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The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison

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Although formal constitutional provisions are not exhaustive of the individual rights enjoyed by citizens of Canada or of the United States, a comparison of the new Canadian *Charter* and the United States Bill of Rights is illuminating. After discussing certain general topics relating to the scope of protcctcd rights, including the requirement of governmental action, the assertion of affirmative rights and the degree of protection offered to victims of the incidental effects of discrimination, the author undertakes a comprehensive cataloguing of rights protected by the relevant United States and Canadian provisions. He concludes that, in broad outline, the list of rights textually protected in each country is similar, but that

Même si les droits dont jouissent les citoyens du Canada et des États-Unis ne se limitent pas aux termes de dispositions constitutionnelles formelles, une comparaison de la *Charte* canadienne et du *Bill of Rights* des États-Unis est révelatrice. L'auteur examine certaines questions d'ordre général se rattachant à l'étendue des droits protégés, y compris la nécessité d'interventions gouvernementales, la revendication de droits positifs et le degré de protection offert aux victimes des effets indirects de la discrimination. L'auteur dresse ensuite un inventaire complet des droits expressément protégés par les constitutions du Canada et des États-Unis, et conclut généralement que quoique les degrés de protection ainsi offerts sem-

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there are distinctions which may be of importance, depending upon the approach taken ultimately by the Canadian judiciary. For example, the *Charter* seems to provide greater opportunities to assert collective minority rights than does the U.S. Bill of Rights. On the other hand, the *Charter* does not prohibit the "establishment" of religion, nor does it protect property rights explicitly. Drawing upon the wealth of United States case law, the author suggests potential difficulties for Canadian courts grappling with the *Charter*, and he points to some possible solutions that have been devised by U.S. courts dealing with similar problems.

blent similaires, certaines divergences entre les textes pourraient s'avérer importantes selon l'approche éventuellement prise par les tribunaux canadiens. Par exemple, la revendication de droits collectifs semblerait plus aisée sous l'empire de la *Charte* que du *Bill of Rights*. En outre, la *Charte* ne prohibe pas l'appui de croyances religieuses par l'État et ne protège pas explicitement les droits de propriété. S'inspirant d'une jurisprudence abondante aux États-Unis, l'auteur fait état de certaines difficultés d'interprétation dans la *Charte*, et signale quelques-unes des solutions inventées par les tribunaux des États-Unis face à des problèmes semblables.

Synopsis

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Introdnction

The United States has, for many years, afforded significant constitutional protection[1] to a broad range of individual political, civil and personal rights. These rights have been a prominent aspect of government in the U.S. The constitutionally protected rights and freedoms of U.S. residents are, indeed, often cited as one of the main positive factors that distinguish life in the U.S. from that in other countries.

U.S. constitutional rights are ordinarily enforceable through the courts. Judicial enforcement has become inextricably intertwined with the U.S. system of constitutional rights and is essential to the strength and quality of U.S. rights in their present form. Judicial enforcement has, however, also been a source of deep controversy in the U.S. as the courts have, from time to time, seemed to play an unusually active role regarding important and widely debated issues of social policy that are more often left to legislative resolution in other democratic nations.

Now that Canada has adopted a *Charter of Rights and Freedoms* with constitutional status[2] — and provided explicitly, as well, for judicial enforcement of those rights[3] — it seems natural to compare the two systems. Are the protections for rights offered by Canada's new *Charter* basically similar to the protections that have existed in the United States? Where significant differences exist, what, if anything, do those differences suggest about the relative scope and strength of the constitutional protections of individual rights in the two countries? Will the Canadian judiciary come to play a role regarding questions of social policy similar to that which the U.S. courts have sometimes seemed to assume? This article and a subsequent one will seek to compare some of the main features of the new Canadian *Charter* with corresponding aspects of the protection of rights under the U.S. *Constitution* in an attempt to provide a background for addressing these interesting questions.

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[1] "Constitutional protection" is used here to refer to guarantees of individual rights that are "entrenched" in a formal constitutional document. Unlike common law or statutory rights, constitutionally protected rights cannot be diminished or eliminated by ordinary legislative action, but only through a specified amendment process. The amendment process applicable to the Canadian *Charter* is spelled out in Part V of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.). The amendment procedures for the U.S. *Constitution* are in art. V of that document.

[2] Part 1 of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [hereinafter the *Charter*]. Paragraph 52(2)(a) states that the *Charter* is "the supreme law of Canada". Any law inconsistent with it "is, to the extent of the inconsistency, of no force or effect" (subs. 52(1)).

[3] See the *Charter*, subs. 24(1).

A Clarification and Caution — At the outset of such a comparison, it is appropriate to insert some preliminary words of clarification and caution about the nature and significance of the task at hand.

In comparing the U.S. and Canadian systems, it is tempting to focus primarily, or even exclusively, upon the two relevant constitutional texts. In the case of the *Charter*, its text is, unquestionably, the proper main focus. Having come into effect just over a year ago (on 17 April 1982), that document is as yet unadorned by binding judicial interpretations in the Supreme Court of Canada.[4] The U.S. text,[5] on the other hand (the most

[4] However, judicial interpretations under the *Canadian Bill of Rights*, R.S.C. 1970, Appendix I, while not dispositive of the meaning of similar *Charter* provisions, may nevertheless be relevant as Canadian courts begin to constue the *Charter*. See Hovius, *The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter* (1982) 28 McGill L.J. 31. For general background on the Supreme Court's interpretations of the *Bill of Rights*, see, *e.g.*, W. Tarnopolsky, *The Canadian Bill of Rights*, 2d rev. ed. (1975); Tarnopolsky, "A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada" in *The Constitution and the Future of Canada* [1978] L.S.U.C. Special Lectures 161; P. Hogg, *Constitutional Law in Canada* (1977); Gibson, *-And One Step Backward: The Supreme Court and Constitutional Law in the Sixties* (1975) 53 Can. Bar Rev. 620; and Berger, *The Supreme Court and Fundamental Freedoms: The Renunciation of the Legacy of Mr. Justice Rand* (1980) 1 Supreme Court L.R. 460.

Some *Charter* provisions are also similar to provisions in the constitutions of countries other than the U.S., in international documents such as the *Universal Declaration of Human Rights*; the *International Covenant on Civil and Political Rights*, United Nations G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), reprinted in (1967) 6 I.L.M. 368; the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, European T.S. No. 5 (signed 4 November 1950; entered into force 3 September 1953); and the *American Declaration of the Rights and Duties of Man*, Res. XXX, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965). Interpretations of these provisions by national supreme courts and by bodies such as the European Court of Human Rights are also of potential relevance in construing the *Charter*.

[5] Although the term "Bill of Rights" is commonly used to refer to all U.S. constitutional protections for individual rights, the usage is not technically accurate. Strictly speaking the "Bill of Rights" was the first group of Amendments to the U.S. *Constitution*. The *Constitution* dates from 1789; these Amendments were adopted in 1791. Some of the most important U.S. individual rights provisions can be found in these 1791 amendments. See, for example, the protections for the freedoms of speech and religion (First Amendment); the restriction on unreasonable searches and seizures (Fourth Amendment); the prohibition on compelled self-incrimination (Fifth Amendment); and the prohibition upon cruel and unusual punishments (Eighth Amendment). As originally adopted, however, these Amendments did not apply to the U.S. states (or to local governmental units established under state authority), but constituted limits only upon the newly formed federal government. See *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243 (1833). It has only been through a gradual process of "selective incorporation" into the due process clause of the Fourteenth Amendment (adopted in 1868, shortly after the U.S. Civil War) that most of the provisions of the original 1791 Bill of Rights have ultimately come to be applicable to state and local governments in the U.S. See, *e.g.*, *Palko* v. *Connecticut*, 302 U.S. 319 (1937); and *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). For more on this process of incorporation, see *infra*, note 19.

important parts of which date from either shortly after the original U.S. *Constitution* of 1789 or shortly after the U.S. Civil War of the 1860s), has been subjected to an enormous amount of authoritative judicial interpretation. These decisions and opinions often deal with questions on which the U.S. constitutional text is completely or almost entirely silent, and they also give meanings to U.S. provisions that could hardly be confidently anticipated — or in some cases anticipated at all — by a reading of the relevant text. In the case of the U.S. *Constitution*, then, primary attention must be focused not on the bare text, but on the text as it has been authoritatively interpreted in the Supreme Court of the United States.

In comparing the *Charter* with the U.S. *Constitution*, therefore, one is, to some extent, comparing apples with oranges — the comparison being between a bare Canadian text, at the beginning of its life, and an elaborate and complex system that has been intricately worked out over the years by U.S. courts. Moreover, the text of the Canadian *Charter*, like that of the U.S. *Constitution*, is quite general in nature; it, too, will undoubtedly undergo a process of repeated judicial interpretation before the answers to many fundamental questions begin to emerge. When we "compare" today's *Charter* with U.S. constitutional rights, therefore, we will often more accurately not be "comparing" at all, but rather speculating on what the *Charter* may come to mean, while using the resolution of similar issues under the U.S. *Constitution* as a point of reference and, where it seems appropriate, as a guide.[6]

Individual rights provisions also appear in the body of the original 1789 *Constitution*. Provisions in that document, for example, prohibit either the federal government or the states from enacting *ex post facto* laws or bills of attainder (art. I, §9, cl. 3; art. I, §10, cl. 1); prohibit the states from impairing the obligation of contracts (art. I, §10, cl. 1); and guarantee jury trials in federal criminal prosecutions (art. III, §2, cl. 3). Additionally, some of the most significant U.S. individual rights protections are contained in constitutional amendments adopted after the Bill of Rights. Most prominent today is the Fourteenth Amendment, which contains two of the currently most important U.S. provisions — that states shall not deprive persons of life, liberty or property without "due process of law", or deprive persons within their jurisdiction of the "equal protection of the laws". In addition to serving as the vehicle for applying the 1791 Bill of Rights to the states, the due process clause also had independent significance as a protection for liberty and property, and a vast jurisprudence has, of course, also developed in connection with Fourteenth Amendment equal protection guarantees. Other Civil War and subsequent amendments also contain important individual rights protections. See, for example, the Thirteenth Amendment (1870) (prohibiting slavery); the Fifteenth Amendment (1870) (prohibiting racial discrimination in voting); the Nineteenth Amendment (1920) (gender discrimination in voting); and the Twenty-Fourth (1964) and Twenty-Sixth (1971) Amendments (outlawing the poll tax in federal elections and prohibiting age discrimination in voting for persons over eighteen). This article treats all of these U.S. constitutional protections, not just those in the 1791 "Bill of Rights".

[6] As noted *supra*, note 4, U.S. interpretations and solutions are by no means the only relevant comparative decisional materials.

The caution that should be interposed is this: Although national constitutions unquestionably play an important role in determining the level of respect for individual rights in a nation, their role is by no means exclusive. Neither the Canadian *Charter* nor the U.S. *Constitution* represent the only — or even the primary — protections for individual rights in their respective countries. Both nations protect rights extensively through the common law, and through national, provincial, state, and local legislation. Rights may also be protected through adherence to international treaties and, in the U.S., under State constitutions, provisions of which were the model for the original U.S. Bill of Rights and which have continued to play an important role in some areas. Indeed, both the Canadian *Charter* and the U.S. *Constitution* make absolutely clear that the federal constitutional protections they embody are not intended to preclude the application of other sources of rights.[7]

The *Charter* and U.S. *Constitution* thus represent national *minimum* protections of individual rights. Comparing such constitutional protections is emphatically not equivalent to comparing the actual status of individual rights in Canada and the U.S. as a whole, or within a particular state or province. Rights weakly protected through a national constitution, or not protected at all by that constitution, may not need to be protected — given national traditions and prevailing societal attitudes and practices — or they may be protected by other sources of law. In the U.S., for example, most federal constitutional provisions, as we shall see, apply only as against "governmental" action. There is, however, an extensive body of federal and state legislation prohibiting similar private violations, such as private racial or gender discrimination in employment or housing. In the U.S. there are also presently few, if any, affirmative constitutional entitlements, such as to public assistance or medical care for the indigent. Legislatively created rights to these benefits are quite common, however. On the other hand, drafters or interpreters of constitutions may be motivated to state or develop strong constitutional protections largely because other mechanisms have not proved satisfactory in practice. To take another U.S. example, it is likely that the judicial development of the "exclusionary rule" (excluding the fruits of unconstitutionally obtained evidence from criminal trials) was influenced heavily by the failure of other, non-constitutional mechanisms (such as private tort actions and criminal prosecutions) adequately to control police misbehavior.

Three Modes of Comparison: The Scope, Strength and Enforceability of Rights — In comparing the quality and character of the protection of indi-

[7] See the U.S. *Constitution*, Amendment IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". See also the Canadian *Charter* s. 26: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

vidual rights under different constitutions, three important subjects need investigation. First, it is necessary to examine the catalog of rights that enjoy protection under each constitution. Does each constitution, for example, protect freedom of speech? Does each protect the rights of defendants in criminal proceedings? Is there protection for "property" rights? Are certain kinds of discrimination or unequal treatment prohibited? Does the constitution in question confer any "affirmative" rights, such as mandatory entitlements to welfare, employment or public education? When rights *are* within the constitutional catalog, against whom do they apply? If there is a constitutional right to be protected from racial discrimination, for example, does that include a right to be protected from private discriminatory behavior, or only from governmentally imposed racial discrimination?

Once the applicable constitutional rights are identified, a second vital question — less obvious, perhaps, but at least equally important in the long run — has to do with the level or strength of the protection that is afforded to rights under each constitution. Some constitutional rights may perhaps be absolute, admitting of no interference or impingement, no matter how strong the asserted governmental justification. Under the U.S. *Constitution*, for example, the right to be free from governmentally compelled self-incrimination and the prohibitions upon the establishment of national and state religions probably fall into this category. A large number of important U.S. constitutional rights, however, *do* bow to sufficiently strong governmental justifications, and among these are some of the most well recognized and fundamental of rights, such as the freedoms of expression and religion.

Once a right is thus established as what might be called a qualified, rather than an absolute, right, the critical question concerns the strength of the justification requirement that the applicable constitution imposes as a condition of governmental interference. This requirement may be so strong as to make the right virtually absolute; on the other hand, a justification requirement may, if weak enough, result in no effective constitutional protection at all. And there is, of course, a large middle ground; the variety of possible standards of justification for permissibly impinging upon constitutionally protected interests is almost infinite. In the United States, for example, some constitutionally protected interests may be overridden by regulations that are found merely to be conceivably relevant to "legitimate" governmental interests; in other areas, regulations must be shown to be "substantially" related to "important" governmental concerns; in still other areas, rights may be restricted only upon a demonstration that doing so is "necessary" to serve "compelling" governmental interests.

The third important area for inquiry has to do with the available means for enforcing rights. The most prominent questions here concern judicial

enforcement. In what circumstances is judicial enforcement available? What sorts of remedies, such as damages, injunctions, exclusion of evidence, and declaratory judgments, will courts afford? Do doctrines exist that permit or require courts to decline to enforce rights, even when they are violated without sufficient justification, or that permit legislatures to forbid or prevent courts from enforcing rights in some circumstances? Even the strongest of rights will lose much (although certainly not all) of their strength when no judicial enforcement is available and when resort must be had to more informal or political remedies.

These three topics cover an enormous range. The present article restricts itself to the first of these subjects. It undertakes a comparison of the individual rights interests afforded at least some protection under the Canadian *Charter* and the U.S. *Constitution*. A subsequent article will consider the remaining two questions: the relative strengths of rights *vis-à-vis* asserted governmental justifications in the two systems, and the availability of judicial enforcement of rights under each system.

I. The General Scope of Rights Under the *Charter* and the U.S. *Constitution*

The lists of individual rights afforded protection under the Canadian *Charter* and the U.S. *Constitution* bear a great deal of similarity. Both constitutional texts, for example, protect explicitly the freedoms of expression and assembly,[8] and the freedom of religion.[9] Both texts expressly protect a range of important rights of defendants in criminal proceedings, including the rights to counsel and jury trial,[10] and protection against arbitrary or unreasonable searches and arrests,[11] compulsory self-incrimination,[12] cruel and unusual punishments,[13] *ex post facto* laws,[14] and double jeopardy.[15] Both constitutions also offer protection against certain forms of discriminatory treatment.[16] The text of the Canadian *Charter*, in addition, offers explicit protection to mobility rights,[17] to the rights to vote in federal and provincial

[8] *Charter*, subss 2(b) and 2(c); U.S. *Constitution*, Amendment I.
[9] *Charter*, subs. 2(a); U.S. *Constitution*, Amendment I.
[10] *Charter*, subss 10(b) and 11(f); U.S. *Constitution*, Amendment VI, and art. III, §2, cl. 3.
[11] *Charter*, ss 8 and 9; U.S. *Constitution*, Amendment IV.
[12] *Charter*, subs. 11(c); U.S. *Constitution*, Amendment V.
[13] *Charter*, s. 12; U.S. *Constitution*, Amendment VIII.
[14] *Charter*, subs. 11(g); U.S. *Constitution*, art. I, §9, cl. 3; art. I, §10, cl. 1.
[15] *Charter*, subs. 11(h); U.S. *Constitution*, Amendment V.
[16] *Charter*, s. 15; U.S. *Constitution*, Amendment XIV, §1.
[17] *Charter*, s. 6.

parliamentary elections and to the right to be a candidate in such elections.[18] These rights are not explicit in the text of the U.S. *Constitution*, but a number of Supreme Court decisions show that they do, in fact, receive a substantial degree of federal constitutional protection in the United States.[19]

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[18] *Charter*, s. 3.

