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Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms

*Robert A. Sedler**

In the United States we have long relied on the federal Constitution as the primary source of legal protection against governmental interference with individual rights.¹ In fact, the overriding principle in the structure of constitutional governance is the principle of limi-

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This article is written from the perspective of an American commentator whose interest in Canadian constitutionalism is of very recent vintage, sparked by the promulgation of the Charter of Rights and Freedoms. Accordingly, there are inherent limitations in the type of analysis that the author has attempted to undertake and his analysis should be received with appropriate caution.

Many of the ideas set forth in this article were explored tentatively in an address, "The Constitutional Protection of Individual Rights in Canada and the United States: Some Observations on Comparative Constitutional Development," delivered at the University of Windsor Faculty of Law, on March 16, 1983. Each year Wayne State University Law School and the University of Windsor Faculty of Law, which are across the river from each other, sponsor Wayne-Windsor lectures on a topic of mutual interest. For 1983, the topic was the new Charter of Rights and Freedoms.

I want to express my special appreciation to Morris Manning, Q.C. of the Ontario Bar, Professor Scott Fairley of the University of Windsor Faculty of Law, and Professor Jennifer Bankier of the Dalhousie University Faculty of Law. Mr. Manning, a noted Canadian constitutional practitioner and the author of *Rights, Freedoms and the Courts*, has spent considerable time with me, discussing his "activist" view of the Charter, and making specific comments about the present article. Professor Fairley, who delivered the "Windsor Component" of the Wayne-Windsor lectures in 1983, critiqued an earlier draft of the article. Professor Bankier, a former colleague of mine at Wayne State, has contributed a great deal to my general knowledge of the Canadian legal system. The views expressed in the present article are, of course, my own.

1 State constitutions have recently been "rediscovered" as a source of protection for individual rights against governmental action. However, this rediscovery resulted primarily from resorting to the state constitutions *after* the federal Constitution has proved unavailing. For example, after the United States Supreme Court held in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), that inequalities in school financing between school districts did not violate the fourteenth amendment's equal protection clause, challenges to inequalities in school financing were mounted under the "education" clause and/or the equal protection clauses of state constitutions. *See, e.g., Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *Horton v. Meskill*, 172 Conn. 615, 276 A.2d 359 (1977). Similarly, after the United States Supreme Court held in *Williams v. Zbaraz*, 448 U.S. 248 (1980) and *Maher v. Roe*, 432 U.S. 464 (1977), that state bans on Medicaid funding of abortions did not violate the due process or equal protection clause of the fourteenth amendment, challenges to those

tation on governmental power to protect individual rights.²

In accordance with American constitutional tradition, provisions designed to protect individual rights are generally broadly-phrased and open-ended.³ As a result, it has been the Supreme Court's interpretation and application of these provisions to contemporary issues in American society that has shaped the development of constitutional protection of individual rights in the United States.⁴ The Court has interpreted these provisions as imposing very significant limitations on the federal and state governments' power to interfere with individual rights.⁵

bans were asserted under "right to privacy" and equal protection clauses of state constitutions. See, e.g., *Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981).

On the other hand, state constitutional provisions dealing with the rights of criminal defendants always will be invoked as a matter of course by defense counsel, contending that they provide a greater degree of protection for the criminal accused than comparable provisions of the federal Constitution. A number of state courts have agreed with this proposition in regard to certain guarantees. Compare *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975), with *United States v. White*, 401 U.S. 745 (1971) (search and seizure), and *People v. Burden*, 395 Mich. 462, 236 N.W.2d 505 (1975), with *Apodaca v. Oregon*, 406 U.S. 404 (1972) (jury trial); see generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Linde, *First Things First: Rediscovering The States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Kelman, *Foreward: Rediscovering The State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413 (1981).

2 See Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 123-26 (1983).

The term "individual rights" may be broadly defined to refer to any individual interest that is interfered with by governmental action. In this article, however, the term refers to rights that are *arguably* within the scope of constitutional provisions that, by their terms, are designed to protect individual interests against governmental action. Such constitutional provisions will be referred to as the constitutional rights provisions of the constitution. The Charter of Rights provisions are the constitutional rights provisions of the Canadian Constitution. The constitutional rights provisions of the United States Constitution are the Bill of Rights, the thirteenth, fourteenth, fifteenth, nineteenth, twenty-fourth, and twenty-sixth amendments, the provisions of art. I § 9, cls. 2 and 3, certain parts of art. I, § 10, cl. 1, certain parts of art. III, § 2, cl. 3, and § 3, and art. IV, § 2, cl. 1. The Bill of Rights and the fourteenth amendment are the most important constitutional rights provisions of the United States Constitution.

3 See Sedler, *supra* note 2, at 126-32.

4 See *id.* at 109-20.

5 While great debate exists over whether these provisions *should* have been interpreted in this manner, that they *have* been so interpreted is universally agreed. The "activism" of the Supreme Court—its disposition to invalidate federal and state laws or governmental action interfering with individual rights—has varied only to some degree with the changing personnel of the Court. The "Burger Court," for example, has not been that much less "activist" than the "Warren Court," and entirely new areas of substantive constitutional protection of individual rights, such as gender-based equality, reproductive freedom, and commercial speech, to take just a few examples, have been developed almost entirely by the "Burger Court." See generally THE BURGER COURT: THE COUNTERREVOLUTION THAT WASN'T (V. Blasi ed. 1983).

Canada, by contrast, historically followed the British tradition of parliamentary supremacy. With the passage of the British North America Act of 1867,⁶ Canada became a federal state, with powers allocated between the federal government and the provinces. But this constitutional structure did not contain limitations on the exercise of power within each level of the government. In Canadian legal theory, then, individual rights were not entrenched. The constitution provided the courts with no legal basis to override otherwise valid governmental actions which interfered with individual rights.⁷

The Canada Act of 1982, enacted by the United Kingdom Parliament, significantly changed the structure of constitutional governance in Canada. First, the Act removed all of the United Kingdom Parliament's authority over Canada and patriated the Canadian Constitution.⁸ Second, it contained the Constitution Act, 1982,

6 This is now referred to as the Constitution Act, 1867. Together with its amendments, it is referred to as the Constitution Acts, 1867 to 1975 (No. 2). There were two amendments to the British North America Act in 1975, which explains the basis for this citation.

7 In 1960 Parliament enacted the Canadian Bill of Rights. CAN. REV. STAT. (App. III 1970). It was enacted as an ordinary statute and made applicable only to federal laws. See Pt. II, §§ 2-3. It set forth a number of guarantees of individual rights, and provided generally that federal laws should be "so construed and applied as not to abrogate, abridge or infringe . . . any of the rights or freedoms herein recognized and declared." Pt. I, § 2. Because the Bill of Rights took the form of an ordinary statute rather than of an amendment to the Constitution Act, 1867, the rights contained therein were not entrenched. The precise effect of the new Bill of Rights on federal laws caused considerable debate among academics and in the Supreme Court of Canada itself. The Supreme Court of Canada finally resolved the controversy by holding that the Bill of Rights had the effect of overriding inconsistent federal statutes by making them *inoperative*. See *The Queen v. Drybones*, [1970] S.C.R. 282 (1969). In this sense, the Bill of Rights was referred to as being a "quasi constitutional document representing a half-way house between a purely common law regime and a constitutional one." *Hogan v. The Queen*, [1975] 2 S.C.R. 574, 597 (1975) (Laskin, J., dissenting). However, the Supreme Court of Canada gave the Bill of Rights a very restrictive interpretation. *Drybones* involved a provision of the federal Indian Act making it an offense for an Indian to be intoxicated off a reservation, which the Court held was inconsistent with the "equality before the law" clause of § 1(b) of the Bill of Rights. This was the only case in which the Supreme Court of Canada held a federal law to be inoperative under the Bill of Rights. In other cases the provisions of the Bill of Rights influenced the Court's interpretation of federal legislation or supported the imposition of fair procedures, but on the whole the Bill of Rights was interpreted very restrictively. See Hovius & Martin, *The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada*, 61 CAN. B. REV. 354, 355-63 (1983); See also P. HOGG, CONSTITUTIONAL LAW OF CANADA 431-43 (1977) [hereinafter referred to as P. HOGG, CONSTITUTIONAL LAW]; see generally W. TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS (2d ed. 1975). It has been contended that the Supreme Court of Canada relied on the fact that individual rights were not entrenched to justify its restrictive—and in the view of the authors, unnecessarily restrictive—interpretation of the Canadian Bill of Rights. See Hovius & Martin, *supra*, at 360-63; see also *Jabour v. Law Soc'y of B.C.*, [1982] 1 S.C.R. 307, 362-65 (1982) (effect of lack of entrenchment of freedom of speech).

8 Section 2 of the Canada Act 1982 provides: "No Act of the Parliament of the United

which, together with the Constitution Act, 1867,⁹ now form the "fundamental law" of Canada.¹⁰

For present purposes, the most significant feature of the Constitution Act, 1982, is Part I: The Canadian Charter of Rights and Freedoms. The Charter, like the United States Constitution, provides textual protection for individual rights, and thus entrenches individual rights in the Canadian constitutional system.¹¹

Kingdom passed after the *Constitution Act, 1982* comes into effect shall extend to Canada as part of its law." Since the Constitution Act, 1867, lacked procedures for its amendment within Canada, it could only be amended by the United Kingdom Parliament and was so amended on a number of occasions upon "address" by the Canadian Parliament. With the exception of amendments to the Constitution Act, 1867, however, laws enacted by the United Kingdom Parliament were generally made inapplicable to Canada and the other Dominions by the Statute of Westminster, 1931 (Imp.). CAN. REV. STAT. (App. II 1970). Under that statute, any law enacted by the United Kingdom Parliament could extend to a Dominion only by an express declaration that the Dominion had requested and consented to such extension. Thus, the Constitution Act, 1867, could be and was in fact amended by the United Kingdom Parliament following an "address" by the Parliament of Canada. See P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 18-21.

Obtaining consent of all the provinces or a "substantial consensus" among them to a proposed amendment to the Constitution Act, 1867, is a "convention" or "accepted practice" in Canada, but it does not have the force of law. Thus, since the Canadian Parliament had "addressed" the United Kingdom to amend the Constitution Act, 1867, by the promulgation of the Canada Act 1982, under Canadian constitutional law, the United Kingdom Parliament would have the authority to enact the Canada Act 1982, for Canada, despite the fact that most of the provinces did not support the proposal. See Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (1981).

9 This legislation was formerly titled the British North America Act. With its amendments, it is renamed the Constitution Acts 1867 to 1975 (No. 2). See note 6 *supra* and accompanying text.

10 Constitution Act, 1982, §§ 52, 60. The Canadian Constitution is cited as Constitution Acts, 1867 to 1982. The Canadian Constitution emanates from the United Kingdom Parliament, unlike the United States Constitution, which, in theory, emanates from the "people." Thus, as one Canadian commentator has observed, the Canadian Charter of Rights "is in its origins, a governments' charter and not a peoples' charter." McWhinney, *The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence*, 61 CAN. B. REV. 55, 58-59 (1983). A committee of intermediate-level federal civil servants drafted the text of the Charter. *Id.* at 61. The federal Parliament's approval of the Charter served the same function in Canadian constitutional history as did ratification of the Constitution by the states in American constitutional history.

11 For a discussion of the Charter as an instrument of national unity in Canada, see generally Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 30 (1983). The provisions of the Charter generally set forth rights in affirmative terms, unlike the constitutional rights provisions of the United States Constitution which are expressed in terms of limitations on governmental action. For example, § 2(a) of the Charter provides that everyone has the "freedom of conscience and religion," while the first amendment to the United States Constitution provides that, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." Nonetheless, it is likely that most of the Charter's provisions will be interpreted as imposing limitations on governmental action rather than as creating an affirmative entitlement to governmental assistance in the exercise of those rights. See the discussion in Bender, *The Canadian Charter of Rights and*

From the perspective of an American observer, this article will examine the new Canadian Charter of Rights and discuss how our neighbor to the North now constitutionally protects individual rights. The article's major purpose, however, is to compare and analyze the protection of individual rights under the constitutional systems of our respective nations.

The comparison begins with a discussion of the Charter of Rights' function in the Canadian constitutional system. Next, the article demonstrates how individual rights, can be safeguarded against governmental intrusion in Canada, apart from the Charter's protections. A discussion of the Charter itself follows, which focuses on the contemporary nature of the document, and shows that there is a fundamental difference between the Charter's provisions and the constitutional rights provisions of the United States Constitution. The differences in the constitutional processes are then analyzed, and the discussion turns to how these differences may affect the evolution of constitutional protections in Canada. The article concludes with observations on the comparative development of constitutional protection of individual rights in Canada and the United States.

I. The Function of The Charter of Rights in the Canadian Constitutional System

A. *Basic Outline of the Canadian Constitutional System*

A brief outline of the Canadian constitutional system is necessary to understand the function of the Charter of Rights. The following discussion focuses on three fundamental distinctions between the governmental structures which the Canadian and United States Constitutions establish.

First of all, the Constitution Act, 1867, established a structure of constitutional governance relating to the Canadian federal system which is quite different from that of the American federal system. First, the theory underlying the Canadian Constitution's allocation of federal and provincial powers differs completely from the theory underlying the United States Constitution's division of federal and

Freedoms and the United States Bill of Rights: A Comparison, 28 MCGILL L.J. 811, 822-24 (1983). While the primary purpose of the Charter of Rights in Canada was to entrench individual rights against governmental action, it has been contended that the Charter applies to the resolution of private disputes as well. See, e.g., Doody, *Freedom of the Press, The Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege*, 61 CAN. B. REV. 124, 136-37 (1983); see also the discussion of the applicability of the Charter's provisions to actions of private persons in Bender, *supra*, at 826-32.

state powers. Second, in Canada there is essentially a unitary court system,¹² as opposed to the dual system of federal and state courts in the United States. Third, there are important differences between the distribution of federal and provincial powers under the Canadian Constitution, and federal and state powers under the United States Constitution.

The Canadian Constitution allocates each power exclusively to the federal or provincial level of government.¹³ Section 91 of the Constitution Act, 1867, sets out the federal government's exclusive powers,¹⁴ and section 92 sets out the exclusive powers of the provinces.¹⁵ In theory, these powers do not overlap.¹⁶ Sometimes, however, one aspect of a particular activity may come within a head¹⁷ of federal power, while another aspect of the same activity comes within a head of provincial power.¹⁸ In the case of direct conflict or pre-emption, the exercise of federal power prevails,¹⁹ but ordinarily either the federal or provincial legislature has exclusive power over a particular activity. Because of the exclusive allocation of power in Canada, a law or governmental action is always open to constitu-

12 A separate Federal Court of Canada has jurisdiction over certain federal matters, such as federal revenue, citizenship, and patents, and has jurisdiction to review the decisions of federal agencies. See P. HOGG, *CONSTITUTIONAL LAW*, *supra* note 7, at 124-25. Otherwise, the Canadian court system is unitary.

13 See P. HOGG, *CONSTITUTIONAL LAW*, *supra* note 7, at 95-96, 197-98.

14 Since Canada is a parliamentary system, the reference in § 91 of the Constitution Act, 1867, is simply to the powers of Parliament. This article uses the term "federal government" to maintain comparability between Canada and the United States, where the "federal government" is divided into branches. Regarding the constitutional allocation of power between the federal government and the states under the United States Constitution, however, if the power belongs to any branch of the federal government, it is a "federal power" within the meaning of the Constitution. See *Panama R.R. v. Johnson*, 264 U.S. 375 (1924) (admiralty power).

15 The reference in § 92 of the Constitution Act, 1867, is simply to the powers of the provincial legislatures.

16 "Overlap" is the Canadian term for "concurrent power."

17 "Head" is the Canadian term for the specific powers set forth in the Constitution Act, 1867.

18 This is referred to as "double aspect." See P. HOGG, *CONSTITUTIONAL LAW*, *supra* note 7, at 84-85. For example, provinces can create provincial highway offenses of driving without due care and failing to remain at the scene of an accident under their power over "Property and Civil Rights in the Province," Constitution Act, 1867, § 92(13), while the federal government can create similar offenses under the general criminal law power, which is a federal power in Canada Constitution Act, 1867, § 91(27). See P. HOGG, *CONSTITUTIONAL LAW*, *supra* note 7, at 84.

19 This is referred to as "paramountcy." See P. HOGG, *CONSTITUTIONAL LAW*, *supra* note 7, at 101-14.

tional challenge on *ultra vires* grounds.²⁰

In the United States, the essential feature of the Constitution's allocation of federal and state power is concurrent power, what the Canadians call overlap. The states possess the general sovereign power, except when the federal Constitution prohibits or restricts a particular exercise of it,²¹ and the federal government's enumerated powers have been construed broadly.²² As a result both the states

20 The *ultra vires* question has been extensively litigated in Canada.

The Constitution Act, 1982, makes one change in the allocation of powers under the Constitution Act, 1867. Section 50 amends the Constitution Act, 1867, by adding § 92A, which expands provincial power over non-renewable natural resources. See P. HOGG, CANADA ACT 1982 ANNOTATED 100-04 (1982) [hereafter referred to as P. HOGG, CANADA ACT]. However, this change was the only amendment in the 1982 Act which affected the allocation of power.

