THE ROLE OF GOVERNMENT AND THE CONSTITUTIONAL PROTECTION
OF EQUALITY AND FREEDOM OF EXPRESSION
IN THE UNITED STATES AND CANADA

by

JAMES WARREN GRAYSON

B.A., The University of New Mexico, 1991
J.D., The University of New Mexico, 1994

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

Faculty of Law

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

August 1996

© James Warren Grayson, 1996
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Law

The University of British Columbia
Vancouver, Canada

Date August 27, 1996
ABSTRACT

Canada and the United States are similar in many respects, and both protect individual rights at a constitutional level. However, the Supreme Court of Canada and the United States Supreme Court have developed alternative conceptions of the constitutional protection of freedom of expression and equality. This thesis describes these differences and attempts to explain the reasons for their development.

Under the Fourteenth Amendment, the U.S. Supreme Court merely requires that governmental actors refrain from overt discrimination on the basis of an objectionable ground. Thus, the Court has created numerous doctrines to limit equality to this definition, including color-blindness, intentional discrimination, and multiple levels of review. Each of these concepts has contributed to the application of formal equality by restricting governmental attempts, such as affirmative action, to alleviate social inequality. In addition, the Court's application of content neutrality to freedom of expression cases has restricted attempts to promote equality through legislation restricting hate speech and pornography.

By contrast, the Supreme Court of Canada has interpreted the protection of equality in the Charter of Rights and Freedoms to respond to the actual social consequences of legislation. Rather than limiting the Charter to intentional discrimination, the Court will consider governmental actions which have the effect of creating or encouraging inequality. Similarly, governmental restrictions on hate speech and pornography have been upheld by
the Supreme Court of Canada as necessary for the protection of equality. For the Supreme Court of Canada, equality has a social reality.

These differences suggest an alternative role of government in the rights sphere in Canada and the United States. The United States Supreme Court has developed a rights interpretation which excludes much significant governmental action, whether positive or negative. The Court has incorporated the Bill of Rights into the Fourteenth Amendment and, in doing so, has expanded individual rights at the expense of state power in the promotion of equality. The lack of such a development in Canada has resulted in a more substantial role for social legislation, while still protecting against governmental overreaching through the Charter.
# TABLE OF CONTENTS

Abstract ii
Table of Contents iv
Acknowledgement v

Chapter One Introduction and Methodology
A. Methodology 2
B. Summary of Contents 8

Chapter Two Rights in Context: Political Culture in the U.S. and Canada
A. Introduction 13
B. Political Culture: Initial Observations 13
C. American Individualism 17
  1. Social and Economic Development 18
  2. Institutional Development: Constitution and Bill of Rights 20
  3. Federalism: State and Federal Governments 23
D. Canadian Communitarianism 29
  1. Social and Economic Development 30
  2. Institutional Development: B.N.A. Act and the Charter 32
  3. Federalism: Provincial and Federal Governments 42
E. The Relationship of Political Institutions and Cultural Values 46
F. Conclusion 49

Chapter Three Alternative Conceptions of Equality 51
A. Colorblindness 56
  1. United States 56
  2. Canada 66
B. Levels of Review 75
  1. United States 75
  2. Canada 84
  3. Comparisons 94
C. Intentional Discrimination 102
  1. United States 102
  2. Canada 107
D. Practical Effects 112
E. Conclusion 117

Chapter Four Freedom of Expression 118
A. United States 119
B. Canada 128
C. Governmental Regulation of Pornography 133
D. Governmental Regulation of Hate Speech 143

Chapter Five The Role of Government in the U.S. and Canada—Aggressor, Protector, or Bystander 154
ACKNOWLEDGEMENT

I would like to thank Professor Joel Bakan for his thoughtful suggestions and valuable assistance. I would also like to thank Professor Bill Black for his helpful comments and Professor Rod MacDonald for his assistance with the political culture aspects of the paper. In addition, I thank Professors Rob Schwartz, Christian Fritz, and Ann Scales for their comments on the freedom of expression portions of this paper. I am very grateful to the U.S.-Canada Fulbright Foundation for the funding which made this work possible. Most of all, I would like to thank my wife, Michele Morosin, for her support and insightful critique throughout my work on this project.
Chapter 1
Introduction and Methodology

The constitutional protection of equality is a highly contentious issue in both the United States and Canada. This thesis analyzes the different approach to protecting equality adopted by the U.S. Supreme Court and the Supreme Court of Canada. The U.S. Supreme Court has limited the applicability of the Fourteenth Amendment by adopting the principles of colorblindness, multiple levels of review, and intentional discrimination. By contrast, the Supreme Court of Canada has rejected each of these notions. Instead, it has interpreted s.15(1) of the Charter of Rights and Freedoms in the context of social, political, and economic conditions. As a result, the Supreme Court of Canada has been able to achieve a more substantive form of equality in constitutional law.

As a related matter, this thesis examines two forms of speech which implicate equality issues. The nature of free expression in democratic societies has recently received a great deal of scrutiny. In particular, both pornography and hate speech have caused legislatures to increase governmental regulation in this area in order to protect notions of equality. As a result, the judiciary has been forced to evaluate the propriety of the legislative action under constitutional protections of freedom of expression. The United States Supreme Court and the Supreme Court of Canada have reached opposite conclusions in their resolution of this matter. This thesis
details the nature of these conflicting views and examines the possible reasons underlying these differences.

A. Methodology

In analyzing the law of two different countries, this paper largely relies on the comparative method, which uses a broad multi-disciplinary approach in order to compare legal systems. Comparative law typically relies on the study of social, cultural, and historical information to inform legal similarities and differences.¹

There are many advantages to a comparative approach. In the examination of a domestic legal principle, the comparison of similar principles in other countries adds sophistication and reliability to conclusions. A comparison reveals possible alternative methods of dealing with legal problems.² It demonstrates that different solutions exist and, more importantly, are practicable in another context. As a result, the existence of alternative solutions allows for reevaluation of presently accepted ones. In addition, by exploring the values underlying these alternative solutions, one can more fully appreciate the values promoted by the law in one's own country. While differences in values may explain alternative solutions, the identification of similar goals would allow an analysis of the most appropriate means of reaching those ends.

¹ Alan Watson, LEGAL TRANSPLANTS, 4-5, 9 (1973).

However, the purpose of a comparative approach should be based on more than just the improvement or endorsement of domestic law. In order to promote international relations, it is important to assist in the transfer of knowledge between countries. Scholars of both the United States and Canada should attempt to more fully understand each other's legal problems and solutions. Additionally, scholarship, in striving to further general understanding, encompasses and values the pursuit of knowledge in and of itself.³ Thus, comparative law should not focus solely on the solution of individualized problems.

It may appear that comparing countries with such similar legal traditions does not require analysis beyond obvious differences and, thus, does not require a particular method.⁴ However, such a view disregards the complexity of difference between the United States and Canada. Indeed, only the comprehensive nature of a comparative approach can begin to explain such fundamentally contradictory results between these countries in the constitutional protection of hate speech and pornography.

In order to most accurately reflect the law of two countries in a comparative manner, the starting point in evaluating a

³ Rodolfo Sacco, Legal Formants: A Dynamic Approach to Comparative Law, 39 Am. J. Comp. L. 1, 4 (1991) ("Comparative law is like other sciences in that its aim must be the acquisition of knowledge.").

⁴ "No special form of technique seems to be called for if the comparison is, for instance, between Australian and Canadian law or between English law and the law of the United States." Gutteridge, COMPARATIVE LAW, xi (2d ed. 1949) (quoted in Watson, supra note 1, at 6.)
particular area of law must be the text of the law itself and the official interpretation of that law. This reduces the danger in comparative law of affording too little attention to analyzing a legal principle in foreign law. "Now it has been observed that whereas [Sir Henry Maine's] Ancient Law if often discussed in Jurisprudence and Anthropology courses it is little used in classes of Roman law. The reason is that Maine's statements on Roman law are not reliable."\(^5\) Thus, for any comparative analysis to have significant meaning to scholars of both countries, the respective examination of national law must be comprehensive and independently valid. In addition, legal principles must be evaluated within the context of their purpose within the overall legal system and within society. As a result, laws which are closely related to those being analyzed should also receive attention. Finally, the law must be placed in societal context through historical and cultural analysis.

This approach represents a critical analysis under a comparative functionalist methodology. Within this method of comparison, law is analyzed in relation to society under three separate paradigms: 1) social and cultural norms and values as determining legal development; 2) legal systems and rules as causing social development; or 3) the development of law and society as interrelated.\(^6\) As a result, law is characterized by its function in society, either reflecting social values or as

---

\(^5\) Watson, SUPRA note 1, at 12.

influencing them.\textsuperscript{7} Thus, law must constantly transform itself based on either actual or desired changing societal needs.\textsuperscript{8} For comparative purposes, then, one should analyze laws which have similar functions in society.\textsuperscript{9}

This methodology has been criticized on several grounds. First, it has been questioned whether society and law can be viewed and studied as separate entities.\textsuperscript{10} Law, as an integral aspect of society, cannot be evaluated as an independent system interacting with social development.\textsuperscript{11} The line between which society and law are separated is considerably blurred and constantly changing. Second, law does not necessarily relate to social norms.\textsuperscript{12} Laws can either serve no social function or serve innumerable ones. Thus, the method of functional analysis is arbitrary and based on pre-conceived ideologies and values of the individual researcher.\textsuperscript{13} This leads to the final criticism: functionalism, as an allegedly value-neutral exercise, ignores the inherent nature of comparative researchers as participant-observers, relying on personal bias in evaluation of similarities and differences.\textsuperscript{14}

\textsuperscript{7} Id.
\textsuperscript{8} Id. at 438.
\textsuperscript{9} Id. at 435-36.
\textsuperscript{10} Id. at 440.
\textsuperscript{11} Frankenberg, \textit{supra} note 6 at 437.
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 437.
\textsuperscript{14} Id. at 439.
However, this critique, even taken as accurate, does not destroy the relevance of a functionalist methodology. Rather, it merely emphasizes those aspects of functionalism which require caution, clarification, and reflection. The general theory of functionalism remains valid; laws are based on purposes, rather than formulated in a vacuum or at random. Further, generally speaking, in a democratic system of government, a law's purpose does relate to values held in society at large. While a law's purpose may result from individual law-maker's political, moral, or ideological choice, this conclusion can only be reached by disproving a relationship between the law and social values.

Nevertheless, the functionalist method should be adapted to respond to the above criticisms. A researcher should not assume that the function of a law in one country necessarily carries the same function in another. In addition, researchers should not universally follow only one of the three functionalist paradigms; the relationship of law and society should only be determined based on concrete research on a case-by-case basis. This analysis can be completed with three equally valid presumptions in performing socio-legal research: 1) law as a dependent variable influenced by social, political, cultural, and economic factors; 2) law as a product of individual decision-making and individual bias; and 3) law as an independent variable

15 "[T]he relationship between law and society may be more complex than the simple notion that societal conditions determines the law." Alan Watson, From Legal Transplants to Legal Formants, 43 AM. J. COMP. L. 469, 475 (1995).
influencing social life. Finally, comparative functionalist researchers should always be aware of the danger of ethnocentrism.

This critical approach to comparative functionalism also can be compared to a relational theory of law. Under this approach, law is analyzed as legal relations interacting with social relations, such as economic and political systems. This theory seeks to account for different influential ideologies and the importance of power relations, both concepts which are central to the Critical Legal Studies movement. Additionally, it attempts to place individualized legal rules in a legal pluralist context. This approach, as a supplement to comparative functionalism, can provide a comprehensive methodology in the study of the law in more than one country.

In this paper, I evaluate the constitutional protection of equality and freedom of expression in light of their overall purposes in society. I conduct this analysis independently for the United States and Canada, and without a presumption of

16 Kagan, supra note 2, at 143-44.


18 Id.

19 Id. at 14-15.

20 Id. at 16. By 'pluralist,' Professor Hunt is referring to the "internal interconnections between different forms of legal relations." Id. This does not refer to the theory of law, known as legal pluralism, which is in opposition to legal centralism, or law as promulgated by official governmental means. See John Griffiths, What is Legal Pluralism?, 24 J. LEGAL PLURALISM 1 (1986).
similar function. Additionally, this thesis includes an analysis beyond the legal system to identify whether these laws influence or are influenced by social relations. I assume as equally likely that these laws either reflect political or moral choices by individual legal actors or that the relationship between the regulation of this type of speech and social beliefs is indeterminate.

Finally, as an American, I recognize the danger of ethnocentrism and subjectivity in evaluating Canadian materials. Inevitably, my personal bias or, more accurately, preconception will cause the misinterpretation of some information. However, the broad analysis of legal rules placed in the context of both the legal system and culture and history reduces the degree of subjectivity involved. In addition, the common historical roots of both Canada and the United States in law and culture suggests relatively less likelihood of ethnocentrism. Nonetheless, this will remain a relevant factor in drawing conclusions.

B. Summary of Contents

There are many subtle similarities and differences in the law, history, and culture of the United States and Canada. The two countries share a common legal tradition, developing out of the common law of England. Also, both countries protect equality and freedom of expression at a constitutional level. Incidental to this protection, the judiciary of both countries maintains ultimate authority in the interpretation of these rights. Additionally, these rights, as characterized in the text of the respective constitutions, are very similar. However, the U.S. Supreme Court has established a more restrictive meaning of
equality and a more liberal approach to freedom of expression than the Supreme Court of Canada. Thus, in the context of governmental regulation of hate speech and pornography, these countries have reached disparate results.

While legislatures in both countries have recently attempted to increase restrictions on these forms of speech and have defined these terms in a similar manner, only the Supreme Court of Canada has been willing to uphold these restrictions.\(^\text{21}\) The Supreme Court of Canada has held that these forms of speech are protected under the Charter of Rights and Freedoms. Nonetheless, hate speech and pornography produce sufficient harm in Canadian society to permit their regulation when demonstrably justifiable. By contrast, the United States Supreme Court has more strictly scrutinized these regulations. Although the Court has allowed the regulation of fighting words and other harmful speech,\(^\text{22}\) the Court characterized the regulation of hate speech and pornography as restricting speech based on a particular point of view. Thus, under the content-neutral principle of freedom of expression jurisprudence, the Court has invalidated these laws.

This thesis is an attempt to explain the nature of these different conclusions. Chapter Two of this paper places constitutional interpretation in context. It outlines the


historical, social, and institutional development of the United States and Canada. In addition, it provides an introduction to the interpretation of the Bill of Rights and the Charter of Rights and Freedoms. While Canada has been characterized as being more communitarian than the United States, the most significant constitutional difference between these countries lies in the U.S. Supreme Court's incorporation of the Bill of Rights against the States through the Fourteenth Amendment. This development has significantly reduced the opportunity for positive governmental action in the advancement of individual rights. The lack of such an occurrence in Canada has resulted in a more substantive interpretation of the Charter.

Chapter 3 analyzes each country's conception of the constitutional protection of equality under the Fourteenth Amendment and under s.15(1) of the Charter. This chapter compares differences between these countries' respective methods of protecting equality in the context of three dominant themes, each of which has been applied to a much more limited extent in Canada: colorblindness, multiple levels of review, and intentional discrimination.

In order to explore these differences further, this thesis then turns to the regulation of hate speech and pornography and its implications for equality issues. Chapter 4 begins by providing an overview of American and Canadian interpretations of freedom of expression. Subsequently, it analyzes the constitutional validity of pornography and hate speech regulations, respectively. In this area, the Supreme Court of Canada has focused on notions of harm and equality. These forms
of speech not only harm individuals directly involved in the case, but also promote continued or increased inequality of subordinated groups in society. As a result, the Court has accepted the government's role of protecting and furthering equality through regulation of such harmful speech. The United States Supreme Court has similarly recognized the potential harm of this speech against individuals. However, to the Court, governmental actors cannot promote or suppress a particular point of view. In regulating this speech, the government substitutes its own opinion as a correct viewpoint on an issue, thereby interfering with the marketplace of ideas. Thus, there is a more limited role for governments in the United States to affirmatively protect principles of equality in the context of harmful speech.

Finally, Chapter 5 draws conclusions about the nature of the differences between the constitutional law of equality and freedom of expression in the United States and Canada. Constitutional protection places stricter control on legislative action, which is emphasized by judicial review through constitutional interpretation. As a result, there is an underlying assumption about the role of government in society. The focus of constitutional protection could either be the prevention of governmental interference with rights or the promotion of governmental protection of rights.

Throughout the history of the United States, there are numerous examples of governmental abuses of civil rights, most prominently in the form of slavery in southern states until the end of the Civil War. These abuses have caused the U.S. Supreme
Court to progressively decrease the potential for affirmative governmental action in the rights sphere. Doctrines such as content-neutrality, intentional discrimination, and colorblindness, each contribute to preventing positive governmental action in promoting equality.

By contrast, governments in Canada have long been involved in the regulation of rights. Rather than altering this practice, the Supreme Court of Canada uses the Charter to justify legislative action promoting the value of equality. The primary debate in Canada does not focus on the legitimacy of governmental involvement as much as the identity of the governmental actor. Thus, the strongest objections to the Charter have been based, not in negative rights or antistatist dogma, but under anti-federalist movements originating in Quebec. This debate has not occurred in the context of hate speech and pornography regulation due to the long-held power of the federal government to enforce the criminal law and because these laws do not implicate concerns specific to Quebec. Thus, whereas the American debate has evolved to exclude governmental interference, the Charter of Rights and Freedoms has affirmed the larger role of government in effectuating liberty and equality in Canadian society.
A. Introduction

The method of interpretation for constitutional rights in the United States and Canada, as in many countries, tends to reflect the socio-political values of the society.\textsuperscript{23} Governmental involvement in the sphere of rights involves underlying philosophical assumptions about the role of government and the relative importance of individual rights in society. Legal and political responses in the area of individual rights often reflect a society's particular political culture. The notion of political culture represents the complex interrelationship between ideologies, which includes the values, beliefs, and goals found in a society, and institutions, which includes the structural form of government found in constitutions and legislative enactments. In this chapter, I examine the historical development of political culture in the United States and Canada in order to place contemporary rights analyses in context.