[19] See, *e.g.*, *Edwards* v. *California*, 314 U.S. 160 (1941); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); and *United States* v. *Guest*, 383 U.S. 745 (1966) (mobility rights); *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966); and *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969) (voting); *Williams* v. *Rhodes*, 393 U.S. 23 (1968) (candidacy).

Several constitutional textual bases have been suggested in the cases for the U.S. protection of rights of mobility and travel. These include the U.S. due process clauses (prohibiting federal or state deprivations of "liberty" without "due process of law"); art. V, §2, cl. 1 ("the citizens of each state shall be entitled to all privileges and immunities of citizens in the several States"); the "privileges or immunities" clause of the Fourteenth Amendment ("no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"); and the "commerce clause" of art. I, §8, cl. 3 ("the Congress shall have power...to regulate commerce...among the several States").

Most U.S. voting and candidacy cases rely on equal protection principles. See, in addition to the cases cited above, *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973). Other relevant U.S. constitutional provisions in these areas are the First Amendment (protecting the freedoms of speech, press, assembly and petition, and sometimes seen as protecting political activity generally); the Fifteenth, Nineteenth and Twenty-Sixth Amendments (prohibiting discrimination in voting on account of race, gender or age); the Twenty-Fourth Amendment (prohibiting poll taxes in federal elections); art. I, §2, cl. 1 and the Seventeenth Amendment (providing that the House of Representatives and Senate shall be chosen "by the people"); and art. IV, §4 (providing that the United States "shall guarantee to every State...a Republican form of government").

Close scrutiny of the U.S. constitutional provisions cited in this and the preceding footnotes will create some doubt in the reader's mind about whether it is strictly accurate to say, as the text implies, that the rights mentioned in the paragraph are, in fact, generally applicable in the U.S. to all governmental action, whether under federal or state authority. For example, the U.S. First Amendment, the primary textual basis for constitutional expression and religious rights, provides that "*Congress* shall make no law" interfering with speech or the free exercise of religion [emphasis added]. And although the U.S. Fourth, Fifth, Sixth, and Eighth Amendments (the primary textual bases for most of the rights of defendants in criminal proceedings) do not contain this explicit textual limitation to acts of the federal Congress, the Supreme Court authoritatively held, in *Barron* v. *The Mayor and City Council of Baltimore*, *supra*, note 5, 249, that all of the first eight Amendments were, like the First Amendment, intended solely as limitations "on the exercise of power by the government of the United States, and [are] not applicable to the legislation of the states". A converse textual problem applies to the equal protection clause of the Fourteenth Amendment, which is in terms applicable only to "state" action. (Other rights provisions, such as the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments are, however, expressly made applicable to action by "the United States or by any State". See also art. I, §9, cl. 3 and art. I, §10, cl. 1, prohibiting *ex post facto* laws by the federal and state governments, respectively).

In fact, the implication in the text, that the rights mentioned are applicable to both state and federal governments in the U.S., is generally correct. This result has been reached through construction of the "due process" clause of the Fourteenth Amendment. Over the years after the adoption of the Fourteenth Amendment, the free expression and religion guarantees of the First

Although there is thus a broad range of basic similarity between the rights protected under the *Charter* and the U.S. *Constitution*, there appear to be some significant differences in coverage as well. The official languages and minority language educational rights in the *Charter*,[20] for example, have no apparent U.S. counterparts, in either text or judicial decision.[21] Nor does the U.S. *Constitution* contain any general principle resembling that contained in s. 27 of the *Charter*, which requires that the *Charter* be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". On the other hand, the *Charter* contains no prohibition, as does the U.S. First Amendment, upon governmental "establishment" of religion. Nor does the *Charter* explicitly protect property rights to the extent found in the U.S. constitutional text. The U.S. due process clauses, for example, apply to deprivations of "life, liberty, *or property*",[22] whereas the corresponding language in the *Charter* covers deprivations of "life, liberty and *security of the person*".[23] The U.S. Fifth Amendment, moreover, provides that "private property" shall not "be taken for public use, without just compensation" and the original *Constitution* provides further that states shall not enact laws "impairing the obligation of contracts".[24] The *Charter* contains no directly equivalent provisions.

In addition to these evident textual differences, there appear to be other significant differences as well, due to the fact that the U.S. *Constitution* has, through judicial interpretation, come to embrace some rights that are not at all

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Amendment were gradually made fully applicable by the U.S. Supreme Court to state and local governmental action through "incorporation" of those guarantees into the due process clause of the Amendment, which applies to "state" action. See, *e.g.*, *Gitlow* v. *New York*, 268 U.S. 652 (1925); *Palko* v. *Connecticut*, *supra*, note 5; and *Everson* v. *Board of Education*, 330 U.S. 1 (1947). The same process occurred with regard to most of the criminal procedure guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments. See *Duncan* v. *Louisiana*, *supra*, note 5. In the opposite direction, the equal protection guarantee of the Fourteenth Amendment has been effectively "incorporated" into the due process clause of the Fifth Amendment, which applies to federal governmental action. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

[20] *Charter*, ss 16 to 23.

[21] But see *Lau* v. *Nichols*, 414 U.S. 563 (1974), suggesting possible U.S. constitutional objections, on grounds of equal protection, in a situation where a public school system offered education only in the English language, but where a substantial number of students in that system did not speak English and were not offered supplemental remedial instruction in English.

[22] These clauses appear in the Fifth and Fourteenth Amendments, the former applicable to federal governmental action, the latter to state action [emphasis added].

[23] *Charter*, s. 7 [emphasis added].

[24] Article I, §10, cl. 1. Nor does the *Charter* appear to protect "the right of the people to keep and bear arms" (in the U.S. Second Amendment) or limit the right of government to use private homes to quarter soldiers (Third Amendment). These rights have not been important ones in judicial applications of the U.S. *Constitution*, although the right to bear arms is often invoked in political debates concerning gun control legislation in the U.S.

apparent in the constitutional text. Chief, perhaps, among these potential differences, is the quite recently developed U.S. right to "privacy" — the right responsible, for example, for the 1973 decision of the U.S. Supreme Court that most abortion prohibitions are unconstitutional.[25] The Canadian *Charter* has no provision clearly embodying this privacy right, although it may emerge ultimately in the course of judicial interpretation, as it has in the U.S. United States law also contains a general principle of "substantive" due process, requiring that all regulations impinging upon liberty and property be, to some degree, "reasonable" in light of some legitimate government policy,[26] and a similar general "rationality" requirement for governmental classifications that has been developed under the equal protection clause of the Fourteenth Amendment.[27] These are relatively weak rights at the present time, but they have some theoretical and practical significance. It is not clear whether — or to what extent — either of these general rationality rules will be recognized under the *Charter*.

Before exploring, in greater detail, some of the most important potential similarities and differences in the catalogs of rights protected under the *Charter* and U.S. *Constitution*, it is useful to consider three general topics concerning the scope of protected rights that are relevant in examining the breadth of all of the rights covered by the two documents.

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[25] *Roe* v. *Wade*, 410 U.S. 113 (1973). See also *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (contraceptive use by married persons protected by a similar principle). The U.S. privacy right also applies, in some circumstances, to "informational" privacy, *i.e.*, to situations where the government seeks to collect or disseminate data about "private" behavior without directly regulating that behavior. See *Whalen* v. *Roe*, 429 U.S. 589 (1977).

[26] The degree of judicial review of reasonableness has varied considerably under this doctrine over the years. Compare the relatively substantial level of review indicated in *Lochner* v. *New York*, 198 U.S. 45, 56 (1905) ("Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?") with the extremely low level of review suggested by the currently applicable standard of *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this court uses the Due Process Clause. . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought").

[27] As with the substantive due process rule of rationality, the equal protection rationality standard has varied in its strength over the years. Compare the relatively substantial test of *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920) ("The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike") with the much more permissive standard of *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949) (a legislative classification is reasonable if the local authorities "may well have concluded" that it responded to the legislative concern).

A. *"Negative" vs "Affirmative" Rights*

Individual rights under the U.S. *Constitution* are generally "negative" rather than "affirmative" in nature. United States constitutional rights, that is, are ordinarily rights to be *free from* restrictions on individual freedom and autonomy, rather than rights to affirmative *entitlements* from government or other individuals. Take, for example, the right of free expression. In the U.S. this right clearly does not include a right to demand the financial resources that would be required to engage in a desired level of public communication of ideas — to the resources necessary to publish and distribute a tract or newspaper, for example, or to establish and run a radio or television station, or to rent an arena for a public meeting. Rather, the free expression right in the U.S. is the right, absent a sufficiently strong governmental justification, to be free from governmental prohibitions or restrictions upon expressive activities, assuming that the individual otherwise has the wherewithal to engage in them. Similarly, the abortion right recognized by the U.S. Supreme Court in 1973 is a right to be free from governmental prohibitions of certain abortions — it is not a right to financial support for the costs of abortion, even for those otherwise unable, for financial reasons, to obtain the desired abortion procedure.[28] The right to interstate mobility in the U.S. is likewise a right to be free from governmental interference with travel or migration — not a right to the resources neccssary to permit one to move or to travel.

Many United States rights are actually expressed in the U.S. constitutional text in this negative fashion. To take a free expression example again, the U.S. First Amendment provides that "Congress *shall make no law. . . abridging* the freedom of speech, or the press".[29] The U.S. Fourth Amendment provides, in somewhat the same spirit, that the right to be "secure. . . against unreasonable searches and seizures, shall not be violated". The United States due process right is similarly stated, not as an affirmative right to due process as such, but as a right not to be "*deprive[d]. . .* of life, liberty, or property, *without due process of law*".[30] And some U.S. rights that may appear, at first glance, to be affirmative in nature turn out, in fact, to have predominantly negative characteristics. The judicially developed right of indigents to have free counsel provided at trial or appeal in serious criminal cases, for example,[31] may seem to be an affirmative entitlement, but that "entitlement"

[28] See *Maher* v. *Roe*, 432 U.S. 464 (1977); and *Harris* v. *McRae*, 448 U.S. 297, 316 (1980) ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation").

[29] Emphasis added.

[30] Emphasis added.

[31] See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); and *Douglas* v. *California*, 372 U.S. 353 (1963). Another U.S. right that has both negative and affirmative aspects is that of persons

applies only when the individual is seeking to resist the imposition of governmentally imposed criminal sanctions; the right is really an aspect of the right not to be convicted of a crime without a fair trial. There is no equivalent United States constitutional right to the provision of free counsel for the purposes of asserting affirmative legal claims, such as tort, property or contract rights.[32] Nor has the U.S. given constitutional status to affirmative entitlements to public assistance, unemployment compensation or free medical care — or even to free public education — although those rights are very often conferred by federal or state legislation.[33]

Will the individual constitutional rights newly created by the Canadian *Charter* be predominantly negative in nature, as is true under the U.S. *Constitution*, or will the *Charter* be read as establishing some significant affirmative constitutional entitlements as well? By and large, the *Charter's* language is distinctly more affirmative in cast than is the corresponding U.S. text. Unlike the clearly negative U.S. First Amendment, for example, the *Charter* provides that "[e]veryone has the...freedom of...expression".[34] Similarly, one of the *Charter's* basic mobility rights provisions prescribes that "every citizen of Canada has the right to enter, remain in and leave Canada".[35]

It is certainly conceivable that Canadian courts will, immediately or ultimately, read these or similar provisions as affording a basis for claims of constitutional entitlement to affirmative governmental assistance in some areas. But the more immediately likely reading of this sort of language, despite its affirmative cast, is that negative rights are all that are intended. Note, in this connection, the *Charter's* use of the word "freedom" (rather than the word "opportunity", for example) to describe the constitutional entitlements of Canadians in the area of expression. A "freedom" suggests strongly that the entitlement is, in fact, merely one to be free from governmental

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incarcerated for crime or committed for mental disease or retardation to safe and humane conditions of confinement. See *Estelle* v. *Gamble*, 429 U.S. 97 (1976); and *Youngberg* v. *Romeo*, 457 U.S. 307 (1982).

[32] *Cf. United States* v. *Kras*, 409 U.S. 434 (1973) (government need not waive filing fee for voluntary bankruptcy for one financially unable to pay that fee).

[33] Although there are generally no affirmative U.S. constitutional rights to welfare and similar government benefits, the U.S. equal protection clause often provides a basis for arguing that restrictions in benefit programs constitute unconstitutional classifications or discriminations. Thus, a benefit program that excludes women may constitute constitutional gender discrimination, even though the entire program might constitutionally be abandoned. See, *e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Since such programs are rarely abandoned when unconstitutional discriminations are held to be present in them, a successful equal protection attack often has a practical effect similar to the recognition of an affirmative right.

[34] *Charter*, subs. 2(b).

[35] *Charter*, s. 6.

prohibitions and restrictions (in the absence of a sufficiently strong governmental justification). Even the word "right" (used, for example, in the mobility rights provisions of the *Charter*) seems susceptible to a similar construction — that is, that the right to leave Canada is the right to be free from interference with such activity, not a right to affirmative governmental assistance for one who wishes to leave. If Canadian courts were to read provisions like these as establishing affirmative rights, they would have to decide which governmental units — federal, provincial or local — bore the constitutional obligation to provide the required assistance, and they would also have to decide what the required level of affirmative assistance should be. Would the right to affirmative assistance for politically expressive behavior, for example, be a right to some minimum ability to communicate in the political arena (and how would that minimum be determined)? Would it be a right to *equal* ability to communicate (as compared with persons expressing contending views on the same issues) or perhaps a right to the assistance necessary to bring one to some "average" level of opportunity? The *Charter* provides little or no guidance in answering these questions, should answers become necessary. The desire of Canadian judges to avoid that necessity may provide a strong stimulus toward adopting a basically negative conception of most *Charter* rights.

There is, however, at least one provision of the *Charter* that seems, on the basis of its language, to demand at least very serious consideration as a possible source of affirmative constitutional entitlements. That provision is the first clause of s. 7 — the *Charter* provision closest in language to the well known U.S. "due process" clauses. The second clause of s. 7 provides, in parallel with the U.S. provisions, that individuals have the right not to be deprived of life, liberty or security of the person "except in accordance with the principles of fundamental justice". That right is clearly one of the negative, rather than affirmative, variety, being a right to resist governmental deprivations that are procedurally unjust.[36] But what are we then to make of the first clause of s. 7, which provides that everyone, in addition, has the right "to life, liberty and security of the person"? Unless this language merely duplicates the second clause (an interpretation quite at odds with the presence of two separate clauses and the use of the word "and" to connect them),

[36] The principal focus of this right is undoubtedly upon deprivations that take place through criminal and quasi-criminal proceedings. Specific limitations on criminal prosecutions constitute the remainder of the "Legal Rights" portion of the *Charter*, of which s. 7 is the first provision. Whether this part of s. 7 also gives rights to resist governmental deprivations through civil proceedings, and whether it can be read (as have the U.S. due process clauses) as requiring deprivations that are substantively as well as procedurally just, are questions that are treated in connection with the discussion of some specific *Charter* rights. See *infra*, Parts II(B) and II(C).

something beyond a rule requiring fair procedures must be intended. What could that something be?

One possibility, and perhaps the most natural reading, is that the first clause of s. 7 means to impose *substantive* limits on governmental deprivations of life, liberty and personal security, just as the second clause imposes *procedural* limitations. That is, if a statute were to authorize conviction and imprisonment for a criminal offense without a fair trial, that would presumably violate the second clause of s. 7, whereas if the law were procedurally fair in operation but substantively unreasonable — if it, for example, criminalized private behavior without an adequate justification for doing so in light of legitimate governmental concerns [37] — that might violate the first clause of s. 7. Read this way, the first clause of s. 7 would constitute a "substantive" due process provision similar in nature to that employed from time to time by United States courts under the Fourteenth Amendment.[38] It would still, however, be a right that is essentially negative in character.

But the first clause of s. 7 might also plausibly mean that everyone has the right to life, liberty and personal security in the sense that everyone has the constitutional right to demand some level of affirmative governmental assistance in protecting these vital personal interests. If so, this clause would establish a set of affirmative constitutional rights. Such rights, in their mildest shape, might take the form of constitutional requirements that government provide minimally adequate police protection, and that civil and criminal remedies for trespass to person, and perhaps to property, also be available. Recognition of such constitutional rights would probably not impose any obligations on government in Canada that it does not already seek to meet, although it would certainly provide a basis for allegations that existing protections are not, in fact, adequate in some particular geographical or subject-matter areas. Recognition of such rights might perhaps also raise federalism issues regarding which governmental unit is to bear particular constitutional obligations.[39]

Broader forms of affirmative s. 7 rights to governmental assistance in protecting life, liberty and security of the person would have a greater potential impact. If there are such affirmative rights, it would not, for example, be wholly implausible to argue that the required protection includes

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[37] As, for example, a law criminalizing the use of contraceptives by married couples. See *Griswold* v. *Connecticut*, *supra*, note 25, striking down such a state statute.

