The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941

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I. INTRODUCTION

To the ability and devotion of the profession in past generations must largely be attributed the heritage we have today. But the tendency, which unfortunately is becoming so prevalent, to deny to the individual his traditional right of access to the Courts, threatens to undermine the achievements of centuries. In utter disregard of consequences, the functions of Courts are being transferred to government departments and boards. Thus the sacred rights of individuals are often entrusted to the whims of officials whose main qualification is political loyalty and who have no knowledge or appreciation of those precedents which have stood the test of time.¹

So asserted H.G. Sparling, a prominent Saskatchewan lawyer, in 1937. His view was representative of the fears of many Canadian legal professionals about the administrative state during the 1930s.² Concerned about the erosion of traditional legal principles, and applying comparisons to the emerging fascist states of Europe, many Canadian lawyers and judges launched vitriolic attacks on the growth of government regulation and corresponding use of administrative bodies to implement new social and economic policies.

This view, however, did not go unopposed during the Depression decade. Several prominent legal academics in Canada, notably W.P.M. Kennedy, E. Russell Hopkins, J.A. Corry, John P. Humphrey, John Willis, and Jacob Finkelman, argued that the modern Canadian state required the use of government tribunals and boards as a method of implementing policy. As we shall see, the arguments of these authors reflected an important shift in how Canadian legal professionals thought

† I would like to thank Professor R.C.B. Risk and John Saywell for their advice and support, and Jennifer Llewellyn, and the editors of this journal for their helpful comments.

about the law. This article will explore the shifting attitudes within the Canadian legal academy about administrative law between 1930 and 1941. This article will also explore why this change in attitudes occurred, and whether these academics affected the broader Canadian legal community’s views about the modern administrative state. These issues will be discussed in a five-part analysis. Section one outlines how Canadian legal professionals considered administrative agencies before 1930. Section two indicates the importance of the Depression to the re-evaluation of administrative law. Section three identifies the major Depression-era legal writers in Canada who discussed the emergence of the regulatory state. In section four, this paper compares and contrasts the major themes of these authors. Finally, section five assesses how the contents of Canada’s legal journals at the end of the 1930s indicates a broadening acceptance of administrative law. It will be shown that these academics critiqued traditional ways of thinking about the relationship between citizen and state, and undermined the formalist view of the law, but in the end were less successful in providing an intellectual framework for the future development of Canadian administrative law.

In making these assertions, this paper builds upon research by R.C.B. Risk, who has demonstrated the existence of a Canadian legal realist movement during the late 1920s and, particularly, in the 1930s. However, Risk has thus far failed to provide an in depth exploration of how these Canadian scholars attempted to reshape thinking about the administrative state. As early as 1984, Risk briefly demonstrated in the Dalhousie Law Journal that during the 1930s an important shift occurred in thinking about the administrative state, but to date no Canadian legal historian has adequately assessed these trends. This paper will attempt to fill this void by surveying the Canadian writing on administrative law found in Canada’s legal publications during the Depression era, and by placing this literature within the English and American intellectual context.


II. CANADIAN ADMINISTRATIVE LAW, PRE-1930

It is difficult to separate the histories of Canadian administrative and constitutional law during the late nineteenth and early twentieth centuries. In England, the supremacy of Parliament dictated that the government could empower government departments with administrative powers which, theoretically, were safe from judicial intrusion. In Canada, however, the division of legislative responsibilities between provincial and dominion governments established by the British North America Act⁶ (BNA Act) meant that administrative agencies often faced challenges to their constitutional validity.

The history of Canadian administrative law was therefore often tied closely to that of the constitution, a history that has long been contentious among Canadian political historians concerned with the battles between the provincial and federal governments during the nineteenth century. For example, the titanic struggle between Sir John A. Macdonald and Ontario's Premier Mowat has been immortalized by historians as just one chapter in the long story of Canadian federalism.⁶ More recently, the intellectual battlefield on which the politicians met has been documented.⁷ Historians such as Blaine Baker argue that Canadian lawyers and judges demonstrated a willingness to consider the policy ramifications of their decisions well into the nineteenth century.⁸ In comparison to the early twentieth century, the law-versus-policy and private-versus-public distinctions were more fluid, and Canadian judges more concerned with the social and economic effects of their decisions than with the creation of a scientific, logical set of legal doctrines. The result of these trends was a more deferential mode of judicial interpretation that generally supported government regulatory initiatives.

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⁵ *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c.3.
However, by the late nineteenth century Canadian legal professionals were affected by the rise of legal formalism – an international phenomenon that altered many areas of the law. Legal formalism, a complicated concept, could be characterized by an adherence to four principles. First, it was premised by a strong belief that law was composed of ‘scientific’ legal rules that could be discovered by a careful study and application of legal principles. Second, these legal rules could best be discerned and applied by a close examination of previously decided cases. Thus, judges applied an increasingly rigid doctrine of *stare decisis* during formalism’s rise to ensure that there was little deviation from established principles. Third, legal documents such as legislation and contracts were often thought to speak for themselves, such that a judge could interpret the meaning of legal documents by simply looking for the ‘plain meaning’ of the words. Extrinsic evidence, such as legislative debates or proof of the parties’ intentions, was thought to be unnecessary. Fourth, it was assumed that judges could impartially hear the case before them, having little concern with the policy implications of their rulings. Decisions were to be made on the basis of scientific legal doctrines, rather than unpredictable attempts to adjudicate cases based on the equity of legal outcomes. The high priest of English legal formalism in the realm of constitutional and administrative law was A.V. Dicey. His analysis emphasized individual rights, and the role of courts as the upholder of these rights.

Legal formalists held administrative law to be obnoxious for several reasons. Tribunals were free to disregard precedents, and interpreted statutes by explicitly considering policy ramifications. They reduced the primacy of courts, and the protection of individual rights seemed less likely when administered by agencies employing procedures different from those used in the courts. With the gradual expansion of the administrative state in England in the late nineteenth century, and its rapid increase during and after World War One, formalists lashed out at the increasingly important government...

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departments vested with authority to make administrative decisions. Lord Hewart, the Lord Chief Justice of England, provided a formalist reaction to the growing bureaucratic state in his famous 1929 book *The New Despotism*, an attack which received support from several English academics, including C.K. Allen and Sir John Marriott. Several American scholars mirrored these critiques.

Formalism also played an important role in shaping how Canadian lawyers thought about the administrative state during the early twentieth century. For most of the late nineteenth century, Canadian courts applied a less formalist interpretation of the constitution that permitted the existence of administrative bodies. However, by the end of the nineteenth century formalism began to affect the interpretation of the *BNA Act* such that the legislative spheres of the Dominion and the provinces were judicially interpreted to be completely separate. This polarization of legislative responsibilities provided courts with the opportunity to strike down administrative schemes that infringed the legislative spheres of the dominion or provincial governments. Implicit in this emerging jurisprudential trend were substantial concerns about the increasing size of the administrative state. Bernard Hibbitts argues that the Supreme Court's 1920 *Board of Commerce* decision marked a watershed in the relationship between the Supreme Court and the Canadian state. In the liberal-individualist state encouraged by formalism the role of "the judiciary was limiting and restraining," Hibbitts suggests, and its duty "was to protect the individual, the ultimate creative and responsible force in society, against the state.

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13 For a discussion of American debates on the value of the administrative law, see Horwitz (1992), supra note 9 at 213-246.
was the crucial boundary between the two, shielding the one from the power of other and defining the parameters of their respective spheres.” In regards to administrative law, this movement required that administrative “discretion was to be restrained in the name of the rule of law.”

III. THE DEPRESSION AND THE CRISIS IN CANADIAN LEGAL ORTHODOXY

The 1930s were among the most turbulent years in Canada’s history. Unemployment rates skyrocketed, international trade and per capita income plummeted, and western farmers struggled to keep their land productive. The economic crisis spurred the growth of new political parties, such as the Co-Operative Commonwealth Federation and Social Credit Party. Early efforts to battle the Depression saw governments restrict spending, although a movement for more liberal spending policies slowly gained strength. Stories of jobless men ‘riding the rails’ still permeate Canadians’ collective memory, and rapid declines in today’s stock market quickly result in comparisons to the Great Crash of 1929.