B. Political Culture: Initial Observations

Canada and the United States are similar in many ways. In fact, some scholars have suggested that these countries are as

alike as any two countries in the world.\textsuperscript{24} However, due to
differences in historical development, the cultural values of
these two countries actually vary substantially. Even though the
United States and Canada share a similar heritage from England,
their relationship with England dramatically diverged. One
scholar has described the relationship between the U.S. and
Canada as that of a revolutionary state and a
counterrevolutionary state.\textsuperscript{25} As such, the United States is a
nation which celebrated the overthrow of an oppressive state,
whereas Canada suffered a defeat by association and struggled to
preserve historical connections to England.\textsuperscript{26} This historical
differentiation between Canada and the U.S. has implications in
numerous aspects of society continuing through the present. In
fact, many theorists observe that Canada acts in a more
communitarian manner in relation to the American ideology of
individualism.\textsuperscript{27}

Communitarianism and individualism are two basic
jurisprudential theories which analyze the purposes and goals of
individual rights. Individual, or liberal, theorists construe
individual rights as preserving the notion that people should be

\textsuperscript{24} Seymour Martin Lipset, \textit{Continental Divide: The Values and

\textsuperscript{25} Lipset, supra note 24, at 1; Harry H. Hiller, \textit{Canadian

\textsuperscript{26} Lipset, supra note 24, at 1.

\textsuperscript{27} Patrick Monahan, \textit{Politics and the Constitution: The Charter,
Federalism, and the Supreme Court of Canada}, (1987); Lipset, supra note
24; Macklem, supra note 23, at 119.
free to choose their own ends in an unrestricted manner. The theory presumes that individual rights exist to further individual freedom in society as an end in itself. The function of government under individualist theory includes securing rights for individuals by ensuring that the public and agents of the government do not infringe upon them. Thus, individual freedom should only be limited if it harms others, it interferes with the general structure of liberty, or it is necessary in the interest of securing liberties more closely connected to notions of individualism. Government should not regulate individual freedom in order to protect the morality of society. Human creativity, satisfaction, and fulfillment are achieved to the fullest extent in the absence of governmental limitation on liberty. Associational relationships constrain self-determination and force compromise.


30 This was the only acceptable reason for government regulation for John Stuart Mill. See JOHN STUART MILL, ON LIBERTY (Alburey Castell, Ed. 1947).

31 See Crawford, supra note 28, at 18-21.

32 Major, supra note 28, at 59.

33 See generally Mill, supra note 30.

have individual freedom as a goal, the extent of individual liberty should not vary between different societies.\(^{35}\) As a result, under this theory of individual rights, Canada and the United States should not differ with respect to the protection of individual freedoms.

By contrast, communitarian theorists believe that individual rights are a means to serve larger societal purposes.\(^{36}\) Self-determination is one of the important goals of a democracy; however, this independence should not be defined so broadly that it inhibits the function of society as a whole or others' self-determination.\(^{37}\) The focus of communitarianism, then, is the interdependence and interrelationships with other members of a society. "[H]uman agency cannot be intelligibly abstracted from the ends and purposes that an individual has as a member of society."\(^{38}\) Communitarianism focuses on a shared notion of societal ends, defined by those public practices, evaluations, and traditions of the particular society which enable individuals to realize their freedom.\(^{39}\)

The role of government is to preserve the community, limiting individual freedom as little as possible while taking into consideration the purpose of the freedom with respect to its

\(^{35}\) Crawford, supra note 28, at 4.

\(^{36}\) Schuman, supra note 34, at 587.

\(^{37}\) Crawford, supra note 28, at 18-19,


\(^{39}\) Note, supra note 38, at 689-90.
importance in the community.\textsuperscript{40} Thus, individual rights under communitarian theory should vary between countries in order to account for the specific values and necessities of different communities.\textsuperscript{41} Under this theory, the United States and Canada should differ in the degree of protection afforded individual freedoms only to the extent that these rights disproportionately interfere with the function of society and contravene societal values, respectively.

\textbf{C. American Individualism}

The United States developed out of the Revolutionary War as a classically liberal society.\textsuperscript{42} The ultimate evidence of a Lockean tradition is the language used in the Declaration of Independence, stressing equality and the right to life, liberty, and the pursuit of happiness.\textsuperscript{43} American society can be characterized as having several underlying values and attitudes with respect to the role of government: 1) a general distrust of governmental power;\textsuperscript{44} 2) a relatively equalitarian view of social relations;\textsuperscript{45} 3) a strong notion of individualism;\textsuperscript{46} 4)

\textsuperscript{40} See Major, supra note 28, at 59-60.
\textsuperscript{41} Crawford, supra note 28, at 4.
\textsuperscript{42} Lipset, supra note 24, at 2.
\textsuperscript{43} Kenneth H. Fogarty, EQUALITY RIGHTS AND THEIR LIMITATIONS IN THE CHARTER, 9 (1987).
\textsuperscript{44} Lipset, supra note 24, at 2.
\textsuperscript{45} Id. at 22-23.
\textsuperscript{46} Id. at 27.
a laissez-faire capitalist ethic; and 5) a populist form of
democratic government.\textsuperscript{47}

Each of these values has been associated with the American
Revolution.\textsuperscript{48} As a group, the colonies largely consisted of
middle-class British subjects who fled England either from
political or religious dissatisfaction or in search of economic
gain. As such, it was a society with only a distant feudal
past.\textsuperscript{49} The colonists' discontent with the British government
caused a revolution seeking political independence. This
rejection of authority can be seen in numerous aspects of
American society. Thus, the nature of 18th century colonial
society has continued to define dominant ideologies in the United
States over two hundred years later.

1. Social and Economic Development

As Professor Lipset has concluded, an individualist ethic is
apparent in fundamental social institutions in American society,
including religion\textsuperscript{50} and the economy.\textsuperscript{51} There are indications
that the U.S. is one of the most fundamentalist Christian nations
in the world and is dominated by religious groups, sectarian
Protestants such as Baptists and Methodists, which tend to stress
individualist values. Religious beliefs have contributed to a
greater number of Americans tending to characterize issues in

\textsuperscript{47} Id. at 30.

\textsuperscript{48} Id. at 20.

\textsuperscript{49} Lipset, supra note 24, at 8 (citing observations made by
Friedrich Engels in the late 19th century).

\textsuperscript{50} Id. at 74-78, 84-85.

\textsuperscript{51} Id. at 119-121.
terms of good and evil. These religious beliefs have also encouraged entrepreneurial success.

Economically, the United States has closely followed a capitalist model. Americans are generally driven by profit and the accumulation of wealth. There is a relative willingness to take risk in business and to encourage innovation. The largely bourgeois composition of the U.S. has contributed to the capitalist ideal. Thus, whereas European nations witnessed a struggle between aristocratic elite and capitalist entrepreneurs, the United States did not have a feudal past which inhibited capitalist development.

Nonetheless, the U.S. has been relatively equalitarian in its capitalist endeavors. There has been a rejection of elitist notions of the poor acknowledging their inferiority before the upper-class. American society has continued to stress meritocracy in its capitalist economic system. In addition, education has been more widely available in the United States than in most industrialized countries. This meritocratic perspective has resulted in a relatively greater degree of emphasis on social mobility in the United States. For example,

52 Id. at 84-85 (approximately 95% of Americans believe in God and 66% in the devil as compared to 86% and less than 50%, respectively, in Canada).

53 Id. at 20, 119 (this development was possible geographically due to substantial agricultural, animal, and mineral resources in the United States).

54 Lipset, supra note 24, at 24-25, 154, 159-60.

55 Id. at 24, 160 (specifically noting that 22% of 18-24 year-olds were enrolled in full-time colleges or universities in the U.S. as compared to 14.5% in Canada in 1985).
access to education and professional employment has not been as limited by the socio-economic background of an individual's parents as in Europe and Canada.

Each of these factors has led to decreased government involvement in citizen activity and a general distrust of government.⁵⁶ In fact, both religious and economic development occurred with relatively little governmental interference. With such a strong historical and cultural emphasis on liberalism, some suggest that instead of a country possessing numerous ideologies, Americanism is an ideology itself.⁵⁷ Thus, according to researchers, there is a relative ideological hegemony in the United States which results in a fundamentally individualist society.⁵⁸ This form of individualism has influenced the structure and on-going development of government in numerous ways.

2. Institutional Development: Constitution and Bill of Rights

Largely in reaction to monarchical control,⁵⁹ the U.S. Constitution divides governmental powers in such a way as to prevent excessive control by the executive or, for that matter, any particular branch of government.⁶⁰ Thus, Congress and the President must negotiate and compromise with each other.

---

⁵⁶ Id. at 95 (suggesting that such a societal development has caused a high rate of violent crime in the United States).

⁵⁷ Id. at 19.

⁵⁸ Id. at 19.

⁵⁹ Lipset, supra note 24, at 21.

⁶⁰ U.S. Constitution, Arts. I (Congressional power), II (Judicial power), & III (Presidential power).
Further, the U.S. Supreme Court, acting under the notions of constitutional supremacy and separation of powers, assumed the role of constitutional interpreter in the case of *Marbury v. Madison*. As a result, Congress and the President are subject to the Court's interpretation of their powers under the Constitution. Thus, the federal judiciary has used this power to invalidate legislation violative of the U.S. Constitution and has, therefore, been largely responsible for the constitutional development of individual freedoms.

By diluting the government's power in such a way, the United States has been characterized as relatively stateless. This structural development is connected to the relatively antistatist viewpoint held by many Americans. As a result, the development of individual rights has been dominated by fears of governmental oppression.

The United States rebelled against England's suppression of individual rights; however, citizens of the United States have since witnessed substantial governmental limitation of freedoms.

---

5 U.S. (1 Cranch) 137 (1803).

Even though the Constitution is the supreme law under the Supremacy Clause, the federal courts did not have the inherent power to limit either Congressional or state action through the limitations on authority found in the Constitution. See Robert Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 Notre Dame L. Rev. 1191 (1984).

Lipset, *supra* note 24, at 21 (noting that no national government is as limited in power except that of Switzerland).

Id. at 35.

including the acquiescence to slavery, segregation, forced internment, and the suppression of speech to deter political criticism and stifle opposition to war. As a result, U.S. citizens have tended to distrust government and its power over constitutionally protected rights.\textsuperscript{66} Thus, the development of individual rights in the United States is characterized by a strong notion of individualism.\textsuperscript{67}

The Bill of Rights stresses the importance of individual rights in American society. These rights were established in order to protect against governmental intrusion in the lives of American citizens. Many of these protections directly reflect the colonial dissatisfaction with British governmental policy before the Revolutionary War. For example, the provision relating to freedom of expression and the anti-establishment clause with respect to religion are derived from pre-Revolution complaints against British rule. The meritocratic approach in the United States has also resulted in a dominant theory of equality of opportunity. Under this perspective of equality, the government's role in protecting equality is merely to ensure equal access. There is no obligation for the government to ensure equality of result.


\textsuperscript{67} Schuman, supra note 34, at 585 (stating that American Fourth Amendment law is distinctly individualist).
There is a strong notion that individual rights are necessary as a protection against overreaching by the government. In fact, both major political parties in the U.S., the Republicans and the Democrats, can be characterized as classically liberal and anti-statist. Thus, the majority of political debate in the U.S. occurs within the liberal framework. Each party asserts an alternative method of achieving individualist goals. In addition, much of the attention surrounding rights in U.S. courts relates to this notion of the government as an oppressor of rights. However, much of this sentiment is relatively recent and should be viewed in the context of changes in federalism.

3. American Federalism—State and Federal Governments

The system of government in which political power is divided between national and local governments, thereby creating an interdependent relationship in which neither level is completely subordinate to the other, is known as federalism. Both Canada and the United States operate within a federalist system, but each has created its own unique version. Federalism is a significant aspect of each country's political culture and a key component in analyzing the role of government in relation to individual rights. Governmental power in the area of rights may be divided between federal and local levels just as it is between the judicial and legislative branches. Thus, though a weak federal government may indicate an anti-statist position in a country, the opposite could be true if strong governmental power instead rested in local structures. To determine the true role of the state in relation to individuals in society, the nature of
federalism and the consequent power of each level of government must be assessed.

In the United States, the federal power is diluted to a great extent through the division of powers and the constitutional restriction of Congressional power. However, with respect to the latter, much of this limitation is in relation to the power of state governments within the United States rather than in relation to American citizens in general. Thus, the Constitution and, more specifically, the Bill of Rights are not definitive antistatist documents; rather, they represent the division of state power between the federal and local levels. In fact, there was substantial debate about whether to include the Bill of Rights in the Constitution at all. Alexander Hamilton argued that the explicit recognition of certain rights would necessarily exclude others unintentionally. According to his view of the Constitution, the very structure of the document itself, incorporating division of powers, federalism, and populism, was sufficient to protect individuals from governmental power.\(^68\) Ultimately, the rights were added to the Constitution in order to ensure that the federal government could not overcome local self-government in these matters.\(^69\) Indeed, the Tenth Amendment confirmed the autonomy of states in matters not exclusively within the jurisdiction of the federal government. Thus, the Bill of Rights, in its original form, only applied to

\(^{68}\) Federalist no. 84.

the power of the federal government. This view was upheld in the U.S. Supreme Court by Chief Justice Marshall in *Barron v. Baltimore.*

Following the Civil War, the victory of the northern states resulted in an extremely influential development in the nature of rights in American society. The Civil War Amendments represented the structural abolition of slavery, along with its badges and incidents. Specifically, the Thirteenth Amendment prohibited slavery and involuntary servitude, the Fourteenth Amendment pronounced the equality of citizens and their right to due process in state proceedings, and the Fifteenth Amendment protected voting rights based on race. However, the ultimate effect of these provisions was not fully realized until well into the 20th century.

Initially, these provisions had little effect beyond the explicit application against slave practices in the South. Indeed, the Privileges and Immunities clause was interpreted in a manner which severely limited its possible consequence.71

Around the turn of the century, the Supreme Court began to interpret the Fourteenth Amendment Due Process clause as requiring states to recognize freedom of contract. Thus, state attempts to regulate working conditions in the face of extreme

70 7 Pet. 243 (1833).

71 Slaughter House Cases, 16 Wall. 36, 61 (1873) (upholding a Louisiana statute creating a monopoly in livestock facilities despite a challenge under the Fourteenth Amendment’s privileges and immunities clause, in favor of state police powers, including the power to protect the health, welfare, and safety of the community).
violations were invalidated.\textsuperscript{72} The results of these cases can be better understood in the context of the overall laissez-faire attitude of this period.\textsuperscript{73} Although this did not significantly alter state power in the area of individual rights, it did represent a significant trend toward centralization of federal power.

With respect to individual rights, the shift in power came later and more slowly.\textsuperscript{74} Beginning with \textit{Gitlow v. New York},\textsuperscript{75} the U.S. Supreme Court began the process of incorporating the Bill of Rights into the Fourteenth Amendment. Under the rubric of due process, the Court determined that the fundamental rights articulated in the Constitution should apply to state governments.\textsuperscript{76} Ultimately, this was the most significant anti-statist development in the rights sphere in the United States. Rather than a document dividing power between two governments,

\begin{enumerate}
\item Peck, \textit{supra} note 69, at 291.
\item 268 U.S. 652 (1925) ("[F]or present purposes we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgement by Congress, are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States.").
\item Although the Supreme Court has never explicitly incorporated the entire Bill of Rights into the Fourteenth Amendment, most of the relevant provisions have been transferred. Leonard Levy, ed., \textit{THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY}, XXIII (1970). For a discussion of the debate surrounding this process, see Charles Fairman, \textit{Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding}, 2 STANFORD L. REV. 5 (1949).
\end{enumerate}
the Constitution now prevented any government in the United States from interfering with individual liberties contrary to the Bill of Rights. Prior to these developments, states, within their sovereign police power, could regulate speech and other fundamental matters without federal interference. With the incorporation doctrine, the federal judiciary became the nation's primary keeper and interpreter of rights.

The incorporation doctrine has significantly reduced the opportunity for significant positive action on the part of the government in the protection and promotion of rights. For example, prior to the Fourteenth Amendment, the city of New Orleans passed a law restricting funerals to one chapel, and prohibiting them altogether in Catholic churches, in order to prevent the spread of yellow fever. The Supreme Court, in *Permoli*, upheld a fine imposed against a Catholic priest violating this directive under the reasoning of *Barron*. Thus, the state was able to place public health concerns above those of freedom of religion in order to protect the state's citizens from harm. Advocating the contemporary application of a similar balancing of interests this type of reasoning would not imply that the Fourteenth Amendment has not had a positive impact for individual rights. Indeed, the context in which incorporation of the First Amendment occurred, state prosecutions of individuals advocating communist beliefs, represented a significant development in the protection of political speech. Nonetheless, the Supreme Court's application of freedom of expression against

---

77 *Permoli v. New Orleans*, 3 How. 589 (1845).
the states went well beyond this limited context and followed the degree of scrutiny afforded the federal government under the First Amendment.

According to Justice Holmes, the total incorporation of the First Amendment was not necessary to serve the purposes of the Fourteenth Amendment. 

"[T]he general principle of free speech, it seems to me, must be taken to be included in the 14th Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs, or ought to govern, the laws of the Untied States."\(^{78}\) For example, the Supreme Court could apply an intermediate scrutiny test, used in equal protection cases, to evaluate the legitimacy of state regulation of speech. In the case of the New Orleans public health law, for example, the Court could evaluate the reasonableness of the law in light of the importance of both freedom of religion and public safety. However, the Supreme Court has rejected this position and has applied its First Amendment doctrines in their entirety against state action.\(^{79}\)

Thus, overall, the United States has witnessed a centralization in the power of the federal government in the 20th century. However, this centralization has not expanded the role of the federal government in promoting individual rights. On the


contrary, the Supreme Court has limited the ability of government to balance the needs of society in relation to the importance of individual rights.

D. Canadian Communitarianism

In comparison to the United States, Canada developed in a considerably different manner. First, Canada was settled by both the French and the English. The Treaty of Paris, in 1763, placed Quebec within the British Empire and caused many French bourgeois to return to France.\textsuperscript{80} In response to the French Revolution, many conservative Catholic priests emigrated from France to Quebec.\textsuperscript{81} Similarly, when the Revolutionary War began, Loyalists fled north to Canada from the American colonies.\textsuperscript{82} Thus, the country was inhabited by two distinct societies, both of which had rejected revolutions against governmental tyranny.\textsuperscript{83} As a result, the population was generally conservative, or tory, and possessed an image of the state as a necessity in the protection of the community.\textsuperscript{84} The prime example of this communitarian trust in government is symbolized by the constitutional axiom of "peace, order, and good government" placed in the British North America Act.\textsuperscript{85} Lipset

\textsuperscript{80} Lipset, supra note 24, at 47.
\textsuperscript{81} Id. at 47.
\textsuperscript{82} Id. at 47.
\textsuperscript{83} Id. at 47.
\textsuperscript{84} Id. at 43.
\textsuperscript{85} Constitution Act, 1867, s. 91(1).
identifies several characteristics, including religion and economics, which reflect this communitarian perspective.