[38] U.S. "substantive" due process is discussed *infra*, Part II(C).

[39] Subsection 32(1) of the *Charter* would seem relevant in allocating these affirmative governmental obligations, should they be found to exist. That section applies the *Charter* to the federal and provincial governments "in respect of all matters within [their respective] authorit[ies]".

not only protection against criminal or tortious deprivations by other private individuals, but also governmental assistance in maintaining life, liberty and security against the ravages and demands of nature. The *Charter* might thus require governmental public assistance programs providing the food, shelter and medical care necessary to sustain life, health and a minimally adequate quality of life. United States courts, as noted above, have not similarly constitutionalized rights to welfare or public assistance, but the U.S. constitutional text has no peg as convenient as s. 7 upon which to hang such a set of affirmative rights. If Canadian courts do enter this area, existing public assistance programs may, in general, prove adequate to pass constitutional muster, although litigation would certainly be possible concerning particular applications of these programs, or allegedly unconstitutional exclusions from them. Lurking behind such a set of rights would be knotty problems regarding what constitutes a constitutionally acceptable minimum level of assistance in various areas, whether lack of governmental resources can be invoked as justification for failing to meet those levels, and whether the obligations are imposed upon the federal or provincial governments.[40]

B. *The Requirement of Governmental Action*

Constitutional rights under the United States *Constitution* are, with one historically important exception, rights to be free from *governmental* (or governmentally related) interferences with constitutionally protected activity. Purely private deprivations of life, liberty or property, such as murder, kidnapping or larceny, are illegal or criminal under state or federal law, but they are not unconstitutional, nor are private searches or seizures (such as burglaries), private interferences with freedom of speech or freedom of religion, or private racial or gender discriminations.[41] The prominent excep-

[40] On the latter issue, see *ibid.* There are a few other respects in which the *Charter* may create rights that are primarily affirmative in character. Subsection 4(1) of the *Charter* requires federal and provincial parliamentary elections every five years (subject to the limits of subs. 4(2)); s. 5 requires legislative sessions at least once a year; and s. 3 confers affirmative rights to vote in parliamentary elections and to stand for election. Some aspects of the official languages provisions (ss 16 to 22) may also be viewed as creating affirmative rights in that they require the provision of bilingual governmental services. (These provisions, however, can perhaps also be seen as "negative" prohibitions upon governmental discriminations not otherwise covered by the equality rights provision of *Charter* s. 15.) Finally, it seems possible to read the *Charter* section dealing with minority language educational rights (s. 23) as not only prohibiting unequal treatment for language minorities in certain circumstances, but as also imposing an affirmative *Charter* requirement that the relevant governmental unit provide some minimum level of "primary and secondary school instruction" for all children.

[41] With regard to Fourteenth Amendment rights, see, *e.g.*, *Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of

tion to this rule is the Thirteenth Amendment's prohibition upon slavery or involuntary servitude. This prohibition applies to private, as well as to governmental behavior.[42]

Although the general doctrine that U.S. constitutional rights apply only against governmental action is a firmly established one, the question of what action should be considered to be "governmental" has produced — and continues to produce — a substantial amount of difficult litigation. It is clear that "governmental action" for purposes of the doctrine includes not only formal federal, state and local *legislation*, but also the regulations, internal policies and individual official activities of government agencies, officials and employees. It is also clear that governmental action is present even when such official individual behavior is actually *prohibited* by applicable legislation. Thus, a state police officer in the U.S. acts as the government for the purposes of this doctrine when he conducts an unreasonable search and seizure in the course of an official criminal investigation even when, in doing so, the officer violates state law as well as the standards of the Fourth and Fourteenth Amendments.[43] Moreover, private citizens may violate the U.S. *Constitution* when they conspire in unconstitutional behavior by government

individual rights is not the subject-matter of the amendment"). The proposed Equal Rights Amendment would also contain an express governmental action limitation, applying to gender discriminations "by the United States or by any State". Similarly, it has been clearly understood in the U.S. that the entire original 1791 Bill of Rights was intended only as a limitation on governmental action (initially only *federal* governmental action), despite the fact that this limitation is not made explicit in every Amendment. See *Barron* v. *The Mayor and City Council of Baltimore*, *supra*, note 5.

[42] Thus, the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States". *Civil Rights Cases*, *ibid.*, 20. See also *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Although private invasions of rights do not ordinarily violate the U.S. *Constitution*, the U.S. Congress may nevertheless have constitutional power to prohibit such invasions. See, for example, the *Civil Rights Act of 1964*, P.L. 88-352 (prohibiting racial and gender discrimination in private employment and racial discrimination in private hotels, restaurants and theaters), and the federal *Housing and Urban Development Act of 1968*, P.L. 90-448 (prohibiting race and gender discrimination in the sale or rental of private housing). The power of Congress to enact such legislation is ordinarily found in the federal power to regulate matters that affect interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). Where racial discrimination is involved, such legislation may also rest upon Congress' explicit power to "enforce" the prohibitions of the Thirteenth Amendment, the theory being that private racial discrimination, while not constituting unconstitutional slavery as such, is nevertheless a "badge or incident" of slavery remediable by federal legislation. See *Jones* v. *Alfred H. Mayer Co.*, cited immediately above. U.S. states may (like the Canadian provinces) also choose to enact legislation protecting basic civil rights from private interference (so long as that legislation does not conflict with valid federal legislation on the same subject).

[43] See, *e.g.*, *Monroe* v. *Pape*, 365 U.S. 167 (1961).

officials,[44] or perhaps even when they are encouraged or required by the government to take actions that the government itself could not constitutionally undertake.[45]

Most significantly, action in the United States that is completely non-governmental in the formal sense — for example, the decisions or activities of a private company or corporation — may nevertheless be treated as "governmental" action if the private entity is deemed to be performing a peculiarly "public" function, or if the state is sufficiently "involved" with, or has a sufficient nexus to, the private behavior. A privately owned "company town" was held by the U.S. Supreme Court to have engaged in constitutionally prohibited "governmental" action when it decided to exclude religious evangelists from the town,[46] and a privately owned restaurant that leased space in a state owned parking garage was held by the Court to have engaged in constitutionally prohibited racial discrimination when it pursued its own policy of refusing to serve black customers.[47] In what is perhaps the U.S. Supreme Court's most famous case in this area, it held that a state court could not constitutionally enforce a private racially restrictive land covenant against a black home buyer who had arranged to purchase property subjeet to the covenant. The Court decided that, although "the [private] restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment", the State nevertheless violated the equal protection clause by granting judicial enforcement of the restrictive agreements.[48]

The governmental action doctrine has its limits, however difficult it may be to locate them in particular cases. It has always been clear, for example, that private conduct does not become governmental simply because a state might have prohibited the behavior in question, but has chosen not to do so. It has also been established for many years that privately owned inns, restaurants or public conveyances are not governmental merely because of their

[44] See, *e.g.*, *United States* v. *Guest*, *supra*, note 19.

[45] See, *e.g.*, *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

[46] See, *e.g.*, *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

[47] *Burton* v. *Wilmington Parking Authority*, 365 U.S. 725 (1961).

[48] *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948). There was no difficulty in finding state "action" in *Shelley*; such action was clearly present in the state court's enforcement of the private restrictive covenant. The discriminatory decision, however, had been a purely private one. The precise contours of the *Shelley* decision have never been clarified adequately. The Supreme Court, for example, has not held that all state enforcement of private discriminatory decisions amounts to unconstitutional governmental action. See, *e.g.*, *Bell* v. *Maryland*, 378 U.S. 226 (1964) (where the majority of the Court declined to apply *Shelley* where blacks were prosecuted for trespass for a "sit-in" at a private restaurant that refused them service because of their race). See also *Evans* v. *Abney*, 396 U.S. 435 (1970).

traditionally public character.[49] The same is undoubtedly true generally of large private corporations, despite their possession of a state corporate charter and their subjection to a significant degree of state regulation. Moreover, in recent years, the Supreme Court has appeared to limit the scope of the governmental action doctrine (when compared with the decisions described in the preceding paragraph) by holding, among other things, that the public areas of large, privately owned shopping centers are not to be treated like the streets of company towns;[50] that the actions of a privately owned electric utility company licensed by the state and enjoying a state conferred monopoly are not governmental action;[51] and that a private nursing home's decision to discharge public assistance patients is not governmental action, even though the home is regulated extensively by the state, and receives most of its revenue through federal and state assistance programs.[52]

To what extent will a governmental action doctrine apply under the Canadian *Charter*? Are the rights and freedoms set out in the *Charter* applicable against all interferences, governmental or private, or only to "governmental" behavior? If governmental action is required, will Canadian courts employ a relatively formal approach in determining whether activities are governmental or private, or will they (as the U.S. courts have done) be willing to characterize some formally private action as "governmental" because of its public character or its close relationship to governmental policies or decisions?

The application of most *Charter* provisions appears to be textually limited to governmental processes. That observation seems true, for example, of the voting rights granted by the *Charter*. Those rights apply only in elections "of members of the House of Commons or of a legislative assembly"[53] — not in elections for corporate boards or trade union offices. The official languages obligations of the *Charter*[54] also seem limited to governmental proceedings and services. English and French, for example, are the official languages "in all institutions of the Parliament and government of Canada", in "the legislature and government of New Brunswick", and in the provision of services by those governments. A governmental limitation is also explicit in some of the *Charter's* specific provisions regarding the rights

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[49] *Civil Rights Cases*, *supra*, note 41.

[50] *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507 (1976).

[51] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974).

[52] *Blum* v. *Yaretsky*, 102 S. Ct 2777 (1982). See also *Rendell-Baker* v. *Kohn*, 102 S. Ct 2764 (1982) (employment decisions of a private school, licensed and regulated by the state and deriving income primarily from governmental sources, are not "governmental" action).

[53] *Charter*, s. 3.

[54] *Charter*, ss 16 to 20.

of defendants in criminal proceedings; these sections apply to persons "charged with an offence", "tried", "arrested", and "imprisoned".[55] The *Charter's* equality rights provision also may be directed exclusively toward governmental discriminations in view of its guarantees of equality "before and *under the law*" and of "the equal protection and equal benefit *of the law*".[56]

Although all of these provisions seem to be focused upon governmental behavior, it is probable (as in the U.S.) that their application will not be restricted to limiting only formal *legislative* enactments; decisions and behavior of governmental boards and agencies and official decisions of individual officers and government employees should likely be covered as well. Thus, an individual police officer would violate the *Charter* in imprisoning a person arbitrarily, or in failing to inform a defendant of his or her rights after arrest, even though the officer might be required to do otherwise by applicable legislation or official policy. Even where, as in the equality rights provision, the *Charter's* guarantees relate to "the law", that term should probably be taken in its broad sense, that is, as referring to all official discriminations, whether or not they are legislatively mandated.[57] It also seems plausible that these *Charter* sections with express governmental action limitations will be deemed applicable to behavior that, while purely private in its origin, would nevertheless tend directly to defeat a *Charter* right. Thus, although the *Charter's* right to vote applies only to parliamentary and legislative elections, a private citizen who seeks forcibly to prevent another person from voting in such an election might well be deemed to act in violation of the *Charter*,[58] as might a private company that discouraged its employees from voting by docking their pay.[59] A private citizen who conspires with a police officer to effect an arbitrary arrest might also be covered by the *Charter*. Whether these *Charter* provisions ultimately will embrace anything resembling the full sweep of the U.S. governmental action doctrine — so that private behavior will sometimes be treated as "governmental" merely because of a strong governmental nexus — seems, for now, to be a matter for speculation.

What of provisions of the *Charter* that, unlike the voting and equality provisions, do *not* contain express government action limitations? In some cases, such limitations are strongly implied by the context. Unreasonable

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[55] See *Charter*, ss 9 to 11, 13 and 14.

[56] *Charter*, s. 15 [emphasis added].

[57] It seems relevant here that the affirmative action provision of subs. 15(2) authorizes any "law, *program* or *activity*" designed to remedy disadvantages (not just any formal legislative decision), and that s. 32 makes the *Charter* applicable to the legislatures "and *government[s]*" of Canada and the provinces [emphasis added].

[58] In the U.S., see *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (8th Cir. 1956).

[59] In the U.S. context, *cf. Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421 (1952).

"search[es] or seizure[s]" under s. 8, for example, would appear to be intended to refer to the actions of law enforcement officials. Those deprivations of life, liberty and security of the person required by s. 7 to conform with "the principles of fundamental justice" also seem likely to be governmental deprivations, both because "fundamental justice" would not be terminology ordinarily applied to private behavior, and because s. 7 is the first of a series of "Legal Rights" provisions that, in their procedural sense at least, seem clearly to be addressed to criminal proceedings instituted by the government. A governmental action limitation inherent in the *Charter's* mobility rights provision [60] seems somewhat more questionable, but nevertheless plausible. Rights of entry and exit from a country, the establishment of residency status and the right "to pursue the gaining of a livelihood" (the rights recognized in s. 6) are matters normally dealt with exclusively by government.[61]

The *Charter* section that appears most likely (unlike U.S. constitutional provisions) to be held applicable to private as well as governmental behavior is s. 2, which protects the freedoms of "conscience", "religion", "thought", "belief", "opinion", "expression", "peaceful assembly", and "association". Does a private citizen or group act in violation of the *Charter* in forcibly disrupting a peaceful political assembly? Does a private employer violate the *Charter* in discharging an employee because of the employee's membership in a political party or the employee's religious beliefs or practices? The use of the word "freedoms" to describe these fundamental interests seem somewhat less suggestive of a governmental action requirement than does the use of the word "right" [62] in the *Charter's* mobility and legal rights provisions. Nevertheless, a "freedom", like a "right", can sensibly be seen as describing an entitlement applicable only against official interference. That, for example, is certainly the way the word is used in the U.S. First Amendment, which prohibits Congress from abridging the "freedom" of speech as well as the "right" of peaceable assembly.

In determining whether s. 2 of the *Charter* (or any other section of the *Charter* that lacks a built-in governmental action limitation) applies to private

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[60] *Charter*, s. 6.

[61] Relevant here also may be the fact that the limitations on mobility rights contained in subss (3) and (4) of s. 6 authorize non-discriminatory "laws or practices of general application in force in a province", "laws providing for reasonable residency requirements", and "law[s], program[s], or activit[ies]" designed to ameliorate social or economic disadvantages within a province. In so far as these exceptions relate only to governmental programs, they suggest a similar application for the rights involved.

[62] But *cf. Jones* v. *Alfred H. Mayer Co.*, *supra*, note 42, 421, holding that U.S. federal legislation giving all citizens "the same right" as white citizens to buy real property appears "[o]n its face... to prohibit *all* discrimination against Negroes in the sale or rental of property — discrimination by private owners as well as discrimination by public [officials]" [emphasis in original].

as well as to governmental action, attention must be paid to the meaning of s. 32. That provision applies the *Charter* "to the Parliament and government of Canada in respect of all matters within the authority of Parliament" and "to the legislature and government of each province in respect of all matters within the authority of the legislature of each province". There seems to be considerable strength to the argument that s. 32 thus makes clear that *all Charter* provisions, including s. 2, apply only to governmental action. However, the word "only" does not appear in s. 32, and there is at least some doubt about whether it should be implied. If the *Charter* applies "only" to the federal or provincial governments, would that mean that it has no application in limiting the behavior of local governmental units?[63] Reading "only" into s. 32 might also limit the *Charter* unduly by restricting its application to formal governmental action (thus entirely rejecting the U.S. concept of private action that is treated as governmental because of its strong governmental nexus). Moreover, such a reading might also defeat the *Charter's* application to the actions or decisions of individual officials, such as police who engage in arbitrary or unreasonable searches. Such actions will likely be contrary to statute or official policy and thus difficult to characterize as actions of the "legislature" or "government". Section 32 might therefore perhaps best be read, not as a strict and overriding governmental action requirement for all *Charter* provisions, but merely as an allocation of governmental *Charter* responsibility along the normal lines of Canadian federalism. If so, the possibility exists that s. 2, unlike the equivalent provisions of the U.S. *Constitution*, will indeed be applied to protect Canadians against purely private interferences with the fundamental interests in individual thought, worship, expression, and peaceful political activity.

