rule of recognition that provides technical or factual criteria for what counts as authoritative. The only institutional apparatuses one should have in place are, first, the legislative body that frames the policy of the government as law; second, the administrative officials who see to it that law is implemented effectively (the 'government in miniature',<sup>65</sup> to use Willis's term) and who will also, under conditions of complexity, have a limited law-making function (the 'legislature in miniature'<sup>66</sup>); and, finally, a staff of judges, in the sense of officials who are capable of checking that the administrative officials do their job – but the criteria for doing their job are again technical or factual, as indicated in Willis's general maxim of statutory interpretation quoted above. Indeed, Willis provides a striking example of what Lon L. Fuller has described as a top-down model, in which law or legal order is understood as the kinds of adjustments one needs to make in order to adapt a system of managerial direction from a small enterprise to a large and complex society.<sup>67</sup>

Fuller's alternative is law understood as a mode of social ordering that aspires to achieve a relationship of reciprocity between ruler and ruled. On this model of law, form or process is not just about techniques of efficacy but also about compliance with principles of legality that under-

63 Ibid. at 279.

64 See Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) at 243.

65 'Three Approaches,' *supra* note 8 at 56.

66 Ibid. at 57–8.

67 Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969) at 207.

pin reciprocity and that shape the substantive outcomes achievable through law. There are thicker and thinner ways of filling out these principles. Friedrich Hayek is at the thickest end of what I will call the legality continuum,<sup>68</sup> Ronald Dworkin somewhere in the middle, and Fuller towards the thin end, while A.V. Dicey, in my view, tried to embrace both ends. Where one's legal theory is positioned on this continuum makes a great deal of difference on two closely related issues: the space accorded to democratic determinations of welfare and the degree to which the legitimacy of the administrative state is recognized. However, I will not develop this rival model here, as I want merely to assert its existence in order to make two interrelated points that are important to understanding both Willis and what I have called the legal left.

The first point is that one cannot settle debates between these rivals by appeal to the reality of the legal world, since legal reality is constructed on the basis of political values. In other words, the contest about what is is also a contest about what (politically) ought to be. Let me emphasize that this point is not that all we have to rely on is our subjective perceptions. Rather, it is that, however different the legal orders of liberal democratic societies are from each other, they share a significant core that makes their reality – the experience of living under them – quite different from, say, the lived experience of political order under the Nazis or Stalinism.

The second point suggests that a less extreme contrast is required for the first than Nazi Germany or Stalinism (perhaps apartheid South Africa or Singapore), but this fact only underscores the first point. It is that to have one's theory of order count as a legal theory, one has to establish at least a toehold on the thinnest end of the continuum, and that toehold commits one to more than Willis's brand of utilitarian positivism can take on board. The points are interrelated, as shown by the suggestion that a less extreme example than communism is necessary to make the first point, because, in conjunction, they establish that certain kinds of political ordering cannot authentically claim to be legal.

One must concede that Willis has no constitutional or even legal 'bible' to 'thump,' but that is because he had no legal theory, perhaps not even a political theory. Rather, he had a technical manual – a theory of management for effective top-down government under conditions of social complexity. But that does not mean that he was immune from bible thumping in another domain. As I have argued, his was a cult of government. But if he is not worshipping, as Roberto Unger put it, at a cold altar,<sup>69</sup> one has to ask what animates the cult.

68 I owe this way of putting things, as well as the general insight, to Rueban Balasubramanian.

69 Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harv.L.Rev.* 561 at 675.

If it is the interests of the individual, Willis's vulnerability principle, then one's conception of what it means to serve such interests cannot be kicked away as one climbs the ladder of sketching political and legal order, unless one is willing to sacrifice the very conception with which one started. But as soon as that conception is factored into the sketch, one is inexorably drawn onto the legality continuum. One must espouse at least a thin conception of legality and, at least, some minimal understanding of the need to have a staff of officials who review the administration on the basis of the principles of legality in order to guard against abuse of power or arbitrariness.<sup>70</sup> Evidence for this claim is that Willis, against the grain of most of what he says, commits himself in 1974 to the vulnerability principle and, in much of his earlier work, makes it clear that an independent staff of officials is necessary to guard against official arbitrariness.

But, as we have seen, the vulnerability principle has at best a precarious place in Willis's work, and he never put any effort into elaborating his own idea of institutional structures for independent review of public officials. His engagement with those who did make the effort was thus both polemical and negative. As a result, while his critiques of the lawyer's constitution were wonderfully engaging and often exposed serious weaknesses in his targets, he did not engage seriously with the problems to which his targets were responding: the control of the administrative state in the interests of the individuals it was meant to serve. He thus could make effective arguments against those who seemed to think that the only way to control the administrative state was to destroy it, but not against those who wanted both that state and effective controls.