1. Social and Economic Development

By contrast to the development of religion in the United States, religion in Canada developed under two churches which were hierarchical and had been established by the state in Europe: Catholicism, largely followed by the francophone population, and the Anglican church, largely followed by British Loyalists and which has now largely given way to the unified anglophone sectarian United Church. Because of a lack of emphasis on moralism and a recognition of coexistence, there has not been the same tendency toward competitive values. The hierarchical, state-supported nature of religion in Canada has contributed to the retention of toryism and general communitarian values.

Within the economic sphere, Canada has developed more slowly than the United States. With a larger land mass, a smaller population, and a relative lack of resources, the private business sector was not able to flourish on its own. Rather, the government acted as a necessary partner in economic development. Canadians have been characterized as less aggressive, risk-taking, and innovative than Americans in the business sphere. There has been an overall decreased emphasis on competition and personal economic gain. As a result, the economy in Canada,

86 Lipset, supra note 24, at 79-83.
87 Id. at 118-134.
88 Id.
while relatively strong among industrialized nations, has
developed more slowly than that of the U.S. Nevertheless, the
difference between these two countries' economies is shrinking
and is narrower than any time in history.

Canada's emphasis on ethnic diversity serves as further
evidence of a strong sense of collectivism. Rather than
reflecting the American notion of a melting pot, many scholars
have referred to Canadian society as a mosaic.\footnote{Id. at 173.}
Within this analogy, society values the distinctiveness of each culture and
encourages retention of cultural beliefs and practices.\footnote{Id. at 180.}
This tolerance is largely in response to the powerful presence of
Francophones in Quebec.\footnote{Id. at 179; Morton Weinfeld, Canadian Jews and Canadian Pluralism, in S.M. Lipset, ed., American Pluralism and the Jewish Community (1989) ("The binational origin of the Canadian state paved the way for full acceptance of the plural nature of Canadian society and acknowledgement of the contribution, value, and rights of all Canadian minority groups").}
The presence of such a large minority population, distinct in language, culture, and geography, has
forced Canadian society to tolerate a heterogenous system of
values. In fact, it has been suggested that Canada's multi-
cultural character defines the country's true national identity
more than any other cultural factor. This relatively
communitarian ideology has, in turn, shaped the development of
political institutions in Canada.
2. Institutional Development: B.N.A. Act and the Charter

Within the political sphere, there is arguably more ideological diversity in Canada than in the United States. In addition to the liberal individualist theory found in the United States, Canadian political thought incorporates both toryism and socialism. Toryism finds its basis in 19th century monarchical English politics. Under this ideology, the state is a fundamental institution in society, responsible for maintaining order and ensuring the basic needs of citizens. Individual needs are sacrificed in the interests of the larger community. As such, tories support the economic class system as necessary to achieve social stability and economic prosperity. By contrast, although socialists also advocate the strong role of government in achieving societal ends at the expense of individual concerns, social democrats perceive the objective of this role as eliminating class distinctions through welfare programs.

Thus, without unitary liberal thought, there is greater opportunity for political, rather than judicial, solutions on contentious issues such as the death penalty. In addition, the government has continued to be strongly connected to economic

92 See Macklem, supra note 23, at 143.
93 See id. at 129-38.
94 Id. at 125.
95 Id. at 125.
96 Id. at 125-27.
development, social welfare, crime control, and religion. Canada's ideological diversity can be seen in the development of its legal and political institutions.

In 1867, Canada gained independence from England with the British North America Act. This Act established Canada's Constitution and granted powers to both federal and provincial governments. Structurally, the Parliamentary form of government does not dilute governmental power as much as in the United States. There is not the same emphasis on separation of powers. The executive branch of government is led by the cabinet, a group composed of the Prime Minister and several other

---

97 Lipset, supra note 24, at 51 (noting the importance of Canada's relatively large land mass and small population in promoting a strong governmental role in the economy).

98 For example, the socialization of health care in Canada reaches far beyond the U.S. model of providing services to the elderly, poor, and disabled.

99 Canada has more stringent gun control laws than the U.S., and opinion polls show Canadians place more trust in police protection. See David B. Kopel, Canadian Gun Control: Should the United States Look North for a Solution to its Firearms Problem?, 5 TEMPLE INT. & COMP. L.J. 1 (1991); Charles Taylor, Can Canada Survive the Charter, 30 ALBERTA L. REV. 427, 429 (1992) (arguing that Canada is less violent due to a lack of racial conflict and the nature of political culture).

100 In relation to the U.S., there is a much lesser degree of emphasis on the importance of separation of church and state in Canada.

101 Sedler, supra note 62, at 1192.

102 Lipset, supra note 24, at 50.

ministers, each of whom is a member of Parliament.\textsuperscript{104} In fact, the Prime Minister is the Parliamentary leader of the prevailing political party in the House of Commons.\textsuperscript{105} Because the cabinet has such influence in the House of Commons and is primarily responsible for appointing members of the Senate, it effectively controls both the legislative and executive branches of government in Canada.\textsuperscript{106} In addition, the notion of parliamentary supremacy dominated in Canada until the adoption of the Charter and s.52(1) of the Constitution Act, which allows the judiciary to strike down laws inconsistent with the Constitution, in 1982. Even with such a provision, the notion of parliamentary supremacy continues to influence Canadian courts.\textsuperscript{107} Thus, there has been relatively little oversight of legislative action by the judiciary in Canada.

From the prevalence of positivism and the political ideology of toryism at the time the B.N.A. Act was drafted, the Canadian Constitution retained the British notion of Parliamentary supremacy and, as such, did not contain any specific guarantee of rights similar to the American Bill of Rights.\textsuperscript{108} By dividing

\textsuperscript{104} Id. at 229 (although the Governor General is the formal head of state, he or she must follow the direction of the cabinet).

\textsuperscript{105} Id. at 233.

\textsuperscript{106} Id. at 243.

\textsuperscript{107} Id. at 305.

\textsuperscript{108} Strayer, supra note 65. However, this notion of Parliamentary supremacy was not as rigid as in England. See id. at 4; Hogg, supra note 103, at 303 ("[T]here was no legislative body in Canada which was sovereign in the sense of being able to make or unmake any law whatsoever."). Under the English system, following Parliament's declaration of supremacy after the English
powers exclusively to either federal or provincial levels of government, Canada's constitution established a structural grant of power for judicial review of legislative actions. Canadian courts had constitutional powers to find a statute ultra vires, or outside the scope of a legislative body's constitutional authority. In Canada, some Supreme Court decisions based on ultra vires grounds emphasized the importance of individual freedoms. Thus, even though rights were not constitutionally recognized, Canada did acknowledge their importance to the democratic structure of government.

In 1982, Canada passed the Constitution Act which contained the Charter of Rights and Freedoms. This was the first instance in which Canada constitutionally recognized individual freedoms. The Charter, as a modern document, was formulated in a

---

109 See Sedler, supra note 62, at 1195; Strayer, supra note 65, at 39.

110 Strayer, supra note 65, at 40.

111 For example, since the Constitution grants the exclusive authority to enact criminal laws to Parliament, if a provincial legislature enacted a criminal provision, a Canadian court could hold the statute to be ultra vires. See Strayer, supra note 65, at 39.

112 The Supreme Court of Canada held a provincial statute which prohibited the distribution of communist propaganda to be ultra vires. See, e.g., Reference Re Alberta Statutes, [1938] S.C.R. 100; Sedler, supra note 62, at 1198.

113 Id.

114 Id.
dramatically different atmosphere than the American Bill of Rights. Most notably, this document was not a response to governmental oppression and emerging independence of an inexperienced nation.\textsuperscript{115} Thus, Canada could use its historical experiences as a nation to formulate a document which would reflect values developed and refined since its inception.\textsuperscript{116} In addition, Canada was able to learn from the experience of the United States with the Bill of Rights as well as other national and international documents, such as the European Convention on Human Rights.\textsuperscript{117}

Although the Charter contains many provisions which could be characterized as collectivist, this document has been referred to as the single most "American" of all structural elements in Canada.\textsuperscript{118} In many ways, it mirrors the American Bill of Rights, in conjunction with the 14th Amendment to the U.S. Constitution. In the Charter, there are protections for freedom of expression, freedom of religion, freedom from unreasonable search and seizure, various other protections in the criminal justice system, and rights of equality. Most significantly, although Canada has been characterized as being communitarian and tolerating significantly greater governmental involvement in the area of rights, the Supreme Court of Canada has limited the application of the Charter, like the Bill of Rights, to instances

\begin{footnotes}
\item[115] Id.
\item[116] Id.
\item[117] Sedler, \textit{supra} note 62, at 1198; Strayer, \textit{supra} note 65.
\item[118] Lipset, \textit{supra} note 24, at 116.
\end{footnotes}
of governmental conduct.\textsuperscript{119} Thus, the Charter's sole function is to oversee legislative, or other governmental rule-making, authority. Although the Court may interpret the Charter in such a manner as to allow positive action by the government, the Charter itself cannot mandate such a result. This, more than anything else, demonstrates the similarity of the Charter to the American Bill of Rights.

However, this document differs from the American Bill of Rights in several respects, notably in the strength of governmental interests in relation to individual rights. Most importantly, all of the rights enunciated in the Charter are subject to limitation under s.1. This provision allows governmental action to violate the rights in the Charter if it is demonstrably justifiable in a free and democratic society. This is remarkably different from the absolute nature of the Bill of Rights.

Further, there are other manifestations of a certain faith in representative government. The Charter, retaining aspects of the history of Parliamentary supremacy in Canada, contains a legislative override in s.33.\textsuperscript{120} Parliament and provincial legislatures can circumvent the Charter through an overt purposive statement of intention to do so. This provision has no


\textsuperscript{120} Section 33 of the Charter provides that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."
counterpart in the U.S. Constitution. The inclusion of this section in the Charter symbolizes a substantial trust of the Canadian people in the legislative process.

As a result of such legislative deference, courts in Canada tend not to focus on slippery slope arguments as often as their U.S. counterparts.\textsuperscript{121} Further, although Parliamentary supremacy was altered by this document,\textsuperscript{122} its importance to the Canadian legal system and long history in Canada may demonstrate a greater degree of trust in elected officials by the Canadian people.\textsuperscript{123} Additionally, because of the history of the ultra vires doctrine, Canadian courts have chosen to "read down" and "read in" statutes so that their provisions, even if possibly unconstitutional, will be interpreted so as to conform to the constitution.\textsuperscript{124}

\begin{footnotes}
\footnotetext[121]{See Matsuda, \textit{supra} note 66; compare Garrison v. Louisiana, 379 U.S. 64 (1964) with Keegstra, 3 S.C.R. 697 (1990).}
\footnotetext[122]{The Charter created a method of constitutional, rather than ultra vires, judicial review: s.52. The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. This provision is the equivalent of the Supremacy Clause in Article VI of the U.S. Constitution. However, because this provision is more explicit, Canadian courts did not require a decision equivalent to \textit{Marbury v. Madison} in order to obtain constitutional judicial review. See Sedler, \textit{supra} note 62, at 1197.}
\footnotetext[123]{See Strayer, \textit{supra} note 65; Symposium, \textit{supra} note 66, at 337 (indicating a greater degree of trust in government by the Canadian people than in the United States); Kopel, \textit{supra} note 99, at 43-45.}
\footnotetext[124]{See Sedler, \textit{supra} note 62, at 1196 (stating that this method of interpretation has the effect of judicial legislation by significantly changing the meaning of a statute).}
\end{footnotes}
The Canadian Charter of Rights and Freedoms gives primacy to the values of democracy and community. Unlike the Fourteenth Amendment, the right to equality is specifically granted to several identifiable groups. The Charter makes reference to the preservation of multicultural heritage and affirmative-action programs, and it includes community-based rights such as aboriginal and language rights. Thus, the Charter is more concerned with the related values of democracy and community, rather than with the liberty of the individual against the state. This democratic and community-based interpretation is one of the primary reasons behind s.1 of the Charter.

Section 1 of the Charter is unique in the constitutional law of these two countries. This section reads as follows: "s.1: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (emphasis added). Thus, there is a two part analysis in interpreting all Charter provisions: a) is there a violation of the protected right; b) if so, is it a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s.1 of the Charter? The first step can be characterized as determining the meaning of a

---

125 Monahan, supra note 27, at 102.


127 Monahan, supra note 27, at 102; see Crawford, supra note 28, at 48.

128 Monahan, supra note 27, at 101-102.
specific constitutional guarantee, and the burden is on the individual asserting a violation of the right.\textsuperscript{129} Under the second step, the burden shifts to the government, or the party attempting to justify the limitation of the right, to show that the violation is demonstrably justified in a free and democratic society through both the goal of the legislation and its means of achieving that goal. Because of this reverse onus on the government, the Charter is written in favor of the rights and freedoms.

The authoritative decision in section 1 analysis, \textit{R. v Oakes},\textsuperscript{130} established a uniform and precise test: first, the legislative objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; and second, the means chosen to attain the objective must be proportional to the ends. In applying this analysis, the objective of the legislation must have a "pressing and substantial" concern.\textsuperscript{131} Under the proportionality test, three elements have been identified: first, there must be a rational connection between the legislation and its objective; second, the measure should impair the right as little as possible; finally, the attainment of the objective must be proportional to the effects of the impugned measures and not so severely infringe on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of

\textsuperscript{129} Sedler, supra note 62, at 580.

\textsuperscript{130} 26 D.L.R.4th 200 (S.C.C. 1986).

These principles are uniformly applied to all Charter violations proscribed by law, including s.2(b). Thus, although Canada can define individual freedoms as broadly as the United States, there is more opportunity to limit rights when competing societal interests demand.

This analysis bears some resemblance to numerous tests developed by the U.S. Supreme Court in interpreting the Bill of Rights. For example, the s.1 analysis is similar to the strict judicial scrutiny test under the First and Fourteenth Amendment, the "commercial speech doctrine," the "clear and present danger" test, and the "symbolic speech"

---


133 The terms "proscribed by law" found in section 1 also require a judicial determination in most instances; however, for purposes of this paper, it is sufficient to note that legislative enactments and common law principles satisfy this test so long as they are not overly vague. See Jerome Atrens, THE CHARTER AND CRIMINAL PROCEDURE: THE APPLICATION OF SECTIONS 7 AND 11 (1989).


135 Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").


137 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (state may prohibit advocacy of unlawful action only where such advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

Thus, an important difference between the Charter and the Bill of Rights interpretations appears to be the uniform application of the same test under the Charter for all rights, rather than the development of specific tests for each interest under the Bill of Rights.\textsuperscript{140}

3. Federalism—Provincial and Federal Governments

Like the U.S. Constitution, the British North America Act established a federal system. Similar to the original debate among the framers of the American Constitution, this document represented a compromise between those preferring a unitary state and those preferring sovereignty for each region in the area. However, this Act reflected specific concerns of nineteenth century Canada. First, one of the Act's primary purposes was to resolve linguistic and cultural differences by accommodating Lower Canada, which was predominantly French, and Upper Canada, which was largely inhabited by descendants of British Loyalists. With a goal of cultural harmony and with knowledge of the American system and the civil war it produced, Canada's federal system had a much more centralizing intention than the American federal system.\textsuperscript{141} Contrary to the American Constitution, the British North America Act provided the provinces with enumerated powers and vested the federal government with residual, in addition to enumerated, powers.\textsuperscript{142} However, in practice, while

\begin{footnotes}
\footnote{139} Sedler, supra note 62, at 582.
\footnote{140} Sedler, supra note 62, at 582.
\footnote{141} Hogg, supra note 103, at 108.
\footnote{142} Id.
\end{footnotes}
the federal government dominated in the mid-nineteenth century and for a short period after the Depression and World War II, Canada has witnessed a greater degree of decentralization than the United States.\textsuperscript{143} The shift in power from the federal to provincial level is largely due to the influence of the Judicial Committee of the Privy Council, the final court of appeal in Canada until 1949, which supported strong provincial rights.\textsuperscript{144}

Although Canada's Constitution was founded on the principle of parliamentary supremacy, the role of the judiciary in interpreting the division of power between federal and provincial governments weakened that principle to some extent.\textsuperscript{145} Utilizing the doctrine of ultra vires, the Canadian judiciary struck down many statutes enacted by both Parliament and provincial legislatures as being outside the scope of delegated powers under the B.N.A. Act. This had a significant effect on the power of the judiciary in protecting individual rights. For example, the Supreme Court of Canada struck down several provisions violating freedom of expression based on ultra vires grounds.

The adoption of the Charter gave the judiciary an even stronger role in the protection of individual rights.\textsuperscript{146} However, this document, unlike the Civil War Amendments or the

\textsuperscript{143} Id. at 110 ("[I]t is clear that Canada now has a federal Constitution . . . that is less centralized than that of either the United States or Australia.").

\textsuperscript{144} Id. at 110.

\textsuperscript{145} Id. at 303.

\textsuperscript{146} Hogg, supra note 103, at 797 ("The major effect of the Charter has been the expansion of judicial review.").
Bill of Rights in the United States, did not have specific federalism implications. The rights protected by the Charter applied equally against both the federal and the provincial governments and allowed them both to usurp those rights when demonstrably justifiable under s.1.\textsuperscript{147} Thus, this was neither the division of power represented by the Bill of Rights nor the rejection of power represented by the doctrine of incorporation. Nonetheless, it did place the Supreme Court of Canada in a position at least similar to that of the U.S. Supreme Court: the ultimate interpreter of individual rights at both the national and local governmental level.

