THE MYTH OF THE SACRED: THE CHARTER, THE COURTS, AND THE POLITICS OF THE CONSTITUTION IN CANADA, Patrick James, Donald E. Abelson and Michael Lusztig, eds. (Montreal: McGill-Queens University Press, 2002)

The editors of this volume challenge the myth that the Supreme Court of Canada occupies an apolitical perch above the fray of political life. Rejecting the sacred visage of constitutional law, they argue that "lurking behind the camouflage of justice is a game of redistributive politics that is just as dirty, narrow, and self-interested as the game played in the legislative arena."[1] This approach — prominent (if not hegemonic) in U.S. social science literature — has been, with a few notable exceptions, neglected by Canadian legal scholars. Despite the apprehensions of jurists and practitioners, the strong and insightful essays here testify to the political method's capacity to generate fresh insights about the law.

The book is divided into four sections: Judicial Review and Group Status; The Constitution and Rational Choice; Non-Governmental Players; and the Culture of Constitution-making. While the sections are uneven, there are more than enough quality essays here to warrant recommendation. The opening section on group rights includes three provocative essays: Anthony Peacock addresses judicial rationalism (suggesting that equality rights are creating a "therapeutic constitution"); Mark Rush compares Canada's *Vriend v. Alberta*[2] and *M. v. H.*[3] cases to the American Court's analysis in *Roy Romer, Governor of Colorado v. Richard G. Evans*;[4] and James Kelly suggests a more sophisticated approach to judicial activism, noting that the court interferes more often with non-elected state actors (police officers, for example) than it does with elected representatives and legislatures. The final section of the book, on constitution-making, includes a fine essay by Michael Lusztig that re-works Charles Taylor's recognition of "deep diversity" as a cogent defense to federalism.

The book's most compelling material, however, is found in the second section, where rational choice models are applied to Canadian constitutional law. In the first essay, Tom Flanagan describes three distinct phases in Canada's constitutional evolution, from "checks and balances" to "cabinet domination" and, finally, "judicial supremacy co-existing with cabinet domination." He argues that the third phase "may be a fragmentation of power in comparison to cabinet domination ... but it would be a misinterpretation to see it as a return to classical checks and balances."[5] Flanagan uses rational choice to model this third system, revealing a pattern of strategic interactions between the executive and the courts that is prone to "erratic disruptions" of the policy *status quo*. In the second section's other chapter, Christopher Manfredi compares the judicial invalidations in *R. v. Morgentaler*[6] and *Vriend* by drawing attention to their marked difference "with respect to the Court's willingness to

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

2 [1998] 1 S.C.R. 493 [*Vriend*].

3 [1999] 2 S.C.R. 3.

4 517 U.S. 620 (1996).

5 *The Myth of the Sacred, supra* note 1 at 138.

6 [1988] 1 S.C.R. 30 [*Morgentaler*].

impose future policy constraints on legislative actors."[7] Manfredi argues that the notwithstanding clause's loss of political legitimacy (a casualty of the mega-constitutional politics of Quebec), as well as changes in the institutional environment, explain the shift from the narrow, procedural ruling in *Morgentaler* (leaving the policy field open for new legislation) to the intrusive "reading in" remedy in *Vriend* (leaving no opportunity for a legislative response). The Court's "growing control over constitutional interpretation means that public policy will always be set closer to judicial than to legislative preferences," regardless of the Court's "rhetoric of democratic humility."[8] The crisp writing and clear thinking of these two essays alone make *The Myth of the Sacred* essential reading for anyone interested in judicial power in Canada.

Unfortunately, *The Myth of the Sacred* suffers from a problem typical of collected volumes in that it fails to be entirely cohesive. For example, Donald Abelson's analysis of how think tanks were co-opted by the government in the consultation process leading to the Charlottetown Accord is valuable but out of place here. The third section of the book — "Non-Governmental Players in the Constitutional Arena" — consists of Abelson's essay and Shannon Smithey's useful examination of the conflicting interests of liberal and post-liberal groups in the *R. v. Keegstra*[9] hate speech case. A chapter looking at non-governmental players generally could have added more to the picture of political litigation that the editors clearly intended to reveal. It is difficult, however, to fault a single work for not exhausting the entire field it is helping to advance. As a trail-blazing collection of important essays, *The Myth of the Sacred* is a welcome addition to the expanding body of critical work on Canadian constitutionalism.

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7 *The Myth of the Sacred*, *supra* note 1 at 148.
8 *Ibid.* at 166.
9 [1990] 3 S.C.R. 697.