

COMPARATIVE CONSTITUTIONAL LAW: A CONTEXTUAL APPROACH

LexisNexis Law School Publishing Advisory Board

Paul Caron

Professor of Law

Pepperdine University School of Law *Herzog Summer Visiting Professor in Taxation*
University of San Diego School of Law

Bridgette Carr

Clinical Professor of Law

University of Michigan Law School

Olympia Duhart

Professor of Law and Director of Lawyering Skills & Values Program

Nova Southeastern University, Shepard Broad Law School

Samuel Estreicher

Dwight D. Opperman Professor of Law

Director, Center for Labor and Employment Law

NYU School of Law

Steven I. Friedland

Professor of Law and Senior Scholar

Elon University School of Law

Carole Goldberg

Jonathan D. Varat Distinguished Professor of Law

UCLA School of Law

Oliver Goodenough

Professor of Law

Vermont Law School

Paul Marcus

Haynes Professor of Law

William and Mary Law School

John Sprankling

Distinguished Professor of Law

McGeorge School of Law

COMPARATIVE CONSTITUTIONAL LAW: A CONTEXTUAL APPROACH

Stephen Ross

Professor of Law

Lewis H. Vovakis Distinguished Faculty Scholar

Penn State Dickinson School of Law

Helen Irving

Professor of Law

Sydney Law School

The University of Sydney

Heinz Klug

Evjue-Bascom Professor of Law

University of Wisconsin Law School

Senior Honorary Research Associate, Law School

University of the Witwatersrand

Print ISBN: 978-0-7698-6649-9

Ebook ISBN: 978-0-3271-9155-1

LL ISBN: 978-1-6304-3601-8

Library of Congress Cataloging-in-Publication Data

Ross, Stephen F., 1955- author.

Constitutional law : a contextual approach / Stephen Ross, Professor of Law, Lewis H. Vovakis Distinguished Faculty Scholar, Penn State Dickinson School of Law, Helen Irving, Professor of Law, Sydney Law School, The University of Sydney, Heinz Klug, Evjue-Bascom Professor of Law, University of Wisconsin Law School, Senior Honorary Research Associate, Law School, University of the Witwatersrand.

p. cm.

Includes index.

ISBN 978-0-7698-6649-9

1. Constitutional law 2. Constitutional law--United States. 3. Constitutional law--Canada. 4. Constitutional law--Australia. 5. Constitutional law--South Africa. I. Irving, Helen, author. II. Klug, Heinz, 1957- author. III. Title. K3165.R669 2014

342--dc23

2014004374

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2014 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices

121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800

201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200

www.lexisnexis.com

MATTHEW BENDER

Dedication

Dedicated to our partners, Mary Wujek, Stephen Gaukroger, Gay Seidman, and our children, Elizabeth and Sara (Alex) Ross Kinports, Cressida and Hugh Gaukroger, Benjamin and Matthew Klug

Copyright © 2014 Carolina Academic Press, LLC. All rights reserved.

Table of Contents

Introduction	A FEW THINGS YOU SHOULD KNOW BEFORE TAKING THIS COURSE, AND WHY YOU SHOULD TAKE IT	1
I.1.	WHY A COMPARATIVE STUDY OF AUSTRALIAN, CANADIAN, SOUTH AFRICAN AND U.S. CONSTITUTIONAL LAW IS A WORTHY ENDEAVOR	1
I.2.	BRIEF OVERVIEW OF THE ENACTMENT OF EACH NATION'S CONSTITUTION	3
I.2.1.	The United States of America (1789 and 1860s)	3
I.2.2.	Canada (1867 and 1982)	5
I.2.3.	Australia (1900)	6
I.2.4.	South Africa (1996)	8
I.3.	A FEW BASIC SIMILARITIES AND DIFFERENCES TO UNDERSTAND AT THE OUTSET	13
I.3.1.	Significant cultural differences	13
I.3.2.	Constitutional ideology	14
I.4.	BASIC COMPARISONS OF THE LEGISLATIVE PROCESS IN POLITICAL CONTEXT: A BRIEF INTRODUCTION	19
I.4.1.	United States	19
I.4.2.	Canada	21
I.4.3.	Australia	24
I.4.4.	South Africa	26
I.5.	APPROACHES TO CONSTITUTIONAL INTERPRETATION: A BRIEF SURVEY	29
I.5.1.	Originalism	30
I.5.2.	Textualism	30
I.5.3.	“Living” interpretation	31
I.5.4.	Pragmatism	31
I.5.5.	Applying these theories: the “Persons” case	31
	Reference to Meaning of Word “Persons” In Section 24 of British North America Act, 1867	32
I.5.6.	Interpretation in different countries	38
Chapter 1	FEDERALISM	41
1.1.	THE CONCEPT OF FEDERALISM	42
1.1.1.	Distinguishing constitutional federalism from efficiency decentralization	42
1.1.2.	Why federalism?	42
1.1.3.	Distinguishing co-operative government	43
1.2.	THE FEDERALISM OF THE CONSTITUTIONAL TEXTS	43