Despite the application of this document to both levels of government, this nationalization of the meaning and content of civil liberties sparked a significant federalist debate. Indeed, s.33, the legislative override provision, was a necessary addition in order to gain the support of the requisite number of provinces to enact the Charter.\textsuperscript{148} Thus, similar to the debate surrounding the adoption of the Bill of Rights, the Constitution Act was viewed as a threat to provincial sovereignty. In fact, Quebec has never assented to the Act for this very reason.\textsuperscript{149}

Since the implementation of the Charter, some of the most controversial cases have focused on Quebec's sovereignty over language matters. In \textit{Ford v. Quebec},\textsuperscript{150} the Supreme Court of

\textsuperscript{147} Id. at 798.

\textsuperscript{148} Id. at 892 (stating that s.33 "was the crucial element of the federal-provincial agreement of November 5, 1981 . . . ").

\textsuperscript{149} Id. at 892.

\textsuperscript{150} [1988] 2 S.C.R. 712.
Canada held that a law banning the use of non-French languages on commercial signs violated the Charter's protection of free expression. Subsequently, the Quebec legislature re-enacted the exterior signs portion of the law with a notwithstanding clause under s.33.\textsuperscript{151} In fact, the only substantial use of s.33 has occurred in this context.\textsuperscript{152} However, in doing so, Quebec did not invoke an equivalent override provision in its own Charter of Human Rights and Freedoms.\textsuperscript{153} Thus, Quebec's dissatisfaction with the Charter does not result from a rejection of civil liberties. Rather, it is a matter of provincial sovereignty in an anti-federalist movement.

Whereas the Bill of Rights represented a concession to anti-federalists and a limit only to federal power, the Charter struck a balance between provincial and federal powers by incorporating both s.33 and s.1 into a document applying to both powers. Canada should not need the unsystematic incorporation of the Charter against the provinces which occurred in the U.S. after the adoption of the Fourteenth Amendment. As a result, the Charter is less likely to be transformed into such an antistatist document as the Bill of Rights now represents. Indeed, the Charter should have a much more limited role than the Bill of Rights. "The Charter will never become the main safeguard of civil liberties in Canada. The main safeguards will continue to

\textsuperscript{151} Hogg, supra note 103, at 893.

\textsuperscript{152} Id. at 892-93 (noting that Quebec originally included the notwithstanding clause in a blanket provision covering all legislation; however, this provision expired in 1987 and was not re-enacted).

\textsuperscript{153} Id. at 893 n.5.
be the democratic character of Canadian political institutions, the independence of the judiciary, and a legal tradition of respect for civil liberties.™

This illustrates the primary difference between the United States Supreme Court and the Supreme Court of Canada in analyzing positive governmental attempts to eliminate social inequality at the expense of individual rights; the former, through content-neutrality and colorblindness, has virtually eliminated all such governmental action, while the latter determines both the proper actor and the proper scope of such action. Unlike the United States, there is still a significant role for government in Canada to affirmatively promote principles of equality. Indeed, as this thesis suggests, there does appear to be a more limited application of the Charter than that of the Bill of Rights.

E. The Relationship of Political Institutions and Cultural Values

Although the cultural values and political institutions of the U.S. and Canada appear to support an individualist and communitarian society, respectively, there are many aspects of American and Canadian political culture which indicate greater ambiguity. It has been asserted that the ideologies of the U.S. and Canada are actually very similar.™ Rather than a differing world-view, the primary difference lies in the

---

™ Id. at 796. Interestingly, this statement sounds similar to the arguments of Alexander Hamilton in opposition to the Bill of Rights.

institutionally created possibility for alternative viewpoints to attain a position of power in Canada.\textsuperscript{156}

Both countries possessed a strong Lockean liberal ideology in the 19th century.\textsuperscript{157} In fact, Canadian Tories may have resembled British Whigs in their anti-statist position.\textsuperscript{158} Further, a fairly strong faction in American constitutionalism, the Hamiltonians, preferred a strong federal government acting as a unified power.\textsuperscript{159} Although this position did not entirely succeed, definite conciliations to this group are apparent in the text itself. For example, although Congress' power is specifically limited under Article I and by the Bill of Rights, its laws are nonetheless supreme in the nation. In addition, Congress is able to achieve its powers with "any means which are necessary and proper," a phrase accorded a fairly generous interpretation by the U.S. Supreme Court. Neither of these developments can be characterized as wholly antistatist. Additionally, despite the laissez-faire attitude in the U.S., the government managed to maintain a fairly strong role in the economy at various times in history.\textsuperscript{160} For example, the U.S. promulgated anti-trust laws, regulated wages, and protected against unsafe working conditions.\textsuperscript{161} Further, while the U.S.

\textsuperscript{156} Id. at 674.
\textsuperscript{157} Id. at 677.
\textsuperscript{158} Id. at 677.
\textsuperscript{159} Id. at 678.
\textsuperscript{160} Finlow, supra note 155, at 685.
\textsuperscript{161} Id. at 685.
may have higher rates of advanced education, these rates have not affected actual social mobility in the U.S. as compared with Canada.\footnote{Lipset, supra note 24, at 160.}

In Canada, even though socialism established itself in the political system, the regulation of wages and worker conditions trailed the U.S. for a significant period of time in the early 20th Century.\footnote{Finlow, supra note 155, at 688.} One analysis of 20th century union activity in Canada and the United States supports this view.\footnote{John Richards, A Tangled Tale: Unions in Canada and the United States, in David Thomas, ed., Canada and the United States: Differences That Count, 65 (1993).} As shown in this study, union membership was more prevalent in the U.S. than in Canada until well into the 1950's. Further, the greater percentage of union density in Canada now can largely be explained by public sector participation.\footnote{Id.} This result could reflect a difference in institutional structure more than societal values. Indeed, unless union values completely reversed in these two countries in the 1950's, a notion not supported by opinion poll data, then ideological explanations could not support the development of labor unions in these two countries.

Thus, contrary to earlier suggestions, the ideological development in the two countries can be seen as very similar. Both countries have possessed progressive and conservative values...
in varying strengths and at different times in their history.\textsuperscript{166} Ideology does not exclusively control the development of individual rights in these two countries. While Canada and the Charter may place more emphasis on communitarian values overall, it is not to such an extent that it would control actual outcomes in civil rights issues. In both the United States and Canada, the respective high courts have sufficient constitutional power to interpret rights in either a positive or negative manner. Nonetheless, the United States Supreme Court, through the institutionally and ideologically driven incorporation doctrine, has applied a strictly antistatist perspective in its analysis of individual rights.

F. Conclusion

The interrelationship between social values and governmental institutions is extremely complex. Underlying values undoubtedly influenced the system of government chosen by these two countries. The U.S. Constitution reflects a revolutionary attitude at the time of drafting. Similarly, the British North

\textsuperscript{166} Finlow, supra note 155, at 690. Such a different constitutional structure of government contributed to the alternative practical application of these ideologies into public policy. The Parliamentary form of government in Canada is more flexible in allowing non-liberal political parties to voice their concerns. For example, whereas the Socialist Party struggled and failed in the U.S., social democrats in Canada achieved much greater political recognition. Although this could imply a lesser emphasis on socialist values in the U.S., historical evidence suggests that both countries had a strong socialist movement. There are even examples of anti-communist activity in both countries, though perhaps more extreme in the United States. However, due to the inability of the U.S. socialist supporters to gain political power in a two-party system, the ideological acceptance of this viewpoint diminished with economic prosperity. By contrast, in Canada, socialism controlled a viable political party and established itself in government, ensuring a continuity through economic cycles.
America Act reflected a definite tory influence, as well as an awareness of Canadian cultural diversity, the developments under the U.S. governmental system, and a concern about U.S. expansionism. However, the subsequent interpretation of these documents and general governmental activity in the two countries has been inconsistent enough as to minimize the value of generalizations. Nevertheless, recognizing each country's political culture is crucial in order to understand the underlying assumptions of judges and the historical context in which they decide the proper role of government in the constitutional protection of liberty and equality. Thus, the remainder of this thesis will explore the alternative interpretations of equality and freedom of expression in Canada and the United States.
Chapter 3

Alternative Conceptions of Equality

There are many significant differences in the manner in which the Supreme Court of Canada has applied s.15 of the Charter as compared to the U.S. Supreme Court's interpretation of the Fourteenth Amendment. While the language of s.15 differs from that of the Fourteenth Amendment by explicitly including a number of groups deserving equality protections and by including four separate forms of equality instead of relying solely on the guarantee of equal protection, these language differences alone cannot explain the alternative conceptions of equality in Canada and the United States. This chapter explores and contrasts each country's general approach to the constitutional guarantee of equality.

As an initial matter, it should be noted that the constitutional guarantee of equality in both countries is limited...

---

167 Part 1, Constitution Act, 1982, Schedule B, Canada Act, 1982, 1982, c.11. Section 15 reads: "(1) 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. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental and physical disability."

168 "No State shall deny any person in the United States . . . the equal protection of the laws."
to governmental action. As with other Charter provisions, s.15 only applies to governmental action; purely private action is beyond the scope of the Charter. Similarly, evaluating an act of Congress promulgated under section 5 of the Fourteenth Amendment and directed at both private and public action, the U.S. Supreme Court found that the Fourteenth Amendment only protects against state interference with rights of equality.

Some interpretational schemes have been similar in both Canadian and American models of equality. The Supreme Court of Canada has interpreted the Charter of Rights and Freedoms as

169 In order to reach private discrimination, both countries have promulgated various forms of civil rights statutes at the national and local level which regulate such areas as public accommodation, employment, housing, and eating establishments. These statutes certainly reflect each country's willingness to protect the principle of equality through governmental action. Nevertheless, the extent to which governmental protection of equality is required and governmental violation of equality is prohibited will be defined by constitutional interpretation. Thus, this thesis focuses on the alternative notions of equality as a constitutional right in Canada and the United States.

170 Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 163-64 (stating that s.15 is only "concerned with the application of the law"). Thus, many forms of inequality in Canadian society, those caused by private actors, must be addressed outside of the Charter. This limitation precludes an interpretation of the Charter as a "general guarantee of equality." Id. at 163.

171 The Civil Rights Cases, 109 U.S. 3 (1883) ("Individual invasion of individual rights is not the subject-matter of the Amendment.").

172 The nature of equality law in Canada has changed dramatically in the last ten years. In 1985, s.15 of the Charter of Rights and Freedoms came into force. This represented a significant expansion in the constitutional protection of equality. Although the Court is still divided on some issues of interpretation, the primary analysis for equality rights under s.15 relies heavily on the majority opinion in Andrews. Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143. As delivered by McIntyre, J., the Andrews' opinion established a two-part analysis under s.15: 1) whether the impugned provision
a purposive document: one which should be interpreted in accordance with the purposes of its provisions.\textsuperscript{173} Thus, the Supreme Court of Canada has attempted to articulate the purpose underlying s.15 of the Charter. "The purpose of the Charter is to ensure equality in the formulation and application of the law[, which] . . . entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect, and consideration."\textsuperscript{174} "The overarching purpose of the equality guarantee in the Charter [is] to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance."\textsuperscript{175} However, rather than uniformly following these statements, one scholar has noted a trend in Supreme Court cases to rely on three distinct notions of


\textsuperscript{175} Miron v. Trudel, [1995] 124 D.L.R. (4th) 693, 741; see also Egan, at 661 ("It is this section of the Charter, more than any other, which recognizes and cherishes the innate human dignity of every individual."); McKinney v. University of Guelph, [1990] 3 S.C.R. 229, 391 (Wilson, J.) ("The purpose of the equality guarantee is the promotion of human dignity.").
equality. In addition, L'Heureux-Dube, J., has asserted that the Supreme Court has "divergent approaches" to s.15(1). Nonetheless, each member of the Court has continued to interpret the equality provision in accordance with its overall purpose.

Similarly, the United States Supreme Court has based its interpretation of the Fourteenth Amendment in the context of its general purposes. The Equal Protection Clause "is to be construed liberally, to carry out the purposes of its framers." However, even this similarity in purposive interpretation does not withstand scrutiny.

The U.S. Supreme Court has articulated the purposes of the Fourteenth Amendment with regard to the framer's original intent. Thus, according to the Supreme Court, the Fourteenth Amendment has the purpose of "securing to a race recently emancipated, a race that through many generations has been held in slavery, all the civil rights that the superior race enjoy." As a result, there is a very specific historical circumstance which this provision was intended to alleviate. The Supreme Court has


178 But see Kathleen Mahoney The Constitutional Law of Equality in Canada, 44 Maine L. Rev. 229, note 27 (1992) (stating that the purposive approach of the Supreme Court of Canada has led to a more substantive interpretation of equality rights).

179 Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 306-07 (1879) ("The true spirit of the [Civil War] Amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish.") (emphasis added).

180 Strauder v. West Virginia 100 U.S. 303, 306 (1879).
extended its meaning beyond this original intent to include heightened protection for all races and many other characteristics, as well as protecting generally against irrational and arbitrary legislative action affecting any person in the United States. However, original intent remains influential in modern cases.\footnote{181}

By contrast, the Supreme Court of Canada has specifically rejected an original intent version of a purposive approach. Rather, the interpretation "is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter."\footnote{182}

Beyond this general methodological difference in interpretation, there are, principally, three specific aspects of the U.S. Supreme Court's interpretation of the Fourteenth Amendment which are distinguishable from the Supreme Court of Canada's interpretation of s.15 of the Charter: colorblindness, multiple levels of review, and intentional discrimination.

\footnote{181}{For a discussion of the American debate regarding original intent, see Peck, \textit{supra} note 69, at 161-195.}

\footnote{182}{R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, 344.}
A. Colorblindness

1. United States

Prior to the Civil War, the U.S. Supreme Court, in one of its most infamous decisions, denied the existence of equality on the basis of race. In *Dred Scott v. Sandford*, Chief Justice Taney, writing for the majority, pronounced that no individual in the United States who was a descendant of slaves imported into the country from Africa, whether or not the person was still a slave, could be considered a citizen of the United States. Neither the Declaration of Independence's use of the word "people" nor the Constitution's use of "citizen" included black people within their respective meaning. The Court struck down the Missouri Compromise, which required particular states to be free from slavery as a condition of admission to the Union, because the issue of slavery was a matter for each state to decide for itself.

Even after the adoption of the Fourteenth Amendment, the Court upheld a Louisiana statute which required passengers on

\[\text{References}\]

183 60 U.S. (19 How.) 393 (1857).

184 Id. at 404 ("The general words . . . would seem to embrace the whole human family and if they were used in a similar instrument at this day, would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this document.").

185 Id. at 404 ("It is not the province of the Court to decide upon the justice or injustice, the policy or impolicy of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution.").

186 Id. at 418.
trains to be divided between blacks and whites.\textsuperscript{187} The Court found that the law did not touch on the civil or political rights protected by the Fourteenth Amendment; instead, it was aimed at a matter of social interaction between the races. The Equal Protection Clause "could not have been intended . . . to enforce social, as distinguished from political, equality."\textsuperscript{188} Once the Court made this finding, it went on to conclude that the Constitution cannot be used as a weapon against social prejudices. As a result, the Court refused to prohibit the practice of segregation in the South, despite the facial distinction based on race.

In reaction to \textit{Dred Scott} and \textit{Plessy}, however, the Supreme Court has since adopted the principle of colorblindness\textsuperscript{189} in its decisions. This principle, first articulated by Justice Harlan in \textit{Plessy},\textsuperscript{190} dictates that governmental distinctions illegitimately based on the grounds protected by the Constitution, such as race and national origin, are arbitrary and that these grounds are wholly irrelevant to any legitimate legislative exercise. Rather, the legislature should distinguish

\begin{quote}
\textsuperscript{187} \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896).

\textsuperscript{188} Id. at 538.

\textsuperscript{189} Although the term suggests application only to legislative distinctions based on race, it actually applies to any classification afforded heightened scrutiny under the Equal Protection Clause, such as sex and illegitimacy. In Canada, the principle has been referred to, more accurately, as "sameness" rather than colorblindness.

\textsuperscript{190} 163 U.S. 537, 559 (Harlan, J., dissenting) ("Our Constitution is color-blind.").
\end{quote}
based on individual merit.\textsuperscript{191} Colorblindness establishes a rebuttable presumption that those who are similarly situated be treated in a similar manner.\textsuperscript{192} The extent of proof required to rebut the presumption is determined based on the level of protection designated for the particular characteristic.\textsuperscript{193} Any distinction based on race must further a compelling governmental interest through the least restrictive means available, while distinctions based on sex must further an important governmental interest with means substantially related to the legislative goal.\textsuperscript{194} Thus, colorblindness is not a fixed principle, and it is applied in variable strengths depending on the particular classification challenged.

Based on this principle, the Supreme Court eventually overturned the \textit{Plessy} decision with respect to segregation in

\begin{flushright}
\textsuperscript{191} Plyler v. Doe, 457 U.S. 202, 221-22 (1982) (stating that one of the goals of equal protection is the "abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of merit").
\end{flushright}

\begin{flushright}
\textsuperscript{192} Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (stating that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike"). "What is [the Fourteenth Amendment] but declaring that the law in the States shall be the same for the black as for the white . . . that no discrimination shall be made against them by law because of their color?" Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 307 (1879).
\end{flushright}

\begin{flushright}
\textsuperscript{193} See section B for a more complete discussion about levels of review.
\end{flushright}

\begin{flushright}
\textsuperscript{194} Cleburne, 473 U.S. at 440 (stating that race, alienage, and national origin are "so seldom relevant to the achievement of any legitimate state interest" that strict scrutiny should apply; that gender "generally provides no sensible ground for different treatment"; and that illegitimacy "bears 'no relation to the individual's ability to participate in society'" (quoting Mathews v. Lucas, 427 U.S. 495 (1976)); whereas age is a characteristic which is relevant to the legitimate interests of the state).
\end{flushright}
public schools in Brown v. Board of Education. Chief Justice Warren, delivering a unanimous opinion, found that segregation "generates a feeling of inferiority as to [Black children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." As a result, segregation was depriving minority children equal educational opportunities, even assuming that the segregated institutions were equal in instructional capability. The Court decided that education is a valuable aspect of life in America. Thus, Brown I opened the door to the use of the Fourteenth Amendment in challenging all state action, whether political or social in nature. Nonetheless, this interpretation limited the Fourteenth Amendment by the principle of colorblindness.