To their collective memory of the Depression, Canada’s lawyers add the famous constitutional cases of the 1930s. These cases are typically remembered as the judiciary’s rejection of a variety of dominion, and to a lesser extent, provincial, programs aimed at alleviating the effects of the Depression. Several cases decided by the Judicial Committee of the Privy Council (JCPC) in the early 1930s had given hope to those advocating for greater dominion powers. In Proprietary Articles Trade Association v. A.G. Canada, the JCPC upheld dominion legislation by employing an expansive reading of Ottawa’s criminal law jurisdiction. In two reference cases, Radio and Aeronautics, the JCPC determined that the dominion government

could implement national legislation in order to fulfill commitments undertaken when the government in Ottawa signed international treaties. However, this perceived trend toward increased dominion powers ended in 1936 and 1937 when both the Supreme Court and JCPC found most of Prime Minister R.B. Bennett’s ‘New Deal’ legislation to be *ultra vires* the dominion government.\(^{21}\) The New Deal legislation sought to implement regulatory and administrative schemes to combat the Depression. The JCPC upheld a federal act to assist the ravaged prairie agricultural industry,\(^ {22}\) but struck down legislation creating new labour regulations,\(^ {23}\) establishing a system of unemployment insurance,\(^ {24}\) devising an industry competition policy,\(^ {25}\) and creating a method of marketing natural products.\(^ {26}\)

As today’s law students struggle to stay attentive to lectures about these seemingly ‘ancient’ federalism decisions, the importance of them is undoubtedly lost. These cases, and the debates they stimulated among lawyers and academics, created a crisis in Canadian legal analysis no less important to the development of Canadian law than was the creation of the CCF to Canadian social and political life. The basic assumptions of legal analysis were questioned in the face of new social realities. This debate often focused on the administrative state, as Canadian lawyers and academics sought to reshape the role of law in light of the expansion of government regulatory initiatives. This struggle also occurred in the United States and Britain. According to Morton Horwitz, for instance, the American social context of the early twentieth century required that constitutional law

confront the meaning of its long-standing commitment to the idea of neutrality. Amidst increasing pressure to bring law into closer touch


\(^{22}\) The *Farmers’ Creditors Arrangement Act*, 24-25 Geo. V, c.53.


\(^{26}\) The *Natural Product Marketing Act*, 24-25 Geo. V., 1934, c.57.
with society, what could remain of the post-revolutionary ideal that of a government of laws whose judges saw their role as impartially discovering and declaring pre-existing law? What was to be the fate of the still-broader nineteenth-century ideal of a neutral, non-distributive state astride an American society becoming ever more unequal in wealth and power?27

In the United States these challenges led a number of scholars and legal professionals, under the names 'sociological jurisprudence' and then 'legal realism,' to question the assumptions of American formalism. The literature on these movements is substantial,28 but a definition of American legal criticism remains difficult.29 Nevertheless, a general outline of key principles is possible. Beginning in the early twentieth century a number of American academics, notably Roscoe Pound, developed a theory of ‘sociological jurisprudence’ based upon a belief that the law had lost step with society, and that judges should consider the economic and social consequences of their decisions.30 A product of the American Progressive movement, advocates of sociological jurisprudence considered social science methods in legal analysis, and were optimistic about their ability to correct the law. In the 1920s and 1930s, this stream of thought was expanded by American Legal Realists, a more cynical movement which refuted suggestions that the law was based upon abstract, scientific principles, and that judges were impartial.31 A heated debate emerged in the early 1930s between Pound and Legal Realism’s most famous proponent, Karl Llewellyn, in

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27 Horwitz (1992), supra note 9 at 5.
29 Horwitz suggests that “Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory.” Horwitz (1992), ibid. at 169. N.E.H. Hull meanwhile asks: “if the men who lived through the controversy could not define legal realism’s central tenets, what hope had the historians?” Hull, ibid. at 174.
31 Ibid. at 269.
32 Horwitz (1992), supra note 9 at 169-192.
which Llewellyn attacked Pound’s ideas, which, by the 1930s, Realists deemed too conservative. Despite this controversy, the underlying challenge to legal formalism offered by sociological jurisprudence and legal realism, according to Horwitz, makes the similarities between the movements greater than their differences.

IV. THE CANADIAN LEGAL REALISTS AND CANADIAN ADMINISTRATIVE LAW

In the late 1920s and particularly in the 1930s several Canadian legal academics, like their American contemporaries, sought to reconceptualize the relationship between the state and the citizen by questioning commonly held assumptions about the law. The small size of the English-Canadian academic legal community during the 1930s (approximately twenty full-time law professors in English Canada) dictated that no one university became the center of legal realism in Canada. Rather, a number of law professors from across the country played important parts in the movement. The most prominent participants in the defence of administrative law were John Willis of Dalhousie University; McGill’s John P. Humphrey; Jacob Finkelman and W.P.M. Kennedy at the University of Toronto; and J.A. Corry and E.R. Hopkins of the University of Saskatchewan. Often armed with

34 Dalhousie, for example, the oldest common-law school in Canada, had four full-time professors in 1930. John Willis, A History of Dalhousie Law School (Toronto: University of Toronto Press, 1979) at 103. Ontario had only two law programs prior to 1957. The practitioners’ school, Osgoode Hall, had four full-time lecturers for most of the 1930s; the University of Toronto law program employed the same number of full-time professors in 1930. C. Ian Kyer and Jerome Bickenbach, The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario, 1923-1957 (Toronto: University of Toronto Press, 1987) at 115.
35 Little Canadian writing on administrative law existed prior to these authors. Nigel Tennant published perhaps the first major article in Canada on the subject in the 1928 Canadian Bar Review. Tennant considered the power of the courts to review the decisions of administrative agencies in cases where the legislature had not expressly provided for such a review. Tennant’s arguments demonstrated his adherence to some formalist ideas. For example, he suggested that, in the absence of express statutory provisions outlining the
American legal ideas gained through graduate work at top American law schools, this group of Canadian academics questioned the principles of legal formalism concerning administrative law in the hope of affecting positive change.

In John Willis, Dalhousie had one of the most zealous proponents of the administrative state. Born in England, Willis studied at Winchester, Oxford, and Harvard. He joined Dalhousie’s law school in 1933 and remained there until 1944, at which time he moved to Toronto to join the faculty of Osgoode Hall Law School. Willis worked for the legal department of the International Monetary Fund in 1947-1948, and

procedure to be employed by administrative boards, tribunals should use the procedures developed in the courts. Tennant, however, did recognize the value of these tribunals’ expertise:

Presumably, a Board which exercises its energies and abilities within a narrow field would be more efficient in solving the problems referred to it than would a Court. The purpose and policy of creating Administrative Boards is, in part at least, based upon such an expectation. Does it not seem anomalous, therefore, to suggest that an appeal should be allowed from an expert to a non-expert body?


This paper will not analyze the work of D.M. Gordon. Gordon was a Victoria lawyer who published extensively on administrative law from the 1920s to the 1970s. Like many of the authors explored in this paper, Gordon supported the expansion of the administrative state during the 1930s, but he nevertheless remained a proponent of formalist doctrines. Kent Roach has explored this seeming contradiction in Gordon, concluding that his work demonstrates that the formalist tradition did not have to result in hostility toward the administrative state. According to Roach, “Gordon conceded much freedom to administrative bodies because he believed that their work did not involve the recognition of legal rights and that no principled and consistent grounds justified judicial intervention.” Thus, if “control could not be categorized, it had to be abandoned.” Kent Roach, “The Administrative Law Scholarship of D.M. Gordon” (1989) 34 McGill L.J. 1 at 33, 35. For Gordon’s major articles of the 1930s see, for example, D.M. Gordon, “The Observance of Law as a Condition of Jurisdiction” (1931) 47 L.Q. Rev. 386; and D.M. Gordon, “‘Administrative’ Tribunals and the Courts” (1933) 49 L.Q. Rev. 94.
in 1949 he accompanied Wright and Laskin in resigning from Osgoode Hall and joining the School of Law at the University of Toronto.\(^{38}\)

John Humphrey received his B.C.L. from McGill University in 1927. Called to the Quebec bar in 1929, Humphrey began lecturing in Roman Law at McGill in 1936, and in 1946 became dean of the McGill law faculty. Though he primarily focused on international law and human rights issues for the majority of his academic career, Humphrey took an interest in administrative law in the late 1930s and 1940s.