Table of Contents

1.2.1.	Canada	43
1.2.2.	United States	45
1.2.3.	Australia	46
1.2.4.	South Africa	47
1.3.	BASIC PRINCIPLES OF CANADIAN FEDERALISM	49
1.3.1.	Early doctrine: narrow construction of the Trade & Commerce power	49
1.3.1.1.	First cases	49
	<i>In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919</i>	51
1.3.2.	The modern view of Trade & Commerce	52
	<i>General Motors of Canada Ltd. v. City National Leasing</i>	53
1.3.3.	The limits to the “POGG” and Agriculture power	57
1.3.4.	The breadth of the criminal law power	58
	<i>Morgentaler v. The Queen (“Morgentaler I”)</i>	59
1.3.5.	Judicial reasoning in policing Canadian federalism: “Colourability”	61
1.3.6.	Limits on Provincial power	64
	<i>Her Majesty the Queen v. Morgentaler [Morgentaler III]</i>	64
1.4.	BASIC PRINCIPLES OF U.S. FEDERALISM	70
1.4.1.	Scope of deference	70
	<i>McCulloch v. Maryland</i>	71
1.4.2.	Scope of the Commerce Clause	74
	<i>Gibbons v. Ogden</i>	75
	<i>Cooley v. The Board of Wardens of the Port of Philadelphia</i>	77
1.4.3.	Judicial Limits on Federal Legislative Power: the narrowing and broadening of the scope of the Commerce Clause from the <i>Lochner</i> era to <i>Jones & Laughlin</i>	79
1.4.4.	The rise and fall and rise and fall of the Tenth Amendment as a significant limit on federal legislative power	81
1.4.5.	Lack of requirement that Commerce Clause power be exercised only for commercial regulatory concerns	82
1.4.6.	The pendulum swings back	84
	<i>United States v. Morrison</i>	85
	<i>National Federation of Independent Business v. Sebelius</i>	94
1.4.7.	Limits on state legislative power	103
	<i>Pike v. Bruce Church, Inc.</i>	105
1.5.	BASIC PRINCIPLES OF AUSTRALIAN FEDERALISM	107
1.5.1.	The expansion of federal power via interpretation: <i>The Engineers Case</i>	111
1.5.2.	Implied restraint on the scope of federal power: the “Melbourne Corporation doctrine”	112
	<i>Melbourne v. Commonwealth (“Melbourne Corporation Case”)</i>	112

Table of Contents

1.5.3.	Further growth in federal power: “external affairs”	115
	<i>Commonwealth v. Tasmania (“Tasmanian Dam Case”)</i>	116
1.5.4.	The Trade & Commerce power	119
1.5.5.	Limitations on state power: section 92’s requirement that trade and commerce must be “absolutely free”	122
1.5.6.	Federal expansion yet again: the “corporations power” and <i>Work Choices</i>	123
	<i>NSW v. Commonwealth (“Work Choices Case”)</i>	124
1.6.	BASIC PRINCIPLES OF SOUTH AFRICAN CO-OPERATIVE GOVERNMENT	125
1.6.1.	The distribution of legislative authority under co-operative government	125
1.6.2.	The Constitutional Court’s interpretation of the principles of Co-operative Government	126
	<i>Uthukela District Municipality v. The President of the Republic of South Africa</i>	127
1.6.3.	Disputes over the allocation of legislative authority	129
1.6.3.1.	Constitutional allocation of legislative power	130
	<i>The Premier of the Province of the Western Cape v. The President of the Republic of South Africa</i>	131
1.6.3.2.	Scope of residual national legislative power	137
	<i>The Executive Council of the Province of The Western Cape and the Executive Council of Kwazulu-Natal v. The President of the Republic of South Africa</i>	137
1.6.3.3.	Scope of exclusive Provincial power	142
	<i>Ex Parte the President of the Republic of South Africain Re: Constitutionality of the Liquor Bill</i>	142
1.7.	CONTRASTING APPROACHES TO FEDERALISM: ADDITIONAL COMPARATIVE NOTES AND QUESTIONS	150
1.7.1.	Fiscal federalism and the taxing and spending powers	150
1.7.2.	Active judicial policing of federalism and the national political process	153
1.7.3.	Federalism and partisan politics	156
1.7.4.	Originalism awry	158
Chapter 2	DEFINING THE SCOPE OF CONSTITUTIONAL PROTECTION FOR INDIVIDUAL RIGHTS	161
2.1.	INTRODUCTION	162
2.1.1.	Scope of this chapter	162
2.1.2.	A chronological summary	163
2.1.3.	Close judicial scrutiny of interference with fundamental rights	165