There have been numerous challenges under the Fourteenth Amendment by members of the dominant social group, whether by men against sex discrimination or by whites against race discrimination. For example, in Craig, a statute established differing ages of majority for men and women with respect to the sale of alcohol at twenty-one and eighteen, respectively. Using the principle of colorblindness, the Court applied the same protections of the Fourteenth Amendment against sex

---

196 Id. at 494.
197 "Education is perhaps the most important function of state and local governments." Brown, 347 U.S. at 493.
discrimination for challenges by males as by females.\textsuperscript{199}

Similarly, in \textit{Hogan}, the Court invalidated, under the Equal Protection Clause, a statute which excluded males from a state-supported professional nursing school. The Court made it clear that discrimination against men would receive the same protection as against women.\textsuperscript{200} Thus, through colorblindness, the Court has applied its Equal Protection Clause system of interpretation consistently with regard to the class of discrimination without differentiating among groups within the class.

Colorblindness has also dramatically altered the Court's position with respect to affirmative action. Unlike the above cases, affirmative action does not merely discriminate on the basis of illegitimate criteria; it represents an attempt by a governmental actor to benefit groups which are socially and economically disadvantaged.\textsuperscript{201} This remedial purpose has caused considerable difficulty for the U.S. Supreme Court in formulating a proper standard of review for affirmative action cases.

\textsuperscript{199} \textit{But see Craig}, 429 U.S. at 219 (Rehnquist, J., dissenting) (arguing for a lower standard of review for discrimination against men).

\textsuperscript{200} \textit{Mississippi Univ. for Women v. Hogan}, 458 U.S. 718, 723 (1982) (stating that discrimination "against males rather than against females does not exempt it from scrutiny or reduce the standard of review").

\textsuperscript{201} In \textit{Hogan}, although the state articulated as its purpose the compensation of women for discrimination in education, the Court noted that over 94\% of nursing degrees in the state were granted to women prior to the school's opening. Id. Instead, the Court found the legislature's actual purpose to be the perpetuation of "the stereotyped view of nursing as an exclusively woman's job." Id. Thus, under the Court's reasoning, this is not an affirmative action case.
Beginning with *Regents of Univ. of California v. Bakke*, the Court began the process of evaluating the constitutionality of affirmative action plans. In this case, a white student challenged a medical school policy reserving spaces in each class for minority students. Not surprisingly, the Court was unable to come to sufficient agreement to produce an official opinion. A plurality of four justices argued for a less stringent standard of review than strict scrutiny. In their opinion, the remedial nature of the provision combined with the inapplicability of the suspect class determination to white people sufficiently distinguished this case from typical racial discrimination as to apply the form of intermediate scrutiny articulated in *Craig*.

The Court continued its sharp division on this issue in several other cases, each of which only produced plurality opinions. In *Wygant*, the Court invalidated a race-based layoff preference by a school board. Contrary to the plurality in *Bakke*, this plurality suggested that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." Under this standard, the plurality refused to find compelling the purpose of "alleviat[ing] the effects of societal discrimination" in school

---


205 *Wygant*, 476 U.S. at 273 (Powell, J., writing for the plurality).
by "providing minority role models for its minority students." The plurality required states to have specific evidence of prior discrimination in the particular activity in question requiring remedial efforts in order to justify an affirmative action plan.

The plurality view in Wygant ultimately gained the support of a majority of the Court. In Croson, a Richmond, Virginia, city council required 30% of construction contracts to be used for hiring minority-owned subcontractors. Five justices, though in separate opinions, concluded that "strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'" While the Court noted that there is a compelling interest of government to insure that public funds are not used to further private prejudice, a purpose based solely on evidence of generalized past discrimination is not sufficiently compelling to meet the standards of the Equal Protection Clause. The remedy employed by the state must be "narrowly tailored to remedy the effects of prior discrimination." Under this test, the Court

---

206 Id. at 274.
207 Id. at 277 (stating that state actors "must have sufficient evidence to justify the conclusion that there has been prior discrimination").
209 Id. at 520 (Scalia, J., concurring in judgment) (citing Croson, at 493, 495 (opinion of O'Connor, J.) in which a plurality of four justices applied the strict scrutiny standard of review).
210 Id. at 498.
211 Id. at 508.
found the Richmond plan to be defective in two respects: 1) no race-neutral alternatives were considered; and 2) the 30% quota was not grounded in any evidentiary findings of prior discrimination and was based, instead, on proportions of the population at large.\footnote{Id. at 507-08.} Thus, the Court struck down the affirmative action plan under the Fourteenth Amendment.

Although \textit{Croson} resolved the standard of review with regard to affirmative action by individual states, it did not resolve the question with regard to Congressional action. Under section 5 of the Fourteenth Amendment, Congress has the power "to enforce, by appropriate legislation," the Equal Protection Clause. Nonetheless, the federal government, including Congress, must act in accordance with principles of due process under the Fifth Amendment, interpreted to include protection against the form of invidious discrimination prohibited by the Fourteenth Amendment against the states.\footnote{See Bolling v. Sharpe, 347 U.S. 497 (1954) (striking down the segregation of schools in Washington, D.C. under the Fifth Amendment Due Process Clause).} Within the context of affirmative action plans, the U.S. Supreme Court has had some difficulty reconciling these two propositions.

In \textit{Fullilove v. Klutznick},\footnote{448 U.S. 448 (1980) (addressing a Congressional 10\% set-aside for minority-owned businesses).} the Court was unable to produce a majority opinion on the issue. In addition to the two positions asserted in \textit{Bakke} urging either intermediate\footnote{Id. at 519 (Marshall, J., concurring in judgment) (joined by Justices Brennan and Blackmun).} or
strict scrutiny,\textsuperscript{216} a new test was formulated by three justices to respond to Congress' power under the Fourteenth Amendment. Within this framework, the relevant inquiry focused on whether the objectives were within Congressional authority and whether using racial criteria for such a limited purpose was a constitutionally permissible means of achieving the objectives.\textsuperscript{217} Thus, a majority of the Court did not apply a standard of strict scrutiny,\textsuperscript{218} though there was disagreement as to the proper standard of review among that majority. Ultimately, the Court upheld the Congressional statute at issue.

In \textit{Metro Broadcasting}, the Federal Communications Commission, under a mandate by Congress, promulgated race-based regulations concerning new licenses and "distress sales" in order to promote minority participation in broadcasting. A majority of the Court applied intermediate scrutiny and concluded that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."\textsuperscript{219} Using this test, the Court found that the F.C.C.'s purpose of broadcast diversity was an important

\begin{itemize}
\item \textsuperscript{216} Id. at 523 (Stewart, J., dissenting) (joined by then-Justice Rehnquist); id. at 537 (Stevens, J., dissenting) (arguing for "the most exact connection between justification and classification").
\item \textsuperscript{217} Id. at 473 (opinion of Burger, C.J.) (joined by Justices White and Powell).
\item \textsuperscript{218} \textit{Metro Broadcasting v. F.C.C.}, 497 U.S. 547, 564 (1990).
\item \textsuperscript{219} Id. at 564-65.
\end{itemize}
governmental interest and that the regulations themselves were substantially related to the diversity goal.\textsuperscript{220}

Despite reaching a majority consensus in \textit{Metro Broadcasting}, the U.S. Supreme Court has overruled that decision with respect to the proper standard of review under the Equal Protection Clause for affirmative action plans created by Congress.\textsuperscript{221} The Court rejected the principle of intermediate scrutiny with respect to benign racial classifications by Congress under two separate rationales. First, the test used in \textit{Metro Broadcasting} ignored the reasoning of the Court in \textit{Croson} to the effect that determining whether or not a statute is, in fact, benign is problematic. As a result, strict scrutiny should be applied in order to test the law's actual purpose. Second, the method employed by the Court in \textit{Metro Broadcasting}, by distinguishing between racial discrimination by Congress as opposed to the states, contravened the Court's long-standing principle of "congruence between the standards applicable to federal and state racial classifications . . . ."\textsuperscript{222} Thus, presently, "federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."\textsuperscript{223} Because the Court of Appeals had

\begin{footnotes}
\item[220] Id. at 566.
\item[222] Id. at 181 (citing Buckley v. Valeo, 424 U.S. 1 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (stating same); Bolling v. Sharpe, 347 U.S. 497 (1954)).
\item[223] Pena, 132 L.Ed.2d at 187.
\end{footnotes}
decided the case under the principles of *Metro Broadcasting*, the Court remanded the case rather than analyzing the facts under the strict scrutiny test. The decision in *Pena* demonstrates that neither states nor the federal government have significant power to promote equality under the Fourteenth Amendment. As such, it represents the most recent step toward a completely colorblind system of interpretation.

Because of the outcomes in affirmative action cases, colorblindness has not been without criticism in the United States.\(^\text{224}\) This principle, by assuming equality in the absence of legislative interference, ignores the reality that inequality exists in today's society.\(^\text{225}\) In fact, given the existence of social inequality, colorblindness can actually promote adverse conditions for protected groups. Thus, while the Supreme Court developed this principle in an attempt to prohibit governmental discrimination, its present application actually impedes governmental efforts to alleviate social inequality.

2. Canada

The Supreme Court of Canada has explicitly rejected the principle of colorblindness under an interpretation of


Instead, the Court requires more than a mere showing that a law distinguishes on the basis of an illegitimate ground. The Court has noted that equality is a very elusive concept and that it must be viewed in relation to the parties in question in comparison with the relevant social and political aspects of Canadian society. As implied by this conclusion, the Court rejected the notion that identical treatment is always necessary. Indeed, the Court recognized that situations may arise in which identical treatment could result in a violation of the type of equality protected under the Charter. The Court explicitly rejected the widely accepted analysis of equality as 'similar treatment for those similarly situated.' In doing so, the Court adopted substantive equality as the proper form of Charter protection. The Court found this analysis necessary in light of the explicit protection under the Charter of four

---

226 See, e.g., Weatherall v. Canada (Attorney General) [1993] 2 S.C.R. 872, 877 ("The jurisprudence of this Court is clear: equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality.").


228 Id. at 164-65 (quoting Justice Frankfurter's opinion in Dennis v. United States, 339 U.S. 162, 184 (1950), "It was a wise man who said that there is no greater inequality than the equal treatment of unequals.").

229 Id. at 165.

230 Id. at 165-68.

distinct forms of equality.\textsuperscript{232} Thus, the conception of equality under the Charter went beyond the formal equality recognized under the Bill of Rights.\textsuperscript{233}

Additionally, the explicit exclusion of affirmative action plans from s.15(1) under s.15(2) has the practical effect of avoiding many color-blindness issues. Under the Charter, certain types of legislation which may contravene s.15(1) are explicitly protected from Charter scrutiny under s.15(2).\textsuperscript{234} However, because the Supreme Court of Canada has yet to thoroughly analyze this section of the Charter, its interpretation is still unclear. Nevertheless, there are some indications that this section will be limited to a greater extent than its text may suggest. In \textbf{Hess}, McLachlin, J., in dissent, endorsed the analysis of s.15(2) by a lower court in British Columbia.\textsuperscript{235} Huddart, J., analyzed s.15(2) in light of its purpose: to assure the legitimacy of affirmative action by protecting legislation granting preferential treatment to those suffering from a disadvantage, and not to endorse all laws "intended to have a positive effect."\textsuperscript{236} As a result, "there must be a rational connection


\textsuperscript{233} Id.

\textsuperscript{234} s.15(2): Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental and physical disability.


\textsuperscript{236} Id. at 502.
between the preferential treatment and the disadvantage."\textsuperscript{237}

Ultimately, almost any law has as its purpose the amelioration of conditions in society of those disadvantaged, so s.15(2) must require more than just this stated purpose. Interestingly, Huddart, J., did not analyze the meaning of the term "disadvantaged" under s.15(2), nor elaborate on the degree of nexus between the disadvantage in question and the stated purpose of the law which would be required to satisfy s.15(2).\textsuperscript{238}

Even though these cases may serve to illustrate the manner in which courts can address s.15(2), it is still uncertain whether a majority of the Supreme Court will use a similar analysis. There are certain phrases of s.15(2) which will undoubtedly receive scrutiny by the Court.\textsuperscript{239}

\textsuperscript{237} Id.

\textsuperscript{238} In another lower court case, eventually overruled on technical grounds, the court analyzed s.15(2) in the context of the purpose of s.15 as a whole: "to achieve the objective of equality." Apsit v. Manitoba Human Rights Comm.,(1988) 1 W.W.R. 629, 631 (Man. Q.B.). Because s.15(2) operates as an exception to s.15(1), the government must bear the burden of proving the elements of s.15(2). Rejecting the notion that courts should not look further than the stated purpose of a law in order to satisfy the "object" requirement of s.15(2), Simonsen, J., concluded that there must be a "real nexus between the object of the program as declared by the government" and the means chosen to implement that object. Id. at 642. In order to demonstrate a sufficient nexus, there must be a "reasonable relationship between the cause of the disadvantage and the form of ameliorative action." Id. Additionally, the Court found that an affirmative action program, in order to be upheld under s.15(2), must not unnecessarily deny the existing rights of the non-target group. Id. at 644.

\textsuperscript{239} First, the purpose of any law under this section must be to alleviate or lessen the degree of disadvantage experienced by certain groups in society. There has been some debate whether this purpose should be analyzed under the subjective intent of the legislature or under the objective consequences of the law. Michael Peirce, \textit{A Progressive Interpretation of Subsection 15(2) of the Charter}, 57 SASK. L.REV. 263 (1993) (rejecting several
s.15(1) and s.15(2) provide a greater opportunity for the government to take positive action to promote equality by explicitly recognizing the social reality of inequality.

For example, the Court has made it clear in sex discrimination cases that social and political context are very important considerations. The Supreme Court has upheld two laws which distinguish on the basis of sex against males but do not, according to the Court, constitute discrimination. In Hess, the Court reviewed a statute which criminalized sexual intercourse by males over 14 years-old with females under the age of 14. The defendant challenged the law under s.15(1) because it did not apply to either female perpetrators or to male victims and, thus, was discriminatory on the basis of sex. The Court found that the law was not discriminatory because only males were capable of committing this crime. Wilson, J., writing for

scholars' suggestion of an objective approach in favor of a subjective interpretation). Additionally, the Court will need to determine whether the legislation must attempt to "ameliorate" the disadvantage in a rational manner. Although the explicit exclusion of such a provision from s.15(1) appears to foreclose a s.1. analysis, the Court must determine whether s.15(2) includes a similar proportionality test. Finally, the textual connection between disadvantage and the enumerated grounds of s.15(1) may lead the Court to apply the "enumerated and analogous grounds" analysis from Andrews under s.15(2). Under this approach, the Court may use the same criteria employed in the s.15(1) analysis in determining whether the group sought to be protected qualifies as disadvantaged.


241 Id. at 919.

242 Id. at 927-933. The statute used the term penetration in defining the crime, and women are biologically incapable of committing this act. Id. at 931. The Court contrasted this statute with a hypothetically discriminatory statute punishing only one sex for a crime which could be committed by both sexes, such as murder. Id. at 928.
the majority, recognized that this analysis could result in false justifications for true discrimination, but she concluded that biological realities may legitimately be used for distinguishing between men and women. The Court also recognized the social reality that sexual assaults are overwhelmingly committed by men, as well as the legal reality that Parliament punishes similar acts with a male victim under other sections of the Criminal Code. Thus, the Court went beyond formal notions of equality to determine whether a group was actually being treated in a discriminatory manner given the social, historical, and legal reality.

The Court applied a similar analysis in Weatherall. In this case, a male prisoner challenged the practice of allowing female guards to search male prisoners while not allowing male guards to search female prisoners. The Court rejected this argument in a unanimous judgment. Once again, the Court stated that equality does not require identical treatment and, in some cases, different treatment may more appropriately reflect the values protected by s.15 of the Charter. The Court relied on two contextual reasons in upholding this practice. First, the social reality of male-female relations includes

---

243 Id. at 931-933. Wilson, J., compared this statute with the prohibition of self-induced abortion, a crime only applicable against women due to biological realities. Id. at 933.

244 Id. at 930-931.


246 Id. at 878.

247 Id. at 877.
violence perpetrated by men against women and, equally as important, does not include violence in which women are the aggressor and men are the victim. Thus, due to the general disadvantaged position of women in society and different psychological implications for similar parts of the anatomy (such as with a chest search), a cross-gender search is realistically more threatening for women than for men. Second, assuming a violation of s.15(1) could be demonstrated, an important consideration for the s.1 analysis would be the societal and political attempt to alleviate employment inequality between men and women. This consideration relates to the underlying value of equality in society under s.15 itself. In these two cases, the Court has analyzed equality rights broadly enough to evaluate societal consequences of a law beyond just the alleged discrimination. This is a significant development toward the promotion of substantive equality in a legal context.

Despite this seeming rejection of colorblindness, however, McLachlin, J.'s, analysis of s.15(1) in Miron could be characterized as accepting the principle of colorblindness, though not in the same form as in the United States. Of all the plurality opinions in a recent trilogy of cases, McLachlin, J.'s, in Miron, received the most support, both with respect to the s.15 analysis and the s.1 analysis. While relying on the same

\[248\] Id.
\[249\] Id.
two-part test from Andrews applied in Egan, McLachlin, J., has a somewhat different view of discrimination; the denial of equality must rest on enumerated or analogous grounds and the unequal treatment must be motivated by stereotypical application of presumed group or personal characteristics. The general purpose of equality protection is to prevent "the violation of human dignity and freedom by imposing limitation, disadvantages, or burdens through stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance." Enumerated and analogous grounds serve as indicators of the types of distinctions which are based on stereotypes rather than on actual characteristics and are, therefore, presumptively indicative of discrimination.

Although situations may exist in which a distinction based on enumerated grounds does not violate s.15(1), those situations will be "rare." This proposition, in itself, does not alter the principles of Andrews and Turpin; however, McLachlin, J., seems to read into s.15(1) a shift in burden of proof, even prior to the s.1 analysis. In fact, she states, "one would be

252 Id. at 739. For a more thorough discussion of the enumerated and analogous grounds approach, see Section B.

253 Id. at 741.

254 Id. at 739.


256 Id.

257 Miron v. Trudel, [1995] 124 D.L.R. (4th) 693. According to Cory, J., the claimant still has the burden of demonstrating this element. In order to prove discrimination, a claimant must first show that an "equality right was denied on the basis of a
hard-pressed to show that the distinction [based on enumerated or analogous grounds] is not discriminatory."\textsuperscript{258}

Thus, under this standard, it appears that, absent evidence to the contrary, a party would successfully demonstrate a s.15(1) violation if able to demonstrate a distinction denying equality based on enumerated or analogous grounds. There is no burden on the claimant to demonstrate that the law "impos[es] burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."\textsuperscript{259} Accordingly, the government, or the Court \textit{sua sponte}, must adduce evidence which demonstrates that the impugned provision does not actually disadvantage the claimant based on social, historical, political, and legal context.

