

## DIMENSIONS OF DIGNITY

In an age of constitutional revolutions and reforms, theory and practice are moving in opposite directions. As a matter of constitutional practice, human dignity has emerged in jurisdictions around the world as the organizing idea of a groundbreaking paradigm. By reconfiguring constitutional norms, institutional structures, and legal doctrines, this paradigm transforms human dignity from a mere moral claim into a legal norm that persons have standing to vindicate. As a matter of constitutional theory, however, human dignity remains an enigmatic idea. Some explicate its meaning in abstraction from constitutional practice, while others confine themselves to less exalted ideas. The result is a chasm that separates constitutional practice from a theory capable of justifying its innovations and guiding its operation. By expounding the connection between human dignity and the constitutional practices that justify themselves in its light, Jacob Weinrib brings the theory and practice of constitutional law back together.

JACOB WEINRIB is an assistant professor at the Faculty of Law at Queen's University, Kingston, Ontario. His research interests include legal theory and comparative public law.

## CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW

The aim of this series is to produce leading monographs in constitutional law. All areas of constitutional law and public law fall within the ambit of the series, including human rights and civil liberties law, administrative law, as well as constitutional theory and the history of constitutional law. A wide variety of scholarly approaches is encouraged, with the governing criterion being simply that the work is of interest to an international audience. Thus, works concerned with only one jurisdiction will be included in the series as appropriate, while, at the same time, the series will include works which are explicitly comparative or theoretical – or both. The series editors likewise welcome proposals that work at the intersection of constitutional and international law, or that seek to bridge the gaps between civil law systems, the US, and the common law jurisdictions of the Commonwealth.

*Series Editors*

David Dyzenhaus *Professor of Law and Philosophy, University of Toronto, Canada*

Adam Tomkins *John Millar Professor of Public Law, University of Glasgow, UK*

*Editorial Advisory Board*

T. R. S. Allan, Cambridge, UK

Damian Chalmers, LSE, UK

Sujit Choudhry, Toronto, Canada

Monica Claes, Maastricht, Netherlands

David Cole, Georgetown, USA

K. D. Ewing, King's College London, UK

David Feldman, Cambridge, UK

Cora Hoexter, Witwatersrand, South Africa

Christoph Moellers, Goettingen, Germany

Adrienne Stone, Melbourne, Australia

Adrian Vermeule, Harvard, USA

*Books in the series*

*Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law*

Jacob Weinrib

*Reason of State: Law, Prerogative, Empire*

Thomas Poole

*Bills of Rights in the Common Law*

Robert Leckey

*The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*

Translated by Lars Vinx, with an introduction and notes by Lars Vinx

*Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom*

Janet L. Hiebert and James B. Kelly

*Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*

Yoav Dotan

*Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse*

Jacco Bomhoff

*Judges on Trial: The Independence and Accountability of the English Judiciary*

Shimon Shetreet and Sophie Turenne

*Proportionality and Constitutional Culture*

Moshe Cohen-Eliya and Iddo Porat

*The Politics of Principle: The First South African Constitutional Court, 1995–2005*

Theunis Roux

*The New Commonwealth Model of Constitutionalism: Theory and Practice*

Stephen Gardbaum

*Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere*

Janet McLean

*Judging Social Rights*

Jeff King

*Proportionality: Constitutional Rights and Their Limitations*

Aharon Barak

*Parliamentary Sovereignty: Contemporary Debates*

Jeffrey Goldsworthy

# DIMENSIONS OF DIGNITY

The Theory and Practice of Modern Constitutional Law

JACOB WEINRIB  
*Queen's University, Faculty of Law*



CAMBRIDGE  
UNIVERSITY PRESS

CAMBRIDGE  
 UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107084285](http://www.cambridge.org/9781107084285)

© Jacob Weinrib 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging in Publication data*

Weinrib, Jacob, 1982– author.

Dimensions of dignity : the theory and practice of modern constitutional law / Jacob Weinrib.

pages cm. – (Cambridge studies in constitutional law ; 15)

Includes bibliographical references and index.

ISBN 978-1-107-08428-5 (hardback)

1. Respect for persons – Law and legislation. I. Title.

K3249.W45 2016

342.08'5–dc23

2015022588

ISBN 978-1-107-08428-5 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press  
978-1-107-08428-5 — Dimensions of Dignity  
Jacob Weinrib  
Frontmatter  
[More Information](#)

---

To my teachers

Peddlers of verbiage – and there are some – endlessly make vacuous pronouncements about what they call the importance of practice and the uselessness and danger of theory. There is only one thing to say on this. Imagine any sequence of the most useful, excellent, and considered facts that you possibly can. Can you imagine that the theoretical order does not contain a sequence of ideas and truths that corresponds exactly to your practical chain? Unless you have entirely lost your reason, you will see that the one follows from the other or, better, precedes it. What, pray, is theory unless it is that connected sequence of truths that you might not be able to see until it has been made *real* but which someone has to have seen, unless of course everyone proceeds on the basis of not knowing what they are doing?

