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Comments on "The Umpire of Canadian Federalism"

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COMMENTS ON "THE UMPIRE OF CANADIAN FEDERALISM"

By B. L. STRAYER*

In this chapter the author paints with a broad brush the picture of a Supreme Court making "intuitive" judgments on questions of constitutional validity of statutes, "on the basis of standards which it is making up as it goes along". His thesis is that this has become inevitable because by the passage of time the written constitution of 1867 is hopelessly outmoded, with little of relevance to say to modern Canadians. Therefore the Court is obliged to make constitutional policy as best it can, and this process cannot realistically be viewed as a mere exposition of existing constitutional law.

According to the author, however, the Court is not an appropriate agency to create new constitutional norms. There is the usual criticism that the Court is created by Parliament, its members appointed by the Governor in Council, and yet it must adjudicate constitutional disputes between the federal and provincial governments. Moreover, decisions on changing constitutional norms should be made by political bodies instead because such decisions are essentially political in nature. It is suggested that in recent years the Court may have recognized this implicitly by its apparent reluctance to find statutes invalid.

Given this analysis of the situation, Professor Weiler makes a case for less, rather than more, judicial review in future. If I understand him correctly, he is suggesting that we should drastically reduce or do away with exclusive legislative powers, federal or provincial, and that most, if not all, powers should be concurrent. For the courts the only remaining role — thought to be a limited one — would be to determine questions of conflict between overlapping laws, in order to apply where necessary the rule of paramountcy of federal laws. Also, provincial laws could apparently be judicially scrutinized where it is suggested that they discriminate against "extraprovincial citizens or products".

While it is not entirely clear how we would achieve this state of things, the author indicates two ways in which judicial review might be reduced to a minimum even without constitutional change. First, the Court itself, by generally upholding statutory innovations, might reduce to insignificance the judicial review of legislation. Secondly, the rules of standing might be narrowed to prevent a private individual from challenging any law on the grounds that it merely invades an exclusive but unused legislative power of another jurisdiction, unless he has the consent to do so of the Attorney-General for

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that jurisdiction. (This is in contrast to the "conflict" situation where Professor Weiler considers judicial review to be appropriate).

If the constitution is not going to be developed by the courts, how then is it to adjust to changing conditions? Professor Weiler emphasizes that such development is a political process which should be left to intergovernmental negotiation — not particularly with a view to changing the constitution each time, but rather to striking new bargains from time to time concerning the exercise of (apparently) a wide range of new concurrent powers. For precedent he very aptly refers to past fiscal, economic, and social policies where respective governmental roles have developed and changed through a variety of intergovernmental arrangements more than through constitutional amendment.

A number of questions come to mind in reflecting on the author's analysis and conclusions.

First, it is difficult to accept — at least without more evidence — that the Supreme Court is simply "making up as it goes along" the standards of constitutional validity. The main example cited for this proposition, the *Manitoba Egg Reference,*[1] is compared to several previous decisions which, if followed, would in the author's view have dictated a different result. I would agree that the distinctions are not clearly articulated in the *Manitoba Egg Reference* judgment, but it was the potential for discrimination against out-of-province producers — a potential highlighted by the stated purpose of the scheme — which seems to have been the most important factor in the decision of the majority. This would distinguish it from the *Carnation Co.*[2] case and other earlier decisions upholding provincial laws. Or, to take another test used by the U. S. Supreme Court and cited by the author, the cases could be reconciled on the basis of a "balancing" of legitimate provincial (state) benefits against the burden on interprovincial (interstate) commerce. In fairness to the author he warns us in the preface[3] that he has had to be selective in the use of examples and that he has published elsewhere more extensive studies of the subjects covered. Nevertheless, his first premise — that the Court is of necessity making purely policy decisions — is not in my view sufficiently demonstrated by this one example. Thus, in proceeding to the remainder one is left with some nagging doubts as to whether the interface between intraprovincial and interprovincial trade regulation is not in any federal system one of the most difficult areas for the enunciation (judicially or politically) of universal principles, and whether the undesirability of judicial review of legislation is adequately established by reference to this particular problem.

Secondly, I am skeptical that the whole burden of constitutional development can or should be placed on the political processes. Pressures of time

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[1] *A.-G. Man.* v. *Man. Egg and Poultry Assoc.*, [1971] S.C.R. 689; 19 D.L.R. (3d) 169.

[2] *Carnation Co.* v. *Que. Agricultural Marketing Board*, [1968] S.C.R. 238; 67 D.L.R. (2d) 1.

[3] At p. viii.

alone would not permit settlement through intergovernmental agreement of every constitutional norm. Admittedly, judicial review cannot solve every problem either, but its existence and the occasional resort to it provide the necessary "ground rules" for many intergovernmental relationships. Just as the courts through the common law have provided interstitial, incremental, law-making where legislative bodies would never have had the time or inclination, so they can also through constitutional development supplement the political processes. And frequently the political processes can provide no answer if intergovernmental agreement cannot be reached. It must be kept in mind that the negotiating process is usually not simply a bilateral exercise, but frequently involves a ten-to-one relationship with sometimes up to eleven different views as to the appropriate solution. To revert to the "balancing" of provincial interests against the benefits of a common market, is it inevitable that a satisfactory balance — or indeed any balance — will be struck through the political process? Modern examples could be cited to suggest otherwise.

Thirdly, the acceptance of wholesale concurrency of powers would, in any event, probably leave the courts occupying a central place again in constitutional development. It is suggested that operative conflict might be confined to situations where the laws are "legally contradictory", presumably leaving a narrow field of judicial review. But it is not hard to imagine that this would become the central issue in a vast array of alleged conflicts made possible by the new concurrency of all or most powers.

Fourthly, events may already have overtaken Professor Weiler's call for a drastic limitation on the standing of individuals to attack constitutional validity of statutes in situations where there is no conflict between existing federal and provincial laws. The recent decision of the Supreme Court in *Thorson* v. *A.-G. Can.*[4] has gone far to rationalize the law of standing here, but by extending rather than reducing the right of individual taxpayers to challenge the validity of statutes.

Finally, and by way of summary, it may be argued that Professor Weiler takes too pessimistic a view of the future and utility of judicial review of legislation by the Supreme Court. Admittedly, there is room for the improvement of judicial review — in the rationalization of rules on standing, in presentation of evidence in references (one of the real problems with the *Manitoba Egg Reference*), and in the judicial articulation of general principles capable of application to future situations. But it is too soon, I think, to urge or foretell the abandonment of constitutional litigation in favour of the political processes.

In its breadth of view and provocative conclusions the chapter provides stimulating reading on the role of the Court in relation to the constitution.

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[4] *Thorson* v. *A.-G. Can. (No. 2)* (1974), 43 D.L.R. (3d) 1 (S.C.C.).