For example, in \textit{Weatherall}, the claimant would only have had the burden of demonstrating that men were being treated in an unequal fashion from women based on sex, an enumerated ground. The burden would then be on the government or the Court to

\footnotesize


demonstrate the reason why this provision did not create a
disadvantage in the larger social context. This is a significant
departure from Andrews. In fact, in McLachlin, J.'s, own
opinion, she restates the propriety for shifting the burden of
proof at the s.1 stage of analysis.\textsuperscript{260} Based on this reasoning,
it is unclear whether McLachlin, J., actually intended such a
burden shifting in the context of s.15(1). In order to determine
her meaning, the appropriate inquiry should focus on whether the
claimant or the state would be in the "best position to adduce
[proof]" of disadvantage beyond a distinction based on analogous
or enumerated grounds.\textsuperscript{261}

Like the American application of colorblindness, a
distinction based on constitutionally protected grounds appears
to raise a rebuttable presumption of invalidity under the Supreme
Court's most recent approach. However, unlike American
colorblindness, this presumption would appear to apply equally
with regard to each protected ground. This latter difference
reflects the inapplicability in Canada of the U.S. Supreme
Court's notion of multiple levels of review.

B. Levels of Review

1. United States

Based on the purposes of the Fourteenth Amendment, the
Supreme Court has developed a multi-tiered approach to the
standard of review under the Equal Protection Clause determined
by the group against which a law discriminates. The Court has


\textsuperscript{261} Id.
identified three standards of review: 1) strict scrutiny, under which a government must demonstrate a compelling interest and must employ the least restrictive means available; 2) intermediate scrutiny, under which a government must demonstrate an important interest and must employ means which are substantially related to the objective; and 3) minimum scrutiny, under which the government must demonstrate a legitimate interest and must employ means which are rationally related to the objective. Depending on which group a particular law targets for discrimination, the Court will evaluate the applicability of the Equal Protection Clause according to one of these three tests.

Because the Fourteenth Amendment was drafted in the context of abolishing slavery, any discrimination against blacks will receive strict scrutiny. This principle has been generalized to include any discrimination on the basis of race, including that against whites. In addition, strict scrutiny is applied in the context of legislative distinctions on the basis of national origin, fundamental rights, or, in certain contexts, alienage. Most legislation, however, receives only minimum scrutiny due to the judiciary's limited role in evaluating legislation. There have been many classifications which have

262 See Korematsu v. United States, 323 U.S. 214 (1944).


265 Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (stating that States have a wide latitude for social and economic legislation); see also id. at 443 ("Heightened scrutiny inevitably involves substantive judgments about legislative
caused some difficulty in the Supreme Court's application of a particular standard of review.

For example, the Supreme Court had a difficult time establishing a standard under which to decide cases of discrimination on the basis of sex. In Reed v. Reed, the Court, addressing a statute which explicitly preferred males over females in the selection of an administrator of an estate, applied minimum scrutiny and found the law's means to be arbitrary in relation to its purpose. Subsequently, the Court, in a plurality opinion, did apply the higher standard accorded to racial discrimination, designating classifications based on sex to be "inherently suspect." The Court ultimately struck a compromise between the rationality standard applied in Reed and the "strict judicial scrutiny" applied by the plurality in Frontiero.

In Craig v. Boren, the Opinion of the Court established a new standard of review under the Equal Protection Clause in order to decide cases based on sex discrimination. "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially

\[266\] 404 U.S. 71, 75 (1971).

\[267\] "A 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.'" Reed, 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)).


\[269\] 429 U.S. 190 (1976).
related to achievement of those objectives.\textsuperscript{270} Chief Justice Burger and Justices Powell and Rehnquist dissented from the judgment on the grounds that no heightened scrutiny was appropriate in sex discrimination cases.\textsuperscript{271} According to Justice Rehnquist, the newly created standard of review would create an unacceptable level of judicial subjectivity.\textsuperscript{272}

This standard of review, nonetheless, was solidified into the Court's Equal Protection Clause system of interpretation in both \textit{Personnel Administrator of Mass. v. Feeney}\textsuperscript{273} and \textit{Mississippi University for Women v. Hogan}.\textsuperscript{274} In \textit{Feeney}, the Court addressed the constitutionality of a Massachusetts statute providing a preference to military veterans for civil service positions in the state. The plaintiff challenged the law because it provided a benefit to a substantially disproportionate number of males in relation to females due, at least in part, to federal

\begin{itemize}
  \item \textsuperscript{270} Id. at 197 (emphasis added).
  \item \textsuperscript{271} See Id. at 220 (Rehnquist, J., dissenting) (asserting that the intermediate standard as created "out of thin air" with no textual or historical support).
  \item \textsuperscript{272} Id. at 221 (Rehnquist, J., dissenting) (stating that the language used by the Court was "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation"). Although Justice Rehnquist implied that only this standard lacked historical support, it is far from clear that either the rational basis or the strict judicial scrutiny standard rely on some historical basis and, more than likely, were also created "out of thin air," so to speak.
  \item \textsuperscript{273} 442 U.S. 256, 273 (1979).
  \item \textsuperscript{274} 458 U.S. 718 (1982).
\end{itemize}
restrictions on female enlistment in the military.\textsuperscript{275} The Court applied the standard established in \textit{Craig} for discrimination based on sex and required "an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment."\textsuperscript{276} In \textit{Hogan}, the Court applied the standards articulated in both \textit{Craig} and \textit{Feeney} and found that the statute did not meet the substantial relationship test.\textsuperscript{277}

The most recent decision involving sex discrimination once again applied the intermediate level of scrutiny.\textsuperscript{278} In \textit{J.E.B.}, the Court applied this standard to the use of peremptory jury challenges to exclude members of the jury on the basis of sex. The Court had already struck down such a practice on the basis of race.\textsuperscript{279} Given the important, indeed compelling, governmental interest in achieving a fair and impartial trial, the Court had to decide "whether discrimination on the basis of gender in jury selection substantially furthers" that interest.\textsuperscript{280} The Court began its analysis by noting the historical exclusion of women from juries based on the notion that women were either unfit to

\textsuperscript{275} Feeney, 442 U.S. at 269-270 (noting that at the time of litigation, over 98% of veterans in Massachusetts were male, resulting in a disproportionate number of men hired for civil service jobs).

\textsuperscript{276} Id. at 273.

\textsuperscript{277} Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982).

\textsuperscript{278} J.E.B. v. Alabama ex rel. T.B., 511 U.S. \underline{511}, 128 L.Ed. 2d 89, 102 (1994).


\textsuperscript{280} J.E.B., 128 L.Ed. 2nd at 102.
serve this function or were too fragile to be exposed to "the polluted courtroom atmosphere." The Court found that the justification for peremptory challenges on the basis of sex relied on stereotypical presumptions about jury voting patterns based on sex and "reinvokes [for women] a history of exclusion from the political participation." As a result, the Court prohibited this practice under the Equal Protection Clause.

However, there is lingering doubt whether the intermediate standard will continue to exist or whether sex discrimination will eventually be elevated to the level of "inherently suspect." According to the Court, this is still an undecided issue.

"Because we conclude that gender-based peremptory challenges are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect." Indeed, only two members of the original debate in Frontiero are still on the Court: Justice Stevens and Chief Justice Rehnquist. Although both have since accepted the intermediate standard of review, Justice Stevens originally joined the plurality in Frontiero, while then-Justice Rehnquist argued for no heightened scrutiny beyond the test for

---

281 Id. at 99. Indeed, this practice of exclusion was condoned by the U.S. Supreme Court in Strauder v. West Virginia, 100 U.S. 303, 310 (1879), and only as recently as 1975, the Court began enforcing, based on the Sixth Amendment right to a jury trial, the notion of equal treatment in jury selection procedures. Taylor v. Louisiana, 419 U.S. 522 (1975) (striking down an exemption of women from mandatory jury duty).


80
rationality. It is unclear how the Court would decide this issue if faced directly today, though the principle of *stare decisis* would undoubtedly influence the Court's decision and may weigh against altering the standard.

With the exception of discrimination on the basis of inherently suspect classifications, such as race, national origin, and, to a lesser extent, sex, other forms of discrimination against identifiable groups are evaluated under the minimum scrutiny standard of rational basis review. Because laws must make classifications between different groups of people in order to be effective, most distinctions do not violate the Equal Protection Clause. The Court must defer to legislative judgment in the determination of whether a particular law is necessary, and it must be careful not to overreach its delegated power. Thus, under the minimum level of scrutiny, a law will survive unless it is found to be irrational.\textsuperscript{283} For example, the Court has been very unwilling to strike down laws discriminating on the basis of wealth\textsuperscript{284} and age.\textsuperscript{285} However, other classifications have, if not raised the standard of review, at least received closer attention by the Court.

\textsuperscript{283} Such a diminished standard of review has been characterized as "largely equivalent to a strong presumption of constitutionality." Laurence Tribe, *American Constitutional Law* 1443 (1978).

\textsuperscript{284} San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . .").

\textsuperscript{285} Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).
Although discrimination based on alienage by states, at least when unrelated to a public function, is subject to heightened scrutiny, the Court has limited the application of this principle to aliens authorized by law to be in the country.\textsuperscript{286} The Court has concluded that an individual's illegal presence in the country is a relevant factor in promulgating legislation on the subject and, therefore, should receive only rational basis review.\textsuperscript{287} However, the Court invalidated the statute and concluded that the law could not be "rational unless it promoted a substantial goal of the State."\textsuperscript{288} The Court, therefore, seemed to be expanding the typical minimum scrutiny requirement of a legitimate governmental interest.

Similarly, in \textit{Cleburne v. Cleburne Living Center},\textsuperscript{289} the Court explicitly rejected a heightened scrutiny analysis for the purpose of evaluating laws discriminating against the mentally retarded. In assessing the validity of a zoning requirement of a special use permit in order to operate a group home for the mentally retarded,\textsuperscript{290} the Court noted that the Equal Protection Clause "is essentially a direction that all persons similarly

\begin{flushright}
\textsuperscript{286} Plyler v. Doe, 457 U.S. 202 (1982) (examining the validity of a statute which excluded the children of illegal immigrants from obtaining an education in public schools).\textsuperscript{287} Id. at 220.\textsuperscript{288} Id. at 224 (emphasis added).\textsuperscript{289} 473 U.S. 432 (1985).\textsuperscript{290} Id. The neighborhood in question did not require a permit to operate hospitals, boarding houses, and other similar facilities.
\end{flushright}
situated should be treated alike."\textsuperscript{291} However, the mentally retarded are not similarly situated with the general public due to a diminished ability to cope with and function in society.\textsuperscript{292} Thus, unlike other classifications which may be presumptively suspect, the States have a legitimate interest in distinguishing between the public and the mentally retarded. Nevertheless, as in \textit{Plyler}, the Court did invalidate the law, stating that there was no "rational basis for believing that [a group home for the mentally retarded] would pose any special threat to the city's legitimate interests."\textsuperscript{293} In doing so, the Court went beyond its traditional deferential position in rational basis review with respect to economic and social regulation.\textsuperscript{294}

The Court continued to expand the notion of minimal scrutiny in the recent case of \textit{Romer v. Evans}.\textsuperscript{295} In \textit{Romer}, the Court struck down a Colorado constitutional provision which prohibited protections against discrimination on the basis of sexual orientation by state and local governments.\textsuperscript{296} In \textit{Romer}, the Court applied the minimal scrutiny test to invalidate the state

\textsuperscript{291} Id. at 439.
\textsuperscript{292} Id. at 442.
\textsuperscript{293} Id. at 448.
\textsuperscript{294} Tribe, \textit{supra} note 283, at 1444.
\textsuperscript{295} 64 U.S.L.W. 4353 (1996).
\textsuperscript{296} Although the Court had upheld a law which criminalized the practice of sodomy, \textit{Bowers v. Hardwick}, 106 S.Ct. 2841 (1986), the decision only rejected the application of the Due Process Clause's protection of privacy, not the applicability of the Equal Protection Clause.
constitutional provision. The Court explained that this standard of review "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." The provision at issue, according to the Court, was enacted with a specific intention to harm a politically disfavored group. Thus, the Court concluded that "[a] state cannot so deem a class of persons a stranger to its laws."

2. Canada

Canadian equality law does not incorporate the notion of assigning a particular level of review, and, therefore, a relative presumption of validity, based on the type of classification made by the legislature. All classifications which receive the protection of s.15(1) are evaluated under the same criteria. However, there are aspects of Canadian equality law which mirror the analysis involved in the multi-tiered approach.

Under the Court's analysis of s.15, a complainant must demonstrate membership in a group which is either enumerated in

297 Romer, 64 U.S.L.W. 4363. The Court did not decide whether sexual orientation is a suspect or quasi-suspect classification because the law could not meet the threshold requirement of rationality.

298 Id.

299 Id.

300 In the U.S. Supreme Court, one justice has applied an analysis similar to that of the Supreme Court of Canada in its uniformity. According to Justice Stevens, the proper consideration in every case involving discrimination is whether the distinction is based on a rational decision or merely on some stereotypical viewpoint. Cleburne, 473 U.S. 432, 452 (Stevens, J., concurring).
the Charter provision or which shares fundamental qualities with enumerated groups. Under Andrews, the Court noted that both enumerated and analogous grounds must be interpreted in a "broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended."\(^{301}\) Toward that end, the Court advocated the use of the American concept of a "discrete and insular minority."\(^{302}\) By way of illustrating the meaning of this phrase, the Court described the group in question, non-citizens, as vulnerable to political oppression, due to a lack of power and representation in government.\(^{303}\)

The Court further developed this concept in R. v. Turpin, [1989] 1 S.C.R. 1296. Once again, the Court noted the importance of viewing the distinction in the larger social, political, and legal context.\(^{304}\) Justice Wilson characterized the "discrete and insular minority" analysis as only "one of the analytical tools which are of assistance in determining whether the interest advanced by a particular claimant is the kind of interest s.15 of the Charter is designed to protect."\(^{305}\) Similar to the United States, those characteristics of the enumerated grounds which are to be used in analogy include social, political and legal


\(^{302}\) Id. at 183 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)).

\(^{303}\) Id. at 152.


\(^{305}\) Id. at 1333.
disadvantage, stereotyping, historical disadvantage, political vulnerability, and social prejudice.\(^{306}\)

In addition, a recent trilogy of cases significantly re-examined the proper elements to be considered in determining whether a personal characteristic is an analogous ground. In \textit{Thibaudeau},\(^{307}\) McLachlin, J., in dissent, addressed whether a tax provision distinguished based on an analogous ground.\(^{308}\) Under her analysis, there are many factors, largely those articulated in \textit{Andrews} and \textit{Turpin}, which can assist in making this determination: historical disadvantage, discrete and insular minority status, immutable personal characteristic unrelated to an individual's merit or capacity, similarity to enumerated grounds, and previous recognition by legislatures or courts as an illegitimate ground of discrimination.\(^{309}\) Thus, the enumerated and analogous ground approach is merely a preferred method of analysis under s.15(1) for protecting the important concept of human dignity. In analyzing whether divorced custodial parents constitute an analogous ground,

\(^{306}\) Id. at 1333.

\(^{307}\) Thibaudeau v. Canada, [1995] 124 D.L.R. 94th) 449, 503. Neither the opinion of Cory and Iacobucci, JJ., nor that of Gonthier, J., reached the question of the ground of discrimination. Cory and Iacobucci, JJ., concluded that there was no denial of the four equality rights. Id. at 503. Gonthier, J., found that the tax provision in question did not prejudice the complainant, or, in other words, result in a burden, obligation, or disadvantage not imposed on others. Id. at 486.

\(^{308}\) Id. at 517.

\(^{309}\) Id. at 517 ("[I]t is essential to ask whether the characteristic on the basis of which the prejudicial distinction is made may be used to make irrelevant distinctions that are contrary to human dignity.").
McLachlin, J., focused on historical disadvantage and immutability.\textsuperscript{310} In addition, however, she elaborated on the concept of discrete and insular minority introduced, but not explained, in Andrews. Essentially, a discrete and insular minority, according to Justice McLachlin, is a statistical minority in comparison with other groups in the same category of the personal characteristic, which experiences a disadvantage in society and special difficulties unique to its members.\textsuperscript{311}

Finally, McLachlin, J., relied on a factor not previously articulated: linkage between the analogous ground and one of the enumerated grounds under s.15(1).\textsuperscript{312} Although McLachlin, J., did not elaborate on this factor, a ground of discrimination will more likely be analogous if a law relies on a ground of discrimination related to an enumerated ground. This principle is supported by the Court's inclusion within s.15(1) of adverse effect discrimination.

Similarly, McLachlin, J., in her plurality opinion in Miron,\textsuperscript{313} considered protection of human dignity and freedom against stereotypical use of presumed group characteristics to be

\textsuperscript{310} Id. at 517, 519.

\textsuperscript{311} Id. at 518 (finding that single custodial parents are a statistical minority, are disadvantaged, and are "confronted with social, personal and emotional challenges unique to its members.").

\textsuperscript{312} Thibaudeau, [1995] 124 D.L.R. (4th) at 519 (acknowledging that the "great majority" of divorced custodial parents are women).

