

Volume 4.1 (1997)

Articles

[Can Democracy Survive the War of Tribalism and Globalism?](#)

Benjamin R. Barber

Abstract

As the twentieth century draws to a close, such events as the demise of the former Soviet Union and the reunification of East and West Germany signal a renewal of democratic values on a global scale. The author here contends that two divergent social forces - the tendency toward parochial and tribal conflict (Jihad) and the simultaneous drive toward global homogeneity (McWorld) - are threatening democracy's very survival. Just as global markets undermine national sovereignty, so does nationalism impede the spread of global culture. Yet each is rendering democracy hollow and meaningless. Privatization, consumerism, and the centrality of the market - the markers of globalization - are causing our understandings of citizenship to fundamentally shift away from the culture of democracy. One of the most formidable challenges we will face in the twenty-first century, argues the author, is to preserve democratic values and sustain vibrant civil societies where deliberation about the common good can both be cultivated and contested.

[The Charter and Anglophone Legal Theory](#)

Richard F. Devlin

Abstract

The Canadian Charter of Rights and Freedoms has generated not only new terrain over which discursive positions are mobilized, but it has catalysed theoretical reflection about law, society, state, and the self. Examining the implications of the Charter for Anglophone legal theory, the author conducts both a qualitative and quantitative survey of jurisprudential work on the Charter and concludes that the Charter's impact on legal theory has been significant. The Charter has prompted expansion of the range of interdisciplinary influences, contextualized theoretical reflection, and made jurisprudence more engaged with and relevant to Canadian social life. The Charter also has facilitated a fragmentation or "jurisprudential pluralism," reflective of underlying shifts in Canadian political discourse. The Charter's most significant impact, however, will have been its impetus to transform theoretical engagement with the law in directions far removed from the stale confines of analytical positivism.

[Affirmative Action in Question: A Coherent Theory for Section 15-2](#)

Mark A. Drumbl and John D.R. Craig

Abstract

Affirmative action programs are constitutionally protected in Canada under section 15(2) of the Charter. This section has received little judicial interpretation and, consequently, no coherent approach to the interpretation of section 15(2) has been developed. Furthermore, there is an urgent need to define the meaning of section 15(2), as affirmative action programs can be used to perpetuate stereotypes and discrimination while being given a blanket endorsement through section 15(2). The authors suggest that section 15(2) does not merely promote substantive equality, as this is the function of section 15(1), but embodies the social justice conception of equality, which allocates social benefits based on group membership. Membership in a group, however, may be a poor indicator of need as the least disadvantaged of the target group will often benefit the most. The authors look at a number of authorities from Europe and the United States which have considered the contours of affirmative action programs. Ultimately, the authors suggest that, as section 1 and section 15(2) perform essentially the same role with respect to Charter rights, the test for section 15(2) should be similar to the section 1 Oakes test. The proposed section 15(2) test would result in an interpretation of section 15(2) which would limit the potential gulf between substantive equality and the social justice model.

[Canada, Human Rights, and the O.A.S.](#)

J.P. McEvoy and Donald J. Fleming

Abstract

In 1990, Canada became a member of the Organization of American States (OAS). In this article, the authors provide a useful introduction to the OAS system and explore some of the implications of Canada's membership. One implication is that Canada is now subject to the jurisdiction of the Inter-American Commission on Human Rights (IACHR). As an organ of the OAS, the IACHR is entitled to hear complaints alleging violations of the human rights enshrined in the American Declaration. The authors describe the procedures involved in such complaints and, in particular, examine the complaint in *Joseph*, a refugee determination case which was the first and is, still, the only Canadian decision of the IACHR. Although the petition in *Joseph* ultimately failed, it is clear that future human rights complainants may well look beyond existing domestic remedies, to the international fora. As a result, practitioners representing such complainants undoubtedly will require an increased understanding of international human rights law. This is particularly apparent in light of the expertise the government demonstrated in its reply in *Joseph*.

[Sameness/Difference: A Tale of Two Girls](#)

Margot Young

Abstract

Equality analysis under the Canadian Charter of Rights and Freedoms typically involves the application of a simple, formal equality model that favours claims made by those more similar to dominant norms than different: those more "similarly situated" than those more differently situated. According to the author, the differing results in the equality cases of *Blainey* (a successful claim by an athletic girl to join a boy's hockey league) and *Eaton* (an

unsuccessful claim by a disabled girl to join a regular elementary school class) underscore the inability of Charter equality analysis, at least in the context of disability claims, to overcome received truths about individuals claimants. In the recent case of Eaton, the Supreme Court of Canada assumes as “true” those characteristics usually assigned to the disabled rather than inquiring into the practices and institutions that help contribute to the social construction of difference. Application of a formal equality model leads the Court to affirm the decision, contrary to her parents’ wishes, that Emily Eaton be placed in a segregated educational environment. Rather than simply accommodating disability claims through segregation, the author argues, equality analysis must interrogate the systemic inequities that continue to marginalize the disempowered.

Book Reviews

La Réforme de La Constitution au Canada

Gregory Tardi

The Moral Foundations of Canadian Federalism: Paradoxes, Achievements and Tragedies of Nationhood

Garth Stevenson

A Charterphobic Rethinking of the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory

Ken Norman

Emerging Republics and Collapsing Federations: A Federal Republic: Australia's Constitutional System of Government

John Goldring