21 In American constitutional theory the sovereignty formerly possessed by the British Crown devolved upon the states at the time of Independence, so American states do not depend on the federal Constitution as the source of their power. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936). State sovereignty is affected by the federal Constitution only in the sense that certain exercises of state sovereignty, such as the power to coin money or the power to impose customs duties, are specifically denied to the states or can only be exercised with Congressional approval, under art. I, § 10, or are implicitly denied because the matter in issue is within the ambit of an exclusive federal power. Regarding the allocation of federal and state power, the federal Constitution confers enumerated powers on the federal government and provides under the supremacy clause that in case of a conflict between federal and state powers, the federal power prevails. The principle that the states possess the general sovereign power except as prohibited or restricted by the federal Constitution is textually embodied in the tenth amendment.

22 The federal commerce power is the obvious example. It is difficult at the present time to see *any* activity, no matter how "local," that is not at least arguably within the scope of the federal commerce power. See, e.g., *Barrett v. United States*, 423 U.S. 212 (1976) (purchase by ex-convict from a local retailer of firearm shipped in interstate commerce).

In Canada, by contrast, the federal power to make laws in relation to "the regulation of trade and commerce" under § 91(2) of the Constitution Act, 1867, has been narrowly construed. On its face, this federal power conflicts with the provincial power over "Property and Civil Rights in the Province" under § 92(13). Very early on, the Privy Council by interpretation added "inter-provincial" to "trade and commerce" under § 91(2). See *Citizens' Ins. Co. v. Parsons*, [1881] 7 A.C. 96 (1881). "Inter-provincial Trade and Commerce" under the Canadian Constitution has been construed in nearly the same way as "interstate commerce" under the United States Constitution was construed at the time of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In Canada, for an activity to be within the reach of the federal power over trade and commerce, it must be between provinces or nations, or must "affect the whole dominion." See *Caloil Inc. v. Attorney-General of Can.*, [1971] S.C.R. 543 (1970); see also P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 267-75. No "affecting commerce" strand of the federal trade and commerce power exists in Canadian law. Therefore, the federal government in Canada not only cannot regulate the production of wheat for on the farm consumption, as did the United States government in a plan approved by the United States Supreme Court, in *Wickard v. Filburn*, 317 U.S. 111 (1942), but also cannot regulate the quality of products sold at retail, even if those products have been shipped in interprovincial commerce. See *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844 (1979); see also *Fowler v. The Queen*, [1980] 2 S.C.R. 213 (1980) (a federal law prohibiting the pollution of fishing waters was *ultra vires*). The general regulation of labor relations in Canada is also a provincial mat-

and the federal government have constitutional power to regulate virtually any activity. Realistically then, American constitutional law does not contain a true equivalent of the Canadian concept of *ultra vires*.²³

The exclusivity of Canada's allocation of governmental power, and the concomitant receptiveness of the system to *ultra vires* challenges, necessarily meant that the courts would have to resolve conflicts between the two levels of government. Thus, the legitimacy of judicial review was built into the Canadian constitutional system from the very beginning. Canadian courts did not need a case analogous to *Marbury v. Madison*²⁴ to establish their authority. Judicial re-

ter, as labor matters relate to "property and civil rights in the Province" under § 92(13). *See, e.g.,* Toronto Elec. Comm'rs v. Snider, [1925] A.C. 396 (1925) C.P.R. v. Attorney-General of B.C., [1950] A.C. 122 (1950). The federal government, however, can regulate labor relations in industries that are subject to federal regulation under another head of federal power, such as navigation and shipping, and communications. *See* Reference re Validity of Indus. Relations and Disputes Investigations Act (Stevedores Reference), [1955] S.C.R. 529 (1955); Commission du Salaire Minimum v. Bell Tel. Co. of Can., [1966] S.C.R. 767 (1966); *see also* P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 304-08.

Under § 91 of the Constitution Act, 1867, the federal government also has the residuary power to make laws for the "Peace, Order, and good Government of Canada." This power has been narrowly construed to be limited to "emergency" situations and to matters that "by their inherent nature affect the Dominion as a whole." *See* Attorney-General of Ont. v. Canada Temperance Fed'n, [1946] A.C. 193 (1946). Thus, the power of the federal government to enact temporary wage and price controls during a period of high inflation, which in the United States would be unquestionably within the federal commerce power, *see* Fry v. United States, 421 U.S. 542 (1975), was sustained in Canada as a response to an "emergency" and so within the "Peace, Order, and good Government Power." *See* The Anti-Inflation Act Reference, [1976] 2 S.C.R. 373 (1976); *see also* P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 241-65.

23 *Ultra vires* in Canadian constitutional law must be distinguished from paramountcy, which is the Canadian equivalent of federal supremacy. *Ultra vires* challenges to provincial laws arise when no conflicting federal legislation exists. The question in such a case is whether the matter in issue is within the regulatory authority of the province. *See, e.g.,* Commission du Salaire Minimum v. Bell Tel. Co. of Can., [1966] S.C.R. 767 (1966). A paramountcy challenge can arise only when (1) both a federal law and a provincial law validly apply to the same set of facts under the double aspect principle, *see* note 20 *supra*, and (2) the laws are inconsistent either because they expressly conflict, or because of negative implication (federal preemption). In the case of inconsistency, federal law controls, and thus is said to be "paramount." *See* P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 101-14. In practice, the Canadian courts are not likely to find inconsistency by negative implication; therefore, paramountcy applies practically only in the case of express conflict. *Id.* at 106-10; *see also* Construction Montcalm, Inc. v. Minimum Wage Comm'n, [1979] 1 S.C.R. (1978) (Quebec minimum wage act did not conflict with federal law, and so could be applied to a contractor working on a federal project in Quebec).

24 5 U.S. (1 Cranch) 137 (1803). The power of judicial review then was *assumed* in Canada. However, the "repugnancy" rationale of *Marbury v. Madison* (since the Constitution is superior to ordinary law, a law in violation of the Constitution could not be recognized by the courts) was the same rationale under which the Canadian courts assumed the right to review

view was considered to be supportive of, rather than inconsistent with, parliamentary democracy.²⁵ When the Charter of Rights was promulgated in 1982, it expressly provided that the judiciary would have the responsibility to define its provisions and to decide whether a law or governmental action was consistent with the Charter.²⁶

the validity of laws enacted by Parliament and the provincial legislatures. As Professor Hogg has observed:

The Privy Council (as the ultimate court of appeal for Canada) and the provincial courts in the years immediately after 1867, assumed the right to review the validity of legislation enacted by the Canadian legislative bodies. They used an argument similar to the one which had been accepted in *Marbury v. Madison*. If a statute was inconsistent with the B.N.A. Act, then the B.N.A. Act had to prevail, because it was an imperial statute. Imperial statutes extending to Canada had overriding force because the Colonial Laws Validity Act provided that colonial legislation repugnant to an imperial statute extending to the colony was invalid. After the Supreme Court of Canada was established in 1875 it naturally assumed the same power.

P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 43. See also Law Society of Upper Canada v. Skapinker, slip op. at 9-11 (May 3, 1984).

25 The American term is "electorally accountable policymaking." See M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 9-20 (1982). In Canada, however, the role of the judiciary in defining the meaning of the constitution originally developed in the context of the judiciary's being the "umpire in a federal system," that is, in defining the respective limits of federal and provincial power. It is an oft-repeated statement in Canada that the courts do not have any concern with "the wisdom or expediency or policy" of a statute. See Attorney-General of Ont. v. Attorney General of Can., [1912] A.C. 571, 582 (1912); The Anti-Inflation Reference [1976] 2 S.C.R. 373, 424-25 (1976) (opinion of Laskin, C.J.). The United States Supreme Court frequently makes the same statement when it rejects a due process or equal protection challenge to economic regulation. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 537 (1934) ("With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."). The difference between the situation in the United States and the situation in Canada prior to the promulgation of the Charter was that in Canada the courts lacked the authority to invalidate legislation within the power of enacting level of government, while in the United States the courts could invalidate "unwise" legislation on constitutional rights grounds. See *Griswold v. Connecticut*, 381 U.S. 479, 527-31 (1965) (Stewart, J., dissenting).

Nevertheless, precisely because judicial review in Canada originally developed in the context of the courts' defining the respective limits of federal and provincial power, the exercise of judicial review appears to have been relatively non-controversial, and certainly not considered to be inconsistent with parliamentary democracy. The "momentum" acquired during the pre-Charter period apparently carried over, and the judiciary's authority to declare federal and provincial laws in violation of the Charter has not been seriously questioned. Because of the override provisions, however, Parliament and the provincial legislatures will have the final say over the circumstances in which most of the Charter's provisions will operate.

26 Section 52, the supremacy clause of the Constitution Act, 1982, provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." According to Professor Hogg, § 52 provides the basis for judicial review of all legislation in Canada. All remedies for protection against unconstitutional legislation that were previously available continue to be available by virtue of § 52. Section 24(1) specifically authorizes the

Therefore, the controversy over the propriety of judicial review, which has long been a feature of the American constitutional scene, should not be expected to arise in Canada.²⁷

A second difference in the two constitutional structures is that Canada basically has a unitary court system, in contrast to the United States' dual system of federal and state courts.²⁸ The Supreme Court of Canada is the highest court of appeal for all of Canada and has the authority to decide all questions of provincial law, just as an American state court decides all questions of state law.²⁹ Thus, the dichotomy between questions of federal and state

courts to provide remedies for violations of rights guaranteed by the Charter. *See* P. HOGG, CANADA ACT, *supra* note 20, at 64-66, 104-05.

While Parliament and the provincial legislatures have the power under the override provisions to make laws operative notwithstanding a number of the Charter's provisions, this power does not affect the judiciary's role in defining the meaning of the Charter. It merely means that Parliament and the provincial legislatures can make laws operative even if the judiciary were to find that those laws violate the Charter.

27 However, Canadian colleagues tell me that there is likely to be considerable debate in Canada over how expansive an interpretation the Supreme Court of Canada should give to the Charter's provisions. This debate will be similar to the debate over standards of review, or what has been called the "legitimacy debate," in the United States. For a summary of the "legitimacy debate" in the United States, see Sedler, *supra* note 2, at 95-108. For a provocative discussion of standards of review under the Charter, see Fairley, *Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review*, 4 SUP. CT. L. REV. 217 (1982).

28 As to the function of the Federal Court of Canada, see note 12 *supra*.

29 Unlike U.S. CONST. art. III, § 1, the Constitution Act, 1867, did not give independent constitutional status to a supreme court in Canada. Section 101 of the Constitution Act, 1867, authorized Parliament to provide for a "General Court of Appeal for Canada." In 1875, Parliament established the Supreme Court of Canada, with civil and criminal appellate jurisdiction throughout Canada. Under the Constitution Act, 1867, then, the Supreme Court's composition and jurisdiction depend entirely on federal statute. However, the status of the Supreme Court of Canada may have been constitutionalized to some extent by § 41 of the Constitution Act, 1982, which refers to an "amendment to the Constitution of Canada in relation to the composition of the Supreme Court of Canada." Such an amendment may be made only where authorized by both Houses of Parliament and the legislatures of all the provinces, and it is arguable that this constitutional reference to the Supreme Court of Canada would preclude Parliament from abolishing the Court by means of ordinary legislation.

Section 92(14) of the Constitution Act, 1867, allocates to the provinces the power to establish courts within each province. The provincial courts can exercise the full range of jurisdiction, including questions arising under federal as well as provincial law. Each province has a court of appeals which, for purposes of comparison to the court system in the United States, is a combined state supreme court and a federal court of appeals (except for matters within the jurisdiction of the Federal Court of Canada). The system of lower courts varies somewhat among the provinces, but in general consists of a trial court of general jurisdiction, variously referred to as Queen's Bench, the High Court, or the Supreme Court, and lower provincial courts. *See* P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 115-26.

Prior to 1949, appeals could be taken from the Supreme Court of Canada to the Judicial Committee of the Privy Council. Although such appeals were abolished in 1949, Can. Stat. ch. 37, § 3 (1949), prior Privy Council decisions are considered to have the same precedential

law that has assumed such importance in the United States is completely absent in Canada. When a case comes before the Supreme Court of Canada, it can decide any question properly raised in that case, whether it involves the meaning of the Constitution or the scope of a municipal law.³⁰

Finally, the distribution of federal and provincial powers under the Canadian Constitution differs from the allocation of federal and state powers under the United States Constitution. On the whole, the scope of power which section 91 of the Constitution Act, 1867, grants the federal government has been construed more narrowly than the scope of federal power in the United States. In Canada, any activity within the ambit of federal power inherently exceeds the purview of provincial power, even absent preemptive federal legislation.³¹ However, in Canada, unlike the United States, the general criminal law power is a federal one.³² Thus, Canada has a uniform system of general criminal law, and provincial laws are subject to invalidation on *ultra vires* grounds, as "being in relation to the criminal law."³³

effect as decisions of the Supreme Court of Canada. *See Francis v. The Queen*, [1956] S.C.R. 618, 621 (1956).

30 Because the Supreme Court of Canada is the final authority on the interpretation of the entire body of Canadian law, the common law does not differ from province to province in Canada, as it does in American states. So except for the civil law of Quebec, and the distinctive statutes of each province, the law of Canada is generally uniform throughout the country. P. HOGG, *CONSTITUTIONAL LAW*, *supra* note 7, at 123.

However, in 1975, appeals as of right to the Supreme Court of Canada from the provincial courts of appeal were generally abolished in both civil and criminal cases, and the Supreme Court of Canada now controls its own docket, much like the United States Supreme Court. Applications for leave to appeal to the Supreme Court of Canada are decided by benches of three judges. P. HOGG, *CONSTITUTIONAL LAW*, *supra* note 7, at 122 n.30. As I understand it, leave is rarely granted in cases involving only questions of provincial law, so that in practice the provincial courts of appeal are the final interpreters of most questions of provincial law.

31 *See* note 20 *supra*.

32 Constitution Act, 1867, § 91(27).

33 *See* note 151 *infra* and accompanying text.

However, under Constitution Act, 1867, § 92(15), the provinces are authorized to impose penal sanctions for the enforcement of provincial laws, which means that they can enact penal laws which are often indistinguishable from federal criminal laws. In this sense there is a reversal of the situation in the United States, where the states have the general criminal law power and federal enactments must be brought within an enumerated grant of federal power, so that in Canada, provincial penal law is "specialized," while in the United States, it is the federal criminal law that is "specialized."

Because the provinces are granted broad powers under § 92, most provincial enactments can arguably be brought within an independent head of provincial power, with the result that the provincial penal law power in Canada, like the federal criminal law power in the United States, is in fact substantial. According to Professor Hogg, the dominant tendency has

B. *Function of the Charter of Rights*

The Charter of Rights entrenches individual rights in the Canadian constitutional system. The concept of entrenchment is very important in Canadian legal theory, for it alters the principle of parliamentary supremacy³⁴ and allows the judiciary to protect individual rights from governmental interference. In Canada, as in the United States, the exercise of governmental power interfering with individual rights is now constitutionally limited. Under both systems, the courts can provide relief against governmental action that violates those constitutional limitations. However, as pointed out above, there are still significant differences in the structures of constitutional governance established by the United States and Canadian Constitutions. We will now consider how those differences can lead

been for the Supreme Court of Canada to uphold provincial penal legislation against ultra vires challenges. See P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 291-93. Similarly, as another commentator has observed:

At the present time most federal laws are upheld, as are most provincial laws. This does not mean that there is a totally concurrent criminal law power. Nor does it have to mean that the definition of criminal law is different depending on whether a federal or provincial law is challenged. . . . Most federal laws are valid because Parliament rarely imposed prohibitions and penalties unless there exists some public wrong. Similarly, most provincial prohibitory laws are valid because the provincial legislature ordinarily acts with the *bona fide* intention of legislating within its sphere of authority. Except for the inner core of the criminal domain, there are many public wrongs which can be prohibited to achieve a valid provincial purpose and thus offset any criminal aspect. Hence the asymmetry in the Constitution is more illusory than real.

Arvay, *The Criminal Law Power in the Constitution: and then Came McNeil and Dupond*, 11 OTTAWA L. REV. 1, 25 (1979). Nonetheless, despite the substantiality of the provincial penal law power, it must be emphasized that the general criminal law power in Canada is a federal rather than a provincial function. The general criminal law power includes what is referred to above as the "inner core of the criminal domain," that is, "acts or omissions which are inherently criminal because they are contrary to society's fundamental norms," or "conduct contrary to public morality and public order, or which is harmful to one's person or destructive of one's property." *Id.* at 24.

34 The principle of parliamentary supremacy was necessarily incorporated into the Constitution Act, 1867, which established parliamentary institutions along the model of the United Kingdom. The Preamble refers to a "Constitution similar in Principle to that of the United Kingdom." The range of legislative power exercised by the United Kingdom Parliament was distributed in Canada between the federal government and the provinces, and no limitations on the exercise of either federal or provincial power were contained in the Act. Since § 52 of the Constitution Act, 1982, provides that a law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect, parliamentary supremacy is thereby altered. The "highest law" in the hierarchy of laws in Canada is the Constitution, which includes the Charter of Rights; therefore, the individual rights guaranteed in the Charter are now entrenched against governmental action. Note again, however, that most of the Charter's provisions are subject to override under § 33. To this extent, parliamentary supremacy remains incorporated into the Canadian constitutional structure.

to judicial protection of individual rights in Canada, totally apart from the Charter, in circumstances where in the United States, such protection could be afforded only by invocation of the constitutional rights provisions of the Constitution.

II. Canadian Protection of Individual Rights In Addition to the Charter's Provisions

In Canada, apart from the Charter's provisions, individual rights can be legally protected against governmental action on both non-constitutional and ultra vires grounds. These forms of protection existed prior to the promulgation of the Charter, and they remain viable. Affording protection on these bases may reduce the instances in which the Canadian courts will have to resolve challenges under the Charter.