\textsuperscript{313} Miron v. Trudel, [1995] 124 D.L.R. 94th) 693 (invalidating an insurance provision which denied spousal benefits, based on marital status, to an unmarried partner living a marital-like relationship).
"the overarching purposes of the equality guarantee in the Charter."\textsuperscript{314} As a result, the analogous ground approach should be designed to serve this purpose.\textsuperscript{315} The use of historical discrimination as a prerequisite of an analogous ground would foreclose the development of the Charter in accordance with changing social values.\textsuperscript{316} The enumerated ground of sex does not constitute a discrete and insular minority, and religion is not an immutable characteristic.\textsuperscript{317} These factors are relevant and useful in comparing a characteristic to those grounds enumerated, but the analogous ground approach must be broad enough to incorporate any ground of discrimination under which laws distinguish based on stereotypical characteristics, hostile to human dignity, rather than on actual merit or circumstance. McLachlin, J., found that "freedom to live life with a mate of one's choice in the fashion one chooses" without discrimination is a sufficiently fundamental personal characteristic to be included under s.15(1) of the Charter.\textsuperscript{318} In essence, marital

\begin{itemize}
\item \textsuperscript{314} Id. at 741 (finding marital status to be an analogous ground).
\item \textsuperscript{315} Id. at 746 (analogous ground analysis should be "generous").
\item \textsuperscript{316} Id. at 748 ("[I]f the Charter is to remain relevant to future generations, it must retain a capacity to recognize new grounds of discrimination.").
\item \textsuperscript{317} Id. at 748.
\item \textsuperscript{318} Miron, 124 D.L.R. (4th) at 749. Additionally, unmarried couples have experienced both historical disadvantage and social prejudice. Finally, the status of being unmarried may not necessarily be a choice due to a partner's reluctance to marry or because of financial, religious, or social constraints. McLachlin, J., compared marital status, based on these qualities, to citizenship, another analogous ground, and to religion, an enumerated ground under s.15(1). Id.
\end{itemize}
status is "an irrelevant basis for exclusion and a denial of essential human dignity...."\textsuperscript{319}

In \textit{Egan},\textsuperscript{320} Cory, J.'s plurality opinion addressed the analogous ground concept with respect to sexual orientation.\textsuperscript{321} As with McLachlin, J.'s, approach, Cory, J., concluded that historical disadvantage, discrete and insular minority status, and political vulnerability are only indicators in determining the more "fundamental consideration underlying the analogous grounds analysis [of] whether the basis of distinction may serve to deny the essential human dignity of the Charter claimant."\textsuperscript{322} Thus, human dignity is the primary concern in determining whether a personal characteristic is an analogous ground, and this concept can only be evaluated "in the context of the place of the group in the entire social, political and legal fabric of our society."\textsuperscript{323} In this case, a very divided Court found that the provision violated s.15(1) but upheld the law as demonstrably justified in a free and democratic society. Cory, J., found\textsuperscript{324}

\textsuperscript{319} Id. at 747.

\textsuperscript{320} \textit{Egan v. Canada}, [1995] 124 D.L.R. 94th) 609 (examining the claim of a homosexual man who applied for spousal allowance under the Old Age Security Act; the government denied his application because he was not a "person of the opposite sex," as required by the statute).

\textsuperscript{321} Id. at 673.

\textsuperscript{322} Id. at 673.

\textsuperscript{323} Id. at 674 (quoting Andrews, at 32.).

\textsuperscript{324} Id. Cory, J., also found this law to be facially discriminatory based on the explicit restriction of "opposite sex." Id. at 664. He concluded that this provision made a distinction which denied homosexual couples the equal benefit of the law. Id.
that this law discriminated on the basis of sexual orientation and that sexual orientation is an analogous ground under s.15(1).\textsuperscript{325}

Unlike the American analysis, once a group achieves analogous status, then it receives the same protection under s.15(1) as enumerated groups. There have been some exceptions to this general rule, however. In \textit{McKinney}, the majority of the Court discussed whether a university's mandatory retirement policy would violate s.15(1) of the Charter.\textsuperscript{326} The Court easily concluded that this policy distinguished to a disadvantage against individuals based on enumerated personal characteristics and, as such, violated s.15(1). Additionally, because this provision precluded individuals from engaging in employment, "one of the most fundamental aspects in a person's life,"\textsuperscript{327} it was particularly suspect.

\textsuperscript{325} Egan, 124 D.L.R. (4th) at 673-676. In fact, this holding represented the unanimous opinion of the Court. While agreeing with McLachlin, J.'s, opinion in \textit{Miron} that historical disadvantage and status as a discrete and insular minority are not prerequisites for finding a ground to be analogous, Cory, J., nonetheless found that historical disadvantage, public harassment, and employment discrimination of homosexuals was well-documented. In addition, some homosexual individuals have concealed their sexual orientation in order to avoid hatred. Id. at 674-675.

\textsuperscript{326} McKinney v. University of Guelph, [1990] 3 S.C.R. 229 (finding that universities are not governmental bodies and, therefore, are not subject to Charter scrutiny, but assuming otherwise for purposes of the s.15 analysis); see also Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483; Harrison v. University of British Columbia, [1990] 3 S.C.R. 451.

Having found a s.15 violation, the Court then considered whether the policy was demonstrably justified under the s.1 analysis from *Oakes* adopted in *Andrews*. La Forest, J., noted that this policy was promulgated in an attempt to mediate between competing claims of legitimate social values. As such, the Court should not try to substitute its own judgment for that of the legislative body. The relevant inquiry is whether the government "had a reasonable basis for concluding that it impaired the right as little as possible,"\(^{328}\) rather than whether the right is actually impaired as little as possible. Thus, the mandatory retirement policy of the university, although violative of s.15, was saved by s.1 of the Charter as demonstrably justifiable in a free and democratic society.

Following this discussion, the Court considered whether section 9(a) of Ontario's Human Rights Code\(^ {329}\) violated s.15(1) of the Charter by excluding those over 65 years of age from the protections against employment discrimination. With respect to the protection of age under the Charter, the Court acknowledged that it is an enumerated ground. However, La Forest, J., concluded that age, unlike most other grounds, can potentially be correlated with permissible grounds for making distinctions, such as ability and merit.\(^ {330}\) Overall, according to La Forest, J.,

\(^{328}\) Id. at 286 (emphasis in original).


\(^{330}\) McKinney, [1990] 3 S.C.R. at 297 (recognizing the relationship between advanced age and declining ability). Additionally, the other enumerated factors are associated with hostility, intolerance, and prejudice. By contrast, most individuals in society can expect to reach the age of 65, so there is less suspicion in the motivations for distinguishing on
laws discriminating based on age should not be scrutinized to the same extent as those discriminating on other enumerated grounds.

In a lengthy s.1 analysis, the Court recognized the objective of the Human Rights Code as the protection of those in greatest need from discrimination with respect to a specified age range. With respect to the requirement of minimal impairment, the Court restated the difficulty of evaluating social legislation in which the government has had to choose between competing interests. The judiciary, in the Court's opinion, is not in a position to second-guess judgments made by the legislature based on its own method of factual investigation.\footnote{Id. at 305.} The Court did not conclude that the legislative result was proper; rather, the Court recognized the difficulty of reaching a proper result and, therefore, the reasonable basis in choosing this particular means of advancing the legislative goals. Overall, the Court concluded that this provision represented an incremental approach to protecting individual's rights, and government should be given the opportunity to thoroughly analyze the costs and benefits of changing such an established practice applied throughout Canada.\footnote{Id. at 317.} This suggests that the Court considers age as less fundamental to the notions of equality this ground.

\footnote{Id. at 305. Nonetheless, the Court should evaluate existing knowledge, including social science research, in order to determine whether the government was reasonable in concluding that the infringement on s.15 was minimized to the greatest extent possible.}
protected by the Charter than other grounds enumerated under s.15(1).

Similarly, in Egan, the Court upheld a violation of s.15(1) under s.1. According to both La Forest, J., and Sopinka, J., the law at issue represented a substantial step toward achieving the governmental objective. Although Sopinka, J. found a s.15(1) violation, he concluded that the history of amendments to this Old Age Security Act provision, adding common law spouses and providing benefits to widowed spouses, indicated a "substantial step in an incremental approach to include all those who are shown to be in serious need of financial assistance due to the retirement or death of a supporting spouse." In accordance with the judgment in McKinney, Sopinka, J., afforded deference to the legislature for three reasons: 1) this law "represents the kind of socio-economic question in respect of which the government is required to mediate between competing groups rather than being the protagonist of an individual;" 2) Parliament had amended the law several times in order to expand benefits to those in greatest need, such as to unmarried spouses and widowed spouses, so it was reasonable to assume that Parliament would also expand the law to include homosexual


334 Id. at 618. Although La Forest, J., represented the plurality of the Court on the s.1 issue, Sopinka, J.'s, opinion articulated the intermediate position between the plurality supporting s.15(1) and the plurality supporting s.1. Id. at 653.

335 Id. at 655.

336 Id.

spouses at some point; 3) Parliament should have more time to consider expanding the provision because recognition of sexual orientation as an analogous ground has only occurred recently. 338

By affording this level of deference in Egan and Miron, the Court protects sexual orientation to a lesser extent than marital status. When combined with the Court's characterization of age discrimination in McKinney and its deference in Rodriguez, this creates a form of multiple levels of review. These burgeoning levels of review, however, have yet to reach the extent found in U.S. Supreme Court cases.

3. Comparisons

This difference in the degree of acceptance of the levels of review approach between Canadian and American interpretations of equality can be explained to a large extent by the language and

---

338 Id. at 654-656. See also Rodriguez v. B.C. (A.G.), [1993] 3 S.C.R. 588. In Rodriguez, a woman suffering from a terminal, debilitating disease challenged a provision of the Criminal Code which prohibited her physician assisting in her suicide due to her inability to commit this act on her own. With respect to s.15(1), the Court did not engage in an analysis of the principles enunciated in Andrews. Rather, the majority assumed arguendo that this law discriminates on the basis of physical disability and completed its analysis of the provision under s.1.

Under s.1, the Court characterized the objective of the legislation as preserving life and protecting vulnerable individuals who might be induced in moments of weakness to commit suicide. Id. at 595. The state has a policy that "human life should not be depreciated by allowing life to be taken." Id. Because this is a "morally laden" issue, the Court chose to defer to a greater extent to Parliament's judgment. Id. at 614-15 ("[I]t is not the proper function of this Court to speculate as to whether other alternatives available to Parliament might have been preferable."). As a result, the government must only have had a reasonable basis for concluding that this provision minimally impaired equality rights in achieving its objective. Id. at 614.
history of the Fourteenth Amendment as compared to that of s.15 of the Charter. The Fourteenth Amendment was drafted in the context of a Civil War victory of the Union over the South and the resulting abolition of slavery throughout the country in the Thirteenth Amendment. Thus, it was intended, to a substantial degree, to alleviate the discriminatory, dehumanizing treatment of blacks related to their enslavement. Although the U.S. Supreme Court has extended the application of the Equal Protection Clause beyond that immediate concern, the levels of review indicate the Court's difficulty with doing so. In particular, the Supreme Court struggled with the application of heightened scrutiny to legislative distinctions based on sex. According to the dissent in Frontiero, the proposed, and ultimately defeated, Equal Rights Amendment foreclosed the possibility of protecting sex under the Equal Protection Clause to the same extent as race. Otherwise, the Equal Rights Amendment would be unnecessary. Indeed, less than fifteen years after the adoption of the Fourteenth Amendment, the Court assumed that equal protection did not apply to women.\footnote{Strauder v. West Virginia, 100 U.S. 303 (1879).} As a result, the Supreme Court has not been willing to apply strict scrutiny to governmental classifications based on sex.

Thus, discrimination against blacks or, through the principle of colorblindness, against any race has become the exemplar for achieving the highest level of review under the Equal Protection Clause. All other groups making an initial challenge under the Fourteenth Amendment have been compared with

\footnote{Strauder v. West Virginia, 100 U.S. 303 (1879).}
those aspects of race which require heightened scrutiny. The more successful the group in comparison to racial characteristics, the higher the level of scrutiny under the Fourteenth Amendment.

In Canada, the Charter was not adopted in response to a specific concern about a particular group's position in society. Rather, s.15 is a general guarantee of equality and was drafted in a very broad fashion, enumerating, in a non-exclusive manner, many characteristics as protected. Thus, it has not been necessary for the Supreme Court of Canada to distinguish between those characteristics in terms of their relative "suspect" nature. All of these characteristics are suspect in the sense that they are protected against invidious discrimination. Nonetheless, the Supreme Court of Canada's actual application of the enumerated and analogous grounds approach bears some resemblance to the American model.

Both countries' conception of equality raises a similar concern; there is an inherent difficulty and subjectivity in identifying the proper ground on which the law distinguishes. Assigning a party's characteristics to a particular group is a subjective process based on social context, the characterizations made by the parties, and the decision-maker's individual

---

340 United States v. Carolene Products Co., 304 U.S. 144 (1938) (discrete and insular minority as well as political powerlessness and historical discrimination compared with race factors).

background. Additionally, any conception of the extent to which the chosen group must experience a disproportionate impact will be arbitrary. In choosing which groups to protect, both countries have evaluated social, historical, and political disadvantage, immutability, and discrete and insular minority status. These factors create an initial subjective evaluation of which groups deserve protection in society. Many categorical groups in society experience a disadvantage based on personal characteristics, but only those groups whose characteristics are sufficiently similar to enumerated grounds receive protection under the Charter. Necessarily, any evaluation of the degree of similarity to existing protected groups involves reliance on subjective beliefs.

Further, the protection of a particular group is itself problematic. Some groups will be protected in some situations but not others. Finally, the categorization process is

\(^{342}\) Id. at 186.

\(^{343}\) For example, in Thibaudeau v. Canada, [1995] 124 D.L.R. (4th) 449, McLachlin, J., characterized discrimination against custodial parents as "related" to the enumerated ground of sex because 73% of custodial parents are women. At what percentage would this statistic be sufficient to demonstrate an adverse effect based on sex, rather than on an analogous ground?

\(^{344}\) Iyer, supra note 341 at 197.

\(^{345}\) Egan v. Canada, [1995] 124 D.L.R. (4th) 609, 636; see Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 (citizenship only protected if law does not relate to governmental function); R. v. Turpin [1989] 1 S.C.R. 1296 (province of residence may be protected, but not in relation to application of the criminal law). Additionally, in Graham v. Richardson, the Court struck down a provision denying welfare benefits to noncitizens. 403 U.S. 365 (1971). The Court found that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." Id. at 372. However, in Foley v. Connellie,
rather paternalistic. Courts tend to focus on which group in society is most deserving of protection, rather than determining that a particular provision is arbitrary in its effect. Each of these problems demonstrate the inability of this test to evaluate the actual detrimental impact of a law on a particular portion of the population.

L'Heureux-Dube, J., has recognized the inefficiency and inaccuracy of this process in redressing inequality.\(^{346}\) According to her, the enumerated and analogous ground approach only indirectly advances the purpose of s.15(1).\(^{347}\) Because this section is meant to protect human dignity and recognize each person's worth as a human being, the proper focus of the Court should be on the impact of the law rather than on the basis of distinction.\(^{348}\) The best means of achieving equality is through a combination subjective/objective test, "from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under

the Court established a substantial exception to the reasoning in Graham. 435 U.S. 291 (1978). Whereas the strict scrutiny test had been applied in order to protect a "noncitizens' ability to exist in the community," the test had not been developed in order to ensure equal treatment between citizens and aliens in the political functions of government. "The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens." Id. at 297 As a result, the Court applied a standard of "rational relationship between the interest sought to be protected and the limiting classification." Id. at 292.


\(^{347}\) Id. at 636.

\(^{348}\) Id. at 637-38.
similar circumstances as, the group of which the rights claimant is a member.\textsuperscript{349} This test emphasizes the point of view of the victim of discrimination rather than that of the state. Courts should focus on the actual prejudicial effect of the law, the existence of stereotyping, and whether the law infringes the claimant's human dignity.\textsuperscript{350} Although the enumerated and analogous ground approach sufficiently identifies discrimination among those groups recognized as more socially vulnerable, the discriminatory impact of all legislation violative of s.15(1) should not require discrete group membership.\textsuperscript{351}

One case particularly demonstrates this point. In \textit{Thibaudeau}, the majority focused on the relevant ground of discrimination as parents who are divorced or separated.\textsuperscript{352} In doing so, the Court inescapably concluded that this provision did not violate s.15(1). However, as illustrated by the dissenting opinions, the discriminatory impact of the legislation was experienced by divorced or separated custodial parents.\textsuperscript{353} By comparing custodial and non-custodial parents, the dissenting justices focused on the actual adverse effect of the legislation, rather than on the group identified by the government. Otherwise, the government could always identify a group in need of protection and, for convenience or otherwise, arbitrarily

\footnotesize
\begin{itemize}
\item \textsuperscript{349} Id. at 638.
\item \textsuperscript{350} Id. at 639-40.
\item \textsuperscript{351} Egan, [1989] 124 D.L.R. (4th) at 639-41.
\item \textsuperscript{353} Id. at 509 (McLachlin, J., dissenting).
\end{itemize}
choose to only assist one member of the group. This case demonstrates the overinclusive and underinclusive nature of the approach to discrimination emphasizing group characteristics.\(^{354}\)

Arguably, the American analysis is potentially more flexible and far-reaching in this regard. Whereas s.15(1) of the Charter carries an all-or-nothing categorical process, the multi-tiered approach of the U.S. Supreme Court allows even those groups not deserving of heightened scrutiny to challenge a law's rationality. Legislatures are precluded from discriminating against any group in an arbitrary, irrational manner or based on illegitimate objectives. This lowest level of review has been applied to invalidate legislation in several cases.\(^{355}\) While a successful claim in the typical American case is largely determined by the applicability of heightened scrutiny, Canadian claimants must rely heavily on the application of analogous grounds.

For example, the Supreme Court of Canada has denied three separate claims relating to province of residence based on the inapplicability of the enumerated and analogous grounds approach.\(^{356}\) Taken as a group, these three opinions effectively

\(^{354}\) See also Iyer, supra note 341 at 191-194.


\(^{356}\) In R. v. Turpin, [1989] 1 S.C.R. 1296, three defendants accused of murder challenged the validity of a section of the Criminal Code which permitted residents of Alberta to select a bench trial while members of other provinces, including the defendants' resident province, Ontario, were forced to be tried by a jury. Wilson, J., writing for a unanimous Court, noted the relevance of the social, political, and legal context surrounding the law. Wilson, J., also found that residents of all provinces
except Alberta charged under this provision could not meet the
definition of a "discrete and insular minority," nor was a
distinction based on these characteristics analogous to those
grounds enumerated in the Charter. Id. at 1333. This particular
category of persons did not possess indicia of discrimination in
society at large, such as historical disadvantage, stereotyping,
or political vulnerability. Id. However, the Court did
recognize that a person's province of residence, under other
circumstances, may constitute illegitimate grounds for creating a
legislative distinction. Id. at 1333 ("I would not wish to
suggest that a person's province of residence or place of trial
could not in some circumstances be a personal characteristic of
the individual or group capable of constituting a ground of
discrimination.").

