# Alan Cairns, Selected Essays (Constitution and the Charter)

**Cairns, Alan. *Reconfigurations*. McClelland and Stewart, 1995.**

**Cairns, Alan. *Disruptions*. McClelland and Stewart, 1991.**

**Cairns, Alan. *Constitution, Government, and Society in Canada*. M&S, 1988.**

***Thesis and Summary:***

In “The Embedded State”, Alan Cairns argues that Canadian political scientists still think about Canadian government – and particularly Canadian federalism – as if it were 1867. In the contemporary world, the distinction between state and society which is useful when thinking about Canada in 1867 has become wholly inadequate. What we have today is a complicated and tangled web of relationships between state and society, one in which the actions of the state in the past have led the state to become “embedded” within society and have led society to become increasingly politicized in its relations to the state. Contemporary federalism prompts us to identify with different regions (province, country) for different purposes, and the Charter does the same (along with human rights commissions, affirmative action programs, etc.) with other types of identity. Whether the Charter identities are *caused* by state action remains an open question; what is clear is that the relationship between the two is tangled and complex and points toward the tendency of an ever-increasing number of recognized “identities”.

In “The Constitutional World We Have Lost”, Cairns repeats the claim of “The Embedded State” that things have changed profoundly in Canada since the early days. He outlines five key aspects of Canadian constitutional life in the past – avoidance of difficult issues, exclusion of certain voices, constitutional elitism, a low-profile constitution, and a connection with Britain – which have disappeared today. Cairns dates the transition from the “old world” to the new world to the time of John Diefenbaker; although Diefenbaker had an important role in ushering in the new constitutional world (the Bill of Rights, the enfranchisement of status Indians, and Diefenbaker’s own ethnic heritage played a role here), he was also a witness to other important changes in the same era, including Jean Lesage’s election in Quebec and the increasing role of the international community (especially the UN) in domestic politics.

In “Constitutional Minoritarianism”, Cairns provides another account of the changes which have emerged in Canadian constitutional politics since WWII. His general claim is similar to that in “The Constitutional World We Have Lost”, though here Cairns emphasizes the international aspects of the transformation: the rise of international social movements and the collapse of colonialism. Cairns concludes by predicting that “constitutional minoritarianism” – that is, the politics of minorities – is here to stay, because it is supported by state institutions, academic institutions, demographic factors, and prevailing intellectual currents.

In “The Fragmentation of Canadian Citizenship”, Cairns continues to argue that things are very different now: the past, he says, is another country. What he adds in this essay is the claim that Canadian citizenship is fragmented today in two important ways: first, by three different sociological nations (Quebec, the ROC, and Aboriginals) and second by various types of minorities. To understand the problems with Canadian citizenship today we must understand both of these complex problems (here Cairns would seem to anticipate Will Kymlicka’s well-known distinctions in *Multicultural Citizenship*).

“The Case for Charter-Federalism” is a brief essay which argues that Canada needs *both* federalism (to accommodate regional difference) and the Charter (to accommodate trans-provincial difference) in order to survive today. It concludes with the claim that just as we did not choose federalism in 1867 (“inescapable realities chose it for us”), we are forced to choose Charter-Federalism today.

“Reflections on the political purposes of the Charter” begins by outlining the political purposes behind Trudeau’s ceaseless defense of the Charter, the majority of which have to do with dampening provincial identity (esp. in Quebec) while strengthening Canadian identity across the country, partially by ensuring that one can be either French- or English-Canadian in any part of the country. Cairns then explains some of the oddities of the new constitution (particularly its combination of popular sovereignty in the Charter and parliamentary sovereignty in its amending formula). The remainder of the essay is devoted to an explanation of the relationship between the Charter and Canada’s two minority nations: Quebecois and Aboriginal peoples. Cairns outlines the reasons for resistance to the Charter among these groups, and suggests at the end of his essay that a careful balance between federalism (a federalism which incorporates Aboriginals) and the Charter is required.

“The Judicial Committee and its Critics”, perhaps Cairns’ most famous essay, attacks the two major schools of JCPC criticism: the “fundamentalists” and the “constitutionalists”. Cairns argues that the famous JCPC decisions on federalism, which were consistently in favour of the provinces, were in fact in keeping with the sociological reality of Canada at the time. Although Cairns is well aware of the weaknesses of the JCPC (particularly their lack of an adequate legal theory and/or method and their distance from Canadian reality), he claims that the JCPC was remarkably reflective of Canadian reality. The critics of the JCPC, on the other hand, were given to a variety of mistakes: the fundamentalists embroiled themselves in all the incoherencies related to legal “originalism”, and the constitutionalists, while operating on a sounder foundation, failed to adequately elaborate their theory (beyond consistent attacks on the court). Cairns concludes by claiming that these problems remain with us today.