A. *Non-Constitutional Grounds of Protection*

In Canada, protection of individual rights on non-constitutional grounds is structurally available in all cases because of the unitary court system. Just as federal courts in the United States can interpret a federal law to avoid a constitutional question,³⁵ the Canadian courts can interpret all laws—federal, provincial, and municipal—in this manner. It is a principle of federal statutory interpretation in the United States that statutes should be construed, where possible, to avoid constitutional issues.³⁶ Similarly, in the case of ultra vires challenges the Supreme Court of Canada has stated, "If words in a

35 For example, the court could hold that the arguably protected activity is not within the scope of the law. Thus, in *Yates v. United States*, 354 U.S. 298 (1957), the Supreme Court held that the Smith Act reached only the advocacy of forcible overthrow of the government, thereby avoiding resolution of the issue "in terms of constitutional compulsion." *Id.* at 319. Similarly, in *Scales v. United States*, 367 U.S. 203 (1961), and *Noto v. United States*, 367 U.S. 290 (1961), the Court interpreted the Smith Act's "membership clause" as reaching only active membership in illegal organization with specific intent to further the organization's illegal purpose. It is not always possible, however, in light of the language and legislative history, to give a law such a narrow interpretation. Therefore, in *United States v. Robel*, 389 U.S. 258 (1967), the Supreme Court held that it could not read the requirement of active membership with specific intent into a federal law prohibiting members of "Communist-act organizations" from working in a defense facility, and thus was forced to confront the constitutional question, invalidating the law on first amendment grounds. *Id.* at 262.

36 The classic exposition of this principle was made by Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936):

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

297 U.S. at 348 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1933)).

statute are fairly susceptible of two constructions, of which one will result in the statute being *intra vires*, and the other will have the contrary result, the former is to be preferred."³⁷ In this circumstance, the Canadian court "reads down" the statute to bring it within the power of the enacting level of government.³⁸ The same rationale would justify adoption in Canada of the "avoiding a question as to its constitutionality" rule of federal statutory interpretation in the United States: where reasonably possible, a law implicating individual rights arguably within the protection of the Charter should be "read down" so as to avoid a question as to its constitutionality under the Charter.

What this means then is that the Canadian courts potentially may protect individual rights in any case by holding that the allegedly protected activity does not fall within the scope of the law that has been invoked against it.³⁹ For example, in *Samur v. City of Quebec*,⁴⁰ the Supreme Court of Canada held that a municipal law prohibiting the distribution of literature without the police chief's permission could not be invoked against Jehovah's Witnesses who sought to distribute religious literature. One of the grounds for the decision was that the distribution of religious literature did not fall within the law's prohibition.⁴¹ In contrast, the first amendment provides the only structural basis on which the United States Supreme Court can invalidate similar state or local government measures.⁴²

37 *McKay v. The Queen*, [1965] S.C.R. 798, 804 (1965).

38 See the discussion of "reading down" in P. HOGG, *CONSTITUTIONAL LAW*, *supra* note 7, at 90-92.

39 This assumes of course, that the challenged law is reasonably susceptible of such an interpretation. In *The Queen v. Oakes*, 40 O.R.2d 660 (Ont. Ct. App. 1983), the Ontario Court of Appeals held that the "reverse onus" provision of § 8 of the Narcotics Act that requires the accused to disprove intention to sell after the prosecution has proved mere possession, violated the presumption of innocence provision of § 11(d). The court rejected the argument that the law should be construed as being "inoperative" in those cases where the accused possessed only a small quantity of a narcotic drug, which did not indicate that the drug was possessed for the purpose of sale. The court took the position that such an interpretation was improper because it would require the court to "rewrite the statute on a case by case basis," and that in the statute Parliament could have, but did not, draw a distinction based upon the quantity of the drug possessed.

40 [1953] 2 S.C.R. 299 (1953).

41 This was the ground of decision in the opinion of Justice Kerwin. At that time the Supreme Court of Canada appeared to follow the English practice by which the individual Justices deliver separate opinions rather than there being an opinion for the Court. At the present time, the opinions of the Supreme Court of Canada are substantially the same as the majority (or plurality), concurring, and dissenting opinions in the United States Supreme Court.

42 See, e.g., *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Another non-constitutional theory which Canadian courts can employ to protect individual rights rests on the protections available at common law. This avenue remains available so long as a statute does not prescribe a contrary result. For example, the Canadian Constitution does not require the government to compensate for the taking of private property.⁴³ But the Supreme Court of Canada has upheld the common law right to compensation where private property is taken for public use.⁴⁴ The Supreme Court of Canada likewise invoked the common law to protect Jehovah's Witnesses from extensive harassment by Quebec provincial officials in the 1950's.⁴⁵

Governmental action interfering with individual rights may also be invalidated if the officer or governmental body lacked statutory authority to take the challenged action.⁴⁶ Thus, in *Canadian Broadcasting Corporation v. Quebec Police Commission*,⁴⁷ the Supreme Court of Canada held that the Quebec Police Commission lacked the power to punish an alleged contempt which occurred in its proceedings.

Finally, the Supreme Court of Canada exercises supervisory control over the lower courts and can ultimately decide all matters of substantive law and procedure. For example, criminal trials in Canada are conducted according to uniform procedures.⁴⁸ Therefore, the Supreme Court of Canada can protect criminal defendants on non-constitutional grounds, just as the United States Supreme Court can extend non-constitutional protections to federal criminal

43 Property rights are not protected under the Charter. See notes 100-02 *infra* and accompanying text.

44 Unless a statute specifically gives the government the right to expropriate the particular kind of property without compensating the owner, the courts will enforce the common law right. See *Manitoba Fisheries, Ltd. v. The Queen*, [1979] 1 S.C.R. 101 (1978).

45 See *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (1959); *Lamb v. Benoit*, [1959] S.C.R. 321 (1959); *Chaput v. Romain*, [1955] S.C.R. 834 (1955). In these cases, Quebec officials broke up meetings of Jehovah's Witnesses, arrested them for distributing pamphlets, and engaged in retaliatory cancellation of licences. The victims sought and recovered damages, but possibly could have obtained injunctive relief as well.

46 The same kind of question arises in the United States Supreme Court and the federal courts with respect to the statutory authority of federal officers. In *Kent v. Dulles*, 357 U.S. 116 (1958), the Supreme Court held that the Secretary of State lacked the statutory authority to refuse to issue passports to members of the Communist Party. The Secretary's authority of refusal interfered with the exercise of the constitutional right of travel. *Id.* at 125-29. See also *Ex parte Endo*, 323 U.S. 283 (1944), in which the Supreme Court held that the military authorities were not authorized to detain concededly loyal persons of Japanese ancestry.

47 [1979] 2 S.C.R. 618 (1979).

48 Section 91(27) of the Constitution Act, 1867, gives the federal government the exclusive power over "the Procedure in Criminal Matters." The provinces have the power over civil procedure under § 92(14).

defendants.⁴⁹

Because of the unitary court system in Canada, then, the courts can potentially protect individual rights in all cases on non-constitutional grounds. United States federal courts can do so only when a federal law or governmental action is challenged. Since the overwhelming number of cases in the federal courts challenge state laws or governmental action, these courts have fewer opportunities to protect individual rights on non-constitutional grounds than have the Canadian courts.

B. *Ultra Vires Grounds of Protection*

The second way the Canadian judiciary can protect individual rights is to deem the challenged law or governmental action *ultra vires* the enacting level of government. This ground of invalidation was sometimes invoked in the pre-Charter era and remains following the promulgation of the Charter. In some pre-Charter cases, the Canadian courts invalidated laws or governmental action interfering with individual rights on *ultra vires* grounds, thereby effectively achieving the same result that was or would have been achieved in the United States by the invocation of constitutional limitations. For the most part, the Canadian *ultra vires* cases involved challenges to provincial laws or governmental action.⁵⁰ And in at least some of them, the fact that the challenged provincial law or governmental action implicated important individual rights, such as freedom of expression, was a factor in the court's resolution of the *ultra vires* issue. In the pre-Charter era, the Canadian courts were not necessarily trying, by an expansive use of *ultra vires*, to mitigate the absence of entrenchment of individual rights. There are numerous cases where the Canadian courts sustained against *ultra vires* challenges, laws, or governmental action that now clearly violate the Charter,⁵¹ and that

49 Again, the position of the Supreme Court of Canada in all criminal cases is parallel to that of the United States Supreme Court in federal cases.

50 Similarly, in the United States the overwhelming number of constitutional cases presenting claims of individual rights involve challenges to state or local laws or government action.

51 See *Brooks-Bidlake v. Attorney-General of B.C.*, [1923] A.C. 450 (1923) (prohibition of employment of Japanese and Chinese in connection with timber license on provincial property); *Quong-Wing v. The King*, 49 S.C.R. 440 (1914) (prohibition of employment of white females in places of business kept or managed by Chinese); *Cunningham & Attorney-General of B.C. v. Homa*, [1903] A.C. 151 (1903) (provincial election law prohibiting Japanese from voting).

Other cases upheld governmental actions which at least arguably violate the Charter. See *Walter v. Attorney-General of Alta.*, [1969] S.C.R. 383 (1969) (provincial law prohibiting

would have been invalidated by the United States Supreme Court. This means of protecting individual rights has always been structurally available under the Canadian Constitution and was at least sometimes invoked effectively in the pre-Charter era.

In the *Alberta Press Case*,⁵² which the Supreme Court of Canada decided in 1938, a provincial law enacting a "social credit" program included provisions requiring newspapers to publish the government's reply to printed criticism of the program. The Court held these provisions to be ultra vires the province. Five of the six Justices based their decision on the ground that the provisions were part of the underlying "social credit" program which itself was ultra vires the province. Three of the Justices, however, also posited that the provisions were ultra vires the province, because only Parliament had power to regulate the press. These opinions emphasized the importance of a free press in a democratic society.⁵³ In the United States, of course, these provisions would have violated the first amendment.⁵⁴ In the absence of a comparable specific constitutional limitation on government power, the Supreme Court of Canada used the ultra vires concept to protect freedom of the press in this case.

Similarly, in *Samur v. Quebec*,⁵⁵ ultra vires appeared to be the primary basis on which the Court invalidated a municipal law requiring police permission for the distribution of literature. The "pith and substance"⁵⁶ of the law was not the regulation of the streets, which is within provincial power, but rather the censoring and control of the distribution of written publications, which is not. In addition, the Court held that provincial power to regulate "civil rights within the province"⁵⁷ and "matters of a local or private nature within the province" did not extend to the regulation of freedom of expression.

religious colonies from acquiring additional landholdings); *Nova Scotia Bd. of Censors v. McNeil*, [1978] 2 S.C.R. 662 (1978) (provincial censorship of movies that "offended acceptable standards of morality"); *DuPond v. City of Montreal*, [1978] 2 S.C.R. 770 (1978) (municipal law granting officials the authority to prohibit the holding of assemblies if they had reason to believe that the public peace or safety was endangered).

52 Reference re *Alta. Legislation* [1938] S.C.R. 100 (1938). An appeal to the Privy Council on the validity of the press bill was dismissed on grounds of mootness. *Attorney-General of Alta. v. Attorney-General of Can.*, [1939] A.C. 117 (1938).

53 See the opinion of Duff, C.J., at 132-35, and Cannon, J., at 145-46.

54 See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

55 [1953] 2 S.C.R. 299 (1953).

56 The term "pith and substance" refers to the "dominant or most important characteristic of the challenged law." P. HOGG, *CONSTITUTIONAL LAW*, *supra* note 7, at 80.

57 The term "Civil Rights," as used in § 92(13) of the Constitution Act, 1867, refers to private rights between individuals, such as tort and contract rights. The term "human rights" is used in Canada to refer to freedom from discrimination and the like.

Statutory interference with the freedom of expression was also an important consideration in *Switzman v. Ebling*,⁵⁸ which the Supreme Court of Canada decided in 1959. The Court had previously held that the provinces had the authority to enact a padlock law that applied to houses of prostitution;⁵⁹ but in *Switzman* the Court decided that such a law was ultra vires the provinces when applied to a house used for "communist propaganda."⁶⁰ Regarding religious expression, the 1955 decision of *Birks & Son v. City of Montreal*⁶¹ held that a provincial law authorizing municipal councils to require the closing of stores on religious holidays related to the criminal law and thus was ultra vires.⁶²

Protection of individual rights on ultra vires grounds also appears in several cases involving aliens and Indians. In *Union Colliery of British Columbia v. Bryden*,⁶³ decided in 1899, the Privy Council held that a British Columbia law prohibiting Chinese from working in underground mines was ultra vires. The "pith and substance" of the law related to aliens,⁶⁴ an area within the federal government's exclusive power, rather than to "property and civil rights in the province" or "local works and undertakings."⁶⁵ In the more recent case of *The*

58 [1957] S.C.R. (1956).

59 *Bedard v. Dawson*, [1923] S.C.R. 681 (1923).

60 *Cf. Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), (invalidating on first amendment grounds a state law authorizing the issuance of injunctions against the habitual use of premises for the commercial showing of obscene films).

61 [1955] S.C.R. 799 (1955).

62 The regulation of moral and religious matters, such as whether stores should be closed on Sunday, comes within the proper exercise of the criminal law power, and so is *ultra vires*. See *Attorney-General of Ont. v. Hamilton St. Ry.* [1903] A.C. 524 (1903). The federal Lord's Day Act, however, allows provinces to opt-out and to permit activities on Sunday that are proscribed by the federal Act. The opting-out provision has been upheld as being within Parliamentary authority. See *Lord's Day Alliance of Can. v. Attorney-General of B.C.*, [1959] S.C.R. 497 (1959); see also *Lieberman v. The Queen*, [1963] S.C.R. 643 (1963), in which a provincial law requiring the closure of pool rooms and bowling alleys after midnight on weekdays and all day Sunday was characterized as a law concerned with secular rather than religious matters, and so was *intra vires*.

In the United States, a religious holiday closure law, unlike a Sunday closing law, could not be deemed to advance a secular purpose, and so would violate the first amendment's establishment clause. See *McGowan v. Maryland*, 366 U.S. 420 (1961); *cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (invalidating state law giving churches the effective power to veto applications for liquor licenses in proximity to a church).

63 [1899] A.C. 580 (1899).

64 The purpose of the law was to discriminate against aliens and Canadian subjects of Chinese origin. Apparently, most of the Chinese in British Columbia at that time were aliens.

65 The United States Supreme Court reached a similar result in *Traux v. Raich*, 239 U.S. 33 (1915), under the fourteenth amendment's equal protection clause. In *Traux*, the Court invalidated an Arizona law restricting the employment of aliens by private employers.

Queen v. Sutherland, Wilson, & Attorney-General of Canada,⁶⁶ the Supreme Court of Canada held that a provincial law applicable only to Indians exceeded the province's authority.⁶⁷

Finally, provincial laws discriminating against extra-provincial trade in favor of intra-provincial trade have been held to be ultra vires in several cases.⁶⁸ These decisions achieved the same result in Canada as has the United States Supreme Court's negative commerce clause doctrine.⁶⁹

As stated previously, the suggestion is not being made that in the pre-Charter era the Canadian courts necessarily were trying to use ultra vires to protect individual rights. Although the fact that the challenged provincial law implicated important individual rights was a relevant consideration in some of the cases, a number of laws seriously interfering with individual rights were sustained against ultra vires challenges. The above discussion instead is designed to demonstrate how the structure of the Canadian Constitution allows ultra vires challenges, as well as Charter challenges, to laws interfering with individual rights. As a practical matter, this type of protection of individual rights is not structurally available under the United States Constitution.

In Canada, any law or governmental action interfering with individual rights is potentially subject to challenge on both ultra vires and Charter grounds. Where both kinds of challenges are joined in the same case, Canadian courts should arguably consider the ultra vires challenge before considering the Charter claim. If the particular level of government lacked the constitutional power to enact the law in question, then that exercise of power was analytically void and there is no need for the court to speculate on whether the Charter

66 [1980] 2 S.C.R. 451 (1980).

67 The fact that the law applied only to Indians meant that it would derogate from the federal power to legislate in respect to Indians under § 91(24) of the Constitution Act, 1867. Since this express racial classification could not survive any degree of scrutiny, in the United States it would violate the fourteenth amendment's equal protection clause. "[I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend on the race of the actor." *Loving v. Virginia*, 388 U.S. 1, 13 (1967) (Stewart, J., concurring) (quoting his concurring opinion in *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964)).

68 See *Burns Foods, Ltd. v. Attorney-General of Man.*, [1975] 1 S.C.R. 494 (1973); *Attorney-General of Man. v. Manitoba Egg & Poultry Ass'n*, [1971] S.C.R. 689 (1971).

69 The United States Supreme Court has consistently invalidated state laws that have the effect of discriminating against interstate commerce or out-of-state interests *because of* the interstate nature of that commerce or the out-of-state nature of those interests. See, e.g., *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

would have been violated if such power existed. Moreover, principles of constitutional adjudication in Canada, as in the United States,⁷⁰ instruct the courts to avoid unnecessary constitutional pronouncements and to decide constitutional questions on the narrowest possible grounds.⁷¹ Whether the Supreme Court of Canada will in fact consider the *ultra vires* challenge before considering the constitutional claim is a matter of surmise. Nonetheless, on the assumption that the *ultra vires* ground generally would be considered a narrower ground of decision than the Charter ground, the surmise is a reasonable one.⁷²

This section has demonstrated how individual rights can be judicially protected in Canada, totally apart from the Charter's provisions. Whenever a challenge is made to a law or governmental action implicating individual rights, there are three potential ways by which the right can be judicially protected: (1) non-constitutional protection; (2) *ultra vires*; (3) Charter of Rights. In the United States, by contrast, the federal courts cannot provide non-constitutional protection where state laws or governmental action implicate individual rights, and apart from federal preemption,⁷³ there is rarely an issue under the United States Constitution concerning the competency of the federal or state governments to enact particular laws or otherwise act.