*Emmanuel Joseph Sieyès, “What is the Third Estate?” in  
Political Writings, trans. Michael Sonenscher  
(Indianapolis: Hackett, 2003), 161.*

## CONTENTS

<i>Acknowledgments</i>	page xi
<i>Table of constitutions</i>	xiii
<i>Table of cases</i>	xiv
1 Human dignity and public law	1
1.1 Dignity's dilemma	3
1.2 The antinomy of public law	10
1.3 Dignity's dimensions	14
1.4 Dignity: the concept and the word	23
<b>PART I The normative dimension</b>	<b>35</b>
2 Authority, justice, and public law	37
2.1 Hart's middle path	41
2.2 The principle of authority	47
2.3 The principle of justice	57
2.4 Between anarchism and quietism	65
3 Public authority and private violence	76
3.1 Radbruch and Alexy on the limits of legality	78
3.2 The pathologies of public law	86
3.3 The public meaning of the principle of authority	91
3.4 The barbarism of Nazi power	99
4 Toward public justice	108
4.1 Rawls on ideal and nonideal theory	109



4.2	Hart's reformist project	116	
4.3	Public justice as an ideal and as a duty	119	
4.4	Progress and particularity	127	
	<b>PART II The constitutional dimension</b>	<b>135</b>	
5	The modern constitutional state	137	
5.1	The problem of accountability	141	
5.2	A new form of government	147	
5.3	Assessing commonwealth constitutionalism	160	
5.4	A reply to Waldron	167	
	<b>PART III The doctrinal dimension</b>	<b>177</b>	
6	Constitutional reform	179	
6.1	The rise of eternity clauses	184	
6.2	Against the basic structure doctrine	193	
6.3	Eternity clauses: a justification	200	
6.4	Defending constituent power	205	
7	The moral structure of proportionality	215	
7.1	Constitutional conflicts	218	
7.2	Proportionality as a justificatory sequence	223	
7.3	Alexy and his critics	234	
7.4	Rights as trumps: an alternative?	245	
	Conclusion: public law in postwar theory and practice	253	
	<i>Bibliography</i>	272	
	<i>Index</i>	294	

## ACKNOWLEDGMENTS

I am grateful to everyone who contributed to this project.

For conversations and comments on chapters, I would like to thank T. R. S. Allan, Alan Brudner, Bruce Chapman, Sujit Choudhry, Chris Essert, Harry Fox, Evan Fox-Decent, Stephan Hann, Louis-Philippe Hodgson, James Hunter, Tsvi Kahana, Lisa Kerr, Roy Kreitner, Mattias Kumm, Joanna Langille, Shai Lavi, Jed Lewinsohn, Ryan Liss, Andrew Max, Christopher McCrudden, Tamar Megiddo, Mariano C. Melero, Sophia Moreau, Liam Murphy, Hillary Nye, Sagi Peari, Sareh Pouryousefi, Diana Raffman, Gurpreet Rattan, Kristen Rundle, Wojciech Sadurski, Lena Salaymeh, Samuel Scheffler, Richard Stacey, Hamish Stewart, Azin Tadjini, Jean Thomas, Malcolm Thorburn, Jeremy Waldron, Kathryn Walker, Mark Walters, Emily Kidd White, and Manuel Wörsdörfer. I am incredibly grateful to Judita Pamfil, who launched me on my philosophic odyssey and suggested the cover image. Thanks are also due to Finola O’Sullivan and Richard Woodham and their team at Cambridge University Press, and to Jeevitha Baskaran.

I am deeply indebted to Peter Benson, Joseph Heath, Jason Neyers, Scott Shapiro, Grégoire Webber, and Ariel Zylberman for reading the entire manuscript and offering many thoughtful suggestions. Dieter Grimm provided guidance on the constitutional and doctrinal dimensions of the project. Aharon Barak generously shared his vast “Dignity Library” with me and took the time to discuss the project’s doctrinal dimension. Martin Stone helped me clarify the argument in the opening chapters. David Dyzenhaus provided incredibly valuable comments at every stage. Arthur Ripstein supervised the initial version of this project. I simply cannot imagine supervision of a higher calibre.

I gratefully acknowledge the support of the Social Science and Humanities Resource Council of Canada for a Vanier Canada Graduate Scholarship and a Postdoctoral Fellowship. I also thank the New York University School of Law, where I worked on this book as a Hauser Global Research Fellow at the Center for Constitutional Transitions and,

subsequently, as a Dworkin-Balzan Fellow at the Center for Law and Philosophy.

Finally, I am endlessly grateful to my family: to my parents who in so many ways made this project possible, to Debra for all of her love, and to Max, who, in his first months, stayed up into the night to keep me company while I worked.

Chapter 2 is based on “Authority, Justice, and Public Law: A Unified Theory,” *University of Toronto Law Journal* 64 (2014): 703–35. It is reprinted with permission of the University of Toronto Press. Chapter 5 originally appeared as “The Modern Constitutional State: A Defense,” *Queen’s Law Journal* 40 (2014): 165–211. It is reprinted with permission of the Queen’s University Press.