***Methodology and Theoretical Perspective***

Cairns is often identified as an institutionalist or elite theorist (see, for example, Simeon’s survey of Canadian federalism), and while this is undoubtedly true of some of his work (e.g. “The Governments and Societies of Canadian Federalism”), most of the works surveyed here are quite complex in their approaches. Cairns generally envisions a two-way causal arrow: *from* society *to* the state, and *from* the state *to* society. Cairns is very much concerned with those (e.g. the behavioural school) who over-emphasize social causes without understanding the real autonomy of the state. Cairns’ approach is often historical and occasionally normative, though his normative commitment in these essays is largely restricted to the claim that Canada needs to combine federal accommodation with Charter accommodation if it is to survive.

***Comparison with Other Readings and Contribution to the Literature***

Cairns’ contribution to the literature is wide and varied; nearly all of the more recent literature on the Charter, the constitution, and Canadian federalism deals explicitly or implicitly with Cairns. At the risk of oversimplification, here are a few examples of Cairns’ contribution to the literature. The basic theoretical approach of the JCPC article is picked up and modified by Morton and Knopff in their book on the Charter (and is implicitly assumed by Morton/Knopff’s critics, such as Miriam Smith). The “embedded state” article seems to have had an effect on a number of “literatures” in Canada, particularly those related to policy networks (i.e. the complexity of state-society relationship), federalism (e.g. institutional approaches such as Simeon’s *Federal Diplomacy*), and the relationship between the Charter and Canadian identity politics. Cairns’ arguments in “constitutional minoritarianism” and “the fragmentation” have been picked up by those who study multiculturalism, and seem to have had an effect on normative theorists such as Will Kymlicka (whose distinction between minority nations and multicultural ethnic groups parallels Cairns’ distinction).

***Relevant Exam Questions***

Anything on the relationship between the Charter and federalism; anything on the rise of ethnic minorities and “Charter Canadians” in Canada; anything about regionalism and federalism.

***Detailed Notes:***

*The Embedded State: State-Society Relations in Canada (in* Reconfigurations*)*

33 The theme of the essay is that the tighter fusion of state and society in recent decades due to activist national and provincial governments fragments the state and contributes to multiplication and salience of socio-economic cleavages; the more we relate to one another through the state, the more divided we seem to become

We need to learn to think in terms of politicized societies caught in webs of interdependence with the state; the fusion of state and society makes all things political

34-35 The interaction between state and society is “a complicated multi-partnered dance” and actors in both are involved in an endless game of mutual influence

37-38 Our contemporary thinking about federalism is still along the lines of 1867, which is no longer appropriate; the federalism of 1867 was a response to regional diversities that were also to be incorporated into a new national community; in 1867 the reality of the provincial communities didn’t coexist with a national community, but only the aspiration to create such a community – provincialism rested on historically generated territorial diversities

In the early days of Canadian federalism, provincial governments had little to do with provincial societies: tax was primitive, welfare was private, regulation was scant, etc. but today, the coexisting interventionist governments don’t so much reflect underlying national communities as they recreate them

43-45 The intent for the Charter was to be a nation-building and nation-preserving as well as rights-protecting instrument; but the complex process out of which it emerged produced a Charter in which many internal divisions and cleavages were accorded recognition; not only was the notwithstanding clause included, but also certain specific groups were singled out for constitutional recognition

By singling out specific groups, it fractures the possibility of common citizenship focusing on more abstract or general concerns; Thomas Flanagan’s work on Canada’s human rights commissions shows how the mandate (and the number of excluded peoples) has a tendency to expand

46 Conceptions of community and identity today are increasingly the result of state policy, sometimes as an intended consequence, and sometimes as a by-product of the massive role of the state in our day-to-day existence

47-48 In terms of ongoing programs, citizens and socio-economic interests are grouped first into national and provincial communities, and then subdivided by innumerable administrative units and the programs administered by them: the tendency is to view the public arena as another marketplace in which the currency is power and votes rather than dollars