70 "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,' [and] will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. and P.S.S. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)).

71 See the discussion of avoiding unnecessary constitutional pronouncements in *Canadian Nat'l Transp., Ltd. & Canadian Nat'l Ry. v. Attorney-General Can.*, 49 N.R. 241, 270 (Supreme Ct. 1983) (Dickson, J.), and the discussion of deciding constitutional questions on the narrowest possible constitutional ground in *The Queen v. Hauser*, [1979] 1 S.C.R. 984, 992 (1979) (Pigeon, J.).

72 In the recent case of *The Queen v. Westendorp*, 46 N.R. 30 (Can. Sup. Ct. 1983), the Supreme Court of Canada held that a municipal law prohibiting a person from being on the streets for purposes of prostitution was *ultra vires* as being in relation to the criminal law. The assailant had challenged the law as violating § 7 of the Charter, but later abandoned this ground of challenge. Other recent cases coming from the lower courts have invalidated provincial and municipal "indecent entertainment" type laws on *ultra vires* grounds, as being in relation to the criminal law. See *Prestige Video Productions Victoria and Attorney-General of British Columbia*, [1983] 6 W.W.R. (B.C.S.C. 1982); *Re Attorney-General of New Brunswick and Rio Hotel, Ltd.*, 1 D.L.R.4th 418 (N.B. Ct. App. 1983). Whenever provincial efforts to interfere with freedom of expression are invalidated on *ultra vires* grounds, a potential question under § 2(b) of the Charter is thereby avoided.

73 In the United States, state laws interfering with individual rights occasionally have been invalidated on federal pre-emption grounds. See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (sedition); *Hines v. Davidowitz*, 312 U.S. 42 (1941) (alien registration).

The fact that individual rights structurally can be protected against governmental action in Canada on non-Charter grounds as well as on Charter grounds could affect the development of constitutional protection of individual rights in Canada compared to such development in the United States. There will be comparatively fewer cases in Canada than in the United States, at least over a comparable period of time, in which the Supreme Court of Canada will be required to resolve the case on Charter grounds and thus would have the occasion to define the meaning of the Charter's provisions. To this degree, Charter law in Canada could develop somewhat more slowly than constitutional rights law has developed in the United States.

III. The Charter of Rights

As previously stated, the Charter of Rights entrenches individual rights in the Canadian constitutional system so that these rights may receive judicial protection against governmental intrusion. These rights are set forth in sections 2 through 23.⁷⁴ Under section 1

74 Section 2 sets forth the "fundamental freedoms" of religion, expression, assembly, and association; §§ 3 through 5 set forth political rights; § 6 sets forth mobility rights; §§ 7 through 14 set forth what are called legal rights, which essentially deal with fair procedures in criminal cases; § 15 sets forth equality rights; and §§ 16 through 23 provide for language and educational rights. The political rights sections guarantee every citizen the right to vote in an election for members of the House of Commons or of a legislative assembly, and to be qualified for membership therein. They also require that elections for the House of Commons and for legislative assemblies be held at least every five years. These provisions have been relied on to challenge bans on voting by persons convicted of crime. Compare *Reynolds v. Attorney-General of B.C.*, [1983] 2 W.W.R. 413 (B.C.S.C. 1982) (court invalidated a provincial law that disqualified persons on probation from voting), with *Re Jolivet & Barker & The Queen*, 1 D.L.R.4th 604 (B.C.S.C. 1983) (same court upheld a law prohibiting incarcerated persons from voting). In the United States, "felon disqualification" laws have been held to be authorized specifically by § 2 of the fourteenth amendment, and so are immune from equal protection challenge. See *Richardson v. Ramirez*, 418 U.S. 24 (1974).

Under the language rights sections, English and French have co-equal status as the official languages of Canada, and a person is entitled to use either language in a legal proceeding or in communication with the federal government. Specific minority language educational rights involve the right to have one's children receive primary and secondary school instruction in English and French. See P. HOGG, CANADA ACT, *supra* note 20, at 53-64; see generally Tetley, *Language and Education Rights in Quebec and Canada (A Legislative History and Personal Political Diary)*, 45 LAW & CONTEMP. PROB. 177 (1982).

In *Quebec Ass'n of Protestant School Bds. v. Attorney-General of Que.*, 1 D.L.R.4th 573, (Que. Ct. App. 1983), *aff'd*, July, 1984, the court invalidated the controversial § 101 of the Quebec French Language law, which restricted the right to instruction in English in Quebec schools to children whose parents had received instruction in English in Quebec or who had been in Quebec prior to August, 1977. The law would have denied children of Anglophonic parents who had come to Quebec from elsewhere in Canada or abroad after August, 1977, the right to receive instruction in English in Quebec. Such a denial was flatly inconsistent

of the Charter, the rights set forth in sections 2 through 23 are protected against governmental action, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 1 thus prescribes the mode of analysis to determine the constitutionality of governmental action implicating the individual rights that are now entrenched in Canada.

A. *Textual Entrenchment*

The Charter of Rights differs in many significant respects from the constitutional rights provisions of the United States Constitution. The differences in the provisions protecting individual rights results from the different natures of the two documents. In turn, this dissimilarity exists because the Charter is a contemporary document, promulgated when Canada is at an advanced stage of its legal and political development.

Consider first the nature of the constitutional rights provisions of the United States Constitution and the resultant role of the United States Supreme Court in the development of constitutional protection of individual rights. It is an important part of the American constitutional tradition that limitations on the exercise of governmental power designed to protect individual rights generally be broadly-phrased and open-ended.⁷⁵ When the Constitution and the Bill of Rights were promulgated, the United States was a new nation in the initial stage of its legal and political development. Thus, there was no American experience on which to build in framing limitations on governmental power designed to protect individual rights.⁷⁶ Precisely because the Bill of Rights and the fourteenth amendment are so broadly-phrased and were promulgated in the distant past, the Constitution rarely answers current questions concerning individual rights directly. In large measure, then, through its interpretation of the Constitution, the Supreme Court has developed the constitu-

with the provisions of § 23(1)(b) of the Charter, which provides for continuity of language instruction among family members who belong to the linguistic minority of a province.

75 Sedler, *supra* note 2, at 128-32.

76 Some of the limitations in the United States Constitution and Bill of Rights were directed toward particular practices in colonial times that the framers found objectionable. Such limitations would include the third amendment's prohibition against the quartering of soldiers in private homes, the warrant specificity requirements of the fourth amendment, which were directed against writs of assistance, and the fifth amendment's requirement of grand jury indictment. Other limitations were imposed against the backdrop of English history, including the prohibition against suspension of the writ of habeas corpus in art. I, § 9(2), the prohibition against bills of attainder and ex post facto laws in art. I, § 9(3) and art. I, § 10(1), and the requirements for proof of treason and the forfeiture limitations of art. III, § 3.

tional protections of individual rights which exist in the United States today.⁷⁷

The Canadian Charter of Rights was promulgated in exactly the opposite circumstances. Since the Charter of Rights is a contemporary document, the drafters of the Charter⁷⁸ could build on the Canadian experience as they established a structure of constitutional protection of individual rights. They could consider the relative importance of particular individual rights in contemporary Canadian

77 See Sedler, *supra* note 2, at 109-20.

78 The term "drafters of the Charter" is used here in the same sense as the term "framers of the Constitution" is used in the United States, and refers analytically to the particular session of Parliament that passed the "Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada," in December, 1981. This Resolution contained the Canada Act, which included the Charter of Rights. The Charter of Rights came about through the ordinary legislative process in Canada. The actual text of the Charter was drafted by a committee of intermediate-level federal civil servants. See note 12 *supra*. The Resolution containing the Canada Act was submitted to the Parliament of Canada as a "government bill," and extensive hearings were held by a Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. The bill was first passed in April, 1981, and included certain amendments proposed by the Special Joint Committee, as well as some other amendments. This bill immediately came under court challenge, and after decision of the Supreme Court of Canada in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (1981), the bill was further amended. The final bill was passed in December, 1981, and was submitted as a resolution for action to the United Kingdom Parliament. It was passed by the United Kingdom Parliament, and the Royal Assent was given on March 29, 1982. See P. HOGG, CANADA ACT, *supra* note 20, at 1-3.

The proceedings of the Special Joint Committee have been published. Those proceedings and the Parliamentary debates provide evidence of "the drafters' intent" in the same manner as the Proceedings of the Constitutional Convention and Congressional debates provide evidence of "the framers' intent" in the United States. It is not clear how significant evidence of "the drafters' intent" or other extrinsic evidence will be in litigation under the Charter. As a general proposition, the Canadian courts, like the British courts do not consider extrinsic evidence in the process of interpreting ordinary legislation. However, in constitutional litigation involving ultra vires challenges, the Supreme Court of Canada has permitted some use of extrinsic evidence, primarily to show the historical background of certain provisions of the Constitution Act, 1867, see *Reference re: Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, 66 (1979), and to show the factual context and purpose of the legislation under challenge. See *Re Residential Tenancies Act of Ont.*, [1981] 1 S.C.R. 713, 721 (1981); *The Anti-Inflation Act Reference*, [1976] 2 S.C.R. 373, 387-91 (1976). In *law Society of Upper Canada v. Skapinker*, slip op. (May 3, 1984), the first Charter case decided by the Supreme Court of Canada, extrinsic evidence concerning the history of the Charter provisions at issue was introduced by the parties. Justice Estey, writing for the Court, commented on the Court's practice of "broadening the scope of the record in constitutional matters," and noted that the earlier practice of excluding "historical material" in constitutional cases had been disapproved in constitutional writings. He then went on to say that while the Court had received the "historical material" in the present case, he did not find it necessary to make use of it in arriving at the decision. He ended up by saying that, "I do not wish to be taken in this appeal as determining one way or the other, the propriety in the constitutional interpretative process of the admission of such material to the record." Slip op. at 33-34.

society. They could examine the extent of governmental interference with individual rights in the past and the degree of protection that the Canadian legal system had afforded to individual rights, even absent entrenchment. They could look to the relationship between Canada's values in the 1980's and long-standing traditions and practices, such as governmental aid to denominational schools.⁷⁹ And, of course, they had to take into account the bicultural and bilingual nature of the Canadian people.⁸⁰ In addition, they could learn from the constitutional experience of the United States and other nations, as well as other efforts at legal protection of individual rights, such as the European Charter of Rights. For all of these reasons, the drafters were able to incorporate value choices and resolve a number of issues concerning the nature and extent of individual rights in the text of the Charter itself.

As a result, the Canadian Charter's clear language has resolved a number of important constitutional questions that in the United States have required extensive interpretation by the United States Supreme Court, or have not even yet been fully resolved. For example, only within the last decade has the Supreme Court interpreted the fourteenth amendment's equal protection clause to reach sex discrimination. And the circumstances in which sex-based classifications may be constitutionally permissible are still subject to some dispute.⁸¹ In Canada, however, section 15(1) and section 28 of the Charter⁸² express a value choice of sex-based equality, and any sex-based classification in Canadian law would have to satisfy a very

79 Governmental aid to denominational schools apparently existed at the time of Confederation, and § 93(1) of the Constitution Act, 1867, protected existing rights with respect to denominational schools. Section 2(a) of the Charter of Rights and Freedoms guarantees only "freedom of conscience and religion," and does not contain the "non-establishment" component of the first amendment of the United States Constitution. Perhaps at least one of the reasons for framing § 2(a)'s guarantee in terms of "freedom of conscience and religion" was to avoid any implication that governmental aid to denominational schools or other traditional forms of governmental involvement with religion would be unconstitutional.

80 Thus, the Charter contains guarantees of language rights and minority language educational rights. See note 73 *supra*. Section 27 also provides that "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

81 See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Michael M. v. Superior Court*, 450 U.S. 464 (1981); *Rostker v. Goldberg*, 453 U.S. 57 (1981).

82 Section 15(1) expressly includes discrimination based on sex in the list of prohibited discriminations. Section 28 provides that "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." The effect of § 28 is to avoid the three-year delay the coming into force of § 15, as provided in § 32(2), and to exempt sex-based discrimination from the override provisions of § 33. Thus,

heavy burden of justification.⁸³ Similarly, the constitutional controversy in the United States over the permissibility of "affirmative action" programs⁸⁴ will not arise in Canada, because section 15(2) of the Charter specifically authorizes affirmative action programs.⁸⁵

A number of the legal rights provisions of the Charter likewise provide textual answers to many questions about constitutionally required procedures in criminal cases. Similar questions have required extensive litigation and Supreme Court interpretation in the United States. In some instances, it is apparent that the drafters examined the American constitutional experience, drawing certain ideas from it, and rejecting others. For example, section 8 of the Charter tracks the fourth amendment in providing that "[e]verybody has the right to be secure against unreasonable search or seizure,"⁸⁶ but does not include the fourth amendment's specificity of the warrant and probable cause requirements.⁸⁷ On the other hand, section 10(b) of the

all sex-based discrimination is subject to immediate challenge under the Charter, and unconstitutional sex-based discrimination is not subject to override.

The question would still exist as to whether certain laws or governmental action disadvantaging *some women* because of their sex violates the Charter. The United States Supreme Court has held that discrimination against pregnant women, such as denying them benefits available to other employees, does not constitute discrimination on the basis of sex within the meaning of the fourteenth amendment's equal protection clause, or come within the ambit of federal laws prohibiting discrimination on the basis of sex. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Canadian courts have also held that the denial of social insurance benefits to pregnant women did not violate the prohibition against sex discrimination contained in the Canadian Bill of Rights. *See* Stuart v. Attorney-General of Can., 44 N.R. 320 (Fed. Ct. App. 1982); *Bliss v. Attorney-General of Can.*, [1979] 1 S.C.R. 183 (1978). Whether the Canadian courts would reach the same result under the Charter is still an open question.

83 Professor Hogg suggests that in light of § 28, all sex-based classifications could be held unconstitutional. This would be so if § 28 has the effect of preventing the operation of the limitation provisions of § 1. *See* P. HOGG, CANADA ACT, *supra* note 20, at 72.

84 In the American constitutional context, "affirmative action" refers to the express use of race-conscious criteria to benefit racial minorities or of gender-conscious criteria to benefit women. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Kahn v. Shevin*, 416 U.S. 351 (1974).

85 Section 15(2) provides: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The only type of challenge that could be raised to an affirmative action program, in light of the text of § 15(2), is whether its object may properly be seen as "the amelioration of conditions of disadvantaged individuals or groups." Presumably, legislative bodies would have wide latitude in this regard.

86 In this respect, the fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ."

87 Mr. Manning suggests that one reason why the drafters may have omitted these requirements is that they considered them to be redundant. Warrant requirements have long

Charter, which requires that a suspect be informed of the right to counsel upon arrest, effectively adopts one element of the American *Miranda* rule.⁸⁸

Moreover, the legal rights provisions provide textual answers to many questions of constitutionally-required procedures in criminal cases that are very different from the way that such questions have been answered in the United States. In this regard, they reflect different value choices about the degree of protection that should be afforded persons accused of crime.⁸⁹ For example, in Canada the right to the assistance of counsel under section 10(b) of the Charter is limited to the right to obtain counsel; there is no constitutional obligation on the government under this section to provide counsel for indigents. Likewise, the guarantee against double jeopardy is narrower in Canada than in the United States; under section 11(h), jeopardy does not attach until the accused has been "finally acquitted." This section would appear to permit the government to appeal from a judgment of acquittal and to always allow a retrial following a mistrial.⁹⁰

existed in Canadian law, and it could be contended that these requirements were subsumed in the general prohibition against unreasonable searches and seizures. A contrary interpretation would be that the drafters intended to avoid problems with probable cause. In any event, the textual standard is that of "unreasonable search or seizure," and questions relating to the specificity of the warrant and of probable cause will be resolved within the framework of that standard. See M. MANNING, RIGHTS, FREEDOMS AND THE COURTS 275-79 (1983).

Professor Hogg suggests that another reason for omitting these requirements from § 8 is that they textually would render unconstitutional any use of writs of assistance. The abuse of writs of assistance in the colonial period was an abuse with which the framers of the fourth amendment were familiar, but such writs are still authorized in Canada. See P. HOGG, CANADA ACT, *supra* note 20 at 29-30. Professor Hogg, however, subsequently has taken the position that writs of assistance are "almost certain to be held invalid." Hogg, *Canada's New Charter of Rights*, 32 AM. J. COMP. L. 283, 291 (1984). See *The Queen v. Carriere*, 4 C.C.R. 97 (Ont. Prov. Ct. 1983), where a lower court in Ontario held that the use of writs of assistance constituted an unreasonable search and seizure under § 8 and violated the "Fundamental principles of justice" provisions of § 7.

88 See P. HOGG, CANADA ACT, *supra* note 20, at 33-34.

89 According to the government, the theory of the legal rights provisions is that they basically entrench existing law and practice, and that "most of [these rights] already exist in Canada by precedent and practice, or ordinary statute law." THE CHARTER OF RIGHTS AND FREEDOMS: A GUIDE FOR CANADIANS 12 (1982). Our reference to textual answers to questions of constitutionally-required procedures in criminal cases is to the provisions of §§ 8-14, which deal specifically with the rights of the criminal accused. Additional protections for the criminal accused may be found to inhere in the "fundamental principles of justice" provision of § 7. See M. MANNING, RIGHTS, FREEDOMS AND THE COURTS at 227-32, 267-71.