At the University of Toronto law program, W.P.M. Kennedy and Jacob Finkelman defended the use of administrative tribunals. Trained as a English historian, Kennedy’s interests shifted during the 1920s toward the study of Canadian constitutional law. Kennedy also played an important role in the history of legal education in Ontario. The law program at the University of Toronto was just a sub-department of the Political Economy Department until Kennedy reshaped legal education at the University. Named ‘Professor of Law and Federal Institutions’ in 1927, Kennedy soon led an increasingly distinct law program. The University made law a separate department in the Faculty of Arts in 1930, and eleven years later created the ‘School of Law.’\(^{39}\)

Born in Poltava, Russia, Jacob Finkelman emigrated to Canada at the age of eight months when his parents settled in Hamilton, Ontario. Finkelman graduated with a B.A. from the University of Toronto in 1926, and proceeded to Osgoode Hall, from which he graduated in 1930 with honours. The law school at the University of Toronto recognized his talents, and immediately after his graduation from Osgoode he joined the teaching staff at Kennedy’s law school as a lecturer in Industrial and Administrative law. In 1932, Finkelman inaugurated the first course in Labour law taught in Canada. The following year, the University of Toronto granted Finkelman LL.B and M.A. degrees, and appointed him a professor. By the early 1940s Finkelman garnered respect as one of Canada’s leading labour law experts. He assisted in the preparation of Ontario’s first collective bargaining act, and took a one-year leave of absence from the law school in 1943 to act as the first Registrar of the Ontario Labour Court. In 1944, Finkelman returned to teach at the School of Law, but also became Chairman of Ontario’s Labour Board.

\(^{38}\) See Risk, “John Willis,” supra note 3.

Like the University of Toronto, Saskatchewan had a pair of professors advocating the acceptance of administrative law: James Alexander Corry, and E. Russell Hopkins. Corry graduated with a Bachelor of Laws degree from the University of Saskatchewan in 1923, received a B.C.L from Oxford in 1927, and a LL.M from Columbia University in 1935. Corry taught law at the University of Saskatchewan between 1927 and 1936 before moving to Queen's University, where he taught in the political science department until the 1960s. Corry's primary academic interests included statutory interpretation and administrative law. E. Russell Hopkins attended law school in Saskatchewan in the early 1930s, and came under the influence of, among others, Corry. After attending Oxford as a Rhodes Scholar, Hopkins returned to the University of Saskatchewan to teach. Like Corry, Hopkins' interests included administrative law and statutory interpretation.

Collectively, these academics attempted to reshape the legal profession's view of administrative law. While the authors were not identical in their approaches, topics, or quality of work, they shared several mutual assumptions about how the law should be reconceptualized with regard to the regulatory state. This paper will provide an analysis, in turn, of the work of John Willis, W.P.M. Kennedy, J.A. Corry, Jacob Finkelman, E.R. Hopkins, and John Humphrey.

i. John Willis and the 'Functional Approach'

An English legal historian reading this paper might be perplexed by the inclusion of Willis in a discussion of Canadian writing on the administrative state during the 1930s. After all, prior to Willis' 1933 appointment to Dalhousie, much of his writing focused on English legal developments. However, Willis developed an interest in the study of Canadian administrative law as the Depression decade unfolded. His fellow Canadian legal realists were undoubtedly pleased by his shift in emphasis, for Willis possessed considerable expertise in administrative

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41 For a full discussion of all of Willis' scholarly work see Risk, “John Willis,” supra note 3.
law, and one of the keenest minds in the Canadian legal academic community.\textsuperscript{41}

Willis’ expertise in administrative law, powerful analysis, and focus on English developments during the early 1930s were all on display in his 1933 book \textit{The Parliamentary Powers of English Government Departments}.\textsuperscript{42} Willis was one of several English legal academics, including William Robson and Ivor Jennings,\textsuperscript{43} to respond to C.K. Allen and Lord Hewart’s attacks on the administrative state. Willis suggested that the Lord Chief Justice’s had descended “from Olympus to launch an attack upon the ‘lawlessness’ of the government departments,” but that it was “time to call a halt and look more closely into a few of the extraordinary powers criticized by Lord Hewart.”\textsuperscript{44} He further asserted that the development of administrative government departments reflected the new social realities of a more complex society. The majority of his book discussed the procedures Parliament could use to implement the administrative state. Some of the key issues identified by Willis formed the basis for his future work on Canadian administrative law. For example, he criticized the formalist methods of interpreting regulatory statutes. Willis explained that, “armed with a dictionary,”

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the Court impartially construes the words, and since the words have little meaning apart from an environment in which they are used, the Court, compulsorily ignorant of their true environment, must place them against the background of the Common Law, and replace the assumptions of 1931 by the assumptions of Lord Coke.\textsuperscript{45}
\end{quote}

Willis thought the solution might be the creation of administrative courts, for the expanded form of government “must be administered by

\begin{itemize}
\item \textsuperscript{42} John Willis, \textit{The Parliamentary Powers of English Government Departments} (Cambridge: Harvard University Press, 1933).
\item \textsuperscript{44} \textit{Supra} note 42 at 3.
\item \textsuperscript{45} \textit{Ibid.} at 171.
\end{itemize}
those who do not draw their inspiration from Common Law analogies."46

Willis' first direct foray into the Canadian discussion about administrative law came in 1935. In his article, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional"47 published in the first issue of the University of Toronto Law Journal, Willis argued that it was a common and necessary feature of English government to delegate powers to departments and commissions. After establishing the necessity of such bodies, Willis suggested that the practical problem was "how to fit into our constitutional structure these new institutions whose growth seems inevitable."48 Willis argued that the answer to this question depended on which of three possible approaches one took toward government by departments or commissions: the judicial approach, the conceptual approach, or the functional approach.

Advocates of the judicial approach perceived statute law as an intrusion upon the internal coherence on the common law, were "uncompromisingly individualistic," such that rights "of property and freedom from personal restraint are sacred,"49 and believed that administrative law included an excessive application of executive discretion. The result of these views was "an increase in the class of discretions which the court is prepared to control,"50 the widening of procedural errors for which courts would deprive tribunals of jurisdiction, and courts' increased willingness to review administrative decisions despite privative clauses.51

Willis critiqued the creation of well-defined legal categories in his discussion of the conceptual approach. In the conceptual approach, judges formulated neat categories by relating the "unknown to the known," and perceiving "the likeness in unlike things."52 Willis

46 Ibid. at 172. For additional comments by Willis on English developments see John Willis, "The Delegation of Legislative and Judicial Powers to Administrative Bodies" (1932-1933) 18 Iowa L.R. 150.
48 Ibid. at 59.
49 Ibid. at 60.
50 Ibid. at 61.
51 Ibid. at 62.
52 Ibid. at 69.
identified, as indicative of this type of reasoning, the distinction commonly employed in England between 'judicial' and 'quasi-judicial' functions. Formalists claimed that quasi-judicial decisions were based on policy considerations, while judicial ones were not. Willis, however, argued that decision-making bodies could not be so neatly defined into such categories, and that the dichotomous division into judicial and quasi-judicial broke down when applied to practical problems. Willis asserted that all decisions involved policy choices, and thus “either all decisions of appellate courts are ‘quasi-judicial,’ and so need not be made by the ordinary courts at all, or else all decisions by administrative bodies... are judicial and so must be made by a judge and the court of king’s bench.”

Although he undermined the conceptual differences between tribunals and courts, Willis still believed that each body possessed different sets of skills. He thus argued that decision-making responsibilities should be assigned to the person or body best suited to make specific types of determinations. For example, when policy was a paramount factor, courts were inadequate decision-makers because “although skilled in the ascertainment of facts and in weighing of arguments,” courts were “unskilled in the consistent determinations of policy.”

Willis preferred the functional approach to administrative law, which required the establishment of commissions or 'governments in miniature' to hear policy-oriented disputes. These commissions would be appointed by the executive, but be free of departmental control and possess memberships with security of tenure. These boards would often include a lawyer, “for he is best equipped to investigate and estimate the weight of facts upon which the decision of the board will be based,” and several others having “special knowledge of the problem which the legislation is designed to solve, for policy can best be translated into action by those who know the background against which it is placed.”