49-50 Citizens now move according to the rhythms of government calendars; donations made before tax time, decisions made for tax purposes, government is evaded by the underground economy

51-52 Politicization of ethnicity meant that the ethnic distribution of power, income, status, and language was subject to political modification: thus Aboriginals have increased their political activity, stimulated by government funding and the opening up of the constitutional issue; similar developments among women, gays, and the handicapped

There are also international forces at play: the women’s movement, Aboriginals, Gays are all linked with similar movements outside Canada; all of which derives from the explosion of group identities and the belief that the state is the agent for remedial action

54 Today we approach the state as fragmented selves, calculating whether we should emphasize our ethnicity, age, gender, region, language, sexual preferences, etc. As for whether state cleavages generate social cleavages or the reverse, this is a subject for case studies; as a whole, what seems to exist is that the state will recognize cleavages that are to its advantage and that private interests seek recognition and support and will redefine themselves if such a recognition is plausible; the overall tendency is for the state to recognize more identities and cleavages

56 It is a mistake to focus exclusively on Canada, since Canada is a player in a much broader movement, a global ideology that calls for the expansion of the state

57 It’s too simple to speak about state autonomy; in reality the state is interdependent; as a result of past performance, it’s linked in thousands of ways to interests in society that can no longer be described as private

57-58 From one perspective, the multiple fragmentation of society contributes to integration, since the non-territorial distribution inhibits regional tendencies and contribute to cross-pressures which reduces various demands;

59-61 What now exists is a series of overlapping governmentalized societies in which the limits to political authority are set by the enduring interactions between society / economy and government; the difficulties of retreat and major change are demonstrated everywhere, including in the difficulties involved with bringing the deficit under control; the fragmentation of society generates an urgent need for political leadership and works against the appearance of such leadership

The claim is not that the state has “control” à la USSR, because the state power is so dispersed and fragmented that it can’t achieve anything approximating total control

*The Constitutional World We Have Lost (in* Reconfigurations*)*

98-99 The purpose of the essay isn’t to lament the loss of a constitutional world, but rather to illustrate the very great differences between the old constitutional world and the one that exists today; the constitutional world we have lost was “simplicity itself” compared to the constitutional world we have gained

101-03 The institutions of the constitutional framework were in place from the beginning: federalism, parliamentary government, constitutional monarchy, and the judiciary; federalism rooted itself deeply in Canadian society; its Quebec base of support was supplemented by the institutional self-interest of the political and administrative class that operated the provincial order of government

103-12 The constitution of yesteryear was by and large a living constitution that responded successfully to challenges within the system; but the older constitutional order rested on practices that are no longer feasible: avoidance of fundamental issues, presence of a “custodial mother”, restriction of the social base of the political order by exclusionary practices, employment of elitist politics

1. The avoidance strategy: conscious and habitual practice of avoidance, including the absence of an amending formula which left the issue of the location of sovereign power off the table, resting on four unresolved tensions: conflict between those who saw themselves as British and those who saw themselves as Canadians; conflict between federal and provincial governments; conflict between Quebec and the rest of Canada; conflict between Canada as a system of governments and Canada as a nation of citizens (exemplified in the debates after Meech Lake)
2. The exclusion strategy: exclude certain segments from full membership in the community, including aboriginal peoples, women, ethnic minorities
3. Constitutional elitism: with the exception of the conscription referendum, there was no equivalent in Canada to the widespread public participation beginning in the Quebec referendum in 1980 and through the 1992 demise of Charlottetown; formal constitutional change was not seen as a matter for citizens; in the absence of a Charter, there was no engagement with citizenry directly in terms of non-federal criteria
4. A constitution without Charisma: low profile constitution and no Bill of Rights; the derivative status of the constitution contributed to its low profile
5. Divided British-Canadian identity

112-14 In many ways the Diefenbaker era led directly to our current constitutional world

1. The 1960 Bill of Rights signaled a weakening hold of parliamentary supremacy on the Canadian imagination and contributed to rights consciousness
2. Franchise extension in 1960 to status Indians which boosted political involvement and helped set the stage for aboriginal involvement in constitutional issues
3. Appointment of the first woman cabinet minister, Ellen Fairclough, in 1957, an early and mild response to perceptions about male dominance
4. Little sensitivity for French Canada, but a deep sensitivity for the failure to recognize Canadians who lacked founding people status (and a real pride about the eighteen different racial origins in his conservative caucus)

Diefenbaker was acutely aware of international developments, including the collapse of colonialism and the significance of the United Nations. There were also two other important developments during the Diefenbaker years:

1. The 1960 victory of the Lesage Liberals in Quebec is the conventional date for the beginning of modern, secular Quebec nationalism
2. Attenuation of deferral dominance from a centrifugal provincialism (supplementing Quebec’s quiet revolution) which led directly to the Pepin-Robarts analysis that the twin forces of duality and regionalism were the major challenges in Canada

In short, Diefenbaker’s constitutional world is our own in a way that King’s and St. Laurent’s constitutional world is not.