C. *When Are Rights Violated: Direct Interferences vs Practical Effects*

The clearest situations in which constitutional rights are implicated are those where government directly and purposefully prohibits the exercise of a protected freedom, or openly engages in prohibited discrimination. Thus, if a legislature in Canada were flatly to forbid the practice of a particular religion, that would certainly involve rights under subs. 2(a) of the *Charter*. The same would be true if provincial legislation purported to prohibit Canadians from moving to a province (in apparent violation of subs. 6(2)), or members of an ethnic group from being eligible for governmental employment (contrary to

[63] In the U.S., "state" action under the Fourteenth Amendment includes the action of local governmental units. See, *e.g.*, *Hunter* v. *Erikson*, 393 U.S. 385 (1969), apparently on the theory that such units are "arms" of the state. A similar result would seem possible under the *Charter*, even if its application is limited to federal and provincial action.

subs. 15(1)). As noted above, constitutional rights in the U.S. are also clearly implicated when government agencies or officials, rather than legislatures, adopt or employ policies prohibited to the government, and the same result seems a likely one in Canada.[64]

What, however, of laws, policies or other official decisions that, on their face, do not directly limit or infringe rights, that may not have been intended to do so, but that nevertheless have that practical effect? Suppose, for example, that traffic regulations enacted for safety reasons would prohibit certain peaceful public assemblies; or that a school board enacts compulsory school attendance rules that are in direct conflict with the religious principles of a small sect with whose beliefs that board was unconcerned or unaware. Or suppose that minimum one- or two-year durational residency requirements are imposed as conditions of receiving public assistance, and that these requirements, although enacted for reasons of administrative convenience or fiscal integrity, nevertheless operate to deter inter-provincial migration of poor persons who are receiving assistance; or that minimum height and weight requirements for employment as police officers have the effect of eliminating almost all women applicants for such jobs.[65] Are constitutionally protected interests implicated here because of the impact of the rules involved, or are rights to be deemed implicated only by more direct or deliberate invasions?

In the United States, the answer that generally has been given to these questions is that effects *are* constitutionally significant. Serious burdens on free expression, freedom of religion, freedom of movement and other constitutionally protected interests are ordinarily subjected to constitutional scrutiny whether or not they constitute outright direct prohibitions, and whether or not the legislature, agency or official whose policy is involved is found to have intended that a burden occur.[66] Thus, in a well known case involving a

[64] For a leading U.S. case establishing that the improper administration of laws valid on their face can violate constitutional rights, see *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-4 (1886) (administration of laundry licensing laws "with an evil eye and an unequal hand" violates the equal protection clause).

[65] These examples are loosely based on the following U.S. cases: *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Shapiro* v. *Thompson*, *supra*, note 19; and *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977).

[66] Indeed, U.S. law has a general attitude that is hostile to the consideration of actual legislative "motives" in connection with adjudicating the constitutionality of statutes. See, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367 (1968); and *Palmer* v. *Thompson*, 403 U.S. 217 (1971). On the other hand, if the *only* legislative purpose that can be identified as supporting a statute or policy is a constitutionally impermissible purpose (such as a purpose to suppress dissent or religion or interstate migration), the statute will undoubtedly be invalidated. See, *e.g.*, *Shapiro* v. *Thompson*, *ibid.*

federal prosecution for public draft-card burning, the Supreme Court applied free speech principles to the application of a law that prohibited the destruction or mutilation of draft cards, even though it was clear to the Court that the law plainly did not abridge free speech on its face and although the Court, in addition, declined expressly to inquire into whether or not the "purpose" of Congress was to suppress freedom of speech.[67] Similarly, in the area of freedom of religion, the U.S. Supreme Court has struck down a state unemployment compensation law that required applicants to be available for work on Saturday. It held that an impermissible burden was thus imposed upon the religion rights of a Seventh-day Adventist (whose Sabbath was Saturday) because the law forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand".[68] Minimum durational residency requirements as conditions for receiving welfare benefits [69] or free medical care,[70] or as qualifications for voting,[71] have similarly been invalidated as classifications that penalize the constitutionally protected right of interstate migration.[72]

The one major area in United States law where unintended effects have not been accorded constitutional significance has been under one branch of the equal protection clause. Laws or official practices that have a disproportionately negative impact upon minorities or women are not currently treated by the U.S. Supreme Court as instances of racial or gender discrimination unless found to be "purposeful" in design. The U.S. Supreme Court has, for example, refused to recognize constitutionally cognizable racial discrimination in the use of a qualifying test for police officers that excluded four times as many black as white applicants because there was no showing by the plaintiff of "the necessary discriminatory racial purpose".[73] And the Court has similarly declined to find gender discrimination in a strict veterans' preference system for state employment, even though it was clear, because of discrimination in selecting members of the armed forces, that less than two

[67] *United States* v. *O'Brien*, *ibid.*

[68] *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). See also *Wisconsin* v. *Yoder*, *supra*, note 65, striking down the application of a state compulsory school attendance law to Amish children whose parents objected, on religious grounds, to formal public education beyond the eighth grade.

[69] *Shapiro* v. *Thompson*, *supra*, note 19.

[70] *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

[71] *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

[72] Note that these cases find constitutional interests implicated whether the burden or penalty on the individual is a directly coercive one through criminal sanctions (as in the draft-card burning case), or occurs through the withdrawal of governmentally conferred privileges or benefits (as in the case of the unemployed Sabbatarian).

[73] *Washington* v. *Davis*, 426 U.S. 229, 241 (1976).

per cent of veterans eligible for the preference would be women.[74] Perhaps the most well known U.S. application of this purpose requirement in the equal protection area lies in the area of so-called "*de facto*" school segregation. Because of segregated housing patterns, the enforcement of neighborhood school policies in many large U.S. cities results in public schools that are themselves substantially racially segregated. This segregation is currently held to raise no constitutional issue unless school districting laws or policies are found, as a fact, to have been based on conscious segregative motives.[75]

The Canadian *Charter* appears to contain no explicit directives about whether its rights and freedoms may be deemed to be violated by burdens and effects, in and of themselves, or only by direct or purposeful prohibitions and restrictions. The textual indications that exist, however, seem to favor attention to such effects. Thus, the mobility rights provision of s. 6 is explicitly made subject to exceptions for non-discriminatory laws of general application and for reasonable residency requirements.[76] Such exceptions would be unnecessary if mobility rights could only be asserted against direct or purposeful prohibitions upon travel and migration. The question of the relevance of effects, as the foregoing description of the U.S. cases should indicate, is a very important one for the ultimate scope of individual rights in Canada. A constitution that ignores effects may leave many vital individual interests either entirely unprotected, or at the mercy of subjective and difficult judicial conclusions regarding the motives of legislatures and officials. On the other hand, a constitution that pays attention to effects subjects a significantly broader range of legislation and official policies to constitutional scrutiny than is the case if constitutional protections apply only to direct and purposeful prohibitions. Such scrutiny requires courts to strike a balance between legitimate governmental policies and the fundamental individual interests they may inevitably affect. When striking this balance, courts often become vulnerable to criticism for seeming to second-guess legislative judgments about the best means for effecting proper governmental objectives.[77]

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[74] *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 280 (1979). The Court held that the gender discrimination was not purposeful because it was a "preference for veterans of either sex over nonveterans of either sex", not a preference for men over women, as such.

[75] See, *e.g.*, *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973). Proof of such a purpose, however, can be based in some settings on circumstantial as well as direct evidence. See, generally, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

[76] *Charter*, paras 6 (3)(a) and 6(3)(b).

[77] The standards of review that courts may use in making these adjustments will be considered in a subsequent article.

II. Specific *Charter* Rights and their U.S. Counterparts

It would be impossible within the confines of this article to attempt a comprehensive comparative treatment of the potential scope of all, or even most, of the substantive provisions of the Canadian *Charter* that have counterparts in the U.S. system. What follows is a set of observations, from a U.S. perspective, about some specific features of the *Charter's* catalog of rights that seem especially interesting or important in light of the U.S. experience with similar rights.

A. *Legal Rights*

Sections 7 to 14 of the *Charter* deal primarily with the rights of defendants in criminal proceedings. As is true in the original U.S. Bill of Rights, there appear to be both an overall requirement of fair procedure (the second clause of s. 7 providing that "life, liberty and security of the person" not be deprived "except in accordance with the principles of fundamental justice"), as well as a number of detailed provisions. These concern, among other things, arrests, searches, bail, right to counsel, notice of charges, the presumption of innocence, speedy trials, double jeopardy, the right to be free from compelled self-incrimination, the right to jury trial, and the right to be free from cruel and unusual punishments.[78] The overall requirement is probably intended as a general fair trial guarantee that will supplement the specific requirements that follow — as a prohibition, that is, upon aspects of procedural unfairness that may not be explicitly covered by the specific provisions. In the United States, unfair line-ups or other pre-trial identification procedures have been held to violate such a general due process guarantee,[79] as have trials conducted in a "circus" atmosphere,[80] prejudicial pre-trial publicity[81] and prejudicial prosecutorial behavior at trial.[82] These and related practices may similarly be held to constitute failures to adhere to principles of "fundamental justice" under the *Charter*.[83]

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[78] The U.S. Bill of Rights similarly has a general Fifth Amendment "due process" requirement ("nor shall any person... be deprived of life, liberty, or property, without due process of law") supplemented by specific provisions in the Fourth, Fifth and Sixth Amendments.

[79] See *Stovall* v. *Denno*, 388 U.S. 293 (1967).

[80] See *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

[81] See *Irvin* v. *Dowd*, 366 U.S. 717 (1961).

[82] See *Mooney* v. *Holohan*, 294 U.S. 103 (1935).

[83] The use of the words "security of the person" (rather than "property") to describe one of the deprivations covered by s. 7 raises the possibility that a general requirement of trial fairness might not apply under the *Charter* to criminal proceedings where the only penalty is a monetary fine or a forfeiture of property. This would be an unusual result, given the fact that the specific requirements of s. 11 apply, for example, to "[a]ny person charged with an offense", whatever

In connection with its requirement that arrests and searches be "reasonable",[84] the U.S. Fourth Amendment includes an express requirement that warrants be specific in nature,[85] and be based upon "probable cause".[86] The United States Supreme Court has held that such warrants are ordinarily required by the *Constitution* for searches of homes and offices[87] (except where "exigent" circumstances are present or the search is a narrow one incident to a lawful arrest within the home),[88] but that warrants are not required for arrests in streets or public places.[89] Even where warrants are not a constitutional necessity, the basic "probable cause" standard applies.[90] A great deal of case law exists in the U.S. elaborating upon the meaning of this probable cause requirement in various specific contexts, such as the use of police informants.[91]

By omitting explicit warrant and probable cause requirements from the text of the *Charter* in favor of general proscriptions of "unreasonableness" and "arbitrariness", the framers of the *Charter* may have intended to forego the elaboration of specific constitutional rules on these subjects, and to use instead an approach under which "reasonableness" is to be determined on a case-by-case basis in light of all the relevant circumstances. Such an approach might have the merit of avoiding rules that may seem, at times, to be

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the penalty. Perhaps property interests will come to be recognized as part of the "security of the person", a term that can possibly be read as including at least some traditional property rights. See *infra*, text following notes 100 and 101. Interests in an individual's reputation or good name that may be affected by criminal law enforcement can also perhaps be included within the term "security of the person"; alternatively, they may be an aspect of "liberty". But see the U.S. Supreme Court's extremely questionable analysis of such issues in *Paul* v. *Davis*, 424 U.S. 693 (1976).

[84] U.S. *Constitution*, Amendment IV. Although the U.S. Fourth Amendment refers to "searches and seizures", and not specifically to "arrests", "detentions", or "imprisonments" (as do *Charter* ss 9 and 10), such interferences are treated in the U.S. as "seizures" of the person. See the last phrase of the Fourth Amendment ("the *persons* or things to be seized"); *Beck* v. *Ohio*, 379 U.S. 89 (1964); and *Terry* v. *Ohio*, 392 U.S. 1 (1968).

[85] Warrants must "particularly [describe] the place to be searched and the persons or things to be seized".

[86] Police assertions that probable cause exists must be "supported by oath or affirmation".

[87] See *Payton* v. *New York*, 445 U.S. 573 (1980).

[88] See *Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294 (1967); and *Chimel* v. *California*, 395 U.S. 752 (1969).

[89] See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411 (1976). Warrants are, however, ordinarily required for arrests within the home. See *Payton* v. *New York*, *supra*, note 87.

[90] *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

[91] See, *e.g.*, *Aguilar* v. *Texas*, 378 U.S. 108 (1964); and *Spinelli* v. *United States*, 393 U.S. 410 (1969). See also *United States* v. *Ventresca*, 380 U.S. 102 (1965). The Supreme Court has recently diluted probable cause requirements in the police-informant context. *Illinois* v. *Gates*, 103 S. Ct (1983) (forthcoming).

excessively technical and mechanical in their specific applications (this is one of the criticisms often directed against U.S. law in this area)[92] but it might, at the same time, detract significantly from the *Charter's* possible role as a meaningful restraint upon police behavior. Police, that is, are quite likely to deem their conduct in specific cases to be reasonable in the circumstances, whereas they may well adjust that behavior to conform to relatively specific rules elaborated previously by the judiciary, especially if those rules are enforced by mechanisms such as the evidentiary "exclusionary" rule contained in subs. 24(2) of the *Charter*.

The *Charter's* provisions relating to police procedures after arrest — especially procedures regarding police interrogation of suspects — are of interest to U.S. lawyers in light of the substantial attention that has been paid to these matters in recent years by U.S. courts. In *Miranda* v. *Arizona*,[93] the United States Supreme Court held that police could not question or interrogate a person after arrest without first telling the person arrested of various applicable constitutional rights, including the rights to remain silent, to consult with a lawyer, to have free counsel provided if the person arrested is indigent, and to terminate an interrogation at any time for the purpose of consulting with a lawyer or for any other reason. These *Miranda* "warnings" are required, said the Court, to help make effective the general constitutional prohibition against coercive police interrogation — a prohibition that had been recognized earlier by the Court under the due process clauses contained in the Fifth and Fourteenth Amendments.[94] Statements or confessions obtained in violation of the *Miranda* rules are inadmissible as proof of guilt in U.S. courts.[95]

Charter s. 10 requires that arrested persons be informed promptly of the reasons for arrest and of their right to "retain and instruct counsel". No explicit provision is made, however, for telling a defendant of any right to remain silent, or to refuse to submit to or to terminate police interrogation, nor is there an express provision for supplying lawyers to those unable to retain counsel because of indigency. With regard to a possible right of silence under the *Charter* in response to police interrogation, certain forms of coercive interrogation (such as the use of physical torture or intense psychological pressure) would, presumably, conflict with principles of "fundamental justice" under *Charter* s. 7. More generally, all coercive interrogation, or at least the use of the fruits of such interrogation in a subsequent criminal trial, might

[92] See, for example, the unbelievably confusing line of recent U.S. cases dealing with the requirements for stopping and searching automobiles and their contents. The most recent such case is *United States* v. *Ross*, 102 S. Ct 2157 (1982).

[93] 384 U.S. 436 (1966).

[94] See *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

[95] *Miranda* v. *Arizona*, *supra*, note 93, 476.

also violate the *Charter's* explicit right, set out in subs. 11(c), to be free from compulsory self-incrimination.[96] If a right to be free of police coercion does exist, Canadian courts, like the U.S. Supreme Court in *Miranda*, might well deem communication to an arrested person of a right to remain silent to be a necessary adjunct of that right.

The *Charter's* failure to make express provision for affording free counsel to indigents has implications for criminal trials themselves, as well as for preliminary police interrogations and the pre-trial right to silence. Defendants are given, in subs. 10(b), a *Charter* right "to *retain* and instruct counsel", a formulation that suggests the absence of an affirmative right to have counsel retained by the government on an indigent's behalf. The lan-

[96]Note, however, the relatively narrow formulation of subs. 11(c). The self-incrimination right conferred there is that of a person charged with an offence "not to be compelled to be a witness *in proceedings against that person in respect of the offense*" [emphasis added]. Will police interrogation qualify under the *Charter* as a "proceeding. . . in respect of the offence"? Such "proceedings" might possibly be held to be only those of a more formal nature, *i.e.*, the trial itself, preliminary hearings, etc. Even if this construction were adopted, however, one might argue that the *use* at trial of a statement previously compelled by police amounted to compulsion "in" the trial.

The U.S. self-incrimination privilege is textually similar to that in the *Charter*. The U.S. Fifth Amendment safeguards any person from being "compelled in any criminal case to be a witness against himself". It has, however, been clearly established in the U.S., despite this verbal formulation, that the privilege may be asserted outside the confines of a criminal case — in a legislative investigation, for example, or even in civil litigation — when the witness reasonably fears that a compelled statement might subsequently be used to prove the witness' guilt in a criminal case. See *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964).

On the other hand, the U.S. self-incrimination clause has been deemed applicable only to compulsions of "testimonial" materials, and not to compulsion of "physical" evidence, even when that evidence is forcibly taken from the defendant's person or body. Thus, compulsory fingerprinting is permitted, as are compelled blood and breath samples in drunk driving cases (so long as ordinary search and seizure requirements, like the requirement of probable cause, are satisfied). See *Schmerber* v. *California*, 384 U.S. 757 (1966). See, however, *Rochin* v. *California*, 342 U.S. 165, 172 (1952) (forcible police "stomach-pumping" of swallowed narcotics "shocks the conscience" and, hence, violates requirements of due process).