90 Professor Hogg states: "The word 'finally' in S. 11(h) makes clear that the provision does not preclude a retrial ordered by reason of some error at the original trial." P. HOGG, CANADA ACT, *supra* note 20, at 45. See *Re Burrows and The Queen*, 150 D.L.R.3d 317 (Man. Ct. App. 1983), *leave to appeal refused*, June 20, 1983, where part way through the accused's first

The Charter also treats incriminating evidence differently than does the United States Supreme Court's interpretation of the fifth amendment's self-incrimination guarantee. Under section 11(c) an accused may not be compelled to be a witness at his trial. And section 13 protects a witness who has testified from having any incriminating evidence in that testimony used against him in any other proceeding, except in a prosecution for perjury.⁹¹ But the Charter does not protect generally the right to refuse to answer a question in any proceeding on the basis of possible self-incrimination.⁹² In contrast, this right plays an important role in the privilege against self-incrimination in the United States.⁹³ Finally, section 11(f) provides that the right to trial by jury exists only when the maximum punishment prescribed for the offense is at least five years. This provision avoids the "petty offense" problem that has arisen in the United

trial, the government realized it had laid the wrong charge and dismissed the proceedings. It then laid a new information charging a proper offense, which was held not to violate the accused's rights under § 11(h). In Canada, the government can appeal from a verdict of acquittal in a criminal case, and a conviction against the accused may be entered by the appellate court. *See Morgentaler v. The Queen* [1976] 1 S.C.R. 616 (1975) (jury verdict of acquittal of physician on charge of performing an illegal abortion set aside on appeal and conviction entered against physician). For a broader view of the extent of protection afforded by § 11(h), see M. MANNING, *RIGHTS, FREEDOMS AND THE COURTS* 424-29 (1983). In the United States, of course, the government cannot appeal, and there can be no retrial, regardless of any error at the original trial. *See, e.g., Fong Foo v. United States*, 369 U.S. 141 (1962); *cf. Burks v. United States*, 437 U.S. 1 (1978). In some circumstances, a retrial may be barred following the grant of the prosecution's motion for a mistrial. *Compare United States v. Jorn*, 400 U.S. 470 (1971), *with Illinois v. Somerville*, 410 U.S. 458 (1973).

91 This provision resembles use immunity in the United States. *See Pye, The Rights of Persons Accused of Crime Under the Canadian Constitution: A Comparative Perspective*, 45 *LAW & CONTEMP. PROB.* 221, 235-36 (1982). In *Donald v. Law Society of British Columbia*, 2 D.L.R.4th 385 (B.C. Ct. App. 1983), the court held that the ban on the introduction of incriminating evidence was not limited to subsequent criminal proceedings, and so prevented the use of testimony in a prior civil proceedings in subsequent disciplinary proceedings.

92 Again, this is under § 11(c) and § 13. It is possible that § 7 will be interpreted as protecting the right to refuse to disclose incriminating evidence, at least in some circumstances. In *R.L. Crian, Inc. v. Couture*, Sask. Q.B. (Dec. 19, 1983) (unreported), a lower court in Saskatchewan held that it would violate "fundamental principles of justice" to compel a person under administrative investigation to provide incriminating evidence to the investigating officials, because such evidence could be used against him in a subsequent criminal prosecution.

93 *See, e.g., Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Spevack v. Klein*, 385 U.S. 511 (1967). Since there is no right under the Charter to refuse to answer a question on the basis of possible self-incrimination, a party charged with being an accessory after the fact, who is being tried separately, can be compelled to testify as to the transaction in issue at the trial of the principal. *See The Queen v. Bleich*, 150 D.L.R.3d 600 (Man. Q.B. 1983), and an attorney can be compelled to testify in bar disciplinary proceedings against him. *See Re James and Law Society of British Columbia*, 143 D.L.R.3d 379 (B.C.S.C. 1982).

States under the sixth amendment's broad trial by jury guarantee.⁹⁴ Thus, unlike the United States Constitution, the Charter, to some considerable degree, specifically defines the nature and extent of the procedural rights afforded to persons charged with crimes.⁹⁵

Section 6, dealing with mobility rights, also exemplifies how the Charter textually resolves issues that had to be resolved by extensive constitutional interpretation in the United States. Section 6 specifically recognizes: (1) a right to travel outside of Canada and a concomitant right to return;⁹⁶ (2) a right to inter-provincial travel, including a right to take up residence in any province;⁹⁷ and (3) a right to pursue a livelihood in any province.⁹⁸ However, contrary to

94 It is now settled that the offense is "petty" where the sentence authorized for the offense is not more than six months' imprisonment, *see Baldwin v. New York*, 399 U.S. 66 (1969), or in the case of criminal contempt, where the sentence actually imposed is less than six months. *See Codispoti v. Pennsylvania*, 418 U.S. 506 (1974).

95 Professor Pye notes that the right to confrontation and the right to compulsory process are surprisingly absent from the Charter, and that a proposal to include such protections was defeated. *See Pye, supra* note 93, at 246; for a discussion of the Charter's legal rights provisions, *see generally* Ratushny, *Emerging Issues in Relation to the Legal Rights of a Suspect Under the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 177 (1983); M. MANNING, *RIGHTS, FREEDOMS AND THE COURTS* 227-457 (1983).

96 The right to travel outside of the United States and to return is a part of the "liberty" protected by the due process clause. *See Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *compare Zemel v. Rusk*, 381 U.S. 1 (1965), *with Haig v. Agee*, 453 U.S. 280 (1981).

97 In the United States, the right to interstate travel has been found in the internal inferences of the Constitution, as a right "fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1966).

98 In the United States, the right of non-residents to pursue a livelihood in another state is protected by the privileges and immunities clause of art. IV, § 2. *See Hicklin v. Orbeck*, 437 U.S. 518 (1978). The Charter of Rights does not contain the equivalency of a privileges and immunities clause, and apart from the right to pursue a livelihood in another province, a non-resident is not protected from discriminatory provincial laws, such as those barring landholding by non-residents. *See Morgan v. Attorney-General of Prince Edward Island*, [1976] 2 S.C.R. 349 (1975); P. HOGG, *CANADA ACT, supra* note 20, at 25. A challenge to such discrimination possibly could be mounted under the equal protection provisions of § 15(1), but it probably would not be successful. *See Storey v. Zazelenchuk*, 5 C.R.R. 99 (Sask. Q.B. 1982), in which the court held that since § 6 did not deal with voting rights, a six month durational residency requirement for voting in provincial elections did not violate § 6. A durational residency requirement of similar length would violate the constitutional right to travel in the United States. *See Dunn v. Blumstein*, 405 U.S. 330 (1972). In *Law Society of Upper Canada v. Skapinker*, slip. op. (May 3, 1984), the first case in which the Supreme Court of Canada rendered a decision under the Charter, that Court held that the "right to pursue the gaining of a livelihood in any province," within the meaning of § 6(2)(b) was not a "free-standing" right, but was limited to the right to work in a province other than the province of a person's present or previous residence. Therefore, that provision could not be relied on to challenge an Ontario law requiring that all persons seeking to practice law in Ontario be a Canadian citizen or other British subject. *See also Basile v. Attorney-General of Nova Scotia*, 148 D.L.R.3d 382 (N.S.S.C. Trial 1983) (provincial law providing that only permanent residents

the constitutional rule in the United States,⁹⁹ section 6(3)(b) specifically authorizes reasonable residency requirements as qualifications for receipt of publicly-funded social services. Also, section 6(4) permits a province to require employment preference for social or economically disadvantaged residents where the rate of employment in that province falls below the general rate of employment in Canada.¹⁰⁰

Even some of the Charter's provisions that appear broadly-phrased and open-ended differ in some respects from comparable provisions of the United States Constitution. For example, section 7 provides that, "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice." While this provision is similar to the due process clauses of the fifth and fourteenth amendments, it pointedly omits property rights from the list of protected rights. This omission ensures that section 7 could not be relied on to require compensation or even fair procedures for a taking of property by the government.¹⁰¹ The omission also means that "procedural due process requirements"¹⁰² will not apply to Canadian governmental action affecting property interests.¹⁰³ The specific omission of property interests from the list of protected rights under section 7 may indicate that contemporary Canadian society does not consider property interests an important area of individual rights.¹⁰⁴

of Nova Scotia can be licensed as direct sellers is a "reasonable limit prescribed by law," and so does not violate § 6(2)(b)).

99 See *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

100 See P. HOGG, *CANADA ACT*, *supra* note 20, at 25-26.

101 See *id.* at 26.

102 See, e.g., *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975).

103 However, it is possible that entitlement to social welfare benefits in Canada will be held to involve "security of the person" within the meaning of § 7, so as to bring into play "fair hearing" requirements before such benefits can be denied or taken away. Cf. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

104 A more prosaic reason for the omission of property interests from the list of protected rights under § 7, according to one Canadian colleague, was that the provinces wanted to be free from any constitutional constraint when exercising the power to expropriate property. But see *Queen in Right of N.B. v. Fisherman's Wharf, Ltd.*, 135 D.L.R.3d 307 (N.B.Q.B. 1982), *aff'd on other grounds*, 144 D.L.R.3d 21 (N.B. Ct. App. 1983), in which a trial court in New Brunswick held that § 7's guarantee of "security of the person" could encompass the right to enjoyment of property ownership. The case involved a seizure of property on which a party delinquent in his remission of provincial sales taxes held a lien. The court held that under the sales tax collection statute, the lien did not attach to property not owned by the delinquent seller. The court stated that its interpretation of the statute was with regard to the provision of § 7, which it saw as prohibiting the confiscation without compensation of the

The particular language of section 7 differs from the language of the due process clauses in at least two other ways. First, the language of section 7 sets forth the protected right in conjunctive terms. It says that everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with "principles of fundamental justice." Second, it uses the term "principles of fundamental justice" rather than the term "due process of law." In other contexts in Canada, the term "principles of fundamental justice" has been construed to mean "fair procedures."¹⁰⁵ According to the government officials who drafted the text of the Charter, the term "principles of fundamental justice" would mean the same as "procedural due process" in the United States and would not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy in question.¹⁰⁶ It has been suggested that the most natural reading of section 7, in light of its express conjunctive language, is that the first clause imposes substantive limitations on governmental power to interfere with life, liberty, and security of the person, while the second clause imposes procedural limitation on such interference.¹⁰⁷ If section 7 is so interpreted, despite the difference between the language

property of a person other than the delinquent seller for the purpose of collecting a tax. Whether the court's interpretation of § 7's guarantee of "security of the person" as including the enjoyment of property ownership will be followed by other courts is problematical. The New Brunswick Court of Appeals resolved the question without reference to § 7. *But see* M. MANNING, *RIGHTS, FREEDOMS AND THE COURTS* 249-52 (1983).

105 The term "fundamental justice" appears in § 2(e) of the Canadian Bill of Rights, and in that context has been defined to mean "that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case." *Duke v. The Queen* [1972] S.C.R. 917, 923 (1972) (Fauteux, C.J.). The term "fundamental justice" has been said to mean "natural justice," which does have an established meaning in Canadian law, but is limited to "rules of fair procedure." P. HOGG, *CANADA ACT*, *supra* note 20, at 27; W. TARNOPOLSKY, *THE CANADIAN BILL OF RIGHTS* 264 (2d ed. 1975).

106 *Minutes of Proceedings and Evidence of Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, First Session of the Thirty-second Parliament, 1980-81, 46:32 (1981) (statement of B. L. Strayer, Ass't Dep. Min., Dep't of Justice). As to the relevance in constitutional litigation of "drafters' intent," see note 78 *supra*. Mr. Manning, however maintains that the term, "principles of fundamental justice," is not limited to "fair procedures," and that it means something different than "natural justice" or "procedural due process." His position is that section 7 authorizes the courts to "test the substantive content of legislation." M. MANNING, *RIGHTS, FREEDOMS, AND THE COURTS* 232, 255-71 (1983).

107 Bender, *supra* note 11, at 824-25, 843-46. Professor Hogg, on the other hand, apparently assumes that section 7 creates a single, "process-type" right. He states: "[t]he courts could review the appropriateness and fairness of the procedures enacted for a deprivation of life, liberty or security of the person—but that is all. The courts could not review the substantive justification for the deprivation." P. HOGG, *CANADA ACT*, *supra* note 20, at 27.

of section 7 and the due process clauses, section 7 would operate the same way that the due process clauses have operated in the United States. It would also authorize the Canadian courts to review fully the substantive content of all laws implicating individual rights. On the other hand, it is possible that despite the conjunctive language of section 7, the Supreme Court of Canada will treat section 7 as creating a single right—the right not to be deprived of life, liberty, or security of the person except in accordance with “principles of fundamental justice.”¹⁰⁸ If section 7 is interpreted as creating a single, “process-type” right, then the use of the term “fundamental principles of justice” rather than “due process of law” in section 7 may turn out to be quite significant, and section 7 will not have the same substantive import as the due process clauses have in the United States.¹⁰⁹

108 In *The Queen v. Hayden*, [1983] 6 W.W.R. 665 (Man. Ct. App. 1983), *leave to appeal refused*, Dec. 19, 1983, the court so interpreted section 7 and held that section 7 could not be relied on to invalidate a provision of the Federal Indian Act, making it an offense for a person to be intoxicated on an Indian reserve. The court stated:

[t]he phrase “principles of fundamental justice,” in the context of s. 7 and the Charter as a whole, does not go beyond the requirement of fair procedure and was not intended to cover substantive requirements as to the policy of the law in question. To hold otherwise would require all legislative enactments creating offenses to be submitted to the test of whether they offend the principles of fundamental justice. In other words, the policy of the law as determined by the legislature would be measured against judicial policy of what offends fundamental justice. In terms of procedural fairness, that is an acceptable area for judicial review but it should not, in my view, be extended to consider the substance of offense created. *Id.* at 657.

The Court held that the provision violated § 1(b) of the Canadian Bill of Rights because it was not an offense to be intoxicated anywhere else than on the Indian reserve. The provision effectively amounted to racial discrimination.

109 However, even if section 7 is interpreted as creating a single, “process-type” right, this does not mean that in some circumstances, section 7 may not be relied on to review the “substantive validity” of legislation. In *Reference re § 94(2) of the Motor Vehicle Act RSC 1979, c. 288*, [1983] 3 W.W.R. 756, 763-64 (B.C. Ct. App. 1983), the British Columbia Court of Appeals stated that the term “principles of fundamental justice” was not restricted to matters of procedures, but extended to the “substantive validity” of the law as well. At issue in that case was the validity of a criminal statute imposing absolute liability for driving while prohibited or suspended. The court construed the statute as foreclosing the accused from proving that his action in driving was due to an honest and reasonable mistake or that he acted without guilty intent. As so construed, the statute was held to violate § 7. This type of statute illustrates the situation where “procedure” and “substance” blend. The case is similar to American cases such as *Bell v. Burson*, 402 U.S. 535 (1971), in which the Supreme Court invalidated a statute providing for the automatic suspension of the vehicle registration and driver’s license of an uninsured motorist involved in an accident, unless the motorist posted security to cover the damages claimed by the other parties. In *Wisconsin v. Costantineau*, 400 U.S. 433 (1971), the Supreme Court invalidated a statute authorizing state officials, without notice or hearing, to declare a person an “excessive drinker” and post a notice in retail liquor stores that sales of liquor were prohibited to that person. The fundamental unfairness

So too, section 2(a) of the Charter, dealing with religious freedom, omits a non-establishment component. Presumably, this omission was designed to protect from constitutional challenge the long-standing Canadian practice of governmental financial assistance to denominational schools and other traditional forms of governmental involvement with religion. In any event, while the establishment of religion and religious freedom are interrelated,¹¹⁰ the section 2(a) provision for "freedom of conscience and religion" allows governmental action aiding religion so long it does not interfere with an individual's religious freedom.¹¹¹

in these cases has "procedural" as well as "substantive" overtones, because the adversely affected person is denied the opportunity to contest the basis for the imposition of the sanction. Similarly, the person who has been held absolutely liable for driving with a suspended or revoked license has been denied the opportunity to show justification for his behavior. It is the denial of the opportunity to show justification that violates "principles of fundamental justice," and renders the law substantively unconstitutional. In commenting on this case, the court in *Hayden* noted: "What the court decided in that case was that it was contrary to the principles of fundamental justice to enact a limitation on a substantive offence of driving while suspended by taking away the defences of honest or reasonable mistake of fact and lack of guilty intent. The court did not decide that it was unconstitutional to create an offence with penal consequences of driving while suspended." 6 W.W.R. at 657. *See also* *The Queen v. Willeneuve*, 4 C.R.R. 1 (Ont. Ct. App. 1983), *leave to appeal granted*, June 6, 1983 (provisions of federal criminal law to the effect that an honest mistake as to the age of a female under 14 furnished no defense to a charge of having sex with an underage female, did not violate § 7).

110 That interrelationship is clearest when governmental action aiding religion impacts on individuals holding "non-religious" views, as in the bible-reading and school prayer cases. *See* *School Dist. v. Schempp*, 372 U.S. 203, 217-22 (1963). Nevertheless, even in that situation, the non-establishment concern and the religious freedom concern can be differentiated. *See* *Engel v. Vitale*, 370 U.S. 421, 430-33 (1962).