Willis recognized the problem of unlimited administrative discretion, but believed that the regular courts were not well-suited to considering appeals from tribunals. In three ways Willis criticized the English and Canadian practice of permitting appeals to the courts for

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53 Ibid. at 75.
54 Ibid. at 77.
55 Ibid. at 78.
errors of law. First, he suggested that allowing the courts to overturn the
decision of a specialized tribunal meant that “the amateur is asked to
upset the expert.” Second, questions of law were difficult to
differentiate from questions of fact. Last, Willis argued that the best way
to secure a responsible commission “is to show some confidence in the
ability of the men selected to do their job faithfully and according to the
law.” Having argued that courts were ill-suited to review commission
decisions, Willis advocated for the creation of a special administrative
review court, which, like the lower tribunal, possessed specialized
knowledge of the subject area within its jurisdiction.

In a 1939 Harvard Law Review article, Willis again examined what
courts actually did, explaining how Canadian courts employed
techniques of interpretation to permit reviews of administrative
decisions. In so doing, Willis provided his most explicit statement of the
role of politics in shaping legal analysis. Willis argued that the increased
legislation since World War One had prompted the judiciary to strike
back. Big business interests began constitutional battles to prevent
legislative incursions into the laissez-faire market. Business received
favourable hearing from Canadian judges, and in many cases “the
political ideas behind the supposed constitutional prohibition against
‘abdication’ [delegation] are seen in their most naked form.” In
addition, the bench feared encroachments on the powers of courts.
According to Willis, the trends in Canada could be explained by taking
into “account the all-powerful force of judicial legislation” and by
remembering “that behind that force lies the desire to protect against
‘encroachments’ on the traditional jurisdiction of the ordinary courts.”

These encroachments hindered the development of the modern
administrative state. Willis demonstrated how the judicial interpretation
of s.96 of the BNA Act permitted the courts to interfere in administrative
agencies if they deemed these bodies to possess some similarities to
superior courts. He noted that a separation of powers doctrine had been
judicially interpreted into s.96, thus leading courts to ask whether the
tribunal was doing what was exclusively the purview of superior courts

56 Ibid. at 79.
57 Ibid.
58 J. Willis, “Administrative Law and the British North America Act” (1939) 53 Harvard
L.R. 251 at 259.
59 Ibid. at 265.
in 1867.60 This question resulted in increased judicial control of the administrative process, and this interference, said Willis, “has been to retard the growth of the administrative system in Canada.”61 Willis attacked how courts accomplished this, arguing that if it is asked how substantial restriction on the legislative power of the provinces has been evolved from a constitutional provision reserving to the Dominion the appointment of Superior Court judges, we can only point to the judicial legislation outlined above and marvel at the way in which deeply held political beliefs succeed in establishing themselves in the most unlikely phrases of constitutions.62

Willis continued to blame the courts in his discussion of the judicial review of administrative action. Courts had created a “common-law Bill of Rights” by which judges side-stepped privative clauses by asserting that legislatures did not intend to deprive citizens of their right to access the courts. This could be used by the courts to control “an expressed intent of which they happen to disapprove.”63 In addition, courts controlled the procedures employed in the administrative process by inferring judicial procedures to tribunals, and treating procedural errors as excesses of jurisdiction through the employment of the prerogative writs certiorari or mandamus. These judicial excesses stemmed from the social legislation passed during the Depression:

The years of depression since 1929 have induced legislatures to pass laws which are right out of line with traditional ways of thought and therefore distasteful both to those guardians of the past, the lawyers, and to their wealthy clients who have, of course, been adversely affected by these laws.64

Willis’ transition in focus from English to Canadian legal developments culminated with the publication, in 1941, of a collection of essays on the Canadian administrative state, entitled Canadian Boards at Work.65 Willis brought together authors from a variety of backgrounds, including T. Norman Dean, a statistician with the Ontario

60 For a fuller expansion of Willis’ views on the judicial interpretation of s.96 see J. Willis, “Section 96 of the British North America Act” (1940) 18 Can. Bar Rev. 517.
61 Willis, supra note 58 at 270.
62 Ibid. at 270-271.
63 Ibid. at 276.
64 Ibid. at 273.
65 J. Willis, ed., Canadian Boards at Work (Toronto: Macmillan, 1941).
Workmen's Compensation Board; George Farquhar, a member of the Public Utilities Board of Nova Scotia; a former member of the Board of Railway Commissioners for Canada, S.J. McLean; Ontario Securities Commissioner, R.B. Whitehead, and professors J.A. Corry, E.F. Whitmore, and Jacob Finkelman. The articles by Corry and Finkelman will be analysed later in this paper. Willis did not write an article, but provided a lengthy foreword, and wrote three introductory essays for sections of the book dealing with the work of administrative boards, administrative discretion, and administrative procedure. As he had done in his earlier work, Willis articulated his belief in a functional approach to administrative law, concluding that the common law courts and legislatures were "inadequate to perform the tasks required of a government of the twentieth century." He also demonstrated his continued emphasis on the functional approach when he criticized attempts to fit administrative agencies within the legislative, judicial, and executive separation of powers, suggesting that "who, except a lawyer or a political theorist, cares what any board conceptually 'is' as long as he knows what it in fact does?"

ii. W.P.M. Kennedy and the Study of Administrative Law

W.P.M. Kennedy proudly reported in 1934 that the law program at the University of Toronto was the only university in the British Empire that provided special undergraduate and graduate courses in administrative law. Kennedy, as Risk has recently indicated, took an interest in administrative law in the late 1920s, and his inclusion of administrative law in the University of Toronto curriculum appeared to mirror this concern. Kennedy expressed many of the formalist's fears about the rise of the regulatory state until 1934, when he substantially changed his views and became a proponent of the regulatory state. He argued for the necessity of legislative delegation in the changed societal circumstances of the twentieth century. Industrial development, for

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66 Other authors included D.W. Buchanan, a Traffic Manager of the Viceroy Manufacturing Company in Toronto; and Saskatoon practitioner R.L. Waton. Ibid. at xv.
67 Ibid. at v.
68 Ibid. at 2.
69 W.P.M. Kennedy, "Aspects of Administrative Law in Canada" (1934) 46 Juridical Review 203 at 223.
instance, required "not laissez-faire but government control," and increased government intervention "predicates increased legislation, and necessarily, under modern conditions, delegated legislation." 71 Kennedy made explicit his desire to make the law more attuned to the needs of Canada in the Depression:

New standards must be developed in all fields of human endeavour which will be in harmony with the new social philosophy of the age. Care of the sick, the poor, the aged, and the infirm, elimination of slums, control of industry in the interests of humanity, protection of children, universal education, development of natural resources for the benefit of mankind, all demand immediate attention. 72

Administrative agencies served as experimental laboratories in achieving these goals. These experiments were acceptable so long as they operated within the boundaries set up by the legislatures, and conformed to the most important tenants of natural justice. This latter stipulation required that no person judge his own cause, and that every person have an adequate opportunity to present his case, but did not include the application of technical rules of evidence, representation by counsel, or hearings in an open court. 73

These requirements were indicative of Kennedy's continued concerns about the safeguards necessary to prevent excessive administrative discretion. Kennedy criticized Canadians for accepting legislation delegating authority "even in cases where on the surface there appears no vital necessity for such delegation," 74 and warned of "the development of a vast administrative machine" that "leaves us open to all the dangers of bureaucracy, the arch foe of democracy." 75 These dangers led Kennedy to inquire into the controls exercised on tribunals and boards. Unlike Willis and, as we shall see, Corry and Humphrey, Kennedy argued against the creation of a system of administrative courts to hear appeals from lower tribunals and agencies on the ground that "a system of administrative courts composed of persons imbued with the ideals of the civil service would strengthen the dangers." 76

71 Supra note 69 at 207.
72 Ibid. at 221.
73 Ibid. at 224.
74 Ibid. at 212.
75 Ibid. at 214.
76 Ibid. at 228.
Rather, administrative boards needed to establish standards, such as the publication of reasons, which would permit courts to hear appeals fairly.