U.S. self-incrimination principles also prohibit prosecutors from commenting upon a defendant's failure to take the stand at trial, or from commenting upon a defendant's invocation of his or her right to silence in the face of police interrogation. See *Griffin* v. *California*, 380 U.S. 609 (1965); and *Miranda* v. *Arizona*, *supra*, note 93. Nor can such silence be made the basis for criminal or similar sanctions. Since a defendant can, however, be compelled to give blood or breath samples where probable cause exists for believing that relevant evidence would be forthcoming, the U.S. Supreme Court has recently held that evidence of a defendant's refusal to give a breath sample in a drunk driving case can be used as evidence of guilt at trial. See *South Dakota* v. *Neville*, 103 S. Ct (1983) (forthcoming). Presumably, a refusal to submit to such a test could, alternatively, be directly penalized in the U.S. See *Mackey* v. *Montrym*, 443 U.S. 1 (1979).

guage of the U.S. Sixth Amendment on this subject is somewhat broader than that of the *Charter*. The Sixth Amendment gives a defendant the right "to have the assistance of counsel for his defense". Although it is unlikely that the Amendment originally contemplated a requirement that free counsel be supplied to indigents, and although the U.S. Supreme Court held originally that, in general, it did not,[97] the Court more recently has established that an indigent defendant may not, in fact, be tried for a serious offense without counsel being provided.[98] If such a right is not found to be implicit in subs. 10(b) of the *Charter*, it might alternatively be found in the "fair. . .hearing" requirement of subs. 11(d), as a requirement of "fundamental justice" under s. 7 or perhaps as a discrimination against the poor, potentially cognizable under *Charter* s. 15.[99]

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[97] See *Betts* v. *Brady*, 316 U.S. 455 (1942).

[98] See *Gideon* v. *Wainwright*, *supra*, note 31; and *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

[99] Some other potential differences between the *Charter's* "legal rights" and the rights of U.S. criminal defendants deserve brief mention. The *Charter* makes explicit that a defendant is to be "presumed innocent until proven guilty" (subs. 11(d)). This rule is not explicit in the U.S. constitutional text, but is clearly recognized nonetheless. See *In re Winship*, 397 U.S. 358 (1970). In the U.S., the presumption of innocence translates into a requirement of proof of guilt "beyond a reasonable doubt". See *In re Winship*, at 363. Does the *Charter* make the same standard a constitutional requirement in criminal cases? U.S. courts have not resolved clearly the "reverse onus" question that has arisen in Canada, *i.e.*, when, if ever, it is consistent with the presumption of innocence to place the burden of proof regarding certain issues on the defendant in a criminal case. The leading U.S. cases are *Leland* v. *Oregon*, 343 U.S. 790 (1952) (insanity defense); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) (provocation in murder prosecution); *Patterson* v. *New York*, 432 U.S. 197 (1977) (again, provocation); and *Leary* v. *United States*, 395 U.S. 6 (1969) (rebuttable presumption arising from possession in narcotics cases).

The *Charter* affords a right of jury trial (except in the military) for offenses punishable by imprisonment for five years or more (subs. 11(f)). A similar jury right applies in the U.S. for all non-petty offenses and where the person sentenced may be imprisoned for more than six months. See *Baldwin* v. *New York*, 399 U.S. 66 (1970). In the U.S., however, the jury need be neither unanimous nor a twelve-person panel. See *Apodaca* v. *Oregon*, 406 U.S. 404 (1972); and *Williams* v. *Florida*, 399 U.S. 78 (1970). The *Charter* does not address these questions explicitly. Note that the *Apodaca* and *Williams* decisions seem inconsistent with prior historical understandings about the meaning of a "jury" trial in the U.S.

The *Charter's ex post facto* clause (subs. 11(g)) seems less restrictive than U.S. law on the same subject by permitting acts to be criminalized after the fact if they constituted offenses under international law or "general principles recognized by the community of nations" at the time of their commission. No such exceptions have, as yet, been clearly recognized in the U.S. The *Charter* also seems to incorporate a somewhat different double-jeopardy provision than that applicable under U.S. law, where prosecution appeals are not permitted after acquittal. See *United States* v. *Tateo*, 377 U.S. 463 (1964). The *Charter* protects defendants only when "*finally* acquitted" of the offense [emphasis added]. The *Charter* also does not include a right to "presentment or indictment of a Grand Jury". This U.S. Fifth Amendment right is one of the

B. *Due Process in Civil Proceedings*

The requirement of s. 7 of the *Charter*, that persons not be deprived of life, liberty or security of the person except "in accordance with the principles of fundamental justice", seems intended primarily to require fair procedures in criminal cases. Section 7, however, is not on its face limited in application to such prosecutions. Does it also require fair procedures — such as notice of charges, the right to a hearing, a right to counsel, and findings based on evidence — for civil deprivations? Do such procedural rights apply, for example, before a student is expelled from school for misconduct, before a parent is deprived of custody of a child, before public assistance is terminated for lack of eligibility, or before a government employee is discharged?

Procedural rights of this kind exist to a substantial extent in the United States, where they are based upon the due process clauses of the Fifth and Fourteenth Amendments (applicable to the federal government and the states, respectively).[100] Unlike s. 7 of the *Charter*, however, the U.S. clauses apply explicitly to deprivations of "property", as well as to deprivations of "life" and "liberty"; that property provision has been the apparent basis for many of the U.S. judicial decisions in this area.[101] Assuming that *Charter* s. 7 does, indeed, apply in the non-criminal area, the scope of its procedural protections

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few rights in the 1791 Bill of Rights that has not been incorporated into the due process clause of the Fourteenth Amendment. It is, therefore, a constitutional right only in U.S. federal criminal proceedings.

Finally, the *Charter* accords all witnesses who give incriminating evidence "in any proceedings" immunity against the use of that evidence to incriminate the witness in subsequent proceedings (s. 13). Immunity seemingly applies whether the testimony is voluntary or compelled. In the U.S., immunity is constitutionally necessary only if testimony is compelled; not if it is given voluntarily. The immunity, moreover, need only be against the use of the particular testimony or its fruits; "transactional" immunity is not required. See *Kastigar* v. *United States*, 406 U.S. 441 (1972). As discussed *supra*, note 96, in the U.S., "any proceedings" would include civil proceedings, legislative hearings, etc.; incriminating evidence may not be compelled there without providing "use" immunity. Will the *Charter's* automatic immunity similarly be applicable to incriminating testimony given in non-criminal cases (*i.e.*, do "any proceedings" include non-criminal proceedings), and will the *Charter* be limited to "use" immunity, or will it immunize a witness against prosecutions for the transaction regarding which he or she testified?

[100] See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of public assistance); *Perry* v. *Sinderman*, 408 U.S. 593 (1972) (termination of public employment); and *Goss* v. *Lopez*, 419 U.S. 565 (1975) (school suspension). See also *Santosky* v. *Kramer*, 102 S. Ct (1982) (forthcoming) (termination of parental rights); and *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (hearing required before individual's name is publicly posted as an alcoholic).

[101] "Property" is defined under the U.S. due process clauses as including "legitimate claims of entitlement" to government benefits under applicable statutes. See, *e.g.*, *Goldberg* v. *Kelly*, *ibid.*; and *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

will depend primarily upon the breadth of meaning given to the *Charter's* concepts of "liberty" and "security of the person".

Mental health commitment procedures would clearly seem to implicate "liberty" interests; if so, they would be required to be fair under s. 7.[102] The same would seem true of the revocation of parole or probation.[103] The termination of government employment, suspension from school or revocation of a license to practice a trade or profession might also be seen as liberty interests, especially if the reasons given for such actions would make it difficult or impossible for the individual involved to obtain other employment or opportunities.[104]

The individual interest in not being deprived of "security of the person" without acceptable procedures seems capable of including, at a minimum, interests such as being free from searches of the person in connection with non-criminal proceedings (perhaps already covered specifically by *Charter* s. 8), being free from government surveillance and wiretapping (also potentially within the ambit of s. 8)[105] and in being free from interferences such as compulsory sterilization (an interest that might also be viewed as involving individual "liberty").[106] "Security of the person" may, however, be conceived more broadly as including those interests necessary for personal "security" because of their importance in maintaining an individual's quality of life. If so, terminations or denials of public assistance may well require some fair process, as might terminations of existing government employment, license revocations, school expulsions or suspensions (whatever the reasons for the action), deprivations of parental rights, and even deprivations of essential items of real and personal property such as an individual's home, furniture or clothing. The procedural requirements of "fundamental justice" may, of course, vary according to the particular context. More procedural protection might be required as the individual interest becomes more important, and as the reasons for governmental action come to resemble those that commonly underlie the imposition of criminal sanctions.[107]

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[102] In the U.S., see *Vitek* v. *Jones*, 445 U.S. 480 (1980).

[103] In the U.S., see *Morrisey* v. *Brewer*, 408 U.S. 471 (1972).

[104] See *Bishop* v. *Wood*, 426 U.S. 341 (1976).

[105] In the U.S., wiretapping and other forms of non-trespassory electronic eavesdropping were once held not to be "searches" within the meaning of the Fourth Amendment. See *Olmstead* v. *United States*, 277 U.S. 438 (1928). That decision was overruled in *Katz* v. *United States*, 389 U.S. 347 (1967), and non-consensual wiretapping is now fully subject to Fourth Amendment limitations. "Fundamental justice" may not require an adversary hearing prior to the installation of a wiretap, but might require a judicial warrant, a showing of probable cause, a time limit on the eavesdropping, and ultimate notification to the individual that a tap has been used.

[106] See *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

[107] This "sliding-scale" approach is the one generally used in the U.S. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

C. *"Substantive" Due Process and the Right to "Privacy"*

Most forms of governmental regulation involve limitations on the freedom of individuals and corporations to do as they like with themselves and their property. This is true of highway speed limits, drug laws, abortion regulations, minimum-wage requirements, industrial safety rules, *ad infinitum*. These laws may be completely fair in the procedural sense; prescribed legislative procedures may have been followed scrupulously and judicial enforcement mechanisms may incorporate the full panoply of procedural rights and protections required by ss 7 to 14 of the *Charter*. Nevertheless, such laws are sometimes thought to be *substantively* unreasonable — that is to restrict individual liberty without a sufficiently strong public justification for so doing. Where the specific individual liberty interest involved is given express constitutional recognition — as is true, for example, with respect to the interests in free expression, religion and mobility under the *Charter* — that recognition undoubtedly provides a basis for examining the substantive reasonableness of the regulation in light of the asserted governmental justifications.[108] Does the *Charter*, however, also provide a basis for scrutinizing the reasonableness of impingements upon aspects of individual liberty generally — including aspects that are not the subject of specific *Charter* protections?

In the United States, a concept of "substantive" due process has evolved that, over the years, has been employed by courts to require varying degrees of judicial scrutiny of the reasonableness of governmental limitations upon aspects of individual liberty and property not protected specifically by express constitutional protections. At one time, application of this doctrine was especially active in relation to government regulations of business and commerce. It was used during the late nineteenth and early twentieth centuries, for example, to strike down (as unreasonable interferences with liberty, property or "freedom of contract") [109] laws prescribing maximum hours of employment

[108] Thus, *Charter* s. 1 indicates that *Charter* rights generally may only be infringed by "reasonable" limits that can be "demonstrably justified". The role and meaning of s. 1, a subject at the heart of the consideration of the strength of *Charter* rights, will be treated in a subsequent article.

[109] See *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589 (1897): "The liberty mentioned in... [the Fourteenth Amendment] means not only the right of a citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

or minimum wages, laws regulating collective bargaining rights, laws prescribing commercial product standards, and laws conferring limited monopolies.[110] The doctrine was also used from time to time to protect more personal liberties; substantive due process principles were invoked, for example, to strike down state laws requiring children to attend public, rather than private or parochial schools,[111] and prohibiting the teaching of foreign languages in public or private elementary schools.[112]

In the 1930s, the U.S. Supreme Court changed its attitude regarding the application of substantive due process principles to the broad range of economic and social regulations enacted by state and federal legislatures during the period of the Great Depression. It replaced its earlier approach with a test under which legislation would be sustained whenever there "is an evil at hand for correction, and... *it might be thought that the particular legislative measure was a rational way to correct it*. The day is gone when this Court uses the Due Process Clause...to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[113] The Court announced that it would thereafter refuse to apply the doctrine of substantive due process "to sit as a 'superlegislature to weigh the wisdom of legislation'".[114] Many of the earlier decisions were overruled.[115] The doctrine of substantive due process was not entirely obliterated, however. Although there is probably no Supreme Court case since 1940 that strikes down a business regulation as "unreasonable" under the doctrine, the reasonableness principle remains, at least in theory. From time to time, moreover, the Court still engages in what appears to be more than a toothless version of rationality scrutiny of laws regulating activities that do not fall within any specific constitutional protection.[116]

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[110] See, *e.g.*, *Lochner* v. *New York*, 198 U.S. 45 (1905); *Coppage* v. *Kansas*, 236 U.S. 1 (1915); *Adkins* v. *Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923); *Weaver* v. *Palmer Bros Co.*, 270 U.S. 402 (1926); and *New State Ice Co.* v. *Liebmann*, 285 U.S. 262 (1932).

[111] *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

[112] *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

[113] *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955) [emphasis added].

[114] *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963), quoting from *Day-Bright Lighting, Inc.* v. *Missouri*, *supra*, note 59, 423.

[115] See, *e.g.*, *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937); and *Olsen* v. *Nebraska*, 313 U.S. 236 (1941).

[116] See *Paris Adult Theater I* v. *Slayton*, 413 U.S. 49 (1973), where, after holding that "obscene" speech was not expression protected by the First Amendment, the Court nevertheless satisfied itself, at 57, that "there are legitimate state interests at stake in stemming the tide of commercialized obscenity" and, at 61, that "the legislature of Georgia could quite reasonably determine that... [a connection between antisocial behavior and obscene material] does or might exist".

The doctrine of substantive due process has had a significant and important revival in recent years in the United States in one particular area — regulations and prohibitions characterized by the Supreme Court as invading "fundamental" interests of personal "privacy". This development began with *Griswold* v. *Connecticut*,[117] a decision that struck down a state law prohibiting contraceptive use by married persons. Although the *Griswold* opinion was exquisitely unclear regarding the textual source of the constitutional right involved, subsequent cases have recognized that source as the "liberty" provision in the due process clauses, and have employed the revived right to prohibit regulations upon contraceptive use by unmarried persons [118] including minors,[119] upon the rights to marry,[120] to procreate [121] and to possess sexual books and pictures in the home,[122] and upon the right of family members to reside in the same household.[123] The most controversial application of this right, of course, has been to strike down laws prohibiting (or significantly interfering with) abortions prior to fetal viability.[124] On the other hand, the Court has refused to extend the privacy principle to protect consensual homosexual behavior between adults,[125] to establish a right to be free from hair length regulations applicable to police officers,[126] to protect the desire of parents to send children to racially exclusive private schools,[127] or to permit groups of students to live together in residential areas (despite zoning regulations prohibiting such "non-family" uses).[128]

The text of the Canadian *Charter* appears to be much more hospitable than the U.S. constitutional text to the idea of incorporating "substantive" due

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[117] *Supra*, note 25.

[118] *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

[119] *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977).

[120] *Loving* v. *Virginia*, 388 U.S. 1 (1967); and *Zablocki* v. *Redhail*, 434 U.S. 374 (1978).

[121] *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

[122] *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

[123] *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977).

[124] *Roe* v. *Wade*, *supra*, note 25. See also *Doe* v. *Bolton*, 410 U.S. 179 (1973); *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976); and *Colautti* v. *Franklin*, 439 U.S. 379 (1979). The Supreme Court reaffirmed the *Roe* abortion decision in 1983. *City of Akron* v. *Akron Center for Reproduction Health, Inc.*, 103 S. Ct (1983) (forthcoming).

The U.S. Supreme Court has also used the privacy doctrine to suggest an area of "informational" privacy — that is, that there are constitutional limits on the authority of government to gather and disseminate information about an individual's protected "private" behavior, such as the use of drugs to treat medical conditions, the obtaining of abortions, etc. See *Whalen* v. *Roe*, *supra*, note 25. But see *California Bankers Assn* v. *Shultz*, 416 U.S. 21 (1974) (personal bank account records not protected).

[125] *Doe* v. *Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (U.S. Dist. Ct, E. Dist. Virginia).

[126] *Kelley* v. *Johnson*, 425 U.S. 238 (1976).

[127] *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

[128] *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).

process principles. The U.S. text thus forbids deprivations without due "*process*" of law, whereas s. 7 of the *Charter* forbids deprivations not in accordance with "principles of fundamental justice" — a phrase that might more plausibly be read to include ideas of substantive, as well as procedural, justice. Section 7, moreover, confers a seemingly affirmative right to "liberty" upon all persons — again a formulation that might be used as the basis for a rule requiring substantive rationality before that liberty can be restricted.[129]

A major difficulty, however (a difficulty equally present in U.S. law), is that the term "liberty", in the absence of further constitutional definition, seems equally applicable to the "liberty" to pay one's employees the lowest wage the market will allow (and to work them for the longest possible hours), or to the "liberty" to engage in a trade or business despite restrictive licensing and public convenience regulations, as to the liberty to use contraceptives or to undergo an abortion. It is unlikely that Canadian courts will want to apply a substantial level of constitutional scrutiny for reasonableness across the entire range of economic, business and social regulations that affect all areas of "liberty". This hypothesis seems especially true because s. 1 of the *Charter* appears to require a "demonstrable" justification for limits on all protected rights. Such a level of required justification may seem unreasonably formidable when applied to all modern economic regulation, much of which is of an experimental and somewhat speculative nature. If these predictions about general approaches under the *Charter* prove accurate, the crucial question will be whether Canadian courts, like the U.S. Supreme Court in recent years, will seek to develop a separate concept of "fundamental" liberty — liberty deemed especially vital to individual well-being[130] — that, like the specifically protected *Charter* rights of expression, religion and mobility, can be subjected to meaningful judicial protection, while other aspects of liberty remain largely or completely unconstitutionalized.[131]

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[129] See *supra*, text accompanying notes 108 to 112.

