\*A. Cairns, “The Judicial Committee and its Critics,” *CJPS* 4 (1971)

**Overview**

Paper surveys the extent and variety of the criticisms against the JCPC – it provides a more favourable evaluation of the Privy Council’s conduct.

**Background**

* Criticisms of the Privy Council can be roughly separated into 2 opposed prescriptions for the judicial role:
  + Constitutionalists –
    - Critics who advocated a flexible, pragmatic approach that sees the role of judges being that of keeping the BNA Act up to date
    - Took their stand on John Marshall’s assertion that judges must not forget they were expounding a constitution
    - Thought JCPC should have been an agent for constitutional flexibility, concerned with the policy consequences of their decisions
  + Fundamentalists –
    - Criticized the courts for not providing a technically correct, logical interpretation of a clearly worded document
    - According to these folk, basic shortcomings of JCPC was its elementary misunderstanding of the act. They stress a literal meaning of the act with widespread resort to materials surrounding Confederation
    - Fundamentalists simply asserted the Privy Council had done a bad job in failing to follow the clearly laid out understandings of the Fathers embodied in the BNA Act.
* Judicial committee laboured under 2 fundamental weaknesses: (1) the legal doctrine which ostensibly guided its deliberations, and (2) its isolation from the setting to which those deliberations referred

**Conclusion:**

* It is valid, if somewhat perverse, to argue that the weakness/confusion of Cdn jurisprudence constituted one of the main justifications for ending appeals to the Privy Council – the attainment of judicial autonomy was a prerequisite for first class Cdn jurisprudence
* The inadequate jurisprudence, the legacy of nearly a century of judicial subordination, which accompanied the attainment of judicial autonomy in 1949, has harmfully affected the Supreme Court in the last 2 decades
* As yet, the SCC, law schools, legal professions, political elites have been unable to devise an acceptable role for the court in Cdn federalism