Volume 6.2 (2002)

Special Issue: Rights in Context: Comparing Constitutional Regimes in the United States and Canada

Full Issue

Structuring Rights

Canada's Charter of Rights: Paradigm Lost?
Lorraine E. Weinrib

Abstract

The author sets out the judicial role that is appropriate in the analysis of rights claims under the Canadian Charter of Rights and Freedoms. This judicial role is appropriate, she argues, because it fulfills the specific remedial purposes of the Charter, offers the best reading of the Charter's text against the background of its drafting history, and reflects the particular model of rights-protection that the Charter was designed to incorporate, i.e., the model embedded in post-Second World War constitutions and international rights-protecting instruments. While the Supreme Court of Canada initially adopted this judicial role (by applying purposive interpretation of the rights guarantees and only principled and normative application of the limitation clause), some judges later departed from it, preferring a more deferential approach for rights claims embedded in a socio-economic context. The author argues that this deferential approach is inappropriate for the Charter for a number of reasons. As a matter of constitutional interpretation, it lacks any foundation in the Charter's political history, text or chosen model ofrights-protection.As a matter of constitutional history and theory, it imports as generic an outdated, misconceived, and parochial American constitutional paradigm.

The Structural Conception of Rights and Judicial Balancing
Richard H. Pildes

Abstract

The author argues that two ideas, the protection of atomiscic human rights and the traditional balancing of those rights, are mistakenly perceived as central to constitutional adjudication in the United States and Canada. Rather than rights acting as "trumps," rights channel the kinds of reasons governments can invoke when acting in different spheres. Similarly, balancing rhetoric does not adequately describe the process of judicial decisionmaking. Instead, constitutional adjudication primarily entails judicial efforts to define the kinds of reasons that are impermissible justifications for state action in different spheres. The author demonstrates how to see traditional balancing rhetoric as obscuring a decisionmaking process that is better characterized as a judicial definition of impermissible

justifications or excluded reasons.

Liberty

Liberty Rights, the Family, and Constitutional Politics
Hester Lessard

Abstract

The pursuit of parental claims under section 7 of the Charter has required courts to expand the liberty rights jurisprudence beyond the confines of a minimal notion of physical liberty. In so doing, the Supreme Court of Canada has added to a small but growing number of cases that recognize an “irreducible sphere of personal autonomy” or privacy rights under section 7. The parental rights claims, however, are particularly contradictory, revealing a deeply embedded and more pervasive tension between the individualist values of classical liberalism and the deference to traditional family values typical of conservative ideologies. The key features of these two currents in legal and political discourse are examined and compared in order to explicate more fully their uneasy fusion in the parental rights case-law. The constitutionalization of traditional family relationships represented by the parental rights decisions provides an important counterpoint to Charter case-law that aims to introduce notions of substantive equality and pluralism to family law discourses.

Tradition, Principle and Self-Sovereignty: Competing Conceptions of Liberty in the United States Constitution
Robin West

Abstract

The “liberty” protected by the United States Constitution has been variously interpreted as the “liberty” of thinking persons to speak, worship and associate with others, unimpeded by onerous state law; the “liberty” of consumers and producers to make individual market choices, including the choice to sell one's labour at any price one sees fit, free of redistributive or paternalistic legislation that might restrict it; and the liberty of all of us in the domestic sphere to make choices regarding reproductive and family life, free of state law that might restrict it on grounds relating to public morals. Although the United States Supreme Court has never done so, the same phrase could also be interpreted as protecting the positive liberty of individuals to engage in decent work, to enjoy general physical safety and welfare, and to be prepared for the duties of citizenship. Such a progressive interpretation, in fact, might be more in line with the overall purpose of the Reconstruction Amendments, of which the right to not be deprived of one’s liberty without due process of law, is a part.

Equality

The Purpose of Canadian Equality Rights
Donna Greshner

Abstract

The equality provisions in the Canadian Charter of Rights and Freedoms protect the individual's rights to belong to three types of communities simultaneously: the universal community of human beings, the Canadian political communities, and individual identity communities. These rights ensure the diversity of our multicultural country. The author examines the historical antecedents of Charter equality provisions and the purposive approach to their interpretation. The author concludes that the Supreme Court of Canada is moving towards a "full membership" model of equality rights which ensures that membership in identity communities cannot be the basis for exclusionary or discriminatory treatment.

Middle-Class White Privilege
Ruth Colker

Abstract

The law and economics approach to anti-discrimination law, with its key principles of efficiency and personal autonomy, perpetuate disturbing and stereotypical attitudes about race. The author examines both educational affirmative action and employment affirmative action in the United States. Through devices such as alumni preference programs, educational institutions are able to indirectly maintain a white, propertied social and economic structure. Similarly, employers and professional organizations are able, through aptitude tests and word-of-mouth recruiting, to avoid affirmative action initiatives. By relying too heavily on the "efficiency" of law and economics, courts are ignoring nondiscriminatory employment options. The law and economics approach must locate and address white privilege before criticizing minority attempts to even the score.