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Articles

Double-Consciousness in Constitutional Adjudication
Richard Primus

Abstract

Constitutional theorists are familiar with epistemic and consequentialist reasons why judges might allow their decision making to be shaped by strongly held public opinion. The epistemic approach treats public opinion as an expert indicator, while the consequentialist approach counsels judges to compromise legally correct interpretations so as not to antagonize a hostile public. But there is also a third reason, which we can think of as constitutive. In limited circumstances, the fact that the public strongly holds a given view can be one of the factors that together constitute the correct answer to a constitutional question. In those circumstances, what the public thinks must be an ingredient in the judge's own view of the right answer.

The *Charter* in the Administrative Process: Statutory Remedy or Refounding of Administrative Jurisdiction?
Nicolas Lambert

Abstract

In asking whether administrative tribunals can apply the Charter, jurists have assumed that the Charter is a statutory remedy that can be applied or not, rather than consider it the basis of a general refounding of administrative jurisdiction. The result, evidenced in Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Worker's Compensation Board) v. Laseur, has been an unprincipled expansion of administrative power under the Charter but also, as a response to this ruling, a general legislative withdrawal of Charter jurisdiction from administrative tribunals, as evidenced in Alberta's Administrative Procedures and Jurisdiction Act (APJA). The author argues that this ruling, along with the APJA, represent extreme solutions to a more complex problem, which finds its origins in the autonomy of constitutional and statutory interpretation. The author proposes a more integrated view of constitutional and statutory interpretation, which would, on the whole, result in broader administrative responsibility under the Charter without going as far as to allow for an " informal" declaration of unconstitutionality of primary legislation. The author explains why statutory and constitutional interpretation remain dissociated, and how they can be integrated through the presumption of constitutionality.

Kyoto, The Constitution, and Carbon Trading: Waking a Sleeping *BNA* Bear (or Two)
Steward Elgie

Abstract

This article explores the federal government's constitutional authority to pass legislation controlling greenhouse gas emissions, particularly through emissions trading, in light of litigation over the new Kyoto Protocol Implementation Act. The author argues that federal power can be found under three constitutional powers: POGG, treaty implementation, or a combination of Criminal Law and Trade and Commerce — although each would require some extension of existing doctrine, and would confer slightly different powers. Deciding the case based on the Criminal and Trade powers would be the constitutionally safest route, but it would do little to provide further guidance on the scope of federal environmental lawmaking powers. The Criminal power does not allow Parliament to use all of the tools needed to properly address modern environmental problems, such as climate change. The POGG power provides for a broader range of tools, but limits Parliament's ability to address the full breadth of modern environmental problems by requiring their division into subcomponents. The most helpful basis for deciding the case, in terms of constitutional guidance, would be the federal treaty-implementing power. A number of jurists and scholars have been calling for a re-examination of this issue since 1937, and it is hard to imagine that a better opportunity will arise to do so. The article discusses arguments for and against a federal treaty-implementing power, and several options for determining the scope of such a power. At its essence, the challenge for the courts in this case will be to determine how to reconcile the reality of an powers — and in particular, how to do so in the context of addressing global climate change, arguably the most serious challenge of our time.

Book Reviews

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Book Review of Aharon Barak
The Judge in a Democracy: Barak's Judicial Philosophy
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