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Announcements

Special Issue: Constitutionalism and Democracy: Papers by Joel Colón-Ríos

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"Democracy and Revolution: An Enduring Relationship?"
Denver University Law Review, Forthcoming
Victoria University of Wellington Legal Research Paper No. 19/2013

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We take the view that, as understood from a thoroughly democratic standpoint, revolutions need not be “uncontainable and disorderly occurrences that resist confinement”. Instead, we insist that it is better and feasible to think of certain revolutions as being part and parcel of a vigorous democratic culture and sensibility. Indeed, we contend that a democratic revolution can not only occur “when challengers self-consciously adopt non-constitutional means to transform the state with the consent of their fellow citizens”, but also when challengers self-consciously adopt and use constitutional means to transform the state. For us, there is no sharp or enduring distinction between some revolutions and constitutional changes: a robust democracy will incorporate constitutional means by which to facilitate periodic revolutions. In this sense, we follow through on Albert’s claim that “there can be no higher authorizing force than citizens themselves” and take even more seriously than he does “the promise of revolution as the most noble civic ambition”. To paraphrase de Tocqueville, there is no need in a true democracy to invent the end of revolution as it becomes a continuing and integral part of democratic arrangements themselves.

The paper is divided into three parts. The first part is devoted to explaining how democratic revolutions can be profitably understood as exercises of constituent power unmediated by any particular way of proceeding; reference will be made to contemporary developments in global politics. The second part contends that the democratic legitimacy of a revolution does not depend only on whether it was supported by citizens or on whether the regime it creates governs in the name of the citizenry, but also on whether it attempts re-produce its democratic impulse through a ‘weak’ constitutional order that contains participatory procedures for its own transformation. Finally, in the third part, we defend the radical proposal that an unconditional commitment to democracy implies that revolutionary-initiated constitutions should leave the door open for future exercises of constituent power or, what is the same thing, for future democratic revolutions. Throughout, we develop and stand by an account of democracy as both a theory and practice that re-orders the traditional relationship between constitutionalism and democracy.

"The Counter-Majoritarian Difficulty and the Road Not Taken: Democratizing Amendment Rules"
Canadian Journal of Law and Jurisprudence, Vol. XXV, No. 1, 2012
Victoria University of Wellington Legal Research Paper No. 20/2013

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Discussions about the democratic legitimacy of judicial review of legislation are usually framed in terms of the so called ‘counter-majoritarian’ difficulty, the idea that judicial review is a deviant institution in a democracy. How can a country be considered democratic if a group of non-elected judges have the faculty to strike down laws that have been adopted by a majority of the elected

representatives of the people? In framing the question in those terms, however, we tend to forget that there is nothing in the counter-majoritarian difficulty suggesting that judicial review of legislation is necessarily problematic from a democratic perspective. An institutional arrangement that gives judges the faculty to strike down laws inconsistent with the constitution only creates a counter-majoritarian difficulty if the constitution cannot be amended by simple majorities. In not paying proper attention to the role played by a rigid amendment process in the existence of a counter-majoritarian difficulty, this paper will argue, we have missed the opportunity of democratizing processes of constitutional reform in important ways while at the same time maintaining in place a system of constitutional review in which judges retain the ability of striking down legislation.

The idea of giving simple majorities the possibility of having the final word on the meaning and scope of rights is of course not new. In fact, it is the basic feature of the weak system of judicial review now present in several commonwealth countries. However, such a system does not go beyond courts and legislatures, beyond legal and political constitutionalism, and it is therefore open to the same types of critiques advanced by defenders of strong judicial review against systems of legislative supremacy. This paper defends the view that in a democratic society, deliberation and decision-making about the meaning and content of the constitution should extend beyond the ordinary institutions of government. Under that conception, a more democratic approach to the counter-majoritarian difficulty would provide popular majorities (as opposed to legislatures) with the faculty to amend the fundamental law in order to respond to a judicial decision that invalidated an ordinary law. For example, citizens could be able to engage in the activity of constitutional reform through non-constituent assemblies, triggered by popular referendum and having the specific mandate of deliberating about the judicial decision in question and the power to propose constitutional changes that would be subject to popular ratification.

"Notes on Democracy and Constitution-Making"
New Zealand Journal of Public and International Law, Vol. 9, No. 1, 2011
Victoria University of Wellington Legal Research Paper No. 21/2013

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This article explores the relationship between democracy and constitution-making. It begins by advancing the view that constitution-making, given its episodical nature, makes possible the use of certain procedures and mechanisms that cannot be generally used in the context of daily governance, even though they appear to have a strong democratic pedigree. After establishing the general approach to democracy and constitution-making in which the article rests, the author examines the legal and political practices that make the act of creating a new constitution consistent with basic democratic principles. In so doing, it develops a set of criteria that must be met for a constitution-making episode to be considered democratic.

"What's Democracy Got to Do With It? A Critique of Liberal Constitutionalism"
CLPE Research Paper No. 29/2007
Victoria University of Wellington Legal Research Paper No. 22/2013

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This paper examines the extent to which Ronald Dworkin's liberal constitutionalism, as presented in

his recent work "Is Democracy Possible Here? Principles for a New Political Debate," can provide the basis and impetus for the realization of democracy in contemporary societies. The paper is divided into three main sections. We begin by locating the broader institutional contexts within which debates about the importance and salience of democratic politics have taken place and introducing Dworkin's distinctive and defiant contribution to those debates. In the second and main section, we offer a substantial critique of Dworkin's proposals and demonstrate how his (and fellow constitutionalists') liberal project may be as much a part of the problem as the solution. That critique is divided into four parts; it includes a series of philosophical, political, constitutional, and historical arguments against the democratic credentials of Dworkin's project. The third section explores a different approach to how democracy can be more effectively and fully mobilized to meet present-day challenges; the emphasis here is on more affirmative and constructive proposals. By way of conclusion, we speculate on the directions that further efforts might take to fulfill the promise of democratic politics in contemporary societies. We maintain that, if democracy is to be realizable, then it needs to be of a more robust and less derivative kind than Dworkin's liberal project envisages. Rather than arguing that any remnants of constitutionalism should be abandoned, we propose to redress as we challenge the supposed balance between constitutionalism and democracy and, in its place, combine a strong democracy with a weak constitutionalism.
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About this eJournal

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Judicial Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior

lecturer corresponds approximately to a North American associate professor in rank.

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