

## THE NEGOTIABLE CONSTITUTION

In matters of rights, constitutions tend to avoid settling controversies. With few exceptions, rights are formulated in open-ended language, seeking consensus on an abstraction without purporting to resolve the many moral–political questions implicated by rights. The resulting view has been that rights extend everywhere but are everywhere infringed by legislation seeking to resolve the very moral–political questions the constitution seeks to avoid.

*The Negotiable Constitution* challenges this view. Arguing that under-specified rights call for greater specification, Grégoire C.N. Webber draws on limitation clauses common to most bills of rights to develop a new understanding of the relationship between rights and legislation. The legislature is situated as a key constitutional actor tasked with completing the specification of constitutional rights. In turn, because the constitutional project is incomplete with regards to rights, it is open to being re-negotiated by legislation struggling with the very moral–political questions left underdetermined at the constitutional level.

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# THE NEGOTIABLE CONSTITUTION

On the Limitation of Rights

GRÉGOIRE C. N. WEBBER



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## PREFACE AND ACKNOWLEDGEMENTS

This book explores the limitation of constitutional rights. In matters of rights, constitutions proceed largely in abstractions, seeking agreement on grand formulations that abstract away from the controversies of specific rights-claims. Yet, until they undergo a process of limitation, constitutional rights lack justification and sense as claims. The limitation clauses of most domestic and international charters of rights make explicit the process of limitation necessary for translating underdeterminate constitutional rights into determinate rights suitable for application. The argument defended in this book is that the limitation of constitutional rights remains open to re-negotiating by the legislature. It is argued that constitutions for the most part leave the difficult, contested and contingent process of limitation unresolved within the constitution itself and instead, through a limitation clause, authorize the legislature to complete the limitation of constitutional rights. In this way, the constitution, and especially the limitation of constitutional rights, is conceived of as an activity. Because the limitation of constitutional rights is provided by legislation, re-negotiating is always available and may proceed through regular democratic channels. In this way, the constitution, far from being abstracted from democratic activity, is forever negotiable by that very activity.

I am grateful to many people who have contributed, in various ways, to the development of this book. Some of the chapters are revised from my doctoral dissertation, others are new. But the general orientation of the argument was developed during my time at the University of Oxford. I begin by thanking my doctoral supervisor, John Finnis, for his invaluable support. He has helped me struggle, far better than I could have done alone, with the ideas explored in this book. I also owe special thanks to Chris McCrudden and my two examiners, Richard Bellamy and Leslie Green, who encouraged me to pursue my project and who challenged me on some of its core premises. I gratefully acknowledge the support offered by the doctoral scholarship I received from the Pierre Elliott

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