While Kennedy's academic writing focused predominantly on Canadian constitutional law for the remainder of the 1930s, his interest in administrative law remained apparent in two ways. First, he included a chapter on administrative law in the second edition of his history of the Canadian constitution, published in 1938. The second indication of Kennedy's continued interest in administrative law was the content of the first volume of the *University of Toronto Law Journal*, the legal publication established by Kennedy in 1935. The first volume of the *UTLJ* included articles by three of the authors who helped reshape the Canadian legal profession's opinions about the value of administrative law. We have already discussed the article by John Willis; the others were by J.A. Corry and Jacob Finkelman.

### iii. J.A. Corry and the Political Philosophy of Administrative Law

J.A. Corry has mostly been remembered as a political scientist at Queen's, but Risk has recently stressed Corry's work as a legal scholar. Corry's work in administrative law during the 1930s demonstrates his talents and interests in both scholarly fields.

Corry published his first major article on the administrative state in 1933. Published in the *Proceedings of the Canadian Political Science Association*, Corry's article considered the changing social, economic, and political conditions that resulted in the adoption of administrative discretion as a device of governance. Corry asserted that parliament and courts were ill-suited to implementing new government programs. Courts, for example, employed procedures that assume "at every turn

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78 In 1923, the *Canadian Law Times* (1881-1922) and the *Canada Law Journal* (1861-1922) combined to form the *Canadian Bar Review*. Edited by Charles Morse until 1934, and by Cecil A. Wright from 1935 to 1945, the *Canadian Bar Review* was the most influential academic legal journal in Canada during the 1930s. In 1935, however, W.P.M. Kennedy established and edited the *University of Toronto Law Journal* as a rival academic law journal.

79 Risk, "Volume 1," *supra* note 3 at 199.

that all men are equally able to defend their rights” and that their “whole emphasis is upon private right rather than social need.” In making these assertions, Corry demonstrated his lack of faith in nineteenth-century formalist principles. “The common law courts are deprived of their control over the official,” Corry argued partly because of a lack of sympathy with social aims but mainly because they are not suitable instruments for the furtherance of a policy. For it has been their chief glory to have no policy other than to hold the scales of justice evenly between interests which, in theory at any rate, were capable of precise definition.

While Corry believed that administrative agencies helped alleviate such problems, he also perceived the development of new issues, including inadequate parliamentary supervision of boards and tribunals, and the potential harm done to individual rights by hasty administrative action. In the end, he recognized that administrative bodies were “simply a device of governance which, like all others, may be abused.” Furthermore,

whether it should be encouraged or resisted depends, not upon whether it accommodates itself to the abstractions which satisfied the temper and environment of an era of political development now belonging to the past, but upon the nature of the result aimed at, the efficacy of tried, traditional methods to achieve it and the character of the interests which may be imperilled by its adoption in the particular case. Only upon a balance of these considerations can a useful judgment be rendered.

Corry published three more articles and a book on administrative law by 1941, and these works remained primarily, though not exclusively, focused on the political influences affecting administrative boards. In 1936, he discussed the benefits and problems of publicly-run industries and powerful regulatory boards in the *Canadian Journal of Economics and Political Science.* He also published an article in the first volume of the *University of Toronto Law Journal* entitled

81 Ibid. at 192.
82 Ibid. at 193.
83 Ibid.
84 Ibid. at 206.
"Administrative Law and the Interpretation of Statutes." Despite its title, this article was concerned primarily with statutory interpretation, a process he argued was a creative exercise. This led Corry to question why courts failed to acknowledge their role in shaping the administrative state. The common law tendency was for judges to safeguard private rights from arbitrary action, but unfortunately judges failed to "search out the objectives of state action or the means necessary to achieve them. And any ambiguity in the rule will be resolved in favour of individual rights rather than administrative efficiency." This often stultified parliament's aims, Corry argued, and thus "[w]e must look much more closely at what the judges do than at what they say." The inherently legislative role of judges affected administrative law. "The modern state everywhere is engaged in adjusting itself to the machine age," Corry explained, and legislators establish boards and tribunals to meet new socio-economic challenges, but "at present the judges interpret and apply these statutes and thus can further or obstruct their objects. Unless they are familiar with the aim and purpose of the legislation so as to aid in the adjustment, the orderly process will fail or pass to other hands."

Corry's next major project on administrative law was a 1939 study prepared for the Royal Commission on Dominion-Provincial Relations. Ten chapters of this project examined the historical expansion of regulation in such areas as public health, railways, and labour relations. These descriptive chapters focused on the structure of regulatory initiatives, and on the particular societal forces which resulted in individual legislative schemes. The report is noteworthy here for two reasons. First, Corry explained the reasons for the creation of ad hoc administrative tribunals exercising judicial and legislative functions. As he had done in previous articles, he focused on the shift in political philosophy. During the nineteenth century the doctrine of laissez-faire "received powerful confirmation in the everyday scene," Corry asserted, and thus the

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87 Ibid. at 288.
88 Ibid. at 289.
89 Ibid. at 293.
self-made men who have moulded Canada saw convincing proof of the maxim in their own success. This belief in a self-reliant individualism was strong enough to postpone any serious attempt at state regulation until the twentieth century and to prevent any significant development of social services other than education, until after the Great War.91

After the First World War, however, a change in assumptions about the state/citizen relationship required a new form of governance. The report is also noteworthy because Corry addressed whether a system of administrative courts was preferable for controlling administrative discretion. Corry argued that if courts reviewed the discretionary decisions of administrative bodies then it was necessary that they be experts in the area under consideration, and that they be well-informed of the legislation’s purpose. Common law courts were poorly equipped for these functions, and were hindered by their inherently conservative nature. However, the palpable danger of unlimited discretion led Corry to argue, like Willis, for the establishment of permanent administrative courts which would apply a uniform set of procedures when dealing with disputes between individuals and state officials.92

Corry also wrote the introduction to Willis’ 1941 book *Canadian Boards at Work*. Here Corry outlined some of the major types of boards, and, more importantly, continued to drive home his explanation of the shift in philosophical assumptions which underlay the need for administrative agencies.93 “The role which government is expected to play in any society largely determines the means which are to be employed,” suggested Corry, and thus in “any discussion of the part played by boards and commissions in present-day government, this close relationship between methods and objectives must be kept constantly in mind.”94 *Laissez-faire* presumptions had dictated that the state should have little involvement in the day to day life of citizens, but with industrialization and urbanization *laissez-faire* was rejected “because it was found to be inadequate in a complex society. It is to be replaced by a collectivist ideal which aims at the welfare of the group,

91 Ibid. at 5.
92 Ibid. at 16.
94 Ibid. at xvii.
albeit at considerable cost to the claim of the individual to do as he pleases.”

iv. Jacob Finkelman and the Separation of Powers

Jacob Finkelman’s first foray into the debate about administrative law also came in the first issue of the *University of Toronto Law Journal*. In “Separation of Powers: A Study in Administrative Law,” Finkelman explored the validity of the tripartite division of government into ‘legislative,’ ‘executive,’ and ‘judicial’ parts. Finkelman related the attacks of Lord Hewart and C.K. Allen, and asserted that these critiques were part of a larger movement in which criticisms from the courts became more pronounced as parliament, apparently convinced that the traditional conservatism of the judiciary was ill-suited for the application of new social standards, and itself groaning under the weight of unparalleled burdens, boldly took the bit between its teeth, and began to withdraw more and more jurisdiction from the courts.

Finkelman drew upon Willis’ “Three Approaches to Administrative Law” article in asking whether the concepts of legislative, executive, and judicial had precise meanings. He quickly dismissed the accuracy of the terms, suggesting that “it has never been found possible to differentiate absolutely the functions of government.” The remainder of his paper focused on issues relating to judicial review of administrative decisions, and the judicial construction of constitutional instruments.