Here we find yet another ambivalence in Willis. He could never make up his mind whether he was dealing with a real enemy or a myth conjured up by the likes of Coke, Hewart, Atkin, and Shaw. Usually, he claims that the lawyer's constitution is a myth, a 'pseudo Bill of Rights,' a claim that gives him the luxury of speaking from an allegedly empirical high ground. But that high ground not only obstructs any serious engagement with the problems to which the lawyers were responding, it also leaves him with nothing to say if government decides to self-destruct or to engage in the promotion of human rights. Sometimes he will admit the reality of the lawyers' constitution, a 'common-law Bill of Rights,' in which presumptions of statutory intent have been turned by judges into a 'rule of constitutional law.'<sup>71</sup> But once one admits the reality of the lawyers' fully normative constitution, one cannot oppose it from an empirical high ground. My point is not that one is debarred from empirical arguments, only that one needs more. One needs, that is, to

70 Thomas Hobbes, *Leviathan* (1660), ed. by Richard Tuck (Cambridge: Cambridge University Press, 1997) provides a magnificent illustration of this claim.

71 Willis, 'Administrative Law and the BNA Act,' *supra* note 50 at 281 and 274.

oppose normative claims about law that are embedded in the constitutional order with normative as well as empirical arguments. A political left that wishes to engage with law cannot stop at the luxury of critique – it must present a fully normative picture of legal reform.

#### IV *Harry Arthurs's pluralism*

The most sustained attempt to provide an alternative in Canada is presented by Harry Arthurs. As a labour and administrative lawyer, with extensive experience of both the administration of statutory labour regimes and the courts' meddlesome intrusions into them, Arthurs has always been sceptical of judicial review. But in his essay 'Rethinking Administrative Law: A Slightly Dicey Business,' which I believe to be his most sophisticated and elaborate account of the ills of judicial review, his negative critique does not prescribe an exorcism of judicial review. Instead, he insists that judges have a role in legal order as guardians of what he calls 'fundamental,'<sup>72</sup> even 'transcendent,' 'constitutional values.'<sup>73</sup>

This is not the occasion to trawl through Arthurs's work, as I have done through Willis's, rewarding as the catch would be. I want to exploit just this essay in order to make a couple of points about the legal left, points that are potentially general in that they show that my argument against Willis has traction beyond his work, but whose generality is of course open to question because it would take at least a monograph to support them properly.<sup>74</sup> I must mention another caveat, which is that I know from Arthurs personally, and also from his subsequent essays,<sup>75</sup> that his remarks about the judicial role did not have a transcendent role in his work. But his retrospective regret about them is not important to me in the context of this article. My concern here is what the left critique of the rule of law tells us about its logic, and not the development of Arthurs's thought.

Arthurs canvasses, with due acknowledgement, much the same themes as Willis did: Dicey's distorting conceptualism; judicial hostility to the administrative state; the fact that expert officials are better placed to make policy decisions than generalist judges; the idea that the provisions of the statute are best understood in light of the actual intentions of government and not by confining the search for meaning to the four corners of the statute, while relying on quasi-constitutional presumptions of meaning taken from the common law.

<sup>72</sup> Arthurs, 'Rethinking Administrative Law,' *supra* note 20 at 21–2.

<sup>73</sup> *Ibid.* at 44.

<sup>74</sup> Loughlin, *Public Law and Political Theory*, has a far wider sweep than a monograph of this kind, but it makes many of the salient points. For my differences with Loughlin, see David Dyzenhaus, 'The Left and the Question of Law' (2004) 17 *Can.J.L.Juris.* 7.

<sup>75</sup> *E.g.*, Harry Arthurs, 'Protection against Judicial Review' [1983] 43 *Rev. du B.* 277.

He differs from Willis both with regard to the mode of analysis and with regard to several substantive issues. In contrast to Willis's, Arthurs's engagement with what Willis called the lawyer's constitution is profoundly theoretical and also deliberately normative. And this difference is not, of course, due to Willis's intellectual shallowness but to the fact that Arthurs, unlike Willis, unequivocally recognizes the reality of the lawyer's constitution and thus the need to engage on a normative plane with its claims. Moreover, he does not, as we have already seen, totally reject those claims. The issue, then, is whether this last feature of his essay is a necessary product of serious engagement; in other words, to revert to my earlier formulation, the issue is whether, once one recognizes the worth of rule by statute law, one must also be committed to the logic of the rule of law.