Table of Contents

2.1.4.	Interpreting “liberty” in the shadow of <i>Lochner</i>	168
	<i>Lochner v. New York</i>	168
	<i>Ferguson v. Skrupa</i>	172
2.2.	CLOSE SCRUTINY OF DEPRIVATIONS OF LIBERTY UNDER THE FOURTEENTH AMENDMENT	174
	<i>Roe v. Wade</i>	178
	<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i>	184
	<i>Lawrence v. Texas</i>	194
2.3.	CLOSE SCRUTINY OF DEPRIVATIONS OF LIBERTY AND SECURITY OF THE PERSON UNDER SECTION 7 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS	199
	<i>Morgentaler v. The Queen (“Morgentaler II”)</i>	202
2.4.	DEFINING THE SCOPE OF BROADLY WORDED PROVISIONS OF THE SOUTH AFRICAN CONSTITUTION AND BILL OF RIGHTS . .	210
	<i>S v. Makwanyane</i>	211
	<i>De Reuck v. Director of Public Prosecutions</i>	215
2.5.	CONSIDERATION OF IMPLIED LIMITS ON GOVERNMENTS TO INFRINGEMENT INDIVIDUAL FREEDOMS IN AUSTRALIA	221
	<i>Australian Capital Television PTY Ltd v. Commonwealth</i>	225
	<i>Lange v. Australian Broadcasting Corporation</i>	230

Chapter 3	BALANCING THE VALUES OF DIGNITY, EQUALITY, AND FREEDOM	237
------------------	---	------------

3.1.	INTRODUCTION	237
3.1.1.	The concept of human dignity and its relation to equality and freedom .	237
3.1.2.	Organization of this chapter	238
3.2.	BASIC APPROACHES TO FREEDOM OF SPEECH AND EXPRESSION	239
3.2.1.	Basic U.S. approach to free speech	239
3.2.1.1.	Circumstances that justify content-based speech restrictions	242
3.2.1.2.	Content-neutral restrictions	245
3.2.2.	Basic Canadian approach to free speech	245
3.2.2.1.	Pre-Charter antecedents	246
3.2.2.2.	Basic Charter principles	246
	<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i>	246
3.2.3.	Basic Australian approach to free speech	253
3.2.3.1.	Overview of the implied freedom of political communication	254
3.2.3.2.	More recent cases	256
3.2.4.	Basic South African approach to free speech	258
3.3.	BALANCING RACIAL EQUALITY AND FREEDOM: HATE SPEECH	259
3.3.1.	Canada	259

Table of Contents

	<i>R. v. Keegstra</i>	259
3.3.2.	United States	270
	<i>R. A. V. v. City of St. Paul, Minnesota</i>	270
3.3.3.	South Africa	277
	<i>The Islamic Unity Convention v. Independent Broadcasting Authority</i>	277
3.3.4.	Australia	282
3.4.	BALANCING GENDER EQUALITY AND FREEDOM: REGULATION OF PORNOGRAPHY	285
3.4.1.	Canada	285
	<i>R. v. Butler</i>	285
3.4.2.	United States	291
	<i>American Booksellers Association, Inc. v. Hudnut</i>	292
3.4.3.	South Africa	297
	<i>De Reuck v. Director of Public Prosecutions (Witwatersrand Local Division)</i>	297
3.4.4.	Australia	298
3.5.	REGULATION OF ELECTION SPENDING	299
3.5.1.	United States	299
	<i>Citizens United v. Federal Election Commission</i>	300
3.5.2.	Canada	308
	<i>Harper v. Canada (Attorney General)</i>	308
3.5.3.	Australia	312
3.5.4.	South Africa	313
Chapter 4	EQUALITY (GENERALLY)	315
4.1.	BACKGROUND AND OVERVIEW	316
4.1.1.	Origins of constitutional concern about equality	316
4.1.1.1.	Lack of original protection against racial and other forms of discrimination	316
4.1.1.2.	Modern responses to discrimination and inequality	318
4.1.1.2.1.	U.S.: the Civil War amendments	318
4.1.1.2.2.	Canada: the Charter of Rights and Freedoms	319
4.1.1.2.3.	South Africa's new Constitution	319
4.1.1.2.4.	Australia's statutory response	320
4.1.1.3.	Illustration: evolving protection against gender-based discrimination	321
4.1.2.	The fundamental purpose of equality guarantees	323
4.2.	THE PROBLEM OF JUDICIAL SCRUTINY OF LEGISLATIVE CLASSIFICATIONS	324
4.2.1.	Articulating the problem	324