Finkelman argued throughout his paper that doctrine did not determine the outcome of cases. For example, he pointed out that the distinctions between ‘ministerial’ and ‘judicial’ employed in *mandamus* often broke down such that they “do not represent anything of definiteness.” Similarly, the separation of powers distinction “has no place as a principle of law.” Rather, practical concerns should

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95 Ibid. at xix.
97 Finkelman, *ibid.* at 318.
98 Ibid. at 320.
99 Ibid. at 324.
100 Ibid. at 341.
develop an effective working system. The allocation of powers "need not imply either theoretical or actual separation, but leaves ample room for interaction," and thus the allocation of government functions "grows out of necessity and common sense." 101 Finkelman concluded with a plea that practical concerns dominate the consideration of administrative law. Interestingly, Finkelman saw the freedom of courts to intervene in the administrative process as imperative to this aim. "It is better for law, in serving the ends of society," contemplated Finkelman, to allow as much freedom as possible to the judiciary in controlling 'administrative' action, to take the risk of confused judgments, of 'distinguishings', of 'distinctions', rather than to cabin and confine the discretion of the judges. We are here dealing with a field of law which by its very nature defies standardization or the alleged symmetry of codification. The time is not yet ripe for the laying down of any complete scheme of the relationship between the judiciary and administrative law; and we can only hope that, if that time ever comes, there will prevail such a sanity, derived from experience and goodwill, as will result in preserving a due balance between working efficiency and the life of the individual citizen. 102

In Finkelman's second major piece on administrative law, published in 1939, he provided a powerful argument as to why modern states required administrative bodies. 103 Finkelman asked his readers to consider how changes in the social philosophy of government necessitated the creation of new institutions. "The situation may be summed up in a few words," Finkelman argued: society "is abandoning one philosophy and is adopting another. Laissez-faire is rapidly fading into the limbo of forgotten things and in its place we are developing new doctrines...." 104 Finkelman then returned to a discussion of the separation of powers, arguing that the nineteenth-century focus on liberty led to the division between judicial, executive, and legislative branches. These were artificial, theoretical distinctions, and Finkelman asked his readers to "turn from theory to practise," and "turn from diatribes to realities; let us examine facts." 105 The legal system had mirrored the dominant philosophy of individualism, but then

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101 Ibid.
102 Ibid. at 342.
104 Ibid. at 166.
105 Ibid. at 170.
came the rude awakening. The romance was ended. *Laissez-faire* had failed to bring happiness to the masses of mankind. In fact, the untold misery and suffering and the social waste which followed in the wake of the new industrial system caused a revulsion of feeling which is gradually undermining even the *positive* achievements of the past century.\(^{106}\)

Governments needed to balance collective and individual needs, and people turned to the state for assistance.

Finkelman, however, had concerns about the new administrative state. People demanded from their politicians a more activist government, but Finkelman asserted that politicians had “passed the buck” to new administrative agencies.\(^{107}\) He recognized the positive attributes of these administrative agencies – including their speed, technical skill, accessibility, freedom from technicality, and experience – but expressed concern about the explosion of boards and tribunals. Noting that Parliament should not abdicate its powers, he warned that there were “many grave dangers inherent in such delegation, and the critics of the system are quite right in calling attention to these dangers.”\(^{108}\) Finkelman therefore advocated the creation of safeguards similar to those which made Parliament the protector of British liberties – that is, that the public, through the democratic process, be active in shaping the design and policies implemented by tribunals. In addition, Finkelman encouraged the employment of three essential principles of justice: that no person judge his or her own case, that no policy be condemned unheard, and that parties know the reasons for decisions.\(^{109}\)

Finkelman also contributed to Willis’ book on Canadian boards.\(^{110}\) After indicating the extensive expansion of delegated authority, and the concurrent increase in the powers delegated, Finkelman allayed fears that the Ontario legislature had lost control over administrative bodies. The cabinet governed administrative law through the issuance of

\(^{106}\) *Ibid.* at 171.


\(^{108}\) *Ibid.* at 176. He went on to assert that “as a lawyer, I would be so bold as to say that the dangers here are greater than in the case of the delegation of legislative power; and I would like to assure you that this statement is not dictated by sentimental attachment to established procedures.” *Ibid.* at 176-177.

\(^{109}\) *Ibid.* at 177.

regulations, suggested Finkelman, though he warned that care should be taken in the formulation of regulations because they "cannot be subject to the scrutiny of parliamentary debate," and thus "it would not be too much to expect that the administrative authority which enacts them should be most meticulous in its efforts to ensure that no injustice will be caused through their operation." In the end, however, delegated legislation would only be controlled by the expression of public opinion and its subsequent effect on the legislature.

v. E. Russell Hopkins, John P. Humphrey and Fears of Discretion

Two new figures published on Canadian administrative law in 1939: E. Russell Hopkins and John Humphrey. Both scholars gave considerable attention to alleviating the fears among the Canadian legal community about the administrative state, although they used somewhat different methods to accomplish this goal.

In his paper "Administrative Justice in Canada," Hopkins explained at length the need for a new method of government which would include extensive use of administrative tribunals. He asserted that administrative law was "no longer an illegitimate exotic," but admitted that boards and tribunals employed diverse procedures. These procedures were excused on the ground that they were "experimental laboratories whose activity is accompanied by the confusion and irregularity associated with the process of trial and error."

In arguing for the administrative state, Hopkins employed three broad arguments. First, like earlier Canadian legal realists, he attempted to demonstrate the artificiality of the distinction between judicial and administrative decision-making. The division between administrative discretion and legal rule "stands firm in the heaven of ideas," but sways "uneasily in the earthier air of application," suggested Hopkins.

111 Ibid. at 188.
112 Ibid.
114 Hopkins (1939), Ibid. at 619.
115 Ibid. at 621.
116 Ibid. at 622.
Discretion was inherent in administrative and judicial decision making, a view that was implicit in Hopkins’ view of the judicial process:

It is fully recognized by the bar that legal opinions are as their name implies in the nature of reasoned prophesies; that facts like witnesses are not always reliable; that whenever recorded authority is silent, obscure or confused, the judge is driven towards measures of innovation; and that, moreover, with broad changes in the facts and standards of society must come a gradual alchemy in the adjustment of wise laws to modern instances.\(^{117}\)

In his second argument for the regulatory state, Hopkins focused on the differences, rather than the similarities, between the administrative and judicial decision-making processes. Judges applied existing legal rules to the extent that changing social conditions permitted, but the decision-making process in administrative law "contemplates the settling of affairs by the discretionary pursuit of generalized statutory objectives."\(^{118}\) Thus, while both judges and administrators made choices, boards and tribunals had more flexibility. This was necessary because governance in England and Canada required increased state action to decrease the hardships of the individualist state and laissez-faire economics. Thus, "the teteology of law is undergoing alteration; it is no longer expressible simply in terms of the abstract freedom of the abstract man. Freedom, it is true, is still an aim of government; but it is freedom with security."\(^{119}\)

Hopkins’ third argument focused on the benefits of the regulatory state and promised increased certainty in the application of administrative law in the years ahead. While admitting that occasional errors would occur, he advocated experimentation. Citing Willis, Hopkins called for a functional approach, pointing out the time and cost savings of administrative law, and that board members possessed specialized knowledge of the questions under dispute. Hopkins also employed an argument in favour of administrative agencies aimed directly at the pocketbooks of his fellow legal professionals. "It may be added that of this legal order those learned in the law must remain principal trustees," Hopkins pointed out, and between "the individual and the state today there stands a maze of law and policy through which

\(^{117}\) Ibid. at 623.
\(^{118}\) Ibid. at 624.
\(^{119}\) Ibid. at 626.
the trained lawyer... is the most likely guide.” To further allay fears of
the administrative process, Hopkins pointed out that incorporating more
lawyers would introduce order and regularity, and “sponsor the growth
of an adequate theory of social control which without seriously
impairing the efficiency of these bodies would have due regard to the
event of individual justice.” He also hoped for increased certainty in
this new area of the law, believing that the discretion of boards and
tribunals would “resolve itself into rule and standard and administrative
law will increasingly approximate justice according to law.”

Humphrey also demonstrated a desire to organize and
conceptualize administrative law. Humphrey began his 1939 article in
theCanadian Journal and Economics and Political Science by quickly
recounting the story of changed political and social circumstances
requiring the expansion of the regulatory state. His primary concern,
however, was to identify the legal controls on illegal or arbitrary
administrative action. After asserting that courts provided the only
safeguards, he discussed various remedies including injunctions,
mandamus, habeas corpus, quo warranto, prohibition, and certiorari.
Humphrey warned against an extension of judicial interference on
grounds other than jurisdictional or procedural error since “the courts
have no standards to guide them, and can only substitute their own ideas
of what is in the public interest for the ideas of the administrative
authority, a function that would not be judicial but legislative.”