## TABLE OF CONTENTS

Basic Law for the Federal Republic of Germany (1949)	1–2, 14, 28–9, 132, 148–9, 151, 153, 180–1, 186–7, 203, 205, 215, 219–20, 234–5
Canadian Charter of Rights and Freedoms (1982)	6, 146, 149–50, 152, 154, 157, 163–4, 215, 220–1, 225, 233, 242
Constitution of Angola (2010)	2
Constitution of Armenia (1995)	1–2
Constitution of Brazil (1988)	188, 202, 215
Constitution of Bulgaria (1991)	1
Constitution of the Czech Republic (1993)	188, 202
Constitution of the Dominican Republic (2010)	1
Constitution of Greece (1975)	1–2, 185, 256
Constitution of Kenya (2010)	2
Constitution of Kosovo (2008)	2
Constitution of India (1949)	2, 19–20, 23, 185, 189–93, 198
Constitution of Italy (1947)	204, 256
Constitution of Mexico (1824)	186, 211
Constitution of Norway (1814)	185–6
Constitution of Peru (1993)	1–2
Constitution of Poland (1997)	1–2, 199
Constitution of Portugal (1976)	186, 188, 256
Constitution of the Republic of South Africa (1996)	23, 26–9, 137, 139, 148–50, 152–4, 192, 215, 219, 225, 270
Constitution of Sweden (1974)	1
Constitution of Turkey (1982)	188

## TABLE OF CASES

- Beit Sourik Village Council v. Israel*, HCJ 2056/04 [2004] IsrSC 58(5) 807 231  
*B.C.G.E.U. v. British Columbia (Attorney General)* [1988] 2 SCR 214 154  
*Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 SCR 307 2, 220  
*Brown v. Board of Education*, 347 U.S. 483 (1954) 170  
 BGSt 2, 237 106  
 BVerfGE 1, 14 204  
 BVerfGE 7, 198 2, 215  
 BVerfGE 16, 194 231  
 BVerfGE 23, 98 80  
 BVerfGE 30, 1 203  
 BVerfGE 45, 187 132  
 BVerfGE 55, 159 226–7  
 BVerfGE 80, 137 219  
 BVerfGE 93, 266 220  
*Canada (Human Rights Commission) v. Taylor* [1990] 3 SCR 892 225, 242  
*Coleman v. Miller*, 307 U.S. 433 (1939) 205  
 Corte Costituzionale, no. 1046/1988 204  
*Dasgenais v. Canadian Broadcasting Corp.* [1994] 3 SCR 835 215  
*Dawood, Shalabi and Thomas v. Minister of Home Affairs*, 2000 (3) SA 936 (CC) 172  
*Egan v. Canada* [1995] 2 SCR 513 152, 220  
*Fay v. New York*, 332 U.S. 261 (1947) 219  
*Gitlow v. New York*, 268 U.S. 652 (1925) 145  
*Golaknath v. State of Punjab* [1967] 2 SCR 762 189–91, 198, 203  
*Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130 2, 152, 220  
*Hunter et al. v. Southam Inc.* [1984] 2 SCR 145 221  
 Judgment of 4 April 1950, 2 Verwaltungs-Rechtsprechung No. 65 (1950) 210  
 Judgment of 14 March 1951, Die Öffentliche Verwaltung 471 (1951) 211  
*Kesavananda Bharati v. State of Kerala* [1973] 4 S.C.C. 225 190–2, 198, 205  
*Lochner v. New York*, 198 U.S. 45 (1905) 145, 170  
*Minerva Mills v. Union of India* [1981] 1 SCR 206 192–3  
*Minister of Home Affairs v. Fisher* [1980] A.C. 319 221  
*Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) 150  
*Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 227

## TABLE OF CASES

XV

- National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, 1999 (1) SA 6 (CC) 225
- Premier of Kwazulu-Natal and Others v. President of the Republic of South Africa*, 1996 (1) SA 769 (CC) 192
- Prinsloo v. Van der Linde*, 1997 (3) SA 1012 (CC) 28, 146
- R. v. Big M Drug Mart Ltd.* [1985] 1 SCR 295 150, 220–1, 224–5
- R. v. Keegstra* [1990] 3 SCR 697 229–30, 242–4
- R. v. Oakes* [1986] 1 SCR 103 2, 152, 215, 220, 225, 227, 231–3, 242, 247
- Reference re Secession of Quebec* [1998] 2 SCR 217 149, 192–3
- Reference re Senate Reform* [2014] 1 SCR 704 192
- R. v. Morgentaler* [1988] 1 SCR 30 6, 152, 220
- S. v. Makwanyane*, 1995 (3) SA 391 (CC) 2, 150, 219, 233
- Slaight Communications Inc. v. Davidson* [1989] 1 SCR 1038 242
- Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917) 71
- Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 SCR 877 215
- United Democratic Movement v. President of the Republic of South Africa*, 1996 (1) SA 769 (CC) 192
- United Mizrahi Bank Ltd., et al. v. Migdal Cooperative Village, et al.* [1995] 49 PD 221 137
- Vriend v. Alberta* [1998] 1 SCR 493 155