[130] In holding that the abortion right was part of "fundamental" liberty in *Roe* v. *Wade*, *supra*, note 25, the U.S. Supreme Court stressed the following factors as relevant considerations in making this determination: that "medically diagnosable" harm might occur to a woman denied an abortion; that an unwanted child could cause "a distressful life and future" for the woman; that "psychological harm may be imminent"; that a family might be "unable, psychologically or otherwise" to care for a child; and that, in some cases, denying the abortion right might create the "difficulties and continuing stigma" of unwed motherhood. The *Griswold* decision, *supra*, note 25, emphasized that marriage involved privacy interests "older than the Bill of Rights" and "intimate to the degree of being sacred", and that marriage "promotes a way of life".

[131] Some judges and commentators in the U.S. who have deemed the due process clause to be an incorrect or inappropriate basis for protecting certain fundamental liberties, such as personal privacy, have argued that protection can be justified, instead, through the U.S. Ninth Amendment. See the concurring opinion of Justices Goldberg, Brennan, and Chief Justice Warren in *Griswold* v. *Connecticut*, *ibid.*, 486. The U.S. Ninth Amendment provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others

D. *Equality Rights*

Both the *Charter* and the U.S. *Constitution* contain textual provisions dealing explicitly with equality rights. The U.S. provision (part of the Fourteenth Amendment) is quite brief: "Nor shall any State [132] ...deny to any person within its jurisdiction the equal protection of the laws". *Charter* s. 15 is more detailed:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[133]

United States equal protection doctrine is awesomely complex. The seemingly simple requirement that government not deny "equal protection" of laws has evolved into a jurisprudence with three distinct branches, each with its own separate focus, intricate rules and analytical approaches. The

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retained by the people". The Canadian *Charter* contains a similar provision in s. 26: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

The prevailing U.S. view about the meaning of the Ninth Amendment is that it is not an independent source of constitutional rights, but rather that it was added to the original Bill of Rights to make explicit that that Bill did not abolish all the other existing rights of people in the U.S. — rights flowing, for example, from the common law or from state constitutions. Section 26 of the *Charter* seems at least equally susceptible to the same construction, *i.e.*, that it was included in the *Charter* in order to make clear that existing federal and provincial civil rights legislation in Canada was not abolished by the *Charter*. If the Ninth Amendment or s. 26 were recognized as independent sources of rights, there would, of course, be no explicit textual guidance regarding the content of those rights, because neither constitutional provision seeks, in the least, to identify the nature of the rights that are retained. The concept of personal "liberty" under the U.S. due process provisions and *Charter* s. 7 — assuming that a substantive content is or can be attributed to those clauses — provides at least some guide to the nature of the rights involved in cases like the U.S. privacy decisions. The scope for judicial "interpretation" is, in all events, enormous. Indeed, substantive due process (when that was a practically significant doctrine in the U.S.) and the newer due process-privacy doctrine have, more than any other U.S. constitutional principles, drawn criticism on the ground that they constitute illegitimate judicial "legislation" regarding policy issues that ought properly to be left to more democratic decision-making.

[132] By a process of "reverse incorporation", this provision is also applicable to the federal government. See *supra*, note 19.

[133] The *Charter* also contains a provision explicitly authorizing affirmative action programs (subs. 15(2)). No similar provision appears in the U.S. text, but affirmative action programs have been the subject of constitutional decisions in recent years. See *infra*, text accompanying notes 167 and 168.

branch of the clause that flows most directly from the Civil War origins of the Fourteenth Amendment is what U.S. courts now refer to as the "suspect classification" branch of equal protection law. Originally, this branch was applied to hostile discriminations toward blacks, for whose protection the amendment was primarily designed.[134] It has come to apply to all racial classifications,[135] to classifications based on national origin[136] and to most classifications based on alienage.[137] It applies, in a somewhat milder form, to gender-based classifications[138] and probably also to classifications relating to illegitimacy.[139] Although the Supreme Court has never directly faced the questions, express discriminations on the basis of wealth or poverty would probably also be treated as at least somewhat suspect,[140] as might some discriminations against the physically or mentally handicapped.[141] Discriminations on grounds of religion are probably also covered, but the result would more likely be based upon the religion clauses of the First Amendment.[142] On the other hand, the Court has ruled that age classifications or discriminations, whether against the young or the old, are not "suspect".[143]

When a classification is "suspect" in U.S. law, the courts apply a degree of "strict" judicial scrutiny requiring that the classification be shown to be necessary to serve legitimate and sufficiently substantial governmental interests.[144] The vast majority of "suspect" classifications do not pass this

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[134] *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).

[135] See *Loving* v. *Virginia*, *supra*, note 120; and *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[136] *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Yick Wo* v. *Hopkins*, *supra*, note 64; and *Hernandez* v. *Texas*, 347 U.S. 475 (1954).

[137] See, *e.g.*, *In re Griffiths*, 413 U.S. 717 (1973). But see *Ambach* v. *Norwick*, 441 U.S. 68 (1979) (alienage classifications related to governmental functions not "suspect").

[138] See *Craig* v. *Boren*, 429 U.S. 190 (1976).

[139] See *Lalli* v. *Lalli*, 439 U.S. 259 (1978); and *Levy* v. *Louisiana*, 391 U.S. 68 (1968).

[140] See, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668 (1966): "Lines drawn on the basis of wealth or property, like those of race..., are traditionally disfavored". See also *Griffin* v. *Illinois*, 351 U.S. 12, 17 (1956): "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." A direct discrimination on the basis of poverty should be distinguished, for these purposes, from a discriminatory impact upon the poor caused by inability to pay for some government service. Discriminatory effects, as noted *infra*, text accompanying notes 151 to 153, are not within the U.S. "suspect classification" doctrine. Thus, while poor people undoubtedly could not be deliberately segregated by law in public schools from more affluent people, a neighborhood school policy that achieves the same result would probably be upheld.

[141] See *Schweiker* v. *Wilson*, 450 U.S. 221 (1981).

[142] See *Everson* v. *Board of Education*, *supra*, note 19.

[143] See *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). See also *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

[144] Where the classification discriminates against a racial or similar minority, only a "pressing public necessity" will suffice. See *Korematsu* v. *United States*, *supra*, note 136. "Equal"

test.[145] It is fair to say, therefore, that such classifications are, with the exception of those contained in some affirmative action programs, at least presumptively invalid; they may theoretically be saved by a showing of important governmental need. Classifications adopted for the *purpose* of harming minorities, however, as well as classifications that reflect the view that the minority group is inferior or that are based upon stereotypical attitudes toward traditional victims of societal discrimination, are probably unconstitutional in all situations.[146] Race- or gender-conscious affirmative action programs, on the other hand, although receiving significant judicial scrutiny, will probably be upheld if the program is tailored carefully to suit one or more of a number of legitimate goals related to reducing the impact of past or present discrimination.[147]

The suspect classification branch of the U.S. equal protection clause was, for many years, restricted severely in application by the doctrine that laws requiring "separate" but equal racial segregation did not constitute unequal treatment cognizable under the clause.[148] *De jure* racial segregation thus remained a feature of life in some areas of the U.S. — including the nation's capital — until the Supreme Court's 1954 decision in *Brown* v. *Board of Education*.[149] *Brown* reversed the separate-but-equal doctrine as it applied to public education, and subsequent cases established that legally required racial segregation is presumptively unconstitutional in all areas of U.S. life.[150] Recently, however, the Supreme Court has imposed a different

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racial classifications may only need to be necessary to serve "legitimate" public needs. See *Loving* v. *Virginia*, *supra*, note 120. The milder test for gender and some other classifications requires a "substantial" relationship to an "important" governmental interest. See *Craig* v. *Boren*, *supra*, note 138.

[145] But see, *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (male-only draft registration is constitutional); and *Korematsu* v. *United States*, *ibid.* (the exclusion of citizens of Japanese origin from West Coast areas during the Second World War held constitutional).

[146] See, *e.g.*, *Mississippi University for Women* v. *Hogan*, 102 S. Ct 3331 (1982).

[147] See *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

[148] See *Plessy* v. *Ferguson*, 163 U.S. 537, 551 (1896): "[T]he underlying fallacy of the plaintiff's argument... [is] the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act [requiring racial segregation on railways], but solely because the colored race chooses to put that construction on it."

[149] *Supra*, note 135. *Brown* held that "[s]eparate educational facilities are inherently unequal".

[150] See, *e.g.*, *Johnson* v. *Virginia*, 373 U.S. 61 (1963). Gender segregation has not been treated as strictly. See *Vorchheimer* v. *School District of Philadelphia*, 430 U.S. 703 (1977) (affirming, by an equally divided Court and without opinion, a decision upholding Philadelphia's maintenance of two sex-segregated academically selective high schools). But, more recently, see *Mississippi University for Women* v. *Hogan*, *supra*, note 146 (striking down a women's-only nursing school in a State that also maintained sexually integrated nursing schools).

limitation upon the suspect classification doctrine. The Court has held that the doctrine deals only with "purposeful" classifications, and not with unintentional discriminatory effects upon minority groups that occur as the result of laws or practices that are racially neutral on their face.[151] Thus, so-called *de facto* racial segregation — segregation caused by racially "neutral" school assignment practices (such as neighborhood schools) or by assignment by academic "aptitude", remains constitutional in the U.S., as does the use of qualifying exams for employment or admission to state schools and universities even when those exams reject a grossly disproportionate number of black applicants.[152] Courts can strike down such practices under the U.S. *Constitution* only if they find that they were adopted for racially discriminatory purposes.[153]

The second branch of the U.S. equal protection clause is one that requires all governmentally imposed classifications, whether "suspect" or not, to be "reasonable".[154] This doctrine has had a history similar to the rise and fall of the substantive rationality doctrine that has been developed under the due process clauses.[155] Rationality arguments under the equal protection clause, however, are today taken somewhat more seriously than due process rationality contentions, and a few modern cases strike down classifications for lack of rationality, without any overt finding of "suspectness" or announced violation of any other constitutional doctrine.[156]

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[151] *Washington* v. *Davis*, *supra*, note 73.

[152] The U.S. Supreme Court has even held, in *Geduldig* v. *Aiello*, 417 U.S. 484, 496, fn. 20 (1974), that the exclusion of pregnancy from a state medical benefits plan is not a sex-based classification because, "[w]hile it is true that only women can become pregnant... pregnancy is an objectively identifiable physical condition". The Court concluded, at 496-7: "There is no risk from which men are protected and women are not". The Court has also held that a strict veteran's preference in state employment decisions does not constitute a gender classification, despite the fact that less than two *per cent* of veterans were women. *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, note 74.

[153] See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). However, modern federal civil rights statutes in the U.S., such as statutes dealing with racial discrimination in private employment, are commonly interpreted as applying to discriminatory effects as well as to discriminatory purposes. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[154] Thus, classifications "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis". *Gulf, Colorado & Santa Fé Ry Co.* v. *Ellis*, 165 U.S. 150 (1897).

[155] See *supra*, text accompanying notes 109 to 128.

[156] See, *e.g.*, *Morey* v. *Doud*, 354 U.S. 457 (1957) (exemption of American Express Company from regulatory scheme). This case was, however, overruled in *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976) ("grandfathering" exemption to business regulation upheld). See also *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971); *United States Dep't of*

The third branch of United States equal protection doctrine is the most recent in origin. It might be termed a doctrine of "substantive" equal protection, and it does, indeed, bear a relationship to the recently evolved U.S. doctrine protecting "fundamental" liberty under the concept of substantive due process.[157] Inequalities of treatment may be especially harmful for two basic reasons. One reason — embodied in the "suspect" classification doctrine — has to do with the nature of the group suffering from discrimination. The law is concerned here with discriminations against groups that have historically been subjected to hostile, stereotyped or irrational prejudices or attitudes. But inequalities of treatment may also be particularly harmful, whether or not any such group is victimized, if the subject matter of the discrimination — the benefit withheld or penalty inflicted on an unequal basis — is an especially important one. Arbitrary administration of capital punishment to convicted murderers, for example, appears a great deal more harmful than equally arbitrary imposition of fines upon parking offenders.[158]

This third limb of U.S. equal protection seeks to recognize these differences by providing that discriminations in the allocation of "fundamental" rights or interests, or discriminations or classifications that burden or penalize the exercise of interests strongly protected under the *Constitution*, are subject to strict judicial scrutiny. Thus, differential treatment in the allocation of free expression rights bears a heavy burden of justification under the U.S. equal protection clause.[159] The same is true of classifications in benefit programs

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Agriculture v. *Murry*, 413 U.S. 508 (1973); and *Zobel* v. *Williams*, 102 S. Ct 2309 (1982). This group of cases can probably all be explained as involving either classifications later recognized as "suspect", or penalties on established constitutional rights (*Reed* v. *Reed*, which is cited immediately above, for example, involved gender discrimination). Recent business regulation cases, where rationality arguments were rejected but nevertheless seriously discussed, include *U.S. Railroad Retirement Board* v. *Fritz*, 449 U.S. 266 (1980); and *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). See also *Schweiker* v. *Wilson*, *supra*, note 141 (welfare benefits classification adversely affecting mental patients).

[157] See *supra*, text accompanying notes 117 to 128.

[158] In *Furman* v. *Georgia*, 408 U.S. 238 (1972), the U.S. Supreme Court held that the administration of capital punishment was unconstitutional unless guided by standards designed to eliminate arbitrariness.

[159] See *Police Dep't of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972). Many of the cases discussed in this paragraph could alternatively have been decided under specific substantive constitutional guarantees, rather than equal protection principles, where the inequality involved could have been seen as a burden on a substantive right, such as that of free expression. The Court in *Mosley* observed, at 96, for example, that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or mere controversial views". See also Justice Harlan's dissenting opinion in *Shapiro* v. *Thompson*, *supra*, note 19, 655.

that penalize the right to travel,[160] or the freedom of religion,[161] or of government employment regulations that burden the right to bear children.[162] Differential allocations of voting rights also receive close equal protection scrutiny in the United States.[163] The same may be true of laws that provide free public elementary and secondary school education to some, but not all, children.[164] At one time — in the 1960s during the latter stages of the Warren Court — it appeared that the U.S. Supreme Court might add significantly to this list of "fundamental" interests, the unequal distribution of which would cause special equal protection concern.[165] More recently, however, some Court decisions have expressly rejected such an approach.[166]

The equality rights provision of the Canadian *Charter* seems to incorporate a doctrine similar in outline to the U.S. notion of "suspect" classifications by affording rights against discriminations based on "race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability". This list of "suspect" discriminations includes one that is not suspect under U.S. law (age) and two others (mental or physical disability) that may or may not be suspect in the U.S. The *Charter*, on the other hand, omits alienage and poverty classifications from its list. That list, however, is apparently not

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[160] *Shapiro* v. *Thompson*, *ibid.*

[161] *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

[162] See *Cleveland Board of Education* v. *LaFleur*, *supra*, note 121.

[163] See, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); and *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969). *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (legislative malapportionment). Unlike the Canadian *Charter* (s. 3), the U.S. *Constitution* contains no affirmative right to vote (see *supra*, note 19), thus necessitating the use of equal protection principles in the voting cases. The same need may arise in Canada, should denial of voting rights be challenged in elections in which the *Charter* creates no affirmative right to vote. The *Kramer* case cited immediately above, for example, concerned an election for a local school board.

[164] See *Plyler* v. *Doe*, 457 U.S. (1982) (forthcoming) (exclusion of illegal alien children from free public schools violates equal protection). See also *San Antonio School District* v. *Rodriguez*, *supra*, note 19 (disparities in educational funding as between different state school districts sustained, but with the observation that plaintiffs' argument might have merit if a state's financing system resulted in an absolute denial of educational opportunities to any children).

[165] A suggestion that classifications denying public assistance might be so treated was, for example, thought by many to be inherent in the Court's observation, in *Shapiro* v. *Thompson*, *supra*, note 19, 627, that, on the basis of the classification challenged in that case, "the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist — food, shelter, and other necessities of life".

[166] *Maher* v. *Roe*, *supra*, note 28 (state exclusion of abortions from medical assistance program for indigents held constitutional). See also, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (limitation on welfare benefits for large families upheld: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.").

exclusive, as indicated by the words "in particular" at the beginning of the enumeration. It seems likely that Canadian courts should and will feel free to add other kinds of classifications to this "suspect" category if their relevant characteristics are sufficiently similar to those mentioned. For example, classifications that discriminate against the very poor would seem a possible candidate for inclusion.