Arthurs's substantive differences with Willis are these: first, while he values expertise, he does not trust it to the extent Willis does and is thus much more interested than Willis in democratic accountability and in democratic institutions more generally; second, while he is just as suspicious of the judicial tendency to privilege *laissez-faire* conceptions of rights, he does not equate the values of constitutionalism with such conceptions; third, he suggests that there are two distinct antidotes to the excesses of judicial review, the functionalist model, which he prefers, and the public law model of a specialized administrative court, which he thinks Willis in fact preferred to functionalism; finally, and the reason for Arthurs's preference for functionalism, he puts forward a pluralist theory of legal order, which he opposes to the unitary conception shared by both the lawyer's constitution and the public law model.

I will start with the last two, as they, I think, are pivotal. Arthurs draws the distinction between 'public lawyers,' who want a 'coherent and distinctive public law jurisprudence, preferably administered by special institutions, which reflects the general techniques and traditions of the legal-administrative system, rather than those of public law,' and functionalists, who are 'less concerned with developing generalizations about public law. Rather, they are prepared to allow the specific tasks at hand to shape the particular legal-administrative response, and to countenance the emergence of largely autonomous systems in various sectors of administrative activity.'<sup>76</sup> Willis, he says, held the public law position despite the fact that he saw the pitfalls of its aspiration to coherence.<sup>77</sup>

Arthurs, however, takes the concern about coherence much more seriously, and it is a concern about coherence however and by whomever it is imposed, since he thinks that coherence undermines pluralism. However, it is not exactly clear what he means by pluralism. It is clear that

<sup>76</sup> Arthurs, 'Rethinking Administrative Law,' *supra* note 20 at 29.

<sup>77</sup> *Ibid.* at 31.

he means at least the descriptive claim that if the officials of different administrative regimes are left to pretty much to their own devices, they will develop their administrative regimes as they see fit rather than as some central body sees fit. But he must mean more than that, since no one will deny that the substantive policy of the immigration law regime will differ from that of labour boards, and so on. A second, much thicker, sense of pluralism is that, in so far as different regimes should be governed by norms of procedural fairness and should stay within the limits of their mandates, they are the best judges of how those norms should apply and what the limits are. But Arthurs does not want this thicker sense of pluralism, clearly because it allows officials to determine the content of precisely the sorts of values he deems transcendent. Rather, it seems, he wants something in between, as is illustrated by his disagreement with Peter Hogg.

In a customarily hard-headed analysis of judicial review published in 1974, Hogg starts by expressing his sympathy with a position very similar to functionalism.<sup>78</sup> He does not accord any intrinsic virtue to judicial review and insists that agencies are best placed to make decisions about what is required in their own specialized contexts. However, he also insists that judicial review has an important role just because judges are generalists and thus can ensure the 'integrity' of the legal order. As support, he cites the Supreme Court's majority decision in *Roncarelli v. Duplessis*, in which Rand J. gave the most important judgment.<sup>79</sup> Hogg also disapproved of the idea of a specialized administrative court, arguing that something like the French Conseil d'état cannot simply be imposed on a different legal and constitutional tradition. Further, he suggests that in any case a specialized court risks either being too sympathetic to the administration, thus losing 'sight of competing democratic or libertarian values,' or becoming too confident and thus insufficiently deferential to the administration.<sup>80</sup>

So far there is much that Arthurs agreed with, and, in addition, Hogg supplies a justification for supposing that a generalist court might do a better job than a specialized administrative court of maintaining what Arthurs calls pluralism, while at the same time guarding constitutional values. What Arthurs objects to is the detail of Hogg's account of appropriate judicial review: that one needs ultimate control by judges of 'general values which are fundamental to the legal order as a whole'; that such control requires that administrative interpretations of the empower-

78 Peter Hogg, 'Judicial Review: How Much Do We Need?' (1974) 20 McGill L.J. 157 [Judicial Review].

79 Ibid. at 164–5, referring to *Roncarelli v. Duplessis*, [1955] S.C.R. 121 [*Roncarelli*].

80 Ibid. at 166. Hogg does not mean by 'libertarian' anything more than the liberty interests of the individual.

ing statute be 'reasonable'; that 'invasions of fundamental civil liberties should be authorized by relatively clear language'; that the basis of discretion should be reasonably related to the purpose of an empowering statute; that procedural fairness should be observed; and that privative clauses should be circumvented in the 'rare extreme case' where either *bona fides* or rationality is lacking.<sup>81</sup>

