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Constitutionalizing Everything; Marital Rape, Polygamy, and Prostitution; The Crown's Powers of Command-in-Chief

Articles

[Constitutionalizing Everything: The Role of "Charter Values"](#)

Mark S Harding and Rainer Knopff

Explicit constitutional provisions can be seen as mere examples of broader zones of constitutional protection based on underlying values or principles, in which case the constitution has a broad, elastic scope. Alternatively, a constitution might protect only the explicit examples of its underlying values, thus leaving much of public importance beyond its reach. In Canada, controversy about these different understandings revolves in part around the appropriate judicial use of "Charter values," an issue that most recently divided the Supreme Court in Ontario (Attorney General) v. Fraser, 2011. While "constitutionalizing everything" — or nearly everything of public importance — in the name of underlying values has become an increasingly dominant international perspective, it remains a matter of significant and enduring controversy. We explore this controversy by setting the Charter values debate in Fraser in the context of similar debates in other cases.

[Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?](#)

Janine Benedet

In this article, the author considers three cases in which criminal laws apply to gendered harms: sexual assault, polygamy and prostitution. The first of these, the Supreme Court of Canada's decision in R v. JA was framed as being about the legal recognition of advance consent to sexual activity while unconscious. While the Court reached a positive result for women in rejecting this doctrine, it did so in a way that obscured the realities for women of domestic violence and sexual assault in spousal relationships. Instead the case was framed by both sides in the language of choice, agency and autonomy. The author argues that similar tensions are present in the Charter challenges to the criminal laws on polygamy and prostitution. In the Polygamy Reference, the BC Supreme Court was unconvinced by evidence of individual choice, instead focusing on the gendered harms of polygamy as practiced. In Bedford, the Ontario Court of Appeal treated prostitution as a question of women's individual choice, leading to a focus on the locations in which women choose to prostitute rather than choice of men to buy sex or the inequalities that drive women into prostitution. The author argues that all of these practices should be understood as causing gendered harms that can justify legal intervention to address them.

[The Crown's Powers of Command-in-Chief: Interpreting Section 15 of Canada's Constitution Act, 1867](#)

Philippe Lagassé

Studies of Canadian constitutional law have tended to overlook section 15 of the Constitution Act, 1867, which vests the command-in-chief of Canada's armed forces in the Crown as the executive power. This article argues that, despite being largely ignored, section 15 is a significant constitutional provision, one that grants the executive constitutionally protected powers over the armed forces. Specifically, the article demonstrates that this section provides the executive with an entrenched constitutional authority to raise, govern, command, and use Canada's armed forces. While parliamentary statutes could limit how this authority is exercised, these powers of the executive cannot be abolished or displaced by an Act of Parliament owing to their being sourced in section 15.

The article begins with an overview of the nature of executive power in Canada, in order to establish that the Crown is vested with constitutionally entrenched authorities that cannot be abolished or entirely displaced by statute. Next, the article argues that section 15 of the Constitution Act, 1867 provides the executive with a constitutionally protected authority to raise, govern, command, and use Canada's armed forces. Drawing on comparisons with Australian and New Zealand laws, the article then demonstrates that these section 15 powers are assumed to exist by Canada's National Defence Act, the parliamentary statute that is often presented as the source of the executive's authority over the armed forces.

Book Reviews

Book Review of Caroline Morris

[*Parliamentary Elections, Representation and the Law*](#)

Navraj Singh Ghaleigh

Book Review of Barry Strayer

[*Canada's Constitutional Revolution*](#)

Sarah Burningham