116-17 There’s another important difference between then and now: our openness (forced, not voluntary) to international opinion – international opinion and the International Women’s Year (1975) and the Decade of Disabled Persons (1983-1992)

118 The formerly excluded, who have not shed the mistrust derived from their past treatment, now join with traditional constitutional players to deal with issues that were formerly avoided, particularly who we are as a people and the location of sovereignty

Constitutional Minoritarianism (in Reconfigurations)

120-1 The salience of minority identities has been heightened by their inclusion in a rights-awarding Charter; and the coexistence of citizen rights and an elitist amending formula puts the question of sovereignty squarely onto the Canadian constitutional agenda

122-25 How did we get here? First of all, various social transformations in the 1960s and 1970s which had no real connection to the constitution got pulled into the constitutional debate as a result of the Charter project; these social transformations themselves derive from domestic and international phenomena: the ebbing of imperialism and the influence of cultural relativism has weakened the self-confidence of the male, white, straight, etc.

These changes would have occurred even if the constitution was totally stable, and by themselves they wouldn’t have opened up the constitution; the coincidental opening of the constitution, and the fact that Trudeau saw a Charter as a way to weaken provincialism, produced a reciprocity of interest between Trudeau, looking for allies, and emerging minorities looking for status: they were encouraged to cast their objectives in constitutional terms

134-38 The new constitutional actors will have staying power for five reasons:

1. The groups have constitutional identities, status, rights, and claims; they will experience constant pressure and incentives (particularly among their elites) to be constitutionally involved
2. The social movements and intellectual tendencies lying behind them are connected to international transformations, which are constant reminders that minorities of various kinds are not alone
3. Scholarly infrastructure has developed that lends credibility to the grievances of the minorities; proliferation of journals, conferences, chairs, etc.
4. The “fact” of multiculturalism as a result of immigration, the high birth rate of the indigenous peoples, and other demographic factors
5. Each group’s activities will be imitated by other minorities which means there will be an overall orientation to the constitution which is sympathetic to minorities

*The Fragmentation of Canadian Citizenship (in* Reconfigurations*)*

158-9 Preliminary comments about the prominence of citizenship today:

1. Gradual waning of the British connection means that we’re now confronted with basic questions of sovereignty, identity, and our place in the world
2. Globalization means a destabilization of links between citizen and state unless they have a positive identification with that state
3. The threats to Canada’s existence raises the fundamental question of what community Canadians wish to give their allegiance to
4. Citizens are made as well as born: immigration makes citizenship an instrument for bridging cleavages between old/new Canadians
5. Behaviour that the modern state needs requires not coercion but autonomous civic behaviour, which alienated citizens will only grudgingly provide
6. Constitutional recognition demanded by Aboriginal peoples requires unique citizenship status
7. Charter of Rights was seen as an instrument to transfer sovereignty to the people
8. Constitutional crisis has undermined the authority of elites and of executive federalism; citizens cannot be treated as chattels

161-62 Canada is home for three sociological nations: Quebec, ROC, and Aboriginal; federalism fits only crudely with this three-nations reality: these are the first major challenges to the idea of a single standard of citizenship

175-83 The other major challenge comes from the political articulation of various social, ethnic, and gender diversities, which reflect three phenomena: (1) ethnic diversity in Canada is increasing (2) diversities based on gender, lifestyle, etc. are now politicized; (3) politicized identities assert that a person cannot represent a person not of that identity

The written constitution is no longer only a functional instrument for the management of federalism but also a powerful symbolic statement of inclusion or exclusion; the politicized heterogeneity is a problem for a representative system that presupposes that one person can speak for another