The *Charter* is also similar to U.S. doctrine in authorizing, in subs. 15(2), affirmative action programs that ameliorate the "conditions of disadvantaged individuals or groups". However, this *Charter* provision seems somewhat broader in its permissive scope than is U.S. affirmative action law, because it authorizes any "law, program or activity that has *as its object*" such amelioration. Under the leading U.S. case, *University of California Regents* v. *Bakke*,[167] a program is not only required to be *intended* to remedy the conditions of the disadvantaged, it must also be tailored carefully and relatively narrowly to achieve that objective.[168]

A critical question regarding the application of the *Charter* to "suspect" classifications concerns the meaning of the word "discrimination". It seems reasonably clear that "discrimination" under the *Charter* includes (as in the U.S.) discriminations in government benefit programs, as well as differential distributions of detriments, punishments or penalties. Do "discriminations" also include classifications that are *equal* on their face, such as those employed in systems of separate-but-equal racial or gender segregation? As in the United States, the answer in Canada should turn perhaps on whether such segregation, in the light of history and current societal attitudes, seems to reflect or encourage attitudes of presumed inferiority *vis-à-vis* one of the segregated groups. Thus, segregation in access to public facilities affecting minority racial or ethnic groups would likely constitute discrimination, while gender segregation in public washrooms could be viewed as non-discriminatory in either purpose or impact. Most importantly, do *Charter*

[167] *Supra*, note 147.

[168] This test comes from the plurality opinion on this point, for Justices Brennan, White, Marshall, and Blackmun. Justice Powell, the fifth Justice addressing the constitutional issue in *Bakke*, *ibid.*, 269, would have required that the program be shown to be "necessary" to the accomplishment of a "compelling" governmental interest. Although Justice Powell was willing to include the interest in educational diversity as a "compelling" interest for a medical school admissions program, he would not have considered as compelling the amelioration of disadvantage caused by past general societal discrimination (as would the Canadian *Charter*). The four remaining Justices in *Bakke* did not address the constitutional issue. A subsequent plurality opinion, in a somewhat different context, stated (again more restrictively than does subs. 15(2) of the *Charter*) "the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal". *Fullilove* v. *Klutznick*, *supra*, note 147, 480.

"discriminations" include discriminatory effects caused by laws that are neutral on their face, or are they limited, as they recently have been in the U.S.,[169] to "purposeful" differences in treatment? The difficulties in proving purpose and motivation may provide a strong incentive to Canadian courts not to make those factors determinative of constitutional rights.[170] It may also be relevant on this issue to refer to *Charter* s. 27, requiring that the *Charter* "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". "Neutral" governmental qualifying tests or other devices that operate, however unintentionally, to exclude certain ethnic, racial or similar groups from full effective participation in Canadian life would appear to create a threat to the underlying purpose of this section.

In addition to rights regarding the "suspect" discriminations enumerated in s. 15, does the *Charter* also incorporate a general requirement (as in the U.S.) that all governmental classifications be "rational", and does it, in addition, permit or require especially close scrutiny of classifications that touch on "fundamental" rights and interests? The same words that give rise to these requirements in the U.S. (that government not deny "equal protection of the laws") are incorporated in the *Charter*. A general rationality requirement, at least where individuals, rather than business entities, are treated differently, may perhaps also be extrapolated from the provision that "every individual" (and not just those who identify themselves by reference to their membership in certain gender, ethnic, religious, and other groups) is entitled to equal treatment.

Much of the fundamental rights-equal protection jurisprudence that has evolved in the United States could be derived in Canada from *Charter* provisions other than s. 15. Thus, classifications that burden or penalize mobility or free expression rights can be examined under those provisions directly.[171] Parliamentary voting rights are also protected affirmatively by the *Charter*, so that the U.S. equal protection approach would be unnecessary here too. Similarly, denial of equal access to public primary and secondary school education can perhaps be dealt with under the strong implication in *Charter* s. 23 that all Canadians have the "*right to have their children receive*

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[169] See *supra*, text accompanying notes 73 to 75 and 151 to 153.

[170] See *Palmer* v. *Thompson*, *supra*, note 66, 225, noting that "[i]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators". That case also identified an "element of futility" in invalidating a law "because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."

[171] See *infra*, Parts II(E) and II(F).

primary and secondary school instruction . . .".[172] What, however, of rights to vote on an equal basis in non-parliamentary elections — such as for local governmental officials — or exclusions from government benefit programs such as public assistance and medical services for the poor, or limitations on access to higher education or vocational training programs? To the extent that such exclusions are based, for example, on race, ethnic origin or gender, or operate disproportionately along such lines, they can be dealt with as "suspect" classifications. Otherwise, the importance of the benefit or privilege involved can, perhaps, be factored into an examination of the "rationality" of the particular exclusion; under such an approach, a determination of irrationality would involve the balancing of the governmental purpose for and necessity of the exclusion, on the one hand, and the harm done to excluded individuals, on the other. Precisely such a "sliding scale" approach has been suggested by Mr Justice Marshall, of the present U.S. Supreme Court, as the proper and most sensitive attitude toward all government classifications, whether or not they qualify as formally "suspect" or have an impact upon recognized constitutional rights.[173]

E. *Mobility Rights*

Mobility rights are placed prominently in the text of the *Charter*. Although there is no closely equivalent text in the U.S. *Constitution*, similar rights have been recognized, as mentioned above,[174] under several different U.S. constitutional provisions. Thus, U.S. citizens have a protected right to leave the U.S. in order to travel abroad,[175] as well as to enter and remain in the U.S.[176] These rights are recognized expressly in subs. 6(1) of the *Charter*.

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[172] Although the main purpose of s. 23 is to guarantee such education in either French or English, depending upon the prior education and the first language learned by the child, the right to receive education in one or the other language would seem to imply an underlying general right to receive some education.

[173] Thus, Mr Justice Marshall has advocated that in all cases, a court should consider "the character of the classification in question, the relative importance to individuals in the class discriminated against of the government benefits that they do not receive, and the state interests asserted in support of the classification". *Massachusetts Board of Retirement* v. *Murgia*, *supra*, note 143, 318. See also his dissents in *Dandridge* v. *Williams*, *supra*, note 166, 508; and *San Antonio School District* v. *Rodriguez*, *supra*, note 19, 70.

[174] See *supra*, note 19.

[175] See *Kent* v. *Dulles*, 357 U.S. 116 (1958). However, the Supreme Court has recently held that the right to a passport may constitutionally be made subordinate to reasonable limitations serving "national security and foreign policy" interests. *Haig* v. *Agee*, 453 U.S. 280 (1981). Government welfare benefits may also be withheld for periods during which the recipient is out of the U.S. *Califano* v. *Aznavorian*, 439 U.S. 170 (1978).

[176] It may, however, be possible to "denaturalize" a naturalized citizen (*e.g.*, for fraud in the naturalization procedure) and then to subject the citizen to deportation. Under the cruel and

Where travel *within* the U.S. is concerned, the Supreme Court has recognized a right to be free from state prohibitions or restrictions on an individual's movement from state to state,[177] and probably from federal prohibitions as well.[178] There may also be a constitutional right to travel from place to place within a state.[179] The *Charter* appears to be somewhat more limited in this respect. Subsection 6(2) confers the right "to move to and take up residence in any province", a right that may not include tourism or temporary visits. (Such rights may, however, be part of the "liberty" protected under s. 7.) Moreover, subs. 6(2) applies only to citizens and permanent residents, whereas the U.S. rights appear applicable, at least so far as state or local restrictions are concerned,[180] to aliens as well.

The most difficult mobility rights problems in the United States have involved indirect negative effects upon mobility or migration caused by residence and similar requirements for governmental benefits or employment. In a long line of cases, U.S. courts have held that various minimum durational residency requirements (that is, requirements that one not only be a resident of the state to receive benefits, but that one have been a resident for a specified minimum period of time) may constitute impermissible "penalties" upon the right to travel. Durational residency requirements have, for example, been struck down as impermissible qualifications for public assistance,[181] non-emergency medical care for indigents[182] and voting.[183] Such durational

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unusual punishment provision of the Eighth Amendment, however, expatriation may not be used as a punishment for crime in the U.S. See *Trop* v. *Dulles*, 356 U.S. 86 (1958).

[177] *Edwards* v. *California*, 314 U.S. 160 (1941) (state prohibition on bringing indigents into California invalid); and *Crandall* v. *Nevada*, 6 Wall. 35 (1867) (Nevada tax on person leaving the State by common carrier invalid). See also *Shapiro* v. *Thompson*, *supra*, note 19, 629: "[T]he purpose of inhibiting migration by needy persons into the State is constitutionally impermissible."

[178] See, *e.g.*, *United States* v. *Guest*, 383 U.S. 745, 758 (1966) ("freedom to travel throughout the United States has long been recognized as a basic right under the Constitution").

[179] See *Memorial Hospital* v. *Maricopa County*, *supra*, note 70; and *King* v. *New Rochelle Municipal Housing Authority*, 442 F. 2d 646, 648 (2d Cir. 1971) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.").

[180] The U.S. federal government may have some power to restrict the mobility of aliens in the U.S. as a condition of their entry. In some circumstances, however, such restrictions might be challengeable as "suspect" alienage classifications under the Equal Protection Clause. The *Charter* does not include alienage in its list of "suspect" classifications, but subs. 6(2) rights apply expressly to aliens who are permanent residents.

[181] *Shapiro* v. *Thompson*, *supra*, note 19.

[182] *Memorial Hospital* v. *Maricopa County*, *supra*, note 70.

[183] *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). On the other hand, a brief durational residency requirement (fifty days) for voting was upheld in *Marston* v. *Lewis*, 410 U.S. 679 (1973), and durational residency requirements for obtaining lower residents' tuition at a state university and for instituting divorce actions against non-residents have been upheld. See *Starns* v. *Malker-*

requirements might be permissible under the *Charter*, at least as applied to publicly provided social services, if deemed to be "reasonable" residency requirements under para. 6(3)(b). On the other hand, it may be that that provision is designed only to authorize reasonable means of determining *bona fide* residency, and not to authorize any minimum durational residency requirements, once residency is established.

What of other requirements that discriminate against non-residents or persons who have recently become residents of a province? The U.S. Supreme Court has upheld local requirements that municipal employees, such as police, teachers or firefighters, be residents of the city where they are employed.[184] On the other hand, it has struck down state laws requiring private businesses to give employment preference to state residents,[185] imposing higher commercial fishing license fees upon non-residents than upon residents [186] and has also struck down an Alaska system under which state oil revenues were distributed to state citizens in amounts that increased depending upon the length of each citizen's residence in the state.[187] The *Charter*, which protects the right to "take up residence" and to "pursue the gaining of a livelihood", would appear to lead to similar results where governmental discriminations are imposed upon employment opportunities on the basis of provincial residence or provincial origin,[188] but other non-employment related discriminations (such as the Alaska oil revenue system) might be covered only if they could be said to interfere with the right to "take up residence" in any province.[189] The general theory of U.S. law in this area appears to be to disfavor discrimination against out-of-staters in any "basic and essential

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son, 401 U.S. 985 (1971), *aff'g* 326 F. Supp. 234 (U.S. Dist. Ct, Dist. Minn.); and *Sosna* v. *Iowa*, 419 U.S. 393 (1975). See also *Jones* v. *Helms*, 452 U.S. 412 (1981) (upholding a statute imposing penalties upon parents who abandon their children, and additional penalties on such parents who thereafter leave the state).

[184] *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645 (1976).

[185] See, *e.g.*, *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978). But see *White* v. *Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct (1983) (forthcoming) (employment preference for city residents on city construction projects upheld).

[186] *Toomer* v. *Witsell*, 334 U.S. 385 (1948). The Court has, however, upheld the imposition of higher recreational hunting fees on non-residents than on residents. *Baldwin* v. *Fish and Game Commission*, 436 U.S. 371 (1978).

[187] *Zobel* v. *Williams*, *supra*, note 156.

[188] Paragraphs 6(2)(b) and 6(3)(a), in combination, give the right to "pursue the gaining of a livelihood" free from discrimination "on the basis of province of present or previous residence". This *Charter* right, however, is modified by subs. 6(4), an "affirmative action" provision permitting employment discrimination in favor of "socially or economically disadvantaged" individuals in provinces with a rate of employment that is below that for Canada as a whole. The U.S. cases have not recognized such an exception.

[189] A discrimination against the ability of non-residents to buy residential property in a province may be a relatively clear example of such an interference.

activities".[190] *Charter* protection will be equally broad — or perhaps broader — if the right to "take up residence" is held to be implicated by all important discriminations against new arrivals from other provinces.

F. *Rights of Religion, Conscience, Free Expression, and Association*

These rights are (with one or two notable exceptions) described in s. 2 of the *Charter* in much the same way that they appear in the text of the First Amendment to the *United States Constitution.*[191] Both texts are extremely general, leaving a vast area for judicial interpretation. United States case law is, indeed, elaborate (rivaling perhaps only U.S. equal protection law in the complexity of the structure that has been built upon a simple, seemingly straightforward text), and the main questions in comparing the *Charter* with the U.S. provisions concern the extent to which Canadian courts will adopt approaches and solutions similar in nature to those that the U.S. courts have evolved.

The main textual differences between the *Charter* and the U.S. First Amendment are the latter's "establishment of religion" clause, which the *Charter* lacks, and the *Charter's* explicit recognition of a separate freedom of "conscience". The U.S. establishment clause had, as its central purpose, the

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[190] *Baldwin* v. *Fish and Game Commission, supra,* note 186. This attitude has a textual constitutional basis in art. IV, §2 of the U.S. *Constitution,* which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States". A leading early case confined these privileges and immunities to those that are "fundamental". *Corfield* v. *Coryell,* 6 Fed. Cas. 546 (no. 3,230) (C.C.E.D. Pa. 1823).

[191] That Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances". The *Charter* protects the "fundamental freedoms" of "conscience", "religion", "thought", "belief", "opinion", "expression" (including freedom "of the press, and other media of communication"), "peaceful assembly", and "association". The main textual differences — the U.S. "establishment" clause and the *Charter's* "conscience" provision — are discussed in the text. The freedoms of "thought", "belief" and "opinion" are all included within the U.S. protections, although not textually specified. See, *e.g., West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act, their faith therein." Freedom of association is also protected in the U.S. See, *e.g., National Association for the Advancement of Colored People* v. *Alabama,* 357 U.S. 449, 460-1 (1958): "Effective advocacy of both public and private points of view... is undeniably enhanced by group association. ... [S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." The separately stated U.S. right to petition the government for redress of grievances probably lies somewhere within the *Charter's* protected freedoms of opinion, expression, press, assembly, and association.

strict prohibition of an official church or religion [192] — an aspect of British law that the U.S. colonists clearly wished to reject. The prohibition has been expanded, however, into one against not only an established church, but also against a broad range of affirmative governmental methods of support for particular religions or religion generally. In recent years, most litigation has concerned either government funding and support for parochial and religious schools,[193] or the institution of prayer or Bible reading requirements or opportunities in public schools.[194] The *Charter* apparently does not mean to prohibit some of these "establishments", such as direct governmental support for religious schools. Others may perhaps violate the freedom of religion clause of *Charter* subs. 2(a), if they are deemed to place sufficiently coercive pressures or burdens on individual freedom of religious choice.[195]

In subs. 2(a), the *Charter* recognizes the freedom of "conscience", in addition to the freedom of "religion". This distinction may or may not represent a significant enlargement of rights compared to U.S. law, depending upon the meaning given ultimately to the term "conscience", and whether that freedom can support a correlative freedom to act or to refuse to act, despite the command of law. United States constitutional law has not appeared to recognize a "civil disobedience" right to refuse to comply with laws that one conscientiously opposes, unless that conscientious opposition

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[192] The establishment clause has been "incorporated" into the Fourteenth Amendment. See *Everson* v. *Board of Education*, *supra*, note 19. Hence the prohibition now applies to state as well as federal "establishments".

[193] See, *e.g.*, *Everson* v. *Board of Education*, *ibid.* (upholding the reimbursement of transportation expenses for children to attend private schools including parochial schools); *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646 (1980); and *Mueller* v. *Allen*, 103 S. Ct (1983) (forthcoming) (the most recent in a tangled line of cases upholding some forms of financial support for religious schools and rejecting others). See also *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (Sunday closing laws upheld against establishment clause challenge); and *Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (State tax exemptions for religious property upheld).

[194] See, *e.g.*, *Engel* v. *Vitale*, 370 U.S. 421 (1962); and *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (rejecting prayers and Bible reading in elementary and secondary schools). But see *Widmar* v. *Vincent*, 102 S. Ct 269 (1981) (establishment clause does not prohibit a state university from making facilities available to student prayer group for religious worship); and *Marsh* v. *Chambers*, 103 S. Ct (1983) (forthcoming) (establishment clause not violated by state legislature's practice of opening each day with a prayer by a chaplain paid from public funds). And see *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (state prohibition on the teaching of evolution violates the establishment clause).