111 The clearest example of such action would be governmental financial assistance to denominational schools. The absence of an establishment component in § 2(a) will also prevent constitutional challenge in Canada to practices such as the use of chaplains in legislative bodies, which the United States Supreme Court has upheld against establishment clause challenge. *See* *Marsh v. Chambers*, 104 S. Ct. 3330 (1983).

In *The Queen v. Big M Drug Mar.*, [1984] 1 W.W.R. 625 (Alta. Ct. App. 1983), the court, in a 3-2 decision, held that the federal Lord's Day Act violated § 2(a) of the Charter, because the main purpose of the law was the religious one of compelling observance of the Christian sabbath. The majority concluded that unlike the situation in American states, *see* *McGowan v. Maryland*, 366 U.S. 420 (1966), the passage of time did not convert the purpose of the law from a religious one to a secular one. The analysis stayed within the framework of "freedom of conscience and religion," by focusing on the burden that the law imposed on those who did not observe Sunday as the sabbath. The court stated: "For those whose religion requires observance of a different Sabbath, this is said to produce at the very least an economic disincentive to the practice of their own religion and at worst a coercive atmosphere in which the nation is perceived to require all its citizens to observe the Christian Sunday." *Id.* at 641. The conclusion, therefore, was that the law "imposes a coercive burden on the free exercise of religion or conscience." *Id.* at 643. The dissenting judges noted the absence of a non-establishment component in § 2(a), and emphasized that the law did not have the effect of compelling anyone to observe Sunday as the sabbath. *Id.* at 659. Their conclusion was

Because the Charter of Rights is a contemporary document, reflecting Canada's advanced stage of legal and political development, the drafters could incorporate certain value choices into the document. While some of the Charter's provisions, such as the fundamental freedoms guarantees of section 2, are broadly-phrased and open-ended like their American counterparts, many of the Charter's provisions specifically define the nature and extent of the protection provided. Thus, the answers to many present or future constitutional questions in Canada may be found in the text of the Charter. Even if the answers are not explicit in the Charter, the Canadian courts in many cases will only need to apply fairly specific constitutional provisions to particular factual situations.¹¹²

B. *Textual and Structural Analysis*

The structure and text of the Charter also prescribe the mode of analysis for questions of constitutional protection of individual rights. As discussed previously, sections 2 through 23 of the Charter set forth the individual rights that are entrenched and thus constitutionally protected from governmental action. Section 1 provides that those rights are guaranteed, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The first step in analyzing a constitutional challenge in Canada is to determine whether the individual right implicated by the law or governmental action comes within the Charter's protection. In other

that "a law having a religious purpose or effect will violate the Charter only if its objective or effect is to oppress or interfere with religious liberty." *Id.* at 664.

In *Regina v. Quinlan*, 60 N.S.R.2d 224 (N.S. County Ct. 1983), a lower court in Nova Scotia held that a provincial law prohibiting the setting of lobster traps in certain areas on Sunday, but not in other areas, violated § 2(a). The court concluded that the prohibition "served the religious conscience" of the persons residing in the prohibited areas, and thus discriminated against persons whose religious faith did not call for the observance of the sabbath on Sunday. *See also Brown v. Brown*, 3 D.L.R.4th 283 (Sask. Ct. App. 1982) (custodial parent has the right to determine religious education of children over objection of non-custodial parent); *Re B*, 2 C.R.R. 329 (Alta. Prov. Ct. 1982) (state can compel blood transfusion for child whose parents had refused consent on religious grounds).

112 In the first Charter case coming before the Supreme Court of Canada, *Law Society of Upper Canada v. Skapinker*, slip. op. (May 3, 1984), the issue before the Court was whether the "right to pursue the gaining of a livelihood in any province" within the meaning of § 6(2)(b), was a "free standing" right, so as to enable an Ontario resident to challenge an Ontario law regulating the practice of law, or whether it was limited to the right to work in a province other than the province of a person's present or previous residence. The Court resolved that question with reference to the location of § 6(2)(b) in the mobility rights part of the Charter, and concluded that the right was a limited one, protecting only new residents or non-residents.

words, the asserted individual right must be specifically guaranteed in the text of sections 2 through 23. This step in the constitutional analysis resembles the United States Supreme Court's process of defining constitutional phrases, such as "freedom of speech."¹¹³ If the Canadian court concludes that the asserted right does not come within the protection of the rights guaranteed by sections 2 through 23, then that right is not entrenched. For example, in *Law Society of Upper Canada v. Skapinker*,¹¹⁴ the first Charter case decided by the Supreme Court of Canada, the Court concluded that the right to "pursue the gaining of a livelihood in any province," guaranteed by section 6(2)(6), was not a "free standing" right; rather, it was related to the right to "move to and take up residence in any province," guaranteed by section 6(2)(a), and so was only for the benefit of non-residents wishing to work in a province other than the province of their present or previous residence. Therefore, the right asserted in that case by a permanent resident living in Ontario, to practice law in Ontario, did not come within the protection of section 6(2)(b). Likewise, if the Canadian courts held that "obscenity" did not constitute "freedom of expression" within the meaning of section 2(b) of the Charter, then any governmental prohibition of "obscenity" law would not be subject to constitutional challenge under section 2(b).¹¹⁵

The Charter also specifically defines the extent of protection af-

113 See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748 (1976) (commercial speech is "speech"); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (peaceful demonstrations constitute "speech"); *Roth v. United States*, 354 U.S. 476 (1957) ("obscenity" is not "speech"); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words" do not constitute "speech"); see also *In re Southam Inc. and The Queen* (No. 1), 41 Ont. 2d 113 (Ont. Ct. App. 1983) (public access to courts within the protection of § 2(b) of the Charter); *Canadian Newspapers Co. v. The Queen*, 47 B.C.R. 150 (B.C.S.C. 1983) (same); cf. *R. v. G.B.*, [1983] 3 W.W.R. 141 (Alta. Q.B. 1983) (public access to courts not within the protection of § 2(b), but a statutory requirement mandating that all juvenile trials be held *in camera* would violate the "public hearing" guarantee of § 11(d)). The United States Supreme Court has grounded the right of public access to trials in the first amendment. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The right is not grounded in the sixth amendment's public trial guarantee. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

114 See note 98 *supra*.

115 Section 2(a) presents similar issues with respect to the meaning of "freedom of conscience and religion." The United States Supreme Court has held that the "free exercise of religion" within the meaning of the first amendment includes the freedom to act in accordance with one's religion as well as freedom to believe. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). It also includes the right not to be subject to "unreasonable burdens" on the exercise of one's religion. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963). These types of issues will have to be resolved by Canadian courts in determining whether religious-based claims come within the protection of § 2(a). See *The Queen v. Big M Drug Mart*, [1984] 1

forded some individual rights. For example, section 10(b) defines the right to counsel as the right to "retain and instruct counsel." Thus, indigent defendants in Canada would have no constitutional right under this section to the appointment of counsel at government expense. And the right to take up residence in any province, guaranteed by section 6(2)(a), does not guarantee immediate receipt of publicly provided social services.¹¹⁶

Having fit the claimed individual right within one of the Charter's guarantees, the second step in the constitutional analysis is to apply the section 1 criteria to determine whether the restriction of that right was valid.¹¹⁷ The restriction violates the Charter, and is therefore unconstitutional,¹¹⁸ unless it constitutes a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society." The clear thrust of section 1 is to place the burden of justification for the restriction on the government.¹¹⁹ The court

W.W.R. 625 (Alta. Ct. App. 1983); [1969] S.C.R. 383 (1969). See also M. MANNING, *RIGHTS FREEDOMS AND THE COURTS* 197-204 (1983).

116 Contrast this to the right to travel guarantee in the United States. See note 99 *supra*.

117 See the discussion of the two-step analysis in *Re Federal Republic of Germany and Rauca*, 41 Ont. 2d 225, 240 (Ont. Ct. App. 1983). The court noted that the first step in the analysis is to determine whether the guaranteed right or freedom has been "infringed, breached, or denied." If the answer to that question is affirmative, then the question becomes whether the denial or limitation of the right "is a reasonable one demonstrably justifiable in a free and democratic society."

Some of the rights guaranteed by the Charter are of such a nature that the question of "demonstrable justification" is subsumed in the question of whether a violation has occurred. Such rights would include § 8's guarantee against unreasonable search or seizure, § 10's arrest rights, § 11's rights to be informed of the specific offense without unreasonable delay, to be tried within a reasonable time, and not to be denied reasonable bail without just cause, and § 12's protection against cruel and unusual treatment or punishment. Other rights are of such a specific nature as not to be subject to a "demonstrable justification" limitation. These include the right to habeas corpus under § 10(c), the right not to be compelled to testify under § 11(c), the right to the presumption of innocence under § 11(c), the right to trial by jury under § 11(f), the non-retroactivity protection of § 11(g), the double jeopardy protection § 11(h), the non-variation of penalty protection of § 11(i), the non-use of incriminating evidence guarantee of § 13, the right to an interpreter under § 14, and the language and minority language education rights of §§ 16-23. For a discussion of the specificity of the minority language education rights as foreclosing any "demonstrable justification" limitation, see *Quebec Ass'n of Protestant School Bds. v. Attorney-General of Que.*, *supra* note 74, at 576.

118 See note 26 *supra*.

119 This was the intention of the drafters. As stated in testimony before the Special Committee:

[I]t was the belief of the drafters that by going to these words demonstrably justified or can be demonstrably justified, it was making clear that the onus would be on the government, or whoever is trying to justify the action that limited the rights set out in the charter, the onus would be on them to show that the limit which was being imposed not only was reasonable, which was in the first draft, but also that it was

must determine whether the restriction is "reasonable,"¹²⁰ whether it is "prescribed by law,"¹²¹ and whether it comports with the limitations on individual freedom properly imposed in a "free and democratic society." In considering the third criterion, the court would presumably consider the acceptability of the restriction in Canadian society, and the existence of similar restrictions in other democratic societies, such as the United States, the United Kingdom, and Commonwealth nations such as Australia and New Zealand.¹²²

The United States Constitution, in contrast, provides no structural or textual guidance for the courts in examining the validity of restrictions that implicate constitutional rights. The Supreme Court has had to develop the entire mode of constitutional analysis on its own. For example, since the terms of the first amendment are absolute, the Court has had to fashion an extensive body of doctrine defining permissible restrictions on expression.¹²³ Likewise, the Court has chosen to analyze due process and equal protection challenges with an articulated two-tiered standard of review.¹²⁴

It would not be proper for the Canadian courts to analyze constitutional challenges in this manner. Once a particular activity is held to constitute "freedom of expression," within the meaning of section 2(b), for example, the Canadian courts can only determine the validity of the restriction on that activity in accordance with the section 1 criteria.¹²⁵ Likewise, in an equal protection challenge, sec-

justifiable or justified, and in doing that they would have to show that in relation to the situation being dealt with, the limit was justifiable.

Minutes of Proceedings and Evidence of Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, First Session of the Thirty-second Parliament, 1980-81, 48:45 (1981) (statement of B. L. Strayer, Ass't Dep. Min., Dep't of Justice). In *re Southam and The Queen*, 41 Ont. 2d 113 (Ont. Ct. App. 1983), the court stated, "[t]he complete burden of proving an exception under § 1 of the Charter rests on the party claiming the benefit of the exception or limitation." *Id.* at 124-25. See *Hunter v. Southam, Inc.*, — S.C.R. —, Sept. 17, 1984 affirming this proposition.

120 See P. HOGG, *CANADA ACT*, *supra* note 20, at 10; M. MANNING, *RIGHTS, FREEDOMS AND THE COURTS* 145-47 (1983).

121 See P. HOGG, *CANADA ACT*, *supra* note 20, at 10-11. In *re Ont. Film & Video Appreciation Soc'y and Ont. Bd. of Censors*, 45 Ont. 2d 80 (Ont. Ct. App. 1984), the court invalidated a film censorship law which contained no standards to determine when a license to show a film could be refused, on the ground that written standards were necessary to satisfy the requirement of "reasonable limits prescribed by law."

122 *Id.*

123 While the Court has adopted a general "ad hoc" balancing approach, it has developed a number of specific doctrines, such as void on its face, prior restraint, and content neutrality, to determine the validity of particular kinds of restrictions on expression.

124 Some members of the Court, however, have contended that in practice the Court employs a "sliding scale" standard of review. See, e.g., *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring).

125 In deciding whether a particular restriction is reasonable, the Canadian courts could

tion 15 would not permit differing standards of review for certain "suspect" classifications. All forms of discrimination which section 15 textually proscribes are considered of equal importance. And section 1 sets forth the standard of review for determining the validity of particular forms of discrimination.¹²⁶

The Charter also deals specifically with the admissibility of evidence obtained by an illegal search and seizure. Section 24(2) prescribes a discretionary exclusionary rule. The court may exclude the evidence if, "having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." Thus, there is an explicit standard for examining the admissibility of illegally obtained evidence, and the court need only apply that standard to the particular facts.¹²⁷

incorporate some of the specific first amendment doctrines promulgated by the United States Supreme Court. For example, like the United States Supreme Court, they could hold that a prior restraint is a "reasonable limit" only in the most exceptional circumstances. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971). They could require that any law which regulates expression be drawn with narrow specificity, and hold any law not so drawn "void on its face." *See, e.g., Coates v. Cincinnati*, 402 U.S. 611 (1971). Similarly, they could hold that any law regulating the "time, place and manner" of expression is not a "reasonable limit" unless it is completely content-neutral. *See, e.g., Police Dep't v. Mosley*, 408 U.S. 92 (1972). These kinds of questions must be resolved within the analytical framework of determining whether a particular restriction can be reasonably justified. This analytical framework focuses on the "reasonableness" of the particular limit, with the burden on the government to establish such "reasonableness." The kind of "ad hoc balancing approach" employed by the United States Supreme Court in dealing with the general permissibility of restrictions on freedom of expression is not authorized under § 1. For example, in *Colten v. Kentucky*, 407 U.S. 104 (1972), the Supreme Court considered the nature of a particular expression—which it characterized as "arguing with a policeman"—to be of a relatively low level, and, balancing the individual's interest in carrying on that type of expression against the state's asserted "crowd control" interest, it struck the balance in favor of the restriction. If a Canadian court were faced with a similar question, it would have to focus entirely on the reasonableness of the particular restriction and could not discount the quality of the individual's admittedly protected expression in resolving the "reasonableness" question.

126 On the other hand, where a challenge was made to a general classification contained in legislation, e.g., a classification among welfare recipients as denying the disfavored group equal protection and equal benefit of the law, it would not be *textually* impermissible for the Canadian courts to vary the degree of scrutiny, depending on the importance of the individual interest, as the United States Supreme Court does under the fundamental and non-fundamental right standard of equal protection review. *Compare Shapiro v. Thompson*, 394 U.S. 618 (1969), with *Schweiker v. Wilson*, 405 U.S. 221 (1981).

127 In the cases that have arisen so far, the courts appear to be applying a "good faith" rule. According to the Ontario Court of Appeals, the factors to be considered in determining whether the admission of the evidence would "bring the administration of justice into disrepute," are the nature and extent of the illegality, the unreasonableness of the conduct involved, and the state of mind of the officer (i.e., whether the officer acted in good faith or knowingly infringed upon the accused's rights). *See, e.g., Regina v. Chapin*, 43 Ont. 2d 458, 462 (Ont. Ct. App. 1983). The police searched a parked vehicle in the absence of the driver and found marijuana. The court held that the party seeking to exclude the evidence had the

C. *The Role of the Canadian Courts Under the Charter*

This discussion has demonstrated that because the Charter is a contemporary document, many of its provisions define the nature and extent of the protection afforded individual rights more specifically than do the constitutional rights provisions of the United States Constitution. The Charter's structure and text, unlike that of the United States Constitution, also prescribe the mode of analysis for the Canadian courts to employ when dealing with questions of constitutional protection of individual rights. For these reasons, the role of the Canadian courts in determining the course of development of constitutional protection of individual rights in Canada will be comparatively less significant than the role played by the United States Supreme Court and the federal courts in the United States.

This submission requires some careful explanation, lest its import be misunderstood. The function of the Canadian courts with respect to the Charter is exactly the same as the function of the United States Supreme Court and the federal courts with respect to the constitutional rights provisions of the United States Constitution: to define the meaning of those provisions and to resolve all questions of constitutional protection of individual rights. The difference in roles in determining the course of development of constitutional protection of individual rights is due to the difference between the nature of the Charter of Rights and the nature of the major constitutional rights provisions of the United States Constitution.

Because of the relative specificity of many of the Charter's provisions, the nature and extent of constitutional protection of individual rights in Canada is to a considerable degree determined, or at least influenced by, the text of the Charter, and the Charter's clear language has resolved a number of constitutional questions that in the

burden of establishing that its admission would "bring the administration of justice into disrepute," and that here even if the search were unreasonable, the evidence would not be excluded. *See also* *The Queen v. Esau*, 20 Man. 2d 230 (Man. Ct. App. 1983), in which the court held that the particular vehicle search probably was reasonable but that, in any event, the admission of the evidence obtained by the search would not "bring the administration of justice into disrepute." On the other hand, where it should have been clear to the officers that the evidence was obtained in violation of the Charter, the evidence has been excluded. *See, e.g., The Queen v. Therens*, 23 Sask. R. 83 (Sask. Ct. App. 1983) (evidence of breathalyzer test excluded where accused was not advised of right to retain counsel); *The Queen v. Starr*, 48 Alta. R. 76 (Alta. Q.B. 1983) (same where test was administered in absence of counsel, over objection of accused); *R. v. Davidson*, 40 N.B.2d 702 (N.B.Q.B. 1982) (illegal search). *But see The Queen v. Collins*, 5 C.R.R. 1 (B.C. Ct. App. 1983), where police officers grabbed a suspect by the throat to prevent her from swallowing the evidence. The court held that the search was illegal, but that the admission of the evidence would not "bring the administration of justice into disrepute."

