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The 20th Annual McDonald Lecture in Constitutional Studies

What Canadian Federalism Means in Québec

Guy Laforest

Articles

The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name?

Luc Tremblay

Abstract

Quebec's Consultation Commission on Accommodation Practices Related to Cultural Differences (the Bouchard-Taylor Commission) was created amid public controversies over the extent to which certain religious or cultural practices should be "accommodated" within Quebec. While multiculturalism has become an important value in the rest of Canada, that value does not comport easily with Quebec nationalism and Quebec conception of sociocultural integration elaborated in the last thirty years. With this background, the Bouchard-Taylor Commission's 2008 Report adopts a concept of "interculturalism." The Report argues that interculturalism is preferable to multiculturalism because it offers a better model of cultural integration; collective identity; and church-state relations. Interculturalism also suggests a better framework for handling cultural and religious requests for reasonable accommodation. The author argues that, instead of proposing a true, novel alternative to multiculturalism, the Report uses a concept of interculturalism that does not fundamentally differ from multiculturalism. Both terms promote or emphasize ethnocultural diversity and equal respect for cultural differences. Multiculturalism can also contribute to formation of collective identity. In addition, the author argues that multiculturalism, as much as interculturalism, can include a commitment to the principle of "open secularism" in church-state relations. Finally, the "citizen route" of accommodation proposed by the Report is not exclusive to interculturalism, but also plays an important role in theories of multiculturalism.

A Strategic Approach to Judicial Legitimacy: Supreme Court of Canada and the *Marshall* Case

Vuk Radmilovic

Abstract

Recent years have seen a worldwide increase in excursions of judicial power into the

political sphere. One obvious effect of this judicialization of politics is to highlight legitimacy concerns associated with the exercise of judicial power. Indeed, how do courts attain and retain institutional legitimacy, particularly in the context of their increasing political relevance? The paper provides an answer to this question by presenting a strategic theory of how courts establish and promote institutional legitimacy and by applying it to the 1999 Marshall case decided by the Supreme Court of Canada. The case provides a unique opportunity to test judicial responsiveness to factors operating in the external, political environment through the application of a controlled before-after case comparison. The theory shows that courts cultivate legitimacy by exhibiting sensitivities to what are political and non-legal factors.

Restraint and Proliferation in Criminal Law

Jula Hughes

Abstract

This paper considers why the criminal law continues to grow despite broad-based policy consensus on the harms of over-criminalization. I argue that political expediency combines with the Canadian constitutional arrangement under ss. 91 and 92 of the Constitution Act, 1867 to drive the expansion of Canadian criminal law. The federal power to criminalize and the provincial responsibility for enforcement amounts to a constitutionally directed unfunded mandate. In a case study of the Westray Bill, the paper examines the political mechanisms and institutional forces that further the expansion of the criminal law and that result in ineffective, inefficient and ultimately harmful prohibitions. The paper concludes that it is legitimate to invoke the constitutional power of the courts to limit the scope of the criminal law and shows how this can be achieved without abandoning established constitutional and criminal law principles and precedent.

Boumediene and the Meanings of Separation of Powers in U.S. Emergency Law

Emily Hartz and Dimitrios Kyritsis

Abstract

This article examines the conception of the U.S. courts' role vis-à-vis the political branches of government in a national emergency that underlies the recent case-law on the rights of the detainees held in Guantanamo Bay and in the U.S. These cases struck historic blows to the Bush Administration's policies on terrorism—the latest of these blows being the Court's 2008 decision in *Boumediene v. Bush*. It has been argued that these cases confirm a pattern in the U.S. Supreme Court's approach to rights during war-time, namely to revert to procedural arguments rather than to develop a framework of substantive constitutional rights to evaluate conflicts between security and rights during times of crisis. We argue that this approach does not square with *Boumediene*. Instead, we offer an alternative analytical approach, whereby courts retain a supervisory role with regard to the content of such measures and their conformity with substantive constitutional guarantees. According to this approach, judicial duty in a national emergency is determined by the proper combination of considerations of both content and institutional design. We call this the "mixed approach"

and we argue that it better accords with the Court's decision in *Boumediene*.

Book Review

Book Review on James B. Kelly and Christopher P. Manfredi, eds.

Self-Defeating and Self-Transforming Dimensions of Proportionality Analysis:

Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms

Dwight Newman