Table of Contents

4.2.2.	Examples of close scrutiny	325
	<i>United States v. Virginia</i>	325
	<i>M. v. H.</i>	330
	<i>The National Coalition for Gay and Lesbian Equality v. The Minister of Home Affairs</i>	338
4.2.3.	The “rational basis” test in American doctrine	341
	<i>Massachusetts Board of Retirement v. Murgia</i>	341
4.3.	WHICH CLASSIFICATIONS WARRANT CLOSE JUDICIAL SCRUTINY?	343
4.3.1.	United States: suspect classifications and fundamental rights	344
	<i>Slaughter-House Cases</i>	344
	<i>United States v. Carolene Products Co.</i>	346
4.3.2.	Canada: substantive discrimination based on enumerated or analogous grounds	350
	<i>Andrews v. Law Society of British Columbia</i>	351
	<i>Law v. Canada (Minister of Employment and Immigration)</i>	357
	<i>R. v. Kapp</i>	361
4.3.3.	South Africa	363
	<i>Prinsloo v. Van Der Linde</i>	364
	<i>Harksen v. Lane</i>	369
4.3.4.	Rationales for the absence of close scrutiny of most economic and social legislation	377
4.4.	INTENTIONAL DISCRIMINATION OR DISPARATE IMPACT	379
	<i>Personnel Administrator of Massachusetts v. Feeney</i>	379
	<i>Eldridge v. British Columbia (Attorney General)</i>	384
4.5.	SAME-SEX MARRIAGE	389
	<i>Minister of Home Affairs v. Fourie</i>	390
	<i>United States v. Windsor</i>	398
Chapter 5	SOCIAL AND ECONOMIC RIGHTS	405
5.1.	INTRODUCTION	405
5.1.1.	International and American roots	406
5.1.2.	The South African approach: a summary	409
5.1.3.	The significance of the South African approach for comparative analysis	410
5.2.	JUDICILIALLY ENFORCEABLE PROTECTION OF SOCIAL AND ECONOMIC RIGHTS UNDER THE SOUTH AFRICAN CONSTITUTION	411
5.2.1.	Allocating scarce resources for health care	411
	<i>Soobramoney v. Minister of Health (Kwazulu-Natal)</i>	411
5.2.2.	Basic right to housing	413

Table of Contents

	<i>The Government of the Republic of South Africa v. Grootboom</i>	414
5.2.3.	Access to essential medicines	417
	<i>Minister of Health v. Treatment Action Campaign</i>	418
5.3.	REASONABLENESS REVIEW	421
	<i>Khosa v. Minister of Social Development</i>	422
	<i>Mazibuko v. City of Johannesburg</i>	425
	<i>City of Johannesburg v. Blue Moonlight Properties</i>	431
5.4.	CONSIDERATION AND REJECTION IN THE UNITED STATES	434
5.4.1.	The possibilities for inclusion through constitutional interpretation	434
5.4.2.	The apex of American recognition of poverty rights	435
	<i>Goldberg v. Kelly</i>	435
5.4.3.	The rejection of social and economic rights	440
	<i>Dandridge v. Williams</i>	440
	<i>San Antonio Independent School District v. Rodriguez</i>	445
5.4.4.	Explanations for the rejection of socio-economic rights in the U.S.	452
5.5.	SOCIAL AND ECONOMIC RIGHTS AS GUARANTEED BY PROTECTION OF “SECURITY OF THE PERSON” UNDER s. 7 OF THE CANADIAN CHARTER	453
5.5.1.	General background	453
	<i>Chaoulli v. Attorney General of Quebec</i>	455
5.6.	NON-CONSTITUTIONAL RESPONSE OF THE AUSTRALIAN GOVERNMENT TO INTERNATIONAL OBLIGATIONS	461