Wary of increased judicial discretion to interfere with the
administrative process, Humphrey firmly advocated for the creation of a
independent system of administrative review. The existing remedies for
individuals in the administrative process were “hopelessly inadequate”
providing “neither protection for the individual nor a means of ensuring
efficient administration.” Humphrey’s solution? Like Willis and
Corry, Humphrey argued that “[t]he only possible solution, therefore,
would seem to be the creation of a system of administrative courts in

120 Ibid. at 635.
121 Ibid. at 636.
122 Ibid. at 636-637.
123 John P. Humphrey, “Judicial Control over Administrative Action with Special
Reference to the Province of Quebec” (1939) 5 Canadian Journal of Economics and Political
Science 417 at 417.
124 Ibid. at 427.
125 Ibid. at 429.
which both the Legislature and the Administration can have confidence.”126

V. THEMES IN THE CANADIAN ADMINISTRATIVE LAW SCHOLARSHIP

There are several very noticeable trends made clear by the preceding synopsis of the scholarly writing on administrative law in the 1930s. The first trend was the vicious attack launched against nineteenth-century liberalism and its related ideas about the individual and the laissez-faire economy. Legal academics, of course, were not the only Canadians to question these basic assumptions during the Depression. Many Canadians questioned the traditional way of understanding the relationship between the citizen and the state. Alvin Finkel, for example, concludes that some elements of the Canadian business community supported government economic regulation and expensive social programs in the hope that these policies would level out the business cycle.127 Many of Canada’s non-legal intellectuals, and members of the expanding dominion government bureaucracy also held these beliefs.128

126 Ibid. at 420.
127 Alvin Finkel, Business and Social Reform in the Thirties (Toronto: James Lorimer, 1979). Finkel also discerns frustration amongst business people when courts deemed government regulatory initiatives unconstitutional, particularly after the New Deal decisions. Many business people wanted more power given to the dominion government, and would have agreed with J.F. Davison of the George Washington University School of Law, who wrote in the Canadian Bar Review that “formal arid legalism of the theorists” dictated that the “position of words and punctuation marks in written briefs has been of greater importance than the position of industrial units and their combinations for trade and industrial purposes.” J.F. Davison, “The Constitutional Utility of Advisory Opinions” (1937-1938) 2 U.T.L.J. 254 at 274.

Davison was born in Halifax and completed his LL.B at Dalhousie. He continued his academic career at Harvard where he received a LL.M and S.J.D. by 1929. He promptly began teaching at George Washington University where he specialized in corporate and administrative law. Davison wrote about the crisis in formalism in his 1929 article on jurisprudence. “After years of realism and academic doubt, sociologists, political theorists, philosophers and jurists are eagerly seeking some formulæ which shall contain fundamental rules for the guidance of contemporary civilisation,” suggested Davison, and they “do not seek the absolutes which the nineteenth century writers sought, but rather something to ensure that permanence and security which the consolidation of wealth created by the industrial and

For a discussion see Doug Owram, The Government Generation: Canadian Intellectuals and the State, 1900-1945 (Toronto: University of Toronto Press, 1986). The Canadian intellectual class was deeply concerned about the Depression, and the judiciary’s interpretation of the BNA Act. Owram suggests that this group formed in the early 1930s, and included, among others, McGill economist and lawyer H. Carl Goldenburg; political scientist and lawyer Norman Rogers of Queen’s University; University of Toronto historian Frank Underhill, and political scientists Harold Innis and V.W. Bladen; and McGill law professors Brooke Claxton and Frank Scott. These intellectuals believed they should shape government policy, and thus made inroads into the expanding federal government bureaucracy of the late 1930s. They were also preoccupied with the Canadian constitution, particularly after the JCPC’s New Deal decisions. As the 1930s progressed, the intellectuals deemed constitutional change a necessary preliminary step to an adequate program of social legislation. They were instrumental in shaping the 1940 Rowell-Sirois Commission’s report on the state of Canadian federalism which advocated that the dominion government should possess greater taxing powers, and create National Adjustment Grants to equalize social programs across the country. Existing historical literature has downplayed the connections between the legal realists and the ‘government generation,’ but their mutual concern with the modern administrative state indicates that the connections between the groups requires further research.

These non-legal intellectuals produced an immense amount of scholarship on the Canadian state. Prior to the explosion of discipline-specific journals after World War Two, many of Canada’s most respected publications were non-specific academic journals that published on a wide-variety of topics. These publications were likely read by many law professors and lawyers, who were thus exposed to the critiques of the judicial interpretation of the BNA Act published by intellectuals in the Queen’s Quarterly, Dalhousie Review, Canadian Journal of Economics and Political Science, and Canadian Forum.


In addition, some of Canada’s legal professionals explicitly accepted the ideas propounded by non-legal academics by incorporating the work of these social scientists in many of their articles. For example, Dalhousie’s Vincent MacDonald’s discussion of the judicial interpretation of the constitution drew upon the articles by Goldenburg, Rogers, and O.D. Skelton published in journals such as the Queen’s Quarterly, the Canadian Journal of Economics and Political Science, and the Proceedings of the Canadian Political Science Association. Vincent C. MacDonald, “Judicial Interpretation of the Canadian Constitution” (1935-1936) 1 U.T.L.J. 260 at 260, 276, 282, 283, 284.
Just as historians have connected the ascent of legal formalism to nineteenth-century *laissez-faire* economics and liberal individualism, the decline of these assumptions was tied to the crisis in Canadian writing about the administrative state during the 1930s. More advanced social welfare policies pressured the assumption that the law preserved individual independence against state interference. This gradual acceptance of the increased place of the interventionist state was apparent in the annual reports of the Canadian Bar Association’s committee on statute law. In 1931, the committee reported that expanding governmental programs would make it difficult “to get people back to the more fundamental principle of individual responsibility....”129 The committee’s view, however, had altered somewhat by 1939 when it noted that the dominant nineteenth-century goal was “to secure to the individual the largest possible measure of personal freedom,” but since World War One society sought “social security and a prosperity in which all shall share.”130

As we have seen, Willis, Kennedy, Corry, Finkelman, Humphrey, and Hopkins shared an awareness of changing socio-political assumptions, and a corresponding need for the law to change. Kennedy perceived this early on,131 telling the Canadian Bar Association in 1929 that the “individual and his ‘rights’” was “giving place to the community and its needs.”132 The modern state was henceforth to achieve its ends not by balancing “individuals against one another as legal ‘right-bearing’ atoms, but as members of groups and associations whose interests are beneficial.”133 In 1934, Corry argued that formalist rules of statutory interpretation were inadequate because they were “developed to interpret statutory changes in the Common Law in an age which was agreed on the primacy of individual rights.” In Depression-era Canada,


however, “the great bulk of statutes have to do with the creation or modification of administrative machinery designed to protect certain paramount public interests” and thus the “world will not wait while we misconstrue these provisions by placing them against a background of the Common Law instead of reading them in light of the social and economic life with which they deal.”

Other Canadian realists also shared these beliefs; for example, in 1937 a bright young scholar named Bora Laskin advocated the necessity of taking social factors into account in legal reasoning:

> The accepted complexity of our modern world, the myriad contending social forces in a continual state of ferment, the constantly changing social conditions of society, impose a heavy task on courts and legislatures to keep the law abreast of current trends. Nor are they in a position to equivocate. The impelling force of economic circumstances has driven them into hurried activity to seek, from their cul-de-sac, to avert the possibility of unexampled disorder through the rapprochement of competing social interests, by throwing the weight of the state behind those interests which the individualistic legal theories of an evanescent period have proven pitifully inadequate to protect.

