

# Volume 12.1 (2006)

## Articles

### [Constitution-Making: A Process Filled With Constraint](#)

*Donald L. Horowitz*

#### *Abstract*

Constitutions are generally made by people with no previous experience in constitution making. The assistance they receive from outsiders is often less useful than it may appear. The most pertinent foreign experience may reside in distant countries, whose lessons are unknown or inaccessible. Moreover, although constitutions are intended to endure, they are often products of the particular crisis that forced their creation. Drafters are usually heavily affected by a desire to avoid repeating unpleasant historical experiences or to emulate what seem to be successful constitutional models. There is a heavily constrained environment, made even more so by distrust and dissensus if the constitution follows a protracted period of internal conflict. Given all these conditions, drafting a constitution that is apt for the problems faced by the drafters is difficult, and prospects are not enhanced by advice that drafters follow a uniform constitutional process that emphasizes openness and public participation above all other values.

### [An Analysis of the "No Hierarchy of Constitutional Rights" Doctrine](#)

*Mark Carter*

#### *Abstract*

In *Gosselin (Tutor of) v. Quebec (Attorney General)* (2005) the Supreme Court of Canada provided its most recent and most extensive statement of the "no hierarchy of rights" doctrine. The doctrine holds that one part of the Constitution can not be used to prevent, restrict, or expand the implementation of another part of the Constitution. The author's analysis of the no hierarchy of rights doctrine emphasizes the extent to which the doctrine is more correctly understood as a recognition of certain hierarchies among constitutional provisions, rather than a rejection of all hierarchies. The author also identifies several other respects in which the sweeping language that the Supreme Court has used to describe the no hierarchy of rights doctrine is at odds with the relatively few situations where the doctrine may be expected to be invoked. Finally, the author characterizes the no hierarchy of rights doctrine as an example of a "strategic positivist" approach to judicial review which may be gaining favour on the Supreme Court.

### [Judging Rights in the United Kingdom: The Human Rights Act and the New Relationship Between Parliament and the Courts](#)

*Ian Bram*

## *Abstract*

This article considers the impact of the United Kingdom's *Human Rights Act 1998* upon the respective functions of the UK legislature and judiciary. It argues that, notwithstanding the UK's Diceyan heritage and the overarching commitment to a traditional understanding of parliamentary sovereignty, the *Human Rights Act* is best understood as 'constitutional statute' which has propelled the courts into a more dynamic role in which a degree of judicial creativity or law-making on rights questions is now evident. The discussion explores debates around the form and constitutional propriety of the enhanced judicial role by reference to models of dialogic constitutionalism before assessing which model best characterises case law developments since 2000.

### [An Autonomy-Based Approach to Section 15\(1\) of the Charter](#)

*Rahool Parkash Agarwal*

## *Abstract*

The author proposes an alternative approach to the test provided in *Law v. Canada (Minister of Employment and Immigration)* for section 15(1) of the *Charter*. Currently, the third branch of Law test maintains that a claimant must show an impairment to her human dignity to establish discrimination and a violation of her equality rights under section 15(1). The author argues that the notion of basic human dignity can be understood as the more precise concept of personal autonomy and, further, that personal autonomy is fully explanatory of the harms or wrongs that arise from differential or unequal treatment. Accordingly, personal autonomy ought to be regarded as the central interest under the third branch of the Law test. The author then addresses how an autonomy-based approach affects the application of section 15(1), in particular with respect to the four contextual factors and the relationship between section 15(1) and section 1.

## **Book Review**

Book Review of Robert A. Dahl

### [On Political Equality](#)

*Patricia Cochran*