[195] Thus, the U.S. school prayer cases could perhaps be decided as free exercise cases. Even though students were not required to participate in prayers led by teachers, their choice of either participating or conspicuously not participating might be deemed coercive upon the free exercise rights of children and parents. Indeed, an official state religion might also possibly be considered to be an impingement on individual freedom. The Supreme Court's opinion in the *Schempp* case, *ibid.*, 222, notes that the establishment and free exercise clauses "may overlap".

has roots in religious conviction or may be said to represent an exercise of rights of free expression.[196] The *Charter* may, on the other hand, constitutionalize a right of civil disobedience where the conscientious root of opposition to law is sufficiently the product of an individual's deeply held system of moral beliefs, whether or not those beliefs are grounded in considerations normally regarded as religious.[197]

With regard to the meaning of the free expression and association provisions of *Charter* subss 2(b) to 2(d), United States law suggests the following basic issues (among others) as ones that may well be likely to arise in the course of future Canadian judicial interpretations:

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[196] Thus, in *West Virginia Board of Education* v. *Barnette*, *supra*, note 191, the Court held unconstitutional regulations requiring children to salute the flag in public schools. The regulations were challenged by Jehovah's Witnesses, who alleged that they violated the command of scripture. The Court's opinion appeared to rely upon principles of free expression and belief, rather than solely upon the free exercise rights of the particular plaintiffs. See the quotation from this opinion, *supra*, note 191. See also *Wooley* v. *Maynard*, 430 U.S. 705 (1977), where Jehovah's Witnesses challenged a New Hampshire law requiring automobiles to carry a licence plate bearing the state motto, "Live Free or Die". The law was struck down, the Court observing, at 715, that the State sought to force an individual to "be an instrument for fostering public adherence to an ideological point of view he finds unacceptable". First Amendment freedom of thought, said the Court, at 714, "includes both the right to speak freely and the right to refrain from speaking at all", rights the Court referred to collectively as "individual freedom of mind".

On the other hand, even clear and sincere religious opposition to compliance with legal requirements may not always overcome sufficiently powerful state justifications. Although the U.S. Supreme Court has, for example, held that compulsory school attendance laws may not be applied to a particular religious group whose principles they violate (see *Wisconsin* v. *Yoder*, *supra*, note 65), it has also upheld a federal law making bigamy a crime, even though the law was challenged by a Mormon who claimed that polygamy was part of his religious duty. See *Reynolds* v. *United States*, 98 U.S. 145 (1878). See also *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination requirement upheld against a freedom of religion challenge); and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (anti-child labor law upheld against freedom of religion challenge by Jehovah's Witness who said it was child's religious duty to sell sect's newspaper).

Although the U.S. *Constitution* may not confer a general freedom of conscience not grounded in religion or rights of free expression or silence, U.S. statutes may confer such exemptions. See, *e.g.*, *United States* v. *Seeger*, 380 U.S. 163, 166 (1965), construing the "conscientious objector" provision of U.S. selective service law to apply, not only to persons holding formal religious beliefs, but also to a belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption".

[197] Thus, the *Charter* may give constitutional protection to the kinds of conscientious belicfs, described in the last paragraph of the preceding footnote, that have been recognized in the U.S. as matters of legislative grace under the selective service law. But see *Gillette* v. *United States*, 401 U.S. 437 (1971), where the U.S. Supreme Court refused to read the selective service statute to extend conscientious objector status to draftees who did not oppose all wars, but objected to participation in the war in Vietnam, deeming it to be "unjust". Would the *Charter's* freedom of conscience provision extend to such a belief?

(a) *Non-speech* — Does freedom of expression include all expressive material, or will some material that has the form of speech [198] nevertheless be deemed not to qualify for constitutional "speech" or "press" protection? United States law once recognized a list of defined types of expression — "obscenity", defamation, commercial advertisements, profanity, and "fighting words" — that were given no constitutional speech protection whatever.[199] As a result, these categories of expression could be suppressed without a demonstration of the normally requisite high level of governmental justification. Most of these definitional exceptions have been eliminated in recent years.[200] Only the doctrine that "obscenity" is unprotected remains in full force, and that doctrine was reaffirmed by the U.S. Supreme Court in 1973 by the margin of only a single vote.[201] Indeed, where defamation of public officials and public figures is involved, the U.S. Supreme Court has applied an extremely protective attitude toward speech, permitting damages or penalties only if the defamatory statement is made with "malice" — that is with actual knowledge of falsity or in reckless regard of the truth.[202] Since expres-

[198] In the U.S., pictures, films and oral expression are, in general, within the free speech guarantee, as is the printed word. See, *e.g.*, *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (films); and *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (playing phonograph record on public street).

[199] See *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-2 (1942): "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words". See also *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) (excluding "purely commercial advertising" from protection as speech).

[200] With regard to defamation, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). With regard to commercial advertisements, see *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). With regard to profanity, blasphemy and other "offensive" speech, see *Cohen* v. *California*, 403 U.S. 15 (1971) ("Fuck the draft" protected speech); and *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) ("sacrilegious" film protected). Profanity on radio and television is, however, subject to regulation. See *Federal Communications Commission* v. *Pacifica Foundation*, 438 U.S. 726 (1978).

[201] *Miller* v. *California*, 413 U.S. 15 (1973). To be obscene — and thus to be definitionally excluded from First Amendment protection — material must be found to meet the following test set out in *Miller*, at 24: The work must "depict or describe sexual conduct. . . specifically defined by the applicable law" and it must also be one which, "taken as a whole, appeal[s] to the prurient interest" in sex, which portrays sexual conduct "in a patently offensive way" and which "lacks serious literary, artistic, political, or scientific value". "Pruriency" and offensiveness may be judged by state-wide (or perhaps even more local) standards, rather than by "national standards".

[202] See *New York Times Co.* v. *Sullivan*, *supra*, note 200. Where defamation of private citizens is concerned, the *Constitution* does not require proof of malice, but it does require that the plaintiff prove both "fault" on the part of the defendant and actual "harm". See *Gertz* v. *Robert Welch, Inc.*, *supra*, note 200. The extent to which non-defamatory invasions of individual privacy by the media or others are constitutionally protected in the U.S. remains

sion rights under the *Charter* are presumably not absolute, it might be the wisest course to include obscenity, defamation, and the like within the category of protected expressions, placing at least some burden upon government to justify these restrictions.

(b) *Symbolic speech* — Will the *Charter* extend constitutional protection to non-verbal "symbolic" means of expression? United States law has accorded "speech" protection to certain forms of flag desecration,[203] to public draft-card burning,[204] to the wearing of black armbands,[205] and to similar non-verbal communications.[206] Again, a relatively inclusive attitude might be justified by the non-absolute nature of *Charter* rights.

(c) *Rights of access* — With the exception of a right of access to criminal trials,[207] U.S. constitutional free press rights have so far been rights to be free from prohibitions or regulations of publication, and have not included affirmative rights of access to proceedings that the government seeks to keep confidential.[208] However, once the press in the U.S. obtains information — even, perhaps, by illegal means or in violation of legitimate government attempts to restrict access to such information — the publication of such

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unclear. See *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Protection of copyright and similar property interests has been constitutionally reconciled with free speech guarantees in the U.S.. See *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (state may prohibit television news program from filming and broadcasting plaintiff's complete "human cannon ball" circus act).

[203] See *Street* v. *New York*, 394 U.S. 576 (1979) (flag burning).

[204] See *United States* v. *O'Brien*, *supra*, note 66.

[205] See *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

[206] It is also clear that U.S. First Amendment protection applies to expression generally, and not only to "political" speech or assembly. But see *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion) suggesting the possibility of a somewhat lower level of protection for some non-political speech: "[S]ociety's interest in protecting... [adult films] is of a wholly different, and lesser, mangitude than the interest in untrammeled political debate. ... [F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." The same theme appears in the plurality opinion in *Federal Communications Commission* v. *Pacifica Foundation*, *supra*, note 200 (radio broadcast of comedian George Carlin's "seven dirty words" monologue).

A related question concerns whether expression rights are available only to those who wish to send messages, or whether there are also protected rights to *receive* information. U.S. law generally recognizes the right to receive. See, *e.g.*, *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). This result seems even easier to reach under the *Charter*, which protects "thought", "belief" and "opinion" as well as the freedoms of "speech" and "press".

[207] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980).

[208] See, *e.g.*, *Pell* v. *Procunier*, 417 U.S. 817 (1974); and *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979).

material is protected strongly.[209] Will the *Charter's* press and media rights include some affirmative access rights and, if so, what proceedings or information will government nevertheless be permitted to keep secret or confidential? U.S. courts are just beginning to face this issue.[210]

(d) *Prior restraints* — In general, U.S. law takes the dimmest possible view of "prior restraints" such as judicial injunctions or licensing laws preventing publication or speech before it occurs.[211] However, the protection given to non-"prior" restraints (such as criminal and civil penalties for accomplished publications) is so strong in many areas that the doctrinal difference may, in fact, be insignificant. Will the *Charter* treat all restraints on speech equally, or will distinctions be made between licensing and prior injunctions, on the one hand, and monetary damages, criminal penalties and non-criminal sanctions, such as discharge from employment, on the other?

(e) *Content restrictions vs neutral "time, place and manner" regulations* — Restrictions directed to the "content" of expression receive perhaps the strongest degree of constitutional protection accorded to any non-absolute individual right under United States constitutional law. Thus, "subversive" advocacy may not be prohibited unless found by the judiciary (legislative findings do not suffice)[212] to create a "clear and present danger" of significant harm, such as violence, and to be intended to incite such harm.[213] Speech may never be completely banned in the U.S. merely because it is ideologically unsound, disagreeable, offensive, or vulgar.[214] A correlative rule strongly disfavors content discriminations in all regulations of speech, even those that do not amount to complete prohibitions.[215]

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[209] See, *e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (the "Pentagon Papers" case); and *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976) (invalidating a judicial "gag" order prohibiting the press from publishing accused's confession prior to trial).

[210] See *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct 2613 (1983).

The existence of governmental broadcasting stations in Canada raises a number of free expression issues that are not as applicable in the U.S., which has no direct counterpart to the C.B.C. Does the *Charter* apply to C.B.C. policies and activities? If so, does the *Charter* impose fairness or equal-time requirements on C.B.C. treatment of political or social issues? The U.S. Supreme Court considered some of these issues in *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973); and *Perry Education Association* v. *Perry Local Educators' Association*, 103 S. Ct 948 (1983).

[211] See *Near* v. *Minnesota*, 283 U.S. 697 (1931). See also *New York Times Co.* v. *United States*, *ibid.*; and *Nebraska Press Association* v. *Stuart*, *ibid.* An example of a permissible prior restraint might be a restraint on "the publication of the sailing dates of transports or the number or location of troops" during wartime. *Near* v. *Minnesota*, at 716.

[212] See *Dennis* v. *United States*, 341 U.S. 494 (1951).

[213] See, *e.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

[214] See, *e.g.*, *Cohen* v. *California*, *supra*, note 200.

[215] See, *e.g.*, *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); and *Consolidated Edison Co. of New York* v. *Public Service Commission*, 447 U.S. 530, 537 (1980) (recognizing "[t]he First Amendment's hostility to content-based regulation").

In addition to offering protection against prohibitions directed toward the content of speech, the U.S. *Constitution* also incorporates protections against a wide variety of regulations upon the "time, place and manner" of expression, such as regulations restricting parades, demonstrations, loudspeakers, handbilling, and leafletting. The U.S. constitutional rules here permit significantly more regulation than where government seeks to censor certain messages entirely. In part, this approach reflects a recognition that time, place and manner regulations are more likely to reflect legitimate concerns for safety and public convenience than regulations of content. Such regulations are also less likely to result in complete suppression of certain messages. In considering time, place and manner regulations, United States courts display a concern for content neutrality, for the substantiality of the public interest on which the regulations are based, and for whether the rules adopt a "least restrictive alternative", that is, whether they are as narrowly tailored as possible (and thus are as minimally intrusive on expression as possible) while vindicating legitimate governmental concerns.[216] Rules that are either "overbroad" in relation to their legitimate purposes,[217] or unnecessarily vague,[218] are struck down frequently either on their face, or as applied. By using doctrines such as vagueness, overbreadth and the disfavor of content discriminations, U.S. courts are often able to protect expressive public activity without questioning the reasonableness or justifiability of the underlying reasons for governmental regulation.[219] Will the *Charter* protect speech and assembly from time, place and manner restrictions, as well as from content prohibitions? If so, will the same level of justification be required for both types of regulations, or will content prohibitions be more suspect, as in the United States?

(f) *The public forum* — Finally, the right to engage in public expressive activity is limited in the United States to what the courts will recognize as a "public forum". These rights do not normally exist on private property,[220] or in public buildings or places that government legitimately seeks to reserve for other uses.[221] Will the *Charter* incorporate a narrow public forum concept as a limitation upon its free expression rights — thus permitting demonstrations

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[216] See, *e.g.*, *Heffron* v. *Int'l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981).

[217] See, *e.g.*, Gooding v. *Wilson*, 405 U.S. 518 (1972).

[218] See, *e.g.*, *Smith* v. *Goguen*, 415 U.S. 566 (1974).

[219] See, *e.g.*, *Cox* v. *Louisiana*, *supra*, note 65; and *Cox* v. *Louisiana*, 379 U.S. 559 (1965).

[220] See, *e.g.*, *Hudgens* v. *National Labor Relations Board*, *supra*, note 50.

[221] See, *e.g.*, *Adderley* v. *Florida*, 385 U.S. 39 (1966) (premises of county jail not a public forum); and *Greer* v. *Spock*, 424 U.S. 828 (1976) (military facility not a public forum). But see *Brown* v. *Louisiana*, 383 U.S. 131 (1966) (quiet demonstration in public library constitutionally protected). See also *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (advertising spaces in city-owned buses not a public forum; city permitted to prohibit political messages in such spaces while permitting commercial messages).

and assemblies to be restricted to certain designated areas — or will it generally require a substantial justification for such geographical restrictions?

Conclusion

This article has undertaken a comparison between the political, civil and personal rights afforded protection under the U.S. *Constitution*, on the one hand, and the new *Canadian Charter of Rights and Freedoms*, on the other. The two sets of protected individual rights bear a great deal of essential similarity. Both systems, for example, protect the freedoms of expression and religion; both offer protection against discriminatory treatment; both protect mobility rights and the rights to vote and stand for election; both also protect a broad and similar range of rights of defendants in criminal proceedings, such as the rights to a fair trial, to be free from compulsory self-incrimination and to be free from unreasonable searches, seizures and arrests.

Although the broad outline of protected rights is similar in the two systems, only time will tell whether, and to what extent, these similarities will extend into more specific definitional issues. Both the *Charter* and the U.S. *Constitution* are quite general in their language. The U.S. text has been subjected to an enormous amount of judicial interpretation over the years — interpretations which, at times, have reached an extraordinary level of constitutional detail. This process is just beginning in Canada and it is not at all clear that Canada will — or should — follow U.S. precedent on specific issues even when the relevant constitutional texts are similar. Nor has Canada yet faced two questions that are of critical importance in assessing the quality of constitutional protection for individual rights: the applicable standard or standards of justification that government must satisfy when it impinges upon protected rights, and the form of judicial enforcement of individual rights protections that may be available in particular situations and circumstances. These two subjects — not covered in the present article — will be addressed in a subsequent paper.

While the catalogs of rights contained in the *Charter* and U.S. *Constitution* are generally similar, there are some important textual differences as well. The U.S. *Constitution*, for example, prohibits the "establishment of religion" by government, and also contains explicit protections for property and contract rights. The *Charter* contains no directly comparable provisions. The *Charter*, on the other hand, has explicit sections regarding language rights in education, governmental processes and governmental services. In general, language rights have no constitutional status in the U.S. The *Charter* also emphasizes, as the U.S. *Constitution* does not, the need to preserve the multicultural heritage of the nation; and the *Charter* also contains a broad and apparently affirmative guarantee (not present in the U.S.) of the rights to life,

liberty and security of the person. Although the effect of these textual differences may be eliminated to some extent by judicial interpretations, it is likely that some significant disparities will nevertheless remain.

Perhaps the most interesting of the unanswered questions raised by comparing the rights protected by the *Charter* and the U.S. *Constitution* concerns the potential applicability in Canada of a concept similar to the U.S. principle that all government regulations and classifications must conform to a general standard of constitutional "reasonableness". This flexible doctrine has provided the underpinning for a significant amount of constitutional rights development in the U.S. It is, for example, the basis for the U.S. principle of "substantive" due process — a doctrine that once primarily protected business interests, but that has more recently evolved into the important U.S. principle of personal privacy. It has also played a large role in the broad development of the U.S. Equal Protection Clause. These broad due process and equal protection doctrines, more than any others, have been the tools through which U.S. courts have, at times, seemed to exercise quasi-legislative power concerning important and controversial social policy questions. The *Charter's* text does not expressly incorporate identical principles, but it contains provisions that may possibly serve as vehicles for their ultimate adoption through an interpretive process.

As with other basic questions about the meaning of the *Charter*, answers here must await the course of future Canadian judicial decision-making. That process of constitutional interpretation through the judiciary has taken place in the United States over a period of almost two hundred years. It is unlikely, moreover, that the process will ever be fully completed. The U.S. *Constitution* is a constantly evolving document — a feature that is a source both of great strength for U.S. constitutional principles and of continuous controversy. Although the evolution of basic constitutional human rights principles may proceed somewhat more swiftly in Canada (which has the experience of the U.S., other nations and the international community — as well as its own experience with national and provincial civil rights legislation — upon which to draw) the process seems almost certain to be one that will be evolutionary in nature over a substantial period of time. The adoption of the Canadian *Charter* represents the beginning, rather than the culmination, of a system of developing constitutional rights that will likely be an important feature of life and government in Canada for many years to come.