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BOOK REVIEWS

The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada

Eds. Patrick James, Donald E. Abelson, Michael Lusztig

Montreal & Kingston: McGill-Queen's University Press, 2002 (208 pp.)

Reviewed by Katherine Burke†

By the religious metaphor in this work's title, the editors immediately reveal the approach they have taken to their subject. The main goal of this collection of essays is to break down the "myths" surrounding Canada's constitutional holiest of holies, the Charter of Rights and Freedoms. The myth the editors are most concerned with, and about, is the widespread, and the authors believe unquestioningly pious, faith in the Charter's ability to bring Canada towards a just and equal society. The editors and authors have set out to unpack the consequences of this conviction on Canada's political landscape; their conclusion is that judicial activism, interest group politics and the increasing centralization of power have flipped our political system from one of parliamentary supremacy to judicial supremacy. As an example, the book warms up to its theme in the introduction by taking thin pot-shots at what the editors believe to be the political infeasibility of using s.33, the "notwithstanding" clause, which they see as evidence of elected Parliament's increasing deference to the non-elected judiciary.¹

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¹ Patrick James, Donald E. Abelson & Michael Lusztig, eds., *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2002) at 4.

The tack of the editors in their introduction, and in the papers they selected for this collection, is quite useful: the papers approach the “sacred” beliefs, such as the ability of the Charter to have a positive impact on equality and justice in Canadian society, with a scepticism based on pure theory and mathematical assessment. In discussing the impracticalities of accurately measuring the impact of Charter decisions the editors’ ideological agenda becomes clear and all the easier to engage with head on. The central refrain in the set-up to the essays in this collection is that by helping groups who form the most impoverished or marginalized segments of our population, we inevitably replace them with another group to take up the lowest rung on the ladder. The impossibility of achieving true consensus about who is “most marginalized” is also discussed, with reference to Frank Michelman’s thoughts on the failures of legitimacy in any institutionalized decision-making structure such as Parliament.

This is a valid point – it is hard to argue that 33 million people could agree on who needs help the most, the soonest, the longest, let alone agreeing on the definitions of “help” or who constitutes a member of that group (*R. v. Corbiere* is a perfect example). Indeed, there are some assumptions that cannot move from the controlled theoretical laboratory to complex real-life situations without breaking down. What many essays in this collection do, however, is base their critical framework upon these assumptions without fully exploring them. For example, the editors cite the on-going contentious political debate and real violence associated with the allocation of the contentious debate over fishing rights in Atlantic Canada between Aboriginal and non-Aboriginal fishers as an example of liberal idealists’ attempts to improve the lot of the “worst off.” The problem, they argue, was trying to solve the problem by granting further access rights to Aboriginals at the ‘expense’ of non-Aboriginal groups traditionally dependant for their livelihood on those fishing rights:

Non-Aboriginal fishermen do not welcome seeing their fishing rights restricted in order that income be redistributed toward Aboriginals. Those who favour Aboriginal claims, in this instance and in others, automatically assume that they are helping those ‘worst off’. But surely the practical difficulties of measurement of both average levels and within-group distribution come to the forefront in a case.²

² *Ibid.*, at 7.

This description ignores many of the complexities involved. Two *Marshall* fishing decisions, violence at Burnt Church and other coastal communities, on-going litigation and community upheaval were not simply a result of people trying to “[help] those ‘worst off’.” Rather, they are the culmination of centuries of racist politics and policies, broken treaties and attempts at compensation, and inarguable realities of environmental, industrial and social change. People trying to ensure reasonable and fair recognition of Aboriginal rights are not simply trying to help Aboriginals out of a sense of liberal guilt; they are, in many cases, trying to ensure the Crown abides by its legal obligations. The assumption that the re-allocation of fishing rights in the Atlantic provinces was “automatic” demonstrates how simplification in the interests of theoretical clarity renders the resulting analysis devoid of any practically useless.

Further, I do not think that the problems of measurement – that is, the difficulty in establishing just which groups, are, specifically, on average, “worst off” – is a legitimate impediment to taking definitive action geared towards raising the general level of equality in Canadian society. After all, it was a fairly elected Parliament that determined the basic rights guaranteed in the Charter, so it is a troubling mischaracterization to say that the Court’s interpretation of the scope of these rights is misplaced because we cannot know if and how groups are benefiting. The scope of the Charter is rightly a matter of interpretation for both academics and the judiciary, and problems of implementation are properly considered by both the judiciary and Parliamentarians. Yet in the analysis suggested by the editors here, these sets of complicated and complementary relationships are glossed over via a concern about measurements. The editors are more than welcome to their opinion that the judiciary has been overzealous in expanding rights, but that opinion should not be couched in the guise of the difficulty of building a big enough ruler.