Athurs's objection is not to the 'formulations in themselves' but that terms such as 'reasonable,' 'fair,' and '*bona fide*' are too equivocal. They put us on to a slippery slope, since they 'compel no concessions to context, although they permit a sympathetic judge to defer to administrative decisions if he wishes.' A more 'rigorously "functionalist"' approach would, Arthurs says, frame questions differently:<sup>82</sup> Are there elements of the administrative decision over which judges 'trained in general law' have special competence relative to the administration – constitutional questions, interpretation of the statute other than the one being administered? 'Has the administrative agency, by its failure to tender a (credible?) explanation for the adoption of a particular procedure, deprived itself of the presumptive deference attributable to its special knowledge?' He also says that what constitutes appropriate procedures depends on knowledge of the subject matter and thus that it is 'functional' to defer to those who have this knowledge.<sup>83</sup> And he concludes as follows:

In the end, it must be conceded, it is the judges' sensitivity and self-restraint which will determine where the line is to be drawn between general rules and specific contexts. What is argued is, is that they should be encouraged to give proper weight to the force of specific context by formulations which do not either encourage adherence to the general or permit it by an obfuscating vagueness. And the reason for this position is a 'functional' one: it is the administration which is the chosen instrument of public policy, not the courts; the full range of practical benefits is most likely to be secured if the administration is permitted to solve problems according to its distinctive norms, rather than those of the courts.<sup>84</sup>

The distance between Hogg and Arthurs does not, at one level, look all that great. It really boils down to the difference between 'credible?' and 'reasonable.'<sup>85</sup> However, since we have also seen Willis insist on keeping

81 Arthurs, 'Rethinking Administrative Law,' supra note 20 at 32, quoting from Hogg, 'Judicial Review,' supra note 76 at 167–76.

82 Arthurs, 'Rethinking Administrative Law,' *ibid.* at 32.

83 *Ibid.* at 32–3.

84 *Ibid.* at 33.

85 Note David Mullan's latest formulation: 'Deference is generally earned by statutory and prerogative bodies justifying outcomes by comprehensible reasons.' David J. Mullan, 'Establishing the Standard of Review: The Struggle for Complexity?' (2004) 17 *Can.J.Admin.L.& Practice* 59 at 94.

judges away from reasonableness review when they reviewed *vires*, one should not underestimate this difference. Moreover, if one looks back at judicial review in Canada since Arthurs published his essay, it is striking that its year of publication – 1979 – also saw publication of two of the most important decisions in Canadian administrative law, *CUPE*<sup>86</sup> and *Nicholson*.<sup>87</sup> *CUPE* mandated judges to take heed of privative clauses by using a patent unreasonableness standard for review for issues within jurisdiction. It thus prescribed deference to administrative expertise. *CUPE* also told judges to be wary of characterizing questions as jurisdictional in order to justify using the more intrusive correctness standard. *Nicholson* began the process of doing away with the conceptualism that Willis decried by making it clear that distinctions such as the one between administrative and judicial functions should no longer set the threshold for review for procedural fairness.

Willis would, of course, have been wary of *Nicholson* because of the danger that the courts were just expanding their jurisdiction at the expense of a conceptual distinction. But since *Nicholson* can be read, especially if the deferential stance of *CUPE* is generalized beyond the situation where there is a privative clause, as requiring deference to expert determinations of appropriate procedures, he might also have thought that the two decisions in conjunction were not the triumph of the lawyers. Indeed, neither he nor Arthurs could, in principle, object to the much later (1999) Supreme Court decision in *Baker*<sup>88</sup> in which exercises of discretion are said not be conceptually different from administrative interpretations of the law and so should be reviewable in the same fashion. For Willis, as I pointed out in the introduction, while arguing that judicial review went too far, also thought that all administrative decisions should be subject to review. Similarly, Arthurs suggests that ‘Dicey’s dichotomy between law and discretion [is] ... untenable,’ that the issue is about achieving the right ‘balance between rules and discretion,’ and he even claims that balancing is ‘not merely inevitable, but constitutionally legitimate in principle.’<sup>89</sup> Arthurs does not think that courts are best placed to review the substance of administrative decisions, but, like Willis, he thinks that it is ‘the substance, rather than the technicalities, of discretion’ that must be addressed.<sup>90</sup>

The big question for Arthurs is the extent to which he shares Willis’s realist premise that law is not distinct from policy. It follows from this

86 *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227.

