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Full Issue

Articles

Reconceiving Rights as Relationship
Jennifer Nedelsky

Abstract

The author proposes a new understanding of rights as a relationship and constitutionalism as a dialogue of democratic accountability. She takes the position that all rights and the concept of rights should be viewed in terms of relationship and that this view provides a better way of resolving rights problems. It is suggested that the focus of decisions regarding rights should be on the kind of relationship we want to foster and the different concepts and institutions that will contribute to that end. In the proposed model, protected rights would be derived from inquiries into what is necessary to create the relationships needed for a free and democratic society. Using this framework, the author argues against constitutionalizing property and concludes by discussing the Alternative Social Charter as an outline of a model of constitutionalism for democratic accountability.

Beyond the Charter Debate: Republicanism, Rights and Civic Virtue in the Civil Constitution of Canadian Society
Andrew Fraser

Abstract

The author offers a solution to the recent debate over the legitimacy of Charter review by removing one of the Charter critics chief concerns: the review of Parliament by a non-elected and unaccountable judiciary. He suggests a return to republican principles and in particular a recognition of the legal professionÕs influence and responsibility in interpreting the Charter. This, he suggests, would be best accomplished by the election of judges by the legal profession and academia (subject to ratification by the populace). He argues that recognizing power where it really lies will have a positive effect on the legitimacy of Charter review and on the legal profession in general. In coming to this conclusion, the author reviews several subsidiary disputes between the critical and republican perspectives.

The Doctrinal Origin of Judicial Review and the Colonial Laws Validity Act
Norman Siebrasse

Abstract

Contrary to a substantial group of constitutional academics, the author argues that the origin of constitutional judicial review is found, not in the "doctrine of repugnancy" which is outlined in s. 2 of the Colonial Laws Validity Act (CLVA), but in the "doctrine of excess of

jurisdiction." To justify judicial review in this country, early Canadian courts relied on the doctrine of excess jurisdiction in order to buttress the supremacy of the Imperial Parliament and limit the authority of the colonial legislatures to amend their own constitutions. The author submits that had the courts seriously examined the CLVA, they would have discovered that s. 5 of the Act did apply to the BNA Act as an Imperial Act, allowing the colonial legislatures to amend the Constitution simply by passing inconsistent legislation. However, the courts were resistant to this possibility because of their inability to grapple with the notions of representative and responsible government. The author extensively considers the doctrines of repugnancy and excess of jurisdiction, the BNA Act and the CLVA as possible sources of constitutional judicial review. He also looks to the Australian, New Zealand and Indian experiences to confirm that Canadian courts took a decidedly different approach to the whole question of judicial review and the applicability of the CLVA to the BNA Act.

Negotiated Sovereignty: Intergovernmental Agreements With American Indian Tribes as Models for Expanding Self-Government
David H. Getches

Abstract

Constitutional issues related to First Nations sovereignty have dominated Aboriginal affairs in Canada for a considerable period. The constitutional entrenchment of Aboriginal self-government has, however, received a setback with the recent failure of the Charlottetown Accord in October of 1992. Nonetheless, day-to-day issues must be accommodated, even while this more fundamental constitutional question remains unresolved. This paper illustrates the American experience with negotiated intergovernmental agreements between tribes and individual states. These agreements have, for example, resolved jurisdictional disputes over taxation, solid waste disposal, and law enforcement between state governments and tribal authorities. The author suggests that these intergovernmental agreements in the United States provide a useful model to resolve lingering issues, effect practical solutions and expand First Nations self-government in Canada.

Book Reviews

Book Review of Alan C. Cairns
Charter Versus Federalism: The Dilemmas of Constitutional Reform
Ian Urquhart

Book Review of Richard Posner
Cardozo: A Study in Reputation
Richard W. Bauman