These critiques – the oversimplification of factors contributing to socio-political legal flash-points, and the difficulty of transferring thought-problem based theories to reality – have been already levelled at other academics, perhaps most notably John Rawls and his theoretical ‘original position.’ Fitting that this collection takes as a tenet of the Charter religion the need to implement a Rawlsian economic plan (one that devotes tax dollars to such things as a social welfare net), based on

the presumed results of a theoretically administered (and recognizably flawed) thought-experiment. The essays as a group then go on to demonstrate how the Charter, the partisan politics that went into its creation, and the social welfare policies that flow out of it, have done on the whole more harm than good.

Each chapter explores the sacrosanct dogmas of Canadian constitutional politics in more depth – primarily the presumption that political decisions demanded by interest group based politics and granted by a judiciary bent on rights and resource redistribution does, in fact, benefit Canadians. The authors in this collection are generally critical of these trends in the Canadian system, and argue essentially that “under the guise of universal fairness, justice-seekers actually promote an agenda of redistribution over efficiency.”³ This, then, is the calamitous result of an unexamined faith: the precarious balance between efficient and redistributive institutions and policies is disrupted by increasing interference on behalf of the judiciary via Charter jurisprudence.

The book uses Tsebelis’ definitions of efficient (“those that ‘improve (with respect to the status quo) the condition of all (or almost all) individuals or groups in a society’”) and redistributive (“those that improve the conditions of one group in society at the expense of another”)⁴ to illuminate this basic dichotomy. The question explicitly raised is: what is the balance that achieves justice? Again, the answer here is manifest from the beginning: the less judicial intervention forcing the legislature’s hand, the better.

The following chapters fall into four categories, the first of which deals with the issue of judicial review and the recognition of various minority and interest groups in Canada. In “Judicial Rationalism and the Therapeutic Constitution: The Supreme Court’s Reconstruction of Equality and Democratic Process under the Charter of Rights and Freedoms”, Anthony Peacock concludes that the Supreme Court is using Charter litigation as an opportunity not to protect minority groups, but to carve out a political role for itself, such that the Court dictates the development of social policy. He states that

³ *Ibid.*, at 14.

⁴ *Ibid.*, at 4.

[w]ith the aim of achieving substantive equality and removing social deviancy from the political landscape, democracy under the Charter has become therapy and the Court a rehabilitative clinic.⁵

The following paper, by Mark Rush (“Judicial Supervision of the Political Process”), develops this thesis in a comparative analysis of the treatment of gay rights by the Canadian and American Supreme Courts. Both this and the final chapter in this section (“the Supreme Court of Canada and the Complexity of Judicial Activism” by Jack Kelly) debate the usefulness of judicial intervention in a liberal constitutional democracy, and both essentially conclude that judicial activism tends to weaken the democratic nature of the state.

The second and third sections of the collection focus on rational choice theory and interest-group politics, respectively. Tom Flanagan’s essay on Canada’s three constitutions is interesting and sets out clearly how rational choice theory is used by academics to explore the relationship between Parliament and the courts. That the basis of his model of chaos and game theory developed initially to explain the dynamics of separation of powers and legislative committee relationships in the United States was important to footnote, as it reveals some of the unarticulated assumptions that underlie the scheme.

The final section of essays deals explicitly with the culture of constitutionalism in Canada, both in the sense that our constitution is intended to be an expression of shared values, but also in exploring the pervasive awareness of the role of the Constitution and the Charter in the Canada’s political psyche, as put forth in Michael Lusztyg’s “Deeper and Deeper: Deep Diversity, Federalism, and Redistributive Politics in Canada”. The final essay, Hudson Meadwell’s “Is it ‘True?’” tries to take apart Will Kymlicka’s suggestion that the solution to our interminable, insecure constitutional debate is to create a “multination federation.” Meadwell believes that Kymlicka’s analogies to other poly-cultural/linguistic federations (Spain, Germany, and particularly Switzerland) are false in that not even Switzerland is multinational. In short, Meadwell doubts that Kymlicka’s suggestion is at all tenable for either domestic stability or international relations. He refuses to accept that such a move is even desirable, as it amounts to essentially entrenching identity politics as the main ground of constitutional recognition of

⁵ *Ibid.*, at 35.

citizens, and would therefore do nothing more than exacerbate tensions between different regions and groups in Canada (such as between Aboriginal and Non-Aboriginal Atlantic fishermen mentioned above).

The main thrust of these essays is to question what the authors perceive to be an otherwise unassailed belief in the Canadian approach to social welfare policies, particularly when they are implemented, as the authors' believe, via constitutional jurisprudence rather than legislative pronouncement. The essays, particularly when they are focussed on constructing a theoretical analysis, are valuable in demonstrating how important it is to push past theory and into real world complexities. Considering the potentially disastrous effect of making decisions based solely on either "effective institutions" or the "desire to help those who are 'worst off,'" the debates brought about by the investigations such as these are extremely important in the pursuit of a general consensus on intervention and justice.