87 *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

88 *Baker v. Canada (Minister of Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

89 Arthurs, ‘Rethinking Administrative Law,’ *supra* note 20 at 25.

90 *Ibid.*

premise that, since judges are ill equipped to review policy, they should not be in the administrative law business. Willis can make that argument, as we have seen, since he regards law as no more than the instrument government has to adopt in order to implement policy. But if there is more to law than that, one is on the legality continuum, and the only issue is where. As we have also seen, Arthurs wants a point short of Hogg's reasonableness review but sufficiently along the continuum to allow for the judicial role in preserving constitutional values.

However, as the story of judicial review in Canada shows, it is very difficult for judges to find a resting place short of reasonableness review, even when they are self-consciously committed to 'sensitivity and self-restraint.' For the jurisprudence of Canada's Supreme Court on deference now requires judges to work with a range of standards, from correctness through reasonableness to patent unreasonableness, determined by a rather complex assessment of the nature of the issue, the nature of the context, and the expertise of the decision maker. Just such an assessment was sketched by Arthurs in 1979, with the exception of his warning against reasonableness review – the idea put forward by the Supreme Court that expertise has to be demonstrated, that is, that decision makers must show why their decision is a reasonable interpretation of their mandate. But even Arthurs's preferred standard, 'credibility' with a question mark, requires demonstration, and, on his own account, he would have to concede that if a tribunal is interpreting the constitution, one would want a rather more elaborate demonstration than on other issues.

Arthurs must surely also object to the ways in which the Court seems to be reneging on its commitment to deference. For the Court now seems to be in two minds both about whether it should ever defer to officials' sense of what is procedurally appropriate and about the best way to interpret their own statute. But he would also have to object to the ways in which the Court seems to be inappropriately deferential, for example, in its claim that it can do the impossible, evaluate official determinations of the weight of reasons without reweighing them; surely this is an example of what Arthurs referred to as the rule of law not 'stoop[ing] to conquer.'<sup>91</sup>

#### V *Conclusion*

My claim is that in a constitutional state, one that is committed to government under the rule of law, judges have to put in place three elements or constitutional fundamentals.<sup>92</sup> First, they must be committed

<sup>91</sup> *Ibid.* at 9.

<sup>92</sup> For a defence of this claim see Dyzenhaus, 'Deep Structure,' *supra* note 49,

to the view that the rule of law has content: law is not a mere instrument of the powerful but, rather, is constituted by values that make government under the rule of law something worth having. Second, judges are entitled to review both legislative and governmental decisions in order to see whether these comply with the values. Third, the onus is on both the legislature and the executive to justify their decisions by reference to these values. A component of the third fundamental is the duty to give reasons, which is the way in which the executive will justify its decisions, so that the individual subject to the decision can know that, among other things, his dignity as an individual, his equal status before the law, has been respected, not only because the official has made the decision free from bias and bad faith but also because the decision has been based on considerations appropriate to the particular statutory regime. The 'perspective within which a statute is intended to operate,' as Rand J. put it in *Roncarelli*, is not constituted only by the statute.<sup>93</sup> As L'Heureux-Dubé J. put it in *Baker*, discretion must be 'exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.'<sup>94</sup>

This claim is, of course, anathema to both Willis and Arthurs. But in different ways they lend it much support. We can learn from both of them, from the combination of realism, functionalism, and pluralism, that it would be much better if judges did not think they had either to stoop or to conquer. The administrative state is not only a phenomenon that has to be fitted into our constitutional order because it is here to stay. It is also legitimate, and so a test of the adequacy of any constitutional theory is whether the theory recognizes this fact. And as we can learn from Arthurs, and from Willis, albeit by negative example, that constitutional theory must articulate a role for public officials to interpret not only their specialized mandates but also the way in which fundamental values are best understood in their particular contexts. Such a role, of course, requires judicial deference, but it also requires that we understand that the legal accountability of the government in a case like *Nolan* is not to an empty form but to something quite substantive.

In sum, Willis's great achievement is to have shown the possibility of a position about the role of law in political order that escapes the normativity of both political and legal argument. But that achievement is also a record of failure. The normative emptiness of his position makes it clear that engagement with normativity is a practical as well as a political imperative. It also makes it clear why, as Arthurs cannot help but show, rule by law requires the logic of the rule of law.

<sup>93</sup> *Roncarelli*, supra note 77 at 140.

<sup>94</sup> *Baker*, supra note 86 at para. 56.