183-85 Yesterday’s constitution was able to contain the less aggressive nationalis of Quebec by federalism and other accommodations; not so any longer for Quebec, aboriginals; the modernity that was to make us one has led to an explosion of particularistic self-consciousness; we must find a way to accommodate diversity without destroying our interconnectedness

*The Case for Charter-Federalism (in* Reconfigurations*)*

191-93 Federalism alone cannot accommodate the multiple Canadian conceptions of community and identity: Canada needs both the Charter and federalism as separate, tailored constitutional responses; the virtue of a Charter is that it gives recognition to individuals who are left out of the territorial accommodation of federalism

One way of assessing a post-Meech proposal will be the extent to which it balances territorial community with trans-provincial identities

Canadians have not chosen Charter-federalism. We did not choose federalism in 1867; inescapable realities chose it for us. We did not choose the Charter in 1982: the Charter formally expressed what we were already becoming

*Reflections on the Political Purposes of the Charter (in* Reconfigurations*)*

195 The many changes in Canadian constitutional culture since 1982 can’t be defined as the effects of the Charter – this would ride roughshod over complex underlying forces and multiple causes; besides, the Charter itself is shaped by ideas, events, and so on

197-99 Trudeau was motivated in his Charter advocacy by four political purposes:

1. The language policy, particularly the s.23 minority-language education rights, was supposed to ensure a country-wide view of French Canada in opposition to the Québecois; the intention was to mute the Quebec claim toward an assertive provincialism; this has not occurred, though it has stimulated minority-language rights holders to see themselves as Canadians and to defend the Charter
2. Transform the base of the constitutional order: draw citizens out of provincialism and into a pan-Canadian sense of self; the Charter is intended to be a nationalizing, Canadianizing instrument; at a general level, this political purpose has been achieved, and the charter impedes constitutional changes that would considerably strengthen provincial jurisdiction
3. Attempt to relocate sovereignty in the people rather than in the governments of Canadian federalism; the original federal proposals combined the Charter with an amending formula with a referendum component which demonstrates the coherence of this view; but the actual constitution is contradictory: popular sovereignty as expressed in charter, sovereignty of governments as expressed in amending formula
4. prominence of the Charter in federal proposals was a tactic to delay discussion of the division of powers until Ottawa’s objectives had been achieved in terms of rights and reform of central institutions; allowed the federal government to appear friendly to the people while the provinces were just power-grabbers

200-03 One of the political effects of the Charter has been the drive for a more open, participatory process of constitutional reform: the Charter was shaped by a *de facto* alliance between the federal government and a diverse group of Charter supporters – women’s groups, the disabled, ethnocultural organizations, and so on – the Charter was shaped by their vigilance in the 1980-81 Special Joint Committee hearings

Although rights-talk leads to a certain amount of clarity, it also threatens to diminish compromise and flexibility – both central to parliamentary government and federalism (though there are the escape valves of the notwithstanding and the reasonable limits clauses)

214 There are of course all kinds of complications involved in the application of the Charter to Aboriginal nations as well as Quebec, although the rejection of the charter by Quebec nationalists has less to do with a rejection of rights (e.g. Guy LaForest supports the Quebec Charter) but more to do with the nationalizing character of the Charter (and of course the means by which the Charter became law in Canada)

214-15 Those who hoped that the Charter would quiet federal-provincial tensions and dampen Quebec nationalism are disappointed; initially, students analysed the Charter in terms of its compatibility with federalism and parliamentary government; the jury is still out on federalism, and the task is to work out an accommodation which is respectful of both

The difficulty is to figure out how the Charter relates to nationalist Quebec and Aboriginal elites; but it’s not right to say that the Charter was a mistake because of these problems: the mobilization sparked by the Charter indicates that the parliamentary and federal system was making insufficient contact with large numbers of Canadians

*The Judicial Committee and its Critics (in* Constitution, Government, and Society*)*

44-52 In general, there have been two opposed prescriptions for the judicial role, and each leads to a specific criticism of the Privy Council: the constitutionalists, who advocated a flexible and pragmatic approach; the fundamentalists, who advocated a technical and logical interpretation of the *BNA Act*

The fundamentalist criticism was that the JCPC misunderstood the act, and their argument had four main stages:

1. First they attempted to provide documented proof that the fathers of Confederation intended to create a centralized system: this was done primarily by ransacking the statements of the Fathers, especially John A. Macdonald
2. Then they attempted to show that the centralization was clearly embodied in the Act itself; show quite easily that the division of powers was designed to favor Ottawa
3. Definition of the judicial role requiring that judges do no more and no less than interpret the Act in a technically correct manner according to the intention of the Fathers of Confederation
4. Then show the failure of the JCPC by contrasting their decentralizing decisions with the centralism of the Fathers