This alteration in political assumptions made it imperative that the legal profession change its basic understanding of how the law operated. Thus, the second broad trend was an almost continual assault on

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135 B. Laskin, “The Protection of Interests by Statute and the Problems of ‘Contracting Out’” (1937) 16 Can. Bar Rev. 669 at 669-670. Laskin graduated from Kennedy’s undergraduate law program in 1933, then attained his M.A. and LL.B degrees at the University of Toronto in 1935 and 1936 respectively. Encouraged by Osgoode Hall’s Cecil Wright, Laskin completed an LL.M at Harvard in 1937. A full-time professor at the University of Toronto (1940-1945, 1949-1965) and Osgoode Hall (1945-1949), Laskin accepted an appointment to the Ontario Court of Appeal in 1965, followed by elevation to the Supreme Court five years later.

formalist thinking. Canadian realists were highly sceptical of conceptual and abstract thinking in any area of the law. Issues like parliamentary sovereignty seemed less important in the face of the Depression than did the creation of (to use Willis' favourite phrase) a functional approach to administrative law. Practicalities, not theory, were the most important considerations. The Canadian scholars were similar to their English academic cousins in this regard, who, according to Martin Loughlin, employed an empirical and historical approach to administrative law, argued for framework legislation and delegated legislation as essential to efficient administrative allocation of administrative tasks, and advocated for the creation of tribunals and boards in which the people with the best technical knowledge and expertise would determine outcomes.136

The third trend showed that, while the Canadian legal realists were highly adept at critiquing judicial and professional attitudes towards administrative law, they generally failed to provide an adequate framework for future administrative schemes. This may have resulted from the size of the foe these academics challenged. Immense amounts of their efforts were spent identifying the change in socio-political assumptions and the need for law to meet these new demands. Relatively little time was devoted to discussing, for example, when courts should consider reviewing administrative decisions. Most of these academics failed to give much attention to the question of what procedures administrative tribunals should employ beyond broad principles of natural justice. As we have seen, these scholars were talented at advocating for a faith in expertise, rejecting the attitudes of courts, and defending administrative discretion, but were less sure what the new administrative state might look like upon completion. The differing attitudes about the establishment of an independent administrative appeal court exemplified this failure to reach consensus on the structure of the regulatory process. As we have seen, Corry, Willis, and Humphrey proposed a system of administrative courts; Finkelman, Kennedy, and Hopkins, on the other hand, looked to the common law courts to review administrative errors.

136 Supra note 16 at 168-169.
VI. A SPREADING ACCEPTANCE OF ADMINISTRATIVE LAW?

Existing literature on legal attitudes towards the administrative state during the 1930s emphasizes the polarity of positions between the academic realists and Canada’s practitioners. Many lawyers and judges clearly had concerns about the growth of the administrative state during this period, but a survey of Canada’s regional and practice-focused law journals hints that the realists may have begun a shift in the debate about administrative law by the end of the 1930s. The conservative *Fortnightly Law Journal* remained unconvincing, taking attacks on administrative tribunals throughout the 1930s. The *Saskatchewan Bar Review* was similarly unswayed.


An analysis of the effect of the Canadian legal realists on the broader legal profession is of course very difficult. The following analysis of the contents of Canada’s less academically-oriented law journals is offered as only one potential starting point for future research on these trends. These journals are also employed out of a belief that they have been underutilised by Canadian legal historians studying the shift in lawyers’ attitudes about the law.

The shift argued for here was likely assisted by the establishment of courses on administrative law at some Canadian law schools. The University of Toronto instituted such a course in the early 1930s, and Dalhousie in 1937. Willis, *ibid.* at 230.

Robert Michael Willes Chitty edited the *Fortnightly Law Journal* from the journal’s inception in 1931. Under Chitty’s direction, the *Fortnightly Law Journal* was the voice of Canadian legal conservatism. Chitty, for example, was well-known for his resistance to the modernization of legal education in Ontario. Kyer and Bickenbach, *supra* note 34 at 139. State action, the *Fortnightly Law Journal* typically argued, undermined individual rights. It often made analogies between the expansion in Canadian government regulation and the fascist activity in Japan and Europe. In 1937, for instance, the *Fortnightly Law Journal* complimented the courts on turning back increased government regulation, and theorized that “the ingenuity of the politician is being taxed to devise new means of attack in this warfare in which the aggressor is as obvious as in the Sino-Japanese conflict.” “Another Battle in the Legislature’s War on the Courts” (1937) 7 *Fortnightly Law Journal* 114 at 114. Similarly, in 1939 it asserted that “the war the Courts are fighting is a war against would-be Hitlerism in our government.” “Legislative Fight to Dominate the Courts” (1939) 9 *Fortnightly Law Journal* 65 at 65. Also see, for example, “Government by Regulation” (1934) 4 *Fortnightly Law Journal* 129; W. McKeeh, “The Evils of Legislation by Regulation” (1934) 4 *Fortnightly Law Journal* 136; “War on Bureaucracy” (1937) 7 *Fortnightly Law Journal* 82; “Constitutional Limitations Upon the Growth of Administrative Tribunals” (1938) 7 *Fortnightly Law Journal* 297; “The Road to Dictatorship” (1938) 8 *Fortnightly Law Journal* 113.

See, *e.g.*, F.W. Turnbull, “Are Courts and Judges to be Discarded?” (1938) 3 *Sask. Bar Rev.* 68; and “Views of the Profession” (1937) 2 *Sask. Bar Rev.* 23 in which several Saskatchewan lawyers expressed their concern with the Depression-era expansion of boards and tribunals.
the *Manitoba Bar News* and the *Bench and Bar*, however, indicate a limited increase in the acceptance of administrative tribunals. For example, while a number of articles in the *Manitoba Bar News*\textsuperscript{141} expressed concern about the rise of administrative tribunals in the 1930s,\textsuperscript{142} the decade ended with a response to these attacks. In an article entitled "In Defence of Administrative Tribunals," Leslie Orr Rowland argued that "the law administered by our present judicial system has reached its limit of improvement or development. The formality of procedure, the intricacies of pleadings, the observance of precedent, have all contributed to stopping the natural development of the communal law.”\textsuperscript{143}

Articles in the *Bench and Bar* displayed a similar trend during the 1930s.\textsuperscript{144} Less formalist perspectives appeared by 1934. The *Bench and Bar* editorialized that in “a country the size of Canada it is inevitable that certain functions of government must be delegated to special bodies.”\textsuperscript{145} The *Bench and Bar* also reported on a speech by Dean James Grafton Rogers of the University of Colorado Law School. Rogers contended that lawyers would

> accept and understand the machinery of administrative law, will aid in devising machinery to remedy its present clumsy operation, and we may even see a separate or parallel system of administrative tribunals set up, instead of trying to call on judges trained in common law methods to adapt themselves to a system so alien in spirit and method.\textsuperscript{146}


\textsuperscript{144}The *Bench and Bar* was a national legal newspaper under the editorialship of Harold Rose that started publication in 1931 and reported notable legal events. For conservative comments on the growth of administrative tribunals see “Commissions and Courts” (March 1933) 3 Bench and Bar 2; and “Legal Frankenstein?” (July 1933) 3 Bench and Bar 2.

\textsuperscript{145}“Sixty-Seven Years of Confederation” (July 1934) 4 Bench and Bar 2 at 2.

\textsuperscript{146}“A New Legal Profession” (July 1935) 5 Bench and Bar 12 at 12. See also the comments of John Willis in “The Profession Speaks” (July 1935) 5 Bench and Bar 2.
While these assertions were still few in number during the late 1930s, their inclusion in the *Manitoba Bar News* and *Bench and Bar* hints at a slow change in attitudes.

**VII Conclusion**

By 1941 the Canadian realists had written an impressive collection of scholarly legal work on the Canadian administrative state. These authors helped undermine traditional ways of thinking about the administrative state, and, more importantly, about the basic functioning of the law. Frank Scott criticized this literature in 1948, suggesting that Canadian administrative law writing "except when dealing with special aspects of Canadian federalism, has been largely derivative, having followed closely the lead of English and American scholars and publicists."[147] In retrospect, Scott's analysis seems overly harsh. The Canadian legal realists identified that the Depression was a time of change – a terrifying time, but also a time of experimentation in public law. That Willis, Finkelman, Corry, Kennedy, Humphrey, and Hopkins could not fully construct a new system of administrative law attuned to Canadian needs in a single decade should not de-value their efforts at undermining formalist approaches to the law. There was still much to be thought through after the publication of the works described in this paper. The realists, however, had slain many of the fears about the growing administrative state. In the years ahead, courts and academics would wrestle with the appropriate standard of review to be applied to the decisions of tribunals and boards. The critics of the 1930s, however, had accomplished their goal: by convincing Canadian lawyers that discretion existed in administrative and judicial processes, and that policy implications were inherent in any decision, these academics opened the door for future debate and scholarship in administrative law.

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