Chapter 6	THE REGULATION OF PROPERTY	465
------------------	---	------------

6.1.	OVERVIEW OF THE RIGHT TO PROPERTY	466
6.1.1.	Textual provisions	466
6.1.2.	The issue of “constitutional jurisprudence” in considering the right to property	467
6.1.3.	American foundations	468
6.1.4.	Australian foundations	468
6.1.5.	Canadian rejection of a constitutional right to property	470
6.1.6.	The South African compromise	470
6.1.7.	The jurisprudential/doctrinal challenge: distinguishing economic liberty	470
6.2.	AMERICAN CONSTITUTIONAL PROTECTION OF PROPERTY BUT NOT ECONOMIC REGULATION	471
6.2.1.	Due Process limits on the use of property	472
	<i>Mugler v. Kansas</i>	472
6.2.2.	The doctrine of regulatory takings	475
	<i>Pennsylvania Coal Company v. Mahon</i>	475
6.2.3.	Distinguishing analysis under the Due Process and Takings Clause guarantees	480

Table of Contents

<i>Lingle v. Chevron U.S.A., Inc.</i>	481
6.2.4. Active or deferential scrutiny	485
6.2.5. Summary	486
6.3. COMPULSORY ACQUISITION, JUST TERMS, AND THE AUSTRALIAN CONSTITUTION	487
6.3.1. What is “property”?	487
6.3.2. What is an “acquisition of property”?	489
<i>Commonwealth v. Tasmania (“Tasmanian Dam Case”)</i>	490
<i>JT International SA v. Commonwealth of Australia</i>	496
6.4. REJECTION OF CANADIAN CONSTITUTIONAL PROTECTION FOR PROPERTY	503
<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i>	504
REFERENCE RE SS. 193 AND 195.1(1)(C) OF THE CRIMINAL CODE (MAN.) “ <i>The Prostitution Reference</i> ”	505
6.5. CANADIAN AND AUSTRALIAN NON-CONSTITUTIONAL PROTECTION FOR PROPERTY	509
6.5.1. The presumption against expropriation	509
6.5.2. The requirement of an acquisition for the benefit of the government or the public	511
<i>Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)</i>	512
6.5.3. Statutory compensation for ‘injurious affection’	518
<i>Antrim Truck Centre Ltd. v. Ontario (Transportation)</i>	518
6.5.4. The supremacy of the political process in deliberate and clear expropriations	522
<i>Durham Holdings Pty Ltd v. New South Wales</i>	522
6.6. SOUTH AFRICAN CONSTITUTIONAL PROTECTION OF PROPERTY	530
<i>President of the RSA v. Modderklip Boerdery (Pty) Ltd</i>	532
<i>First National Bank of SA Ltd T/A Wesbank v. Commissioner, SA Revenue Service</i>	537
6.7. CONCLUDING NOTE ON THE RELATIONSHIP BETWEEN COMMON LAW RECOGNITION OF PROPERTY RIGHTS AND CONSTITUTIONAL PROTECTION	547
<i>Lucas v. South Carolina Coastal Council</i>	548

Chapter 7	UNITARY AND DUAL COURT SYSTEMS AND THE ROLE OF CONSTITUTIONAL VALUES IN PRIVATE LITIGATION	555
------------------	---	------------

7.1. ORGANIZATION OF THE JUDICIARY	555
7.1.1. United States	555
7.1.2. Canada	556
7.1.3. Australia	557

Table of Contents

7.1.4.	South Africa	558
7.1.5.	Who appoints the judges	558
7.2.	THE CONCEPT OF STATE ACTION	560
	<i>Shelley v. Kraemer</i>	561
	<i>Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.</i>	567
7.3.	CASE STUDY OF CONSTITUTIONAL VALUES AND THE COMMON LAW: LIBEL	576
	<i>New York Times Co. v. Sullivan</i>	576
	<i>Hill v. Church of Scientology of Toronto</i>	581
	<i>Grant v. Torstar Corp.</i>	588
	<i>Lange v. Australian Broadcasting Corporation</i>	593
	<i>Khumalo v. Holomisa</i>	604
7.4.	CONSTITUTIONAL VALUES AND THE COMMON LAW	609
7.4.1.	Incorporating values into common law jurisprudence	609
7.4.2.	Legal realism and the constitutionalization of the American common law	612