On the other side, critics of the constitutionalist school argued for a more generous, flexible, liberal approach that recognized the constitutional importance of judicial review; they delighted in the image of the “living tree” as applied to the BNA Act by Lord Sankey; these critics were strong on generalities and short on specifics, but based on the assumption that a large and powerful central government was necessary

52-55 How did the critics explain the actions of the JCPC? One explanation was legal: it was natural for the government to reduce the discretion involved in interpreting vague phrases (like peace, order, good government); sometimes they said that the JCPC was influenced by political considerations inappropriate for the court; others said that the JCPC was a hiding place for reactionary economic interests

55-58 There were, however, supporters of the JCPC as well; when doing so, they typically intermingled judicial and imperial arguments (the most important source of its support was imperial – pride and dignity from the empire of which Canada was a part)

58-66 Is it possible to justify the actions of the JCPC on sociological grounds? It is certainly not enough to praise it for its neutrality and impartiality, since it was clearly biased in favour of the provinces from the 1880s onward

“It is impossible to believe that a few elderly men in London deciding two or three constitutional cases a year precipitated, sustained, and caused the development of Canada in a federalist direction the country would otherwise have not taken.”

The fact is that courts are called into play be groups and individuals seeking objectives that can be furthered by judicial support: in the long run the centralization of the Fathers of Confederation was inappropriate for the regional diversities of a vast land and a large, geographically concentrated minority culture

In the old provinces of Canada and the Maritimes provincial loyalties preceded the new political system: Nova Scotia and New Brunswick were reluctant partners, and Lower Canada sought to obtain as much decentralization as possible; the ambitions of provincial politicians wrested concessions from the federal government; there was an almost inevitable conflict between federal and provincial, particularly when they belonged to opposite parties

Moreover, in response to the increasingly federal society, the centralizing features of the BNA Act fell into disuse: powers of reservation and disallowance were eroded with no intervention by the JCPC

In fact, the provincial bias of the JCPC was generally harmonious with Canadian developments; and there’s more: in Ontario, Mowat and Macdonald were personally hostile to each other, from different parties, and had plenty to disagree about; and generally the late 80s and early 90s was one of the lowest points of national self-confidence in Canadian history; Mowat was greeted as a hero on return from his arguments with the JCPC

66-72 The JC had two fundamental weaknesses:

1. The legal doctrine that guided its deliberations: treated the BNA as an ordinary law and analysed by the standard canons for the technical creation of laws; a serious policy role for the court is required given the written constitution; the court was caught in an inappropriate legal tradition for its task of constitutional adjudication; the JCPC had no sophisticated theory of its own role in the process
2. The isolation of the JCPC from the scene to which its judgments applied; relative ignorance and insensitivity to the Canadian scene, which was exacerbated by the shifting composition of the committee

Given these major weaknesses, the decisions of the JCPC were in fact surprisingly appropriate to Canada

A strong and effective court requires supporters, including good law schools, quality legal journals, a legal fraternity: the minimum conditions for a sophisticated jurisprudence; this was only imperfectly realized in the JCPC

72-84 Back to critics; first, major problems with the originalist (“fundamentalist”) approach:

1. Even if the task was a strict interpretation, you can disagree about whether they succeeded in this or not (refined textual analysis of 91 and 92 makes it tricky)
2. The relationship between the BNA Act and the Fathers who created it is complex; there may be a discrepancy between the intentions and the written result
3. There is the question of whether the Fathers’ intentions are relevant to the present day; society changes, and literalism is therefore inadequate
4. The new and developing areas of government, where uncertainty was greatest, had to be recognized in their novelty by the courts
5. The ability of the courts to work out the constitution can be included in the Fathers’ intentions for that constitution

The intentionist argument is part of a larger argument about the appropriateness of historical material for interpreting the Act, but the use of this pre-Confederation historical material would not have helped the JCPC

The standpoint of the constitutionalists is much more promising, recognizing a policy role for the courts in judicial review, but their statements werew consistently inadequate: they never developed a consistent and meaningful definition of the judicial role in constitutional review.

85 Canadians still suffer from an inability to properly define role of the court in federalism