United States have required extensive constitutional interpretation by the Supreme Court. In many cases, the task of the Canadian courts will be one of applying fairly specific Constitution provisions to particular factual situations. It is only with respect to certain broadly-phrased and open-ended provisions of the Charter, such as section 2, that the Canadian courts will have fully the same opportunity as the United States Supreme Court and the federal courts have had to determine the nature and extent of constitutional protection of individual rights. On the whole, however, the Canadian courts will operate within a narrower constitutional framework.

For this reason, the judicial role in determining the course of development of constitutional protection of individual rights in Canada will be considerably more modest than it has been in the United States.¹²⁸ Judicial interpretation will not influence the development of constitutional protections in Canada to the degree that it has in the United States. Thus, although the judicial function in

¹²⁸ This is totally apart from the *disposition* of the Canadian courts, particularly the Supreme Court of Canada, to find constitutional violations. Some Canadian lawyers and academics maintain that the Supreme Court of Canada is very "conservative" in the popular sense, and will be reluctant to be activist" (as they perceive the United States Supreme Court to be) in its interpretation of the Charter. In large part, this view seems to be based on the very restrictive interpretation that the Supreme Court of Canada gave the Canadian Bill of Rights. See note 7 *supra*. This view is set forth at length in Hovius and Martin, *supra* note 7. The authors state:

It is widely believed that the entrenchment of the Canadian Charter of Rights and Freedoms presages a transformation of our system of government. This view, which is heavily influenced by the United States experience of the last three decades, assumes that the courts will be forced to play a new, activist role in our society. We do not share this view. We believe that the courts, and in particular the Supreme Court of Canada, will seek to avoid such an institutional realignment. They will, instead, strive to ensure that the legislatures continue to bear the responsibility for determining social policy. The history and traditions of the Supreme Court of Canada favor an attitude of restraint. There is nothing in the Charter which will compel the court to renounce its accustomed role. Indeed, there is much which will be serviceable to judges disinclined toward activism.

Id. at 354-55.

The authors further state:

Any attempt to discern the approach which the Supreme Court of Canada will take to the Charter must, therefore, take into account the attitude adopted by the Court to the Canadian Bill of Rights. That attitude illustrates the tradition of judicial restraint which, we argue, will determine the court's interpretation and application of the Charter.

Id. at 356.

The authors also contend that neither the status of the Bill of Rights nor its text demanded a narrow construction of its open-ended concepts that a court which favored judicial activism could have defined those concepts differently. *Id.* at 363. The authors conclude:

We believe that restraint is a principle too deeply imbedded in the thought processes of Canadian lawyers and judges to be abruptly displaced through the

regard to constitutional protection of individual rights is the same in

adoption of the Charter. Conversely, activism as either an approach to judging or a style of judging does not sit well with Canadian judges.

.....
The courts, and in particular, the Supreme Court of Canada will not, then, permit litigants to use the Charter as a means of bringing about basic changes in our political system. They will not arrogate to themselves the authority to resolve the great political and social questions of the day. They will maintain the Canadian judicial tradition.

Id. at 374-76 (footnotes omitted).

Some Canadian commentators, however, have expressed the view that the Court's narrow interpretation of the Canadian Bill of Rights should not be looked to as a guide for its interpretation of the Charter. As Judge LaForest has stated:

The difference, as I see it, is partially psychological. The Canadian Bill of Rights was known to be an expression of self-restraint by Parliament. It was an instruction by Parliament to the courts regarding the manner in which they should read Acts of Parliament. But the courts were quite naturally inhibited from cutting down an Act of Parliament that expressly enacted a provision that judges might otherwise have been inclined to think offended against a right protected by the Bill. As can be seen, I do not share the view of those who think the Bill was not sufficiently strongly worded. I do not see how a non-constitutional Bill of Rights could have been drafted except as a binding direction to the courts. But the Charter is a basic law of the land to which Parliament and the legislatures themselves are subject.

LaForest, *The Canadian Charter of Rights and Freedoms: An Overview*, 61 CAN. B. REV. 19, 22-23 (1983) (footnotes omitted). See also M. MANNING, RIGHTS, FREEDOMS AND THE COURTS 21-67 (1983).

The same view as to the difference between the judicial role in interpreting the Charter's provision and in interpreting the Canadian Bill of Rights has been expressed by some lower courts since the promulgation of the Charter. See *R. v. W.H. Smith*, [1983] 5 W.W.R. 235, 256-57 (Alta. Prov. Ct. 1983); *Reference re § 94(2)*, [1983] 3 W.W.R. 756, 759-64 (B.D. Ct. App. 1983); see also *Southam, Inc. v. Director of Inves. & Research*, [1983] 3 W.W.R. 385, 290-91 (Alta. Ct. App. 1983), *aff'd*, — S.C.R. —, Sept. 17, 1984; cf. *Mitchell v. The Queen*, [1976] 2 S.C.R. 570 (1975), in which the Supreme Court of Canada held that the "fair hearing" provision of the Bill of Rights did not apply to revocation of parole. Post-Charter cases have held that the revocation of parole without a proper in-person hearing violates § 7. See *The Queen v. Nuney*, 5 C.R.R. 69 (Ont. High Ct. 1983); *The Queen v. Conroy*, 5 C.R.R. 118 (Ont. High Ct. 1983); *Re Lowe and The Queen*, 149 D.L.R.3d 732 (B.C.S.C. 1983); *Re Swan and The Queen*, 150 D.L.R.3d 626 (B.C.S.C. 1983).

Regardless of how disposed the Supreme Court of Canada may or may not be to finding violations of the Charter, as will be pointed out subsequently, the judicial role in the development of constitutional protection of individual rights will be considerably more modest in Canada than it has been in the United States. The nature and extent of constitutional protection of individual rights in Canada are to a substantial degree determined by the text of the Charter, and the primary function of the Canadian courts in constitutional litigation will be to apply fairly specific constitutional provisions to particular factual situations. The structure and text of the Charter also prescribe the mode of analysis that the Canadian courts are to employ when dealing with questions of constitutional protection of individual rights. For these reasons, the role of Canadian courts in the development of constitutional protection of individual rights in Canada *structurally* will be considerably more modest than it has been in the United States.

The "activism" of the United States Supreme Court in extending constitutional protection to individual rights must be seen in the context of the fundamental difference between

both nations, the judicial role in determining the course of the development of such protection will not be the same in Canada as it has been and will continue to be in the United States.

IV. The Constitutional Process in Canada

The constitutional process refers to the relationship between the judiciary and the electorally accountable branches of government in the establishment of constitutional norms. Since Canada has both a parliamentary political system and a unitary court system, the constitutional process there refers simply to the relationship between the judiciary and the government. In the United States, the relevant relationship is that between the federal judiciary and the electorally accountable branches of the federal and state governments.

The constitutional process in the United States is structurally confrontational, and the federal judiciary has the ultimate responsibility for establishing constitutional norms.¹²⁹ The "case or contro-

the nature of the Constitution and the nature of the Charter of Rights. Because the major constitutional rights provisions of the United States Constitution are so broadly-phrased and open-ended, and because they were promulgated in the distant past, the constitutional protection of individual rights in the United States has developed in large measure by the Court's interpretation and reinterpretation of these provisions and by the Court's application of these provisions to current problems. The "activism" of the United States Supreme Court is "built-in" to the constitutional structure. The Court must, to some extent, be "activist" in order to perform its constitutional functions of defining the meaning of the Constitution and of applying a document "intended to endure" to problems of contemporary American society.

The United States Supreme Court has admittedly interpreted the constitutional rights provisions of the Constitution expansively to impose very significant limitations on the power of the federal and state governments to interfere with individual rights. Many of the provisions of the Charter of Rights are not so broadly-phrased and open-ended as their American counterparts, and the Canadian courts simply do not have the same "freedom of interpretation" as do the United States Supreme Court and the federal courts. The number of cases presenting significant Charter questions in Canada will be proportionately fewer than the number of cases presenting significant constitutional rights cases in the United States, at least over a comparable period of time. In addition, the types of cases that shaped the development of much of the constitutional rights doctrine in the United States are unlikely to arise in Canada today. The types of cases presenting Charter questions in Canada are likely to be cases in which the conflict between the values embodied in the Charter's provisions and other societal values will be more balanced.

For all of these reasons, totally apart from the tradition of judicial restraint in Canada, Canadian courts cannot be expected to be as "activist" as the United States Supreme Court has been. The more modest role of the Canadian courts in the development of constitutional protection of individual rights is *structurally ordained*, and "activism" comparisons between the Supreme Court of Canada and the Supreme Court of the United States will not be fruitful.

129 The United States Supreme Court has stated that the *Marbury* decision in 1803 "declared the basic principle that the federal judiciary is supreme in exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

versy" limitation on the jurisdiction of the federal courts¹³⁰ precludes the federal judiciary from rendering advisory opinions.¹³¹ The federal and state governments may not obtain prospective determinations of the constitutionality of a proposed law or plan of action. Rather, constitutional challenges arise only when a private entity, either in an affirmative or defensive posture, asks the federal courts to declare an enacted law or governmental action unconstitutional. In common parlance, the federal courts, and particularly the Supreme Court, are said to "strike down" unconstitutional laws.

The federal judiciary has the ultimate responsibility for establishing constitutional norms in the United States. This responsibility arises because the judiciary must define the meaning of the Constitution, and under the supremacy clause,¹³² federal and state laws inconsistent with the Constitution are void. Moreover, due to the difficult process required to amend the Constitution, the Supreme Court realistically has not only the ultimate responsibility for, but also the final say on, the establishment of constitutional norms.

The structural confrontation inherent in the United States constitutional process has fueled continuing controversy over judicial review and the current "legitimacy debate" in constitutional adjudication. When the Supreme Court strikes down existing laws or governmental actions the Court appears to come into direct conflict with the electorally accountable branches of the federal and state governments.¹³³ The fact that the Court realistically has the final say in the establishment of constitutional norms aggravates this conflict and heightens the purported tension between judicial review and electorally accountable policymaking.¹³⁴

In Canada, on the other hand, the constitutional process is not structurally confrontational.¹³⁵ While private entities may challenge

130 U.S. CONST. art. III, § 2(1).

131 *United States v. Muskrat*, 218 U.S. 346 (1911). That the federal courts cannot give advisory opinions has nothing to do with the benefits of adversary presentation and the like. The jurisdiction of the federal courts is constitutionally limited to "cases and controversies," and the Supreme Court has interpreted that provision to require two parties with adverse legal interests. The giving of advisory opinions then is constitutionally proscribed by the case or controversy provision.

132 U.S. CONST. art VI, § 2.

133 The framework of the "legitimacy debate" has revolved around the purported tension between judicial review and electorally accountable policymaking. See Sedler, *supra* note 2, at 95-97.

134 See *id.* at 123-26.

135 The role of the Canadian courts in defining the meaning of the Constitution was "built into" the Canadian constitutional system from the very beginning. See notes 24-27 *supra* and accompanying text.

the constitutionality of laws or governmental action in Canada,¹³⁶ constitutional questions may be brought before the judiciary in other ways. For instance, the federal government can initiate a reference to the Supreme Court of Canada. And provincial governments can initiate references to the provincial court of appeals, with review as of right in the Supreme Court.¹³⁷ In the pre-Charter period, approximately one-third of all Canadian constitutional cases originated as references.¹³⁸ The reference procedure is equally available for the resolution of Charter questions.

By invoking the reference procedure, the government voluntarily asks the courts to determine prospectively the constitutionality of a proposed law or course of action. A private entity is not asking the courts to strike down an existing law or governmental action. In this sense, constitutionalism in Canada could become a cooperative venture. In theory at least, the government is trying to avoid violating the Constitution.¹³⁹ The reference procedure gives the Canadian judiciary an advisory, as well as adjudicative, function which avoids confrontation.¹⁴⁰

The Charter's section 33 override provisions further reinforce the potentially cooperative aspect of Canadian constitutionalism. Under these provisions, either Parliament or a provincial legislature may specifically provide that a law operates notwithstanding the fundamental freedoms provided in section 2, the legal rights provisions of sections 7 through 14, and the section 15 equality provisions.¹⁴¹ In other words, invocation of the override provisions isolates the law

136 Section 24(1) of the Charter specifically provides that, "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Apart from § 24(1), constitutional issues must be resolved when they arise in any case, such as one in which the constitution is relied on defensively. Standing requirements in Canada seem to be relatively liberal. See P. HOGG, CANADA ACT, *supra* note 20, at 64-66; see also P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 78.

137 See P. HOGG, CONSTITUTIONAL LAW, *supra* note 7, at 129-30; (discussion of the reference procedure); see also Attorney-General of Ont. v. Attorney-General of Can. (Reference Appeal), [1912] A.C. 571 (1912).

138 B. STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA 182 (1968). Although the reference procedure is not confined to constitutional questions, it has been used chiefly for that purpose.

139 This is true whether the government is seeking a determination in regard to a proposed law's being *ultra vires* or in regard to its violating the Charter.

140 The reference procedure frequently involves a confrontation between the federal and provincial governments, with the judiciary in the role of "neutral arbiter."

141 The effect of § 28, however, is to exempt sex-discrimination from the override provisions of § 33. See note 82 *supra*. A declaration of override is valid for five years, but at the end of this period the declaration may be reenacted. See Constitution Act, 1982, § 33(3)(4).

from constitutional challenge under these sections. To the extent that the override provisions are employed, parliamentary supremacy remains incorporated in the Canadian constitutional structure.¹⁴² In Canada, then, unlike the United States, judicial review does not mean judicial supremacy. Parliament and the provincial legislature have final say over the circumstances in which most of the Charter's provisions will operate. In the absence of override situations, however, the Canadian judiciary has the responsibility for establishing constitutional norms.

The reference procedure and the override provision, taken together, structurally encourage a *dialogue* between the government and the judiciary concerning the *effect* of the Charter of Rights in Canada. While the constitutional responsibility to define the meaning of the Charter lies with the judiciary, it is within the constitutional authority of the federal and provincial government, because of the override provisions, to determine when laws shall operate notwithstanding the Charter. The dialogue could occur when the government, by way of the reference procedure, asks the judiciary to tell it what the Charter requires; the judiciary responds by advising the government of constitutional requirements. The government then takes final action in light of that advice. However, under the Canadian constitutional structure, the judiciary's advice is not conclusive. The government can make the policy determination that a given law is so necessary for the public welfare that it should be enacted, despite the judiciary's advice that the proposed law violates the Charter.¹⁴³

The nature of the constitutional process in Canada could effect the development of constitutional protection of individual rights. The judiciary's function to define the meaning of the Constitution is firmly established in Canada and is expressly recognized in the text of the Constitution. And parliamentary supremacy is incorporated into the Canadian constitutional structure as well. Therefore, a decision of the Canadian courts holding a law or governmental action

142 Section 33 was not in the original draft of the Charter, but was added at the insistence of the provincial governments. See P. HOGG, CANADA ACT, *supra* note 20, at 33.

143 The government could also reenact a law with an override provision *after* the law had been declared unconstitutional by the courts in an action under § 24(1) or in another proceeding. When the override provision is invoked, theoretically the law cannot violate the Charter, because the law operates "notwithstanding" the Charter's provisions. For the view that override will rarely be invoked, see LaForest, *supra* note 128, at 26. However, Quebec has enacted blanket declaration, invoking the override provisions of § 33 with respect to all Quebec legislation adopted prior to April 17, 1982. The blanket declaration thus far has survived legal challenge. See *Re Alliance des Professeurs de Montreal and Attorney-General of Que.*, Que. Sup. Ct. Apr. 27, 1983, Canadian Charter of Rights Annotated 28-2.

unconstitutional does not conflict with electorally accountable policymaking. Constitutional interpretation by the Canadian courts is not "written in stone"¹⁴⁴ and is really only an element of the dialogue between the judiciary and government concerning the effect of the Charter's provisions.¹⁴⁵ For these reasons, the Canadian courts should feel less constraint, from a structural standpoint, in finding a challenged law or governmental action unconstitutional¹⁴⁶ than should the United States Supreme Court or the federal courts.¹⁴⁷

Likewise, the availability of advisory constitutional interpretations could influence the legislative process in Canada. The reference procedure, coupled with the possibility of override, should encourage the government to seek a judicial determination when the constitutionality of a proposed law has been raised during the legislative debates.¹⁴⁸ In any event, the constitutional process in Canada differs significantly from that in the United States. And this section has illustrated how the nature of the constitutional process could affect the development of constitutional protection of individual rights in Canada.

V. The Comparative Development of Constitutional Protections of Individual Rights in Canada and in the United States: Some Concluding Observations

This article has compared the structural differences between

144 In American constitutional law, it is "critically important that we get the questions right and the answers right, because constitutional law is written in concrete and is not easily washed out by rain or tears." Dixon, *Bakke: A Constitutional Analysis*, 67 CALIF. L. REV. 69, 70 (1979).

145 This is not true, of course, for the provisions of the Charter that are not subject to override. These include the democratic rights provisions of §§ 3-5, the mobility rights provisions of § 6, sexual equality under § 28, and the language and minority language educational rights provisions of §§ 16-23.