Chapter 8

ADVISORY OPINIONS, CONSTITUTIONAL CONVENTIONS, AND THE DETERMINATION OF JUDICIAL AUTHORITY

615

8.1.	THE CONCEPT OF AN “UNCONSTITUTIONAL” LAW OR GOVERNMENT ACT	616
	<i>Marbury v. Madison</i>	616
	<i>Walter L. Nixon v. United States</i>	624
	<i>The State v. Makwanyane</i>	629
	<i>Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (first Certification Decision)</i>	631
8.2.	ADVISORY OPINIONS	636
8.2.1.	United States	636
8.2.2.	Canada	639
	<i>Reference Re Secession of Quebec</i>	639
8.2.3.	Australia	646
	<i>In re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920</i>	646
8.2.4.	South Africa	653
	<i>Tongoane v. Minister of Agriculture</i>	654
8.3.	THE CONCEPT OF CONSTITUTIONAL CONVENTION	660
	<i>Madzimbamuto v. Lardner-Burke</i>	662
8.3.1.	Declaring the existence of conventions	666
	8.3.1.1. Constitutional conventions are not judicially-enforceable law	667
	<i>“The Patriation Reference” (Part I)</i>	667

Table of Contents

8.3.1.2. The Supreme Court of Canada provides advice on whether a proposed act violates a convention	670
“ <i>The Patriation Reference</i> ” (Part II)	670
8.3.2. Distinguishing conventions from long-standing policies	685
8.3.3. Conventions and crisis in the absence of advisory opinions: The Whitlam Affair	685
8.3.4. Relationship between conventions and statutes	689
8.3.5. When constitutional conventions require constitutional amendment . .	690
8.3.6. South Africa	690
<i>Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa</i> . .	691
Chapter 9 HOW ARE DEMOCRACY AND HUMAN RIGHTS BEST PROTECTED?	693
9.1. CHAPTER OVERVIEW	693
9.1.1. Rights entrenchment versus parliamentary sovereignty	694
9.1.2. The current rights debate in Australia	696
9.1.3. Review of alternative ways to protect human rights	698
9.1.4. Why context matters	699
9.2. CANADA: JUDICIAL PROTECTION FOR LINGUISTIC MINORITIES	701
9.2.1. Background on language rights in Canada	701
<i>Paul C. Weiler, Rights and Judges in a Democracy: A New Canadian Version</i>	701
9.2.2. Background on the Notwithstanding Clause	705
9.2.3. Judicial protection of Anglophones in Quebec	707
<i>Ford v. Quebec (Attorney-General)</i>	710
9.2.4. Judicial protection of Francophones in English Canada	716
<i>Barrett v. City of Winnipeg</i>	718
<i>City of Winnipeg v. Barrett</i>	723
9.3. SEGUE: IS SEPARATE BUT EQUAL INHERENTLY UNEQUAL? . .	727
<i>Brown v. Board of Education of Topeka</i>	727
<i>Mahe v. Alberta</i>	731
9.4. UNITED STATES: JUDICIAL PROTECTION OF RACIAL MINORITIES	737
9.4.1. Proof of unconstitutional racial discrimination	737
9.4.2. Judicial review of race-conscious policies designed to benefit minorities	738
<i>Regents of the University of California v. Bakke</i>	738
<i>Shelby County, Alabama v. Holder</i>	749
9.4.3. Contrasting Canadian doctrine regarding ameliorative practices . .	757

Table of Contents

9.3.4.	What is <i>Brown's legacy?</i>	759
	<i>Parents Involved in Community Schools v. Seattle</i>	
	<i>School District No. 1</i>	759
9.5.	THE SOUTH AFRICAN EXPERIENCE	770
	<i>In re: Dispute Concerning the Constitutionality of Certain Provisions</i>	
	<i>of the School Education Bill of 1995</i>	770
	<i>Mec for Education: Kwazulu-Natal v. Pillay</i>	780
9.6.	LESSONS	787
9.6.1.	Is democracy more secure and political minorities better off with judicial protection?	787
9.6.2.	Lessons for the current Australian debate	790
	<i>Evans v. State of New South Wales</i>	795
9.6.3.	Concluding thoughts	803
<hr/> TABLE OF CASES		TC-1
<hr/> INDEX		I-1

Copyright © 2014 Carolina Academic Press, LLC. All rights reserved.