

Proportionality, Balancing and the Structure of Constitutional Rights

SAKAGUCHI, Shojiro

What is the virtue in having a constitutional right ? The special priority of rights is a central idea of liberal political philosophy, denoting the fact only claims of special strength can justify the infringement of right. This 'priority of rights' thesis, however, allows two different interpretations.

According to the first interpretation, priority of rights only means that rights should be given the special weight they deserve when they conflict with governmental interests. This view sees rights as shields against governmental interests. The American balancing test and German proportionality analysis involve very similar thought processes: both incorporate the idea of rights as shields as their core and assess the extent of rights infringement and the relative necessity of the infringement for realizing governmental interests. It can be said that we all live in the age of constitutional balancing.

There may be an alternative interpretation of this 'Priority of rights' thesis, however, that is more attractive. Priority of rights can mean that rights should constrain the kinds of reasons that the government may legitimately act upon when it seeks to regulate individual conducts. In this view rights should be interpreted as trumps over certain kinds of justifications that government invoke.

Rights can serve both as shields and trumps but should not be reduced to either. A balancing test and proportionality analysis are not incompatible with the idea of rights as trumps: both can be used as devices to screen legislation for illicit constitutional purposes.