146 By the same token, it has been contended that because state constitutions in the United States are usually amendable by popular initiative and do not require the "supermajority" that is necessary to amend the federal Constitution, a state court should be more disposed to find that state governmental action violates the state constitution than the United States Supreme Court or federal courts should be in finding that a governmental action violates the federal Constitution. Since the state constitution is "closer to the people," the people of the state can readily amend the state constitution to overturn a judicial interpretation of the state constitution with which they strongly disagree. See Kelman, *supra* note 1, at 432.

147 For the view, however, that "judicial restraint" rather than "judicial activism," will characterize the Supreme Court of Canada's interpretation of the Charter, see the discussion in the excerpt from Hovius & Martin, *supra* note 128.

148 Canadian colleagues with whom I have discussed this point are of the view that the government will be reluctant to utilize the reference procedure in these circumstances.

protections of individual rights under the constitutional systems of Canada and the United States. The following discussion will focus on factors that may lead to a different course of development of constitutional protection of individual rights in Canada than that which has occurred in the United States.

For a number of reasons, constitutional doctrine on individual rights is likely to develop somewhat more slowly in Canada than it has in the United States. First of all, the Canadian system allocates power exclusively to one level of government or the other, and there is a unitary court system in Canada. As a result, individual rights in Canada can be judicially protected on non-constitutional or ultra vires grounds, as well as on Charter grounds. As previously mentioned, the Canadian Supreme Court's likely preference for non-constitutional grounds or ultra vires grounds will reduce the number of cases in which it must resolve Charter questions.¹⁴⁹ The number of challenges to governmental actions under the Charter is further reduced by the specific nature of its constitutional provisions.¹⁵⁰ Precisely because of this specificity, in many Charter cases the court's role will not go beyond the application of fairly specific constitutional provisions to particular factual situations, and "landmark" cases under the Charter are less likely to arise.

One other factor which may reduce the number of significant constitutional rights cases in Canada is the exclusive allocation of the general criminal law power to the federal government, rather than the provinces. In the United States, many important constitutional questions have arisen through challenges to state and local criminal laws implicating individual rights. The laws usually reflect moral judgments and views about the propriety of particular conduct. Often they are enacted in response to local pressures and attitudes which are absent on the national level or as to which there is no national consensus. Similarly, if the general criminal law power in Canada were a provincial function, at least some provinces would enact criminal laws interfering with individual rights that would not be enacted by Parliament, and in the aggregate, there likely would be more laws interfering with individual rights by way of criminal prohibitions. So, the fact that the general criminal law power is lodged at the federal rather than the provincial level in Canada will reduce the number of laws interfering with individual rights by way of criminal prohibition and to this extent will reduce the number of

149 See notes 69-70 *supra* and accompanying text.

150 See note 129 *supra* and accompanying text.

cases presenting Charter questions. In addition, provincial laws interfering with individual rights may sometimes be invalidated on ultra vires grounds as being in relation to the criminal law,¹⁵¹ thereby further reducing the number of cases that the Canadian courts will have to resolve on Charter grounds.

Another factor which may not only slow the development of constitutional rights doctrine in Canada, but may also influence the *content* of such doctrine, is a temporal phenomenon. Questions concerning constitutional protection of individual rights in Canada could not arise until after 1982. Contemporary constitutional doctrine in the United States has evolved over a long period of time, and has developed in large part in response to conditions existing at different times in American society. A major ingredient in the development of constitutional rights doctrine in the United States has been pervasive governmental action that clearly was inconsistent with the values embodied in constitutional provisions protecting individual rights. Much of the constitutional rights doctrine that emerged was reactive to such action. Subsequent doctrinal development occurred within and later cases built upon the framework established by earlier cases. Thus, the content of American constitutional rights doctrine has been strongly influenced by the context in which it first developed. For example, first amendment doctrine developed in response to governmental repression of dissent and expressions of unpopular ideas.¹⁵² The "chilling effect" concept gained prominence as a result of this course of development, and gave rise to the "void on its face" doctrine,¹⁵³ and the "*New York Times* rule,"¹⁵⁴ and provided an analytical basis for the invalidation of any law regulating expression.¹⁵⁵ So too, a long history of pervasive official discrimination

151 See, e.g., *The Queen v. Westendorp*, 46 N.R. 30 (Can. Sup. Ct. 1983); *Henry Birks & Son (Montreal) Ltd. v. City of Montreal*, [1955] S.C.R. 799 (1955); cf. *Schneider v. British Columbia*, [1982] 2 S.C.R. 112 (1982), in which the Supreme Court of Canada held that the compulsory treatment of heroin addicts by various methods, including detention, was *intra vires*, on the ground that its "pith and substance" was health legislation and within provincial power under § 92(b), rather than a "colourable attempt" to stiffen the criminal law.

152 This is reflected in the evolution of the "clear and present danger" test, from *Schenck v. United States*, 249 U.S. 47 (1919), through *Dennis v. United States*, 341 U.S. 494 (1951), to *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

153 See the discussion of the relationship between the concept of "chilling effect" and the "void on its face" doctrine in *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). See also Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CALIF. L. REV. 1308, 1326-27 (1982).

154 See the discussion in *New York Times v. Sullivan*, 376 U.S. 255, 271-80 (1964).

155 See, e.g., *Brown v. Socialist Workers*, 103 S. Ct. 416 (1982); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

against black Americans and other racial minorities shaped the development of equal protection doctrine. And racial discrimination has served as the benchmark for the equal protection analysis of other forms of discrimination.¹⁵⁶

An important factor likely to affect the development of constitutional rights doctrine in Canada cases is the absence of cases involving "outrageous" governmental action. American constitutional rights doctrine was shaped, at least in part, by those kinds of cases.¹⁵⁷ But most cases involving such flagrant constitutional violations would be unthinkable in Canada today, just as they would be unthinkable today in the United States. Cases presenting Charter questions are more likely to be closer ones, where the conflict between the values embodied in the Charter's provisions and other societal interests will be more balanced. In such cases, the Charter will not "cry out for application," and the Canadian courts may not see the same necessity for finding a constitutional violation as did the United States Supreme Court when deciding some landmark constitutional cases.

As the Canadian courts decide how much protection the Charter affords individual rights, they will necessarily consider the context of the Charter claim and the "general climate of freedom" prevailing in Canada today.¹⁵⁸ Indeed, the resolution of many Charter cases

156 "Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons 'the protection of equal laws' in a Nation confronting a legacy of slavery and racial discrimination." *Regents of the University of California v. Bakke*, 438 U.S. 265, 293-94 (1978) (Powell, J.) (citations omitted). The similarity and differences between racial discrimination and other forms of discrimination have been relied on in determining the "suspect" nature of those forms of discrimination. *See, e.g.*, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (age); *Frontiero v. Richardson*, 411 U.S. 677, 685-88 (1973) (gender).

157 For example, the first important case involving a challenge to a coerced confession under the fourteenth amendment's due process clause was *Brown v. Mississippi*, 297 U.S. 278 (1936), where the confession was extracted by severely whipping the helpless defendant. Likewise, the earlier cases where the "clear and present danger" test was invoked successfully were cases where persons were convicted or involved crimes carrying serious sentences for doing nothing more than assisting in meetings called by the Communist Party, *see DeJonge v. Oregon*, 299 U.S. 353 (1937), or distributing Communist Party literature, *see Herndon v. Lowry*, 301 U.S. 242 (1937).

158 The same "general climate of freedom" prevails in the United States today. The kind of "outrageous governmental conduct" cases that arose in earlier times and that shaped the development of constitutional rights doctrine in the United States arise infrequently. In the cases that do arise, the government is likely to be able to assert a substantial interest to justify the interference with the individual right, and the balance between the asserted governmental interest and the individual interest is likely to be much more even than it has been in times past. Thus, in the first amendment area, for example, we no longer see cases where the government is trying to repress the expression of dissent or unpopular ideas. Rather the first

may well depend on the Canadian courts' view of what constitutes a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society."¹⁵⁹ In any event, the contemporary context in which constitutional rights doctrine will develop in Canada will influence the content of that doctrine and the nature and extent of the Charter's protections. The protections may differ significantly from the United States Supreme Court's interpretations of individual rights under the Constitution.¹⁶⁰

The promulgation of the Charter has unleashed a number of constitutional rights cases that were "bottled up" in the pre-Charter era. But by far, the largest group of these cases challenge criminal trial procedures under the Charter's legal rights provisions. These kinds of challenges occur whenever a legal system affords constitutional protection to criminal defendants. Counsel, seeking acquittals for their clients, will take advantage of all available defenses.¹⁶¹ In addition, initial litigation will involve a number of challenges to pre-Charter laws that now either clearly or plausibly violate the Charter.¹⁶² Of course, there will also be some cases that raise novel and

amendment cases generally involve questions such as the protection afforded to commercial speech and the access rights of the media. Many of the constitutional rights cases coming before the United States Supreme Court today seem to involve "secondary" rather than "fundamental" questions, and deal not infrequently with the application of prior-established principles to particular situations. Truly "landmark" constitutional cases, resolving "fundamental" questions, or pronouncing significantly new doctrine, or broadly expanding constitutional protection, are fairly hard to find in the recent Terms of the United States Supreme Court.

159 *See, e.g.*, *Reynolds v. Attorney-General of B.C.*, [1983] 2 W.W.R. 413 (B.C.S.C. 1982) (disqualification of persons on probation from voting violates § 3, and is not a reasonable limit prescribed by law); *cf. Re Federal Republic of Germany and Rauca*, 41 Ont. 2d 225 (Ont. Ct. App. 1984) (extradition is a reasonable limit on the citizen's right to remain in Canada under § 6(a)); *Re Global Communications, Ltd. & Attorney-General of Can.*, 44 Ont. 2d 609 (Ont. Ct. App. 1983) (temporary ban on publication of evidence given at bail hearing in extradition case until completion of accused's trial in the United States is a reasonable limit on freedom of the press).

160 It will be interesting to see for example, whether in the freedom of expression area, the Canadian courts will adopt something akin to the "void on its face" doctrine, or will impose constitutional limitations on the ability of public officials to recover damages for defamation.

161 This phenomenon certainly has appeared in the United States since the "constitutionalization" of criminal procedure by the Supreme Court in the 1960's and thereafter.

162 The "reverse onus" provision of § 8 of the Narcotics Act that requires the accused to disprove intention to sell after the prosecution has proved mere possession is an example. All the courts of appeal that have passed on the question have found the "reverse onus" provision to violate the presumption of innocence contained in § 11(d). *See Regina v. Oakes*, 40 Ont. 2d 660 (Ont. Ct. App. 1983); *The Queen v. Stanger*, 2 D.L.R.4th 121 (Alta. Ct. App. 1983); *R. v. O'Day*, 46 N.B.2d 77 (N.B. Ct. App. 1983); *R. v. Carroll*, 40 Nfld. & P.E.I. 147 (P.E.I. Ct. App. 1983); *R. v. Cook*, 56 N.S.R.2d 449 (N.S. Supreme Ct. App. Div. 1983). On the other hand, the offense of possessing housebreaking tools in circumstances giving rise to an

significant questions concerning constitutional protection of individual rights.¹⁶³ Nonetheless, after the initial stage of litigation has passed, the number of cases presenting challenges under the Charter will be much more measured. And for the reasons discussed above, there will be proportionately fewer cases raising significant questions of constitutional protection of individual rights than in the United

inference that they were used for housebreaking is not considered to impose a "reverse onus" on the accused, and so does not violate § 11(d). See *R. v. Holmes*, 41 Ont. 2d 250 (Ont. Ct. App. 1983); *The Queen v. Kowalczyk*, 20 Man. 2d 379 (Man. Ct. App. 1983). In *Re Boyle and The Queen*, 41 Ont. 2d 713 (Ont. Ct. App. 1983), the court dealt with a presumption that where the accused was in possession of a motor vehicle with the identification number obliterated, the vehicle was obtained by the commission of an indictable offense and the accused knew that it had been so obtained. The court held that the first part of the presumption was valid, but the presumption of knowledge by the accused that the vehicle was so obtained violated § 11(d).

See also *Southam, Inc. v. Director of Inves. & Research of the Combines Inves. Branch*, [1983] 3 W.W.R. 385 (Alta. Ct. App. 1983), *aff'd*, Sept. 17, 1983, in which the court held that a section of the Combines Act (the Canadian anti-trust law) that authorized investigators to enter the premises of a business establishment and take away any documents that might afford evidence of a violation of the Act violated the unreasonable search and seizure provisions of § 8.

163 See the freedom of conscience and religion cases in note 112 *supra*. Another important area at the present time involves the "free press-fair trial" controversy. For illustrative cases, see *Re Global Communications, Ltd. and Attorney-General of Can.*, 44 Ont. 2d 609 (Ont. Ct. App. 1984) (court upheld order of extradition judge in a highly-publicized case barring the publication of the evidence taken at a bail hearing until the completion of the accused's trial in the United States); *The Crown v. Robinson*, 5 C.R.R. 25 (Ont. High Ct. 1983) (allowing publication of accused's name and address does not violate presumption of innocence under § 11(d)); *The Crown v. Sophonow*, 21 Man. 2d 110 (Man. Ct. App. 1983) (court would not restrict publication of all extra-judicial commentary respecting guilt or innocence until appeal had been decided); *The Crown v. Begley*, 2 C.R.R. 50, 38 O.R.2d 549, (Ont. High Ct. 1982) (court imposed ban on press coverage of facts on application for change of venue until the conclusion of the accused's trial).

Challenges have also been made to various forms of pornography regulation. See *Re Ontario Film & Video Appreciation Soc'y and Ont. Bd. of Censors*, 45 Ont. 2d 80 (Ont. Ct. App. 1984) (film censorship law, which contains no standards to determine when license to show film can be refused, violates § 2(b)); *Re Hamilton Indep. Variety & Confectionary Stores and City of Hamilton*, 4 C.R.R. 230 (Ont. Ct. App. 1983) (municipal law authorizing officials to enter "adult entertainment parlours" for purpose of enforcing law regulating sale of "erotic goods" is invalid because definition of "erotic goods" is vague and uncertain); *Re Luscher and Deputy Minister, Revenue Canada Customs and Excise*, 149 D.L.R.3d 243 (Vancouver County Ct. 1983) (federal customs act provision that bans importation of goods of an "immoral or indecent character" is valid).

See also *Van Mulligen v. Saskatchewan Hous. Corp.*, 23 Sask. R. 66 (Sask. Q.B. 1982), in which an employee of a provincial crown corporation, who was also a municipal alderman, voted against provincial government policy at a municipal meeting, and as a result was transferred to another job. The retaliatory transfer was held to violate the employee's freedom of expression rights under § 2(b). Cf. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

For a general discussion of the impact of the Charter's freedom of expression guarantee on existing Canadian laws and practices, see Beckton, *Freedom of Expression—Access to the Courts*, 61 CAN. B. REV. 101 (1983).

States over a comparable period of time, and still fewer cases in which the Supreme Court of Canada will have to resolve the case on constitutional grounds. Therefore, it is submitted that constitutional doctrine in the area of individual rights in Canada is likely to develop more slowly over a comparable period of time than constitutional rights doctrine has developed in the United States.

Second, the Canadian judiciary's role in developing constitutional protections of individual rights is likely to be more modest than that of the American judiciary. As discussed above, in a number of instances, the Charter's text substantially determines the nature and extent of constitutional protection. Certain broadly-phrased and open-ended provisions, such as the fundamental freedoms guarantees of section 2, will provide the Canadian courts with the same opportunity to shape the development of constitutionally protected individual rights as has been the case in the United States. On the whole, however, the Canadian courts will operate within a narrow constitutional framework, and frequently their function will be to apply fairly specific constitutional provisions to limited factual situations. As a result, judicial interpretation will not influence the development of constitutional protection of individual rights in Canada to the same degree it has in the United States.

Finally, the nature of the constitutional process in Canada could lead to a "constitutional dialogue" between the judiciary and the government. The availability of the reference and override procedures provide both the judiciary and the government with a constitutionally prescribed role in determining the extent of the protection of individual rights against governmental action.¹⁶⁴ The reference procedure avoids confrontation and allows the government to obtain a prospective judicial declaration of the constitutionality of a proposed law or course of action. Thus, constitutionalism can be a cooperative venture in Canada. If the judiciary advises the government that the proposed law would violate the Charter, the government may choose to avoid friction and stay its hand. Yet the override provision allows the government to adopt a given law or course of action notwithstanding the judiciary's advice, if it makes the policy determination that it is necessary for the public welfare. In this situation the government will have made a political decision for which it is electorally accountable. The Canadian constitutional structure thus accommodates both the doctrine of judicial review and the principle of parliamentary supremacy. However, the possibility of this "constitutional

164 See notes 135-43 *supra* and accompanying text.

dialogue" could influence both the courts, when resolving particular constitutional questions, and the legislative process, when the constitutionality of a proposed law is raised during legislative debate.

With the entrenchment of individual rights in Canada by the promulgation of the Charter, the structures of constitutional governance established by the Canadian and United States Constitutions have moved into congruence. In Canada, the exercise of governmental power designed to protect individual rights is now subject to constitutional limitations. And Canadian courts can now provide relief from unconstitutional governmental action.

Significant differences remain, however, in the structures of constitutional governance established by the United States and Canadian Constitutions. Moreover, the nature of the Charter of Rights and the United States Constitution differs fundamentally. These differences, combined with the factors previously mentioned, will likely lead the development of constitutional protections of individual rights under the Charter on a course different from that witnessed in the United States.

The future course of Canada's constitutional development should interest the American observer. Just as Canada can learn a great deal from the United States' experience, Americans may glean some valuable insights from the Canadian constitutional experience as it unfolds. Comparative constitutionalism is now no further than the open border to our north.