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Articles

Abstract

This article surveys positions on constitutional reform of the Canadian Labour Congress (CLC) from a historical perspective. In addition to analyzing how Canada's largest labour organization has approached issues of national unity, federalism, and constitutional reform, the article underscores how Canadian constitutional struggles were reflected within the labour movement by focusing on how constitutional politics affected the relationship between the CLC and its Québec affiliate, the (Québec Federation of Labour) FTQ. Specifically, the article traces the gradual eclipse of the CLC's preference for centralization and the emergence of sovereignty-association as a political position which the CLC has both externalized politically and internalized organizationally.

Abstract

In Charkaoui v. Canada (Citizenship and Immigration) it was unsuccessfully argued that the unwritten constitutional principles of the rule of law require a right to an appeal. While the notion of unwritten constitutional principles has received increasing recognition from the Supreme Court of Canada, the Court has yet to establish a clear methodology for discerning their meaning and juristic force. This is a problem because concerns about the legitimacy of judicial review are especially acute with respect to unwritten constitutional principles. This article argues that unwritten constitutional principles can be legitimately employed only if they are immanently derived from within the parameters set by the legal tradition. In all likelihood this approach cannot support the use of the rule of law as an independent basis for impugning the validity of legislation. However, I argue that an immanent reading of the rule of law shows the value of "reasonable justification" to be integral to Canada's rule-of-law tradition. Had the Court in Charkaoui given this value greater weight it might have been more alive to the way in which the IRPA singles out noncitizens, effectively subjecting them to de facto indefinite detention under the pretext of immigration purposes.

Abstract

The Supreme Court of Canada, in its recent “sniffer dog” cases, has once again resorted to ancillary powers to create new and constitutionally sound search powers for police. For a second consecutive year, the Supreme Court of Canada has used the once “rare” ancillary powers test to enshrine police powers that were neither contemplated in legislation, nor given express effect in the common law prior to these decisions. In articulating this test, the court has constructed a calculus that is remarkably similar to section 1 justification analysis under the Canadian Charter of Rights and Freedoms. The synergy between the section 1 test and the ancillary powers test resuscitates grave concerns about judicial activism at the Supreme Court level. However, such activism is more acutely troubling in the context of the judicial invention of police powers. The use of deferential utilitarianism to retrospectively evaluate split-second police decision making and the concomitant justification and constitutionalization of new common law police powers effectively stunt the court’s ability to advocate for rights or to effectively engage in dialogue with Parliament. The sort of activism advanced in the recent “sniffer dog” cases is not the simple usurpation of the parliamentary role — it is, rather, a matter of saving parliamentarians from the political heat and the bother associated with the supervision of police powers. This is a troubling species of judicial activism: preemptive deference.

Book Review

The Forms and Limits of Federalism Doctrine
Hoi Kong