In R. v. S. (S.), [1990] 2 S.C.R. 254, a claimant challenged
the exercise of discretion by Ontario's Attorney General in not
creating an alternative measure to judicial proceedings as
provided in a non-mandatory section of the Act. The Court noted
that distinctions based on province of residence in which
provincial legislatures exercise legitimate jurisdictional powers
do not violate s.15(1). Id. at 288. Otherwise, s.15(1) would
eliminate a division of power between federal and provincial
governments. Id. However, the impugned provision in this case
concerned the differential application of a "valid federal law."
Id. In such circumstances, the Court emphasized that
differential application of the criminal law according to
province actually reinforces notions of federalism by
incorporating community differences. Id. at 290-91. In
addition, with respect to this law, there are implications for
child welfare, administered by provincial governments. Id. at
291. Thus, this legislation does not create a distinction "based
upon a 'personal characteristic' for the purposes of s.15(1) of
the Charter." Id. at 292.

In another decision by the Supreme Court of Canada with
respect to province of residence as a ground of discrimination,
the Court, once again, found no discrimination. Haig v. Canada,
[1993] 2 S.C.R. 995, at pp. 1042-47. In this case, a man who was
precluded from voting in both a federal and a provincial
referendum due to residency requirements challenged the federal
Referendum Act under s.15 of the Charter. Under the Canada
Elections Act, only residents of polling divisions were listed as
entitled to vote. Similarly, the Election Act (Quebec) required
an individual to be domiciled in Quebec for six months before
being included in the list of eligible voters. Because Mr. Haig
had moved to Quebec two months before the respective referenda,
he was excluded from both. Id. at 1007-09.

L'Heureux-Dube, J., writing for the majority, found that
those newly relocated to a province within six months of a
referendum did not form a "discrete and insular minority group"
and did not possess characteristics analogous to the enumerated
grounds under s.15(1). Id. at 1044. This group of individuals,
though denied an opportunity to vote in this referendum, "do not
suffer from stereotyping, social prejudice, . . . historical
foreclose future challenges against federal legislation which
distinguishes on the basis of province of residence. Thus, both
countries rely on a process of categorization which creates
relative presumptions of validity based on the characteristics of
the groups originally recognized in each constitutional document
as deserving of protection against governmental discrimination.

C. Intentional Discrimination

1. United States

The final aspect of American equality law which
substantially differs from Canada is the U.S. Supreme Court's
distinction between de jure and de facto discrimination. Under
this requirement, heightened scrutiny will only apply if a law
facially creates a distinction based on illegitimate grounds or
if a neutral law was enacted with an intent to discriminate on
illegitimate grounds. Thus, situations in which a law causes a
discriminatory impact against groups protected by heightened
scrutiny will not actually receive that level of review unless
the government intended to discriminate. Unlike both
colorblindness and multiple levels of review, which have
historical foundations, the principle of intentional
discrimination is a relatively recent development in U.S. law.
Neither the text nor legislative history of the Fourteenth
Amendment supports this requirement, and it only arose in the
Supreme Court around the early 1970's.

disadvantage, or political prejudice." Id. Additionally, this
group is "highly fluid" and constantly changing. Id.

102
In fact, in *Yick Wo v. Hopkins*, the Court applied the Fourteenth Amendment to a facially neutral statute. In this case, San Francisco had passed a municipal ordinance which gave discretion to a board of supervisors to prohibit the use of wooden buildings to operate a laundry, ostensibly in order to protect the public against the danger of fire. While the law did not explicitly require or suggest discriminatory implementation, it was unquestionably applied on the basis of race and nationality. As a result, it violated the Fourteenth Amendment's guarantee of equal protection of the laws.

Following *Brown II*, the Court ultimately acknowledged the necessity for affirmative steps to be taken immediately by states to integrate public schools. This requirement

---

357 118 U.S. 356 (1886).

358 "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered . . . with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances." Id. at 373-74.

359 *Brown v. Board of Education*, 349 U.S. 294, 300-01 (1955) (hereafter *Brown II*) (delegating primary responsibility for supervision of desegregation to the federal district courts which were instructed to ensure a "prompt and reasonable start toward full compliance" in order "to effectuate a transition to a racially nondiscriminatory school system."). Even though the Court directed that such action was to occur "with all deliberate speed," many states failed to take action which would alter the existing division of schools between blacks and whites. Id.; see also *Cooper v. Aaron*, 358 U.S. 1 (1958); *Goss v. Board of Education*, 373 U.S. 683 (1963); *Griffin v. County School Board*, 377 U.S. 218 (1964) ("There has been entirely too much deliberation and not enough speed" since the mandate of *Brown II*).

360 *Green v. County School Board*, 391 U.S. 430, 437-38 (1968) ("School boards . . . were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").
extended the Equal Protection Clause to a new level; not only were states prohibited from discriminating, they were directed to affirmatively remove the effects of such discrimination in order to comply with the Fourteenth Amendment.\textsuperscript{361} However, the Court later backed away from such a substantive interpretation of the Fourteenth Amendment, instead restricting its application to intentional discrimination.

Until the early 1970's, the only segregation cases before the Court originated out of the South where laws explicitly provided for segregation prior to the Brown ruling. However, in Keyes v. School District No. 1, Denver, Colo.,\textsuperscript{362} the Court addressed the status under the Equal Protection Clause of a law which did not discriminate on its face in the context of school desegregation. The Denver, Colorado, school board had divided up its district in such a way as to create segregated schools without ever actually mandating this result. The Court concluded that the Equal Protection Clause could reach de facto segregation; however, the Fourteenth Amendment was limited to those situations in which the de facto segregation was a result of legislative intent.\textsuperscript{363}

\textsuperscript{361} Id. at 436 ("The transition to a unitary, non-racial system of public education was and is the ultimate end to be brought about.").

\textsuperscript{362} 413 U.S. 189 (1973).

\textsuperscript{363} But see id. at 217-53 (Powell, J., concurring in part and dissenting in part) (arguing that the rationale of Green which required positive action on the part of the States in the South to integrate schools necessarily required the same result in the North and, therefore, the concept of intentional discrimination was at odds with that decision). Interestingly, Justice Powell later joined the Opinion of the Court, requiring intentional discrimination, in Washington v. Davis, 426 U.S. 229
Despite the Court's pronouncement in *Yick Wo* that illegitimate application of a neutral law would not be permitted, the Court, continued to formulate a narrower version of this principle. In *Washington v. Davis*, two black individuals challenged a qualifying exam for the District of Columbia police department on which a disproportionate number of black applicants had failed. The Court distinguished cases under the Fourteenth Amendment from those brought under Title VII, the Congressional Civil Rights Act. Under the latter, Congress had specifically provided that an intention to discriminate need not be proved. However, the Court found this to be inapplicable in Constitutional cases. The Court denied the challenge and, expanding on the reasoning of *Keyes* in the segregation context, found that all cases decided under the Equal Protection Clause require either a state action which discriminates on its face or one which has a discriminatory intent or purpose. While citing a line of cases which had established this requirement, the Supreme Court did not articulate the particular history of the Fourteenth Amendment which would require such an interpretation. Rather, the Court merely stated that the

---


365 "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant. . . . A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." Id. at 241 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).
Fourteenth Amendment's central purpose "is the prevention of official conduct discriminating on the basis of race."\textsuperscript{366}

The U.S. Supreme Court concluded that any other reading of the Fourteenth Amendment would encroach on the government's ability to function. "A rule that a statue designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."\textsuperscript{367}

There have been two primary criticisms of the requirement of intent. First, for any given statute which does not explicitly refer to an illegitimate ground, proof of legislative intention to discriminate can be very difficult.\textsuperscript{368} Second, the focus on the motive of the legislature ignores the real concern of equal

\textsuperscript{366} Id. at 239; see also Village of Arlington Heights v. Metropolitan Housing Development Co., 429 U.S. 252, 266-68 (1977) (establishing criteria which may be used in order to demonstrate a discriminatory purpose behind state action; however, noting that discriminatory impact could only be sufficient in extreme cases, such as the discrimination in \textit{Yick Wo}).

\textsuperscript{367} Id. at 248. The Court applied the purposeful discrimination requirement of \textit{Davis} and \textit{Arlington Heights} in \textit{Feeney} to find that the state did not intend to exclude women from civil service jobs with a veteran preference. Rather, the Court found that the preference applied in favor of both male and female veterans and applied against both male and female nonveterans. Personal Administrator of Mass. v. Feeney, 442 U.S. 256, 275 (1979).

protection: protecting groups from harm resulting from governmental action.\textsuperscript{369}

2. Canada

As with the principle of colorblindness, the Supreme Court of Canada has explicitly rejected the requirement of intentional discrimination. The Court will evaluate all legislation, whether facially objectionable or facially neutral, in order to determine whether there is a violation of s.15. Because the Court will review evidence of the social, political, and economic conditions surrounding the impugned provision, proof of an intent to discriminate is not necessary.\textsuperscript{370} Rather, s.15's purpose is to promote a society "in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect, and consideration."\textsuperscript{371} Thus, a law which adversely affects one group more than another, even if unintentionally so, may violate s.15. Nonetheless, as the text of s.15 provides, the right to equality is qualified by the notion of discrimination. A law which deprives a group of one of the four equality rights in a non-discriminatory manner does not contravene s.15.

\textsuperscript{369} Id. at 319, 323 ("goal [of the 14th Amendment] is the eradication of invidious discrimination"); Andrew Luger, Liberal Theory as Constitutional Doctrine: A Critical Approach to Equal Protection, 73 GEORGETOWN L.R. 153, 172 (1984) (stating that courts should limit de facto discrimination due to the reinforcement of unequal social relations).


\textsuperscript{371} Id. at 171.
However, the Court struggled with the proper definition of discrimination.\textsuperscript{372} Relying on human rights acts throughout Canada, the Court defined discrimination as "a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."\textsuperscript{373} The Court explicitly distinguished the suspect nature of distinctions based on personal characteristics as opposed to those based on merit and capacity.\textsuperscript{374}

However, it is still unclear whether the Court will actually follow its rejection of intentional discrimination in practice. The Court has yet to find a violation of s.15(1) in the context of adverse effects discrimination.\textsuperscript{375} For example, the Court has not acknowledged broader social inequalities for women in cases of non-intentional, adverse effect discrimination involving economic considerations. In \textit{Symes}, a female partner in a law firm challenged a tax provision which prevented her from

\begin{itemize}
\item \textsuperscript{372} Id. at 172.
\item \textsuperscript{373} Id. at 174.
\item \textsuperscript{374} Id. at 174-75.
\end{itemize}
deducting child care as a business expense on her income tax.\textsuperscript{376} The Court referred to the \textit{Andrews} analysis under s.15(1) and recognized the validity of adverse effect cases under the equality provision of the Charter.\textsuperscript{377} However, the Court did not find evidence that this specific statute adversely affected women.\textsuperscript{378} Even though evidence established that women disproportionately carry the burden of caring for children, there was insufficient evidence to establish that women disproportionately pay for child care.\textsuperscript{379} This latter evidence was necessary for the Court due to the primarily economic impact of this tax provision and an identical legal obligation on both parents to financially care for their child, thereby creating a presumption of fathers' actual financial contribution.\textsuperscript{380} As a result, the Court could not find a disadvantage either for women as a group or for the subgroup of professional women, as required by s.15(1).\textsuperscript{381} Thus, although the Court recognized sex inequality in the societal distribution of the care of


\textsuperscript{377} Id. at 754. According to the Supreme Court, intent or animus is irrelevant in the context of discrimination.

\textsuperscript{378} Id. at 765.

\textsuperscript{379} Id. at 763-64.

\textsuperscript{380} Id. The Court did theorize that this type of evidence could be demonstrated in another case, especially with respect to single mothers with the primary financial obligation over child care, but there was not enough evidence in this case to show more than an individualized disadvantage resulting from the statute. Id.

\textsuperscript{381} Symes, [1993] 4 S.C.R. at 763-64.
children, it would not infer a similar inequality in the financial responsibility for child care.

In Thibaudeau, the Supreme Court upheld a tax provision which adversely affected custodial parents in relation to non-custodial parents. The Court focused on the purpose of the law: to increase the amount of disposable income for divorced or separated couples in order to more easily meet the financial needs of children. Gonthier, J., for the majority, concluded that both parents need not benefit equally in Parliament's attempt to achieve this goal. Rather, the two parents can be treated as a unit for purposes of meeting the child's financial needs because both parents have a corresponding financial duty to the child. Thus, taking the family unit as a whole, the tax provision provides an overall benefit. As a result, there was no violation of any of the four equality rights protected by s.15(1). Additionally, the Court stated that this provision prejudiced custodial parents regardless of sex. Once again, the Court failed to consider the social reality of inequality in

382 Id. at 763.
384 Id. at 490.
385 Id. at 493.
386 Id. at 491.
387 Id. at 493.
389 Id. at 492-93.
relation to child care as between men and women in the context of a facially neutral statute.\footnote{390}

By contrast, the Court has found a s.15(1) violation in more than half of the facially discriminatory laws which have been challenged.\footnote{391} In fact, in the only two cases in which the Court found an unjustifiable violation of s.15(1), the impugned provision facially discriminated against the protected groups.\footnote{392} Although there have been cases in which the Court failed to recognize a s.15(1) violation for laws making facial distinctions,\footnote{393} a law's de jure discrimination does appear to affect the Court's analysis. As a whole, though there are currently not enough cases with which to draw conclusions with respect to the Court's application of the adverse effects principle, the Court's explicit rejection of the requirement of intentional discrimination suggests a potential of extending equality protection beyond that of the U.S. Supreme Court.

\footnote{390} Additionally, there is a significantly higher burden of proof on claimants asserting an adverse effects claim. The Court has made it clear that s.15(1) requires substantial specific evidence demonstrating an adverse effect. See id. at 492-496; Symes, [1993] 4 S.C.R. at 762-65. Thus, there is a similar concern in both countries about the complainant's ability to prove a violation of constitutional protections of equality in de facto discrimination cases.


D. Practical Effects

Overall, the constitutional protection of equality in the United States has been shaped by three dominant concepts, none of which has been accepted in Canada: colorblindness, multiple levels of review, and intentional discrimination. While the Supreme Court of Canada has developed principles which resemble these American concepts, it has neither been as extreme in application nor as concerned with notions of formal equality. The U.S. Supreme Court has limited the government's ability to consider the reality of social inequality by insisting on colorblindness and focusing on de jure discrimination. The Court, in rejecting claims of de facto discrimination and attempts at affirmative action, has emphasized the importance of removing governmental involvement, both positive and negative, from the struggle for equality. Any governmental conduct based on suspect classifications will not be tolerated under the Fourteenth Amendment. By contrast, the Supreme Court of Canada, in placing more emphasis on social context and actual effects of legislation, has taken a more substantive approach to equality. In Canada, governmental action which promotes principles of equality does not violate the Charter.

These differences in the manner in which Canada and the United States interpret equality could have concrete implications on the outcome of specific cases. In order to illustrate this point, I have analyzed one Canadian case under the American levels of review doctrine and two American cases under s.15(1) of the Charter.
The ultimate evidence of the principle of colorblindness in the United States lies in the Supreme Court's affirmative action position. In Bakke, the Court struck down a medical school's special admissions program designed to increase the representation of disadvantaged students. Although the Court found that race could be a legitimate consideration in admissions, it must be narrowly tailored, based on specific judicial, legislative, or administrative findings, to remedy past constitutional or statutory violations. Restating the rationale for colorblindness, Justice Powell stated that "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." By contrast, because the Supreme Court of Canada has not accepted the principle of colorblindness, it would analyze this case in a significantly different manner.

Under s.15(2) of the Charter, affirmative action programs are granted a special exclusion from the requirements of s.15(1). Nonetheless, even beyond this exemption, the Supreme Court of Canada has interpreted s.15(1) in a manner which would allow legislatures to consider protected characteristics and social context in shaping remedial laws. Under the facts in Bakke, the Court would first determine whether this law violated one of the four equality rights and, then, whether it was


395 Id. at 307.
The Court has noted several times that equality does not require identical treatment. Because the dominant group is over-represented in medical schools, an attempt to remedy this problem, especially in light of the social reality that disadvantaged groups are underrepresented in the medical field,\textsuperscript{397} would not be seen as discriminatory under s.15(1). Further, even assuming a s.15(1) violation, the Court would probably uphold this provision as demonstrably justifiable under s.1. As s.15(2) makes clear, affirmative action plans are "pressing and substantial" concerns. Additionally, the set aside of sixteen positions in a class of one hundred, although not the least restrictive alternative, is not disproportionate to the goals of the provision\textsuperscript{398} and has a fairly minimal impairment on the dominant group. Ultimately, Canada's rejection of colorblindness would result in an opposite conclusion with respect to the impugned provision in \textit{Bakke}.

In \textit{Miron}, an insurance provision denied spousal benefits to an unmarried couple on the basis of marital status.\textsuperscript{399} Even though the couple were living in a marital-like relationship and shared many characteristics with married couples, the insurance provision required a marriage under law. In striking down the


\textsuperscript{397} \textit{Bakke}, 438 U.S. at 369-70 (Brennan, J., concurring in the Judgment in part, and dissenting in part).

\textsuperscript{398} See id. at 374 (Brennan, J.) (stating that the special admission proportion of 16\% is less than the rate of minorities in California's population).

provision, the Supreme Court of Canada found that marital status is an analogous ground under the Charter, that this provision violated s.15(1), and, finally, that it was not demonstrably justifiable under s.1. Under the Fourteenth Amendment, however, this case probably would have a different outcome. This provision contravenes two equal protection requirements; it violates the colorblindness principle by discriminating on the basis of a group characteristic, marital status, against one particular class, unmarried couples, and it does so intentionally in a de jure manner. Nonetheless, under the Court's multi-tiered approach, the claimants must also attempt to gain suspect or quasi-suspect status for heightened scrutiny.

Under the Supreme Court of Canada's analogous ground approach, marital status received protection because, like religion and citizenship, it is a fundamental personal characteristic which has historically served as the basis for discrimination and social prejudice. However, it is likely that the U.S. Supreme Court would not find this group worthy of heightened protection. Unlike race and national origin, marital status does not have any historical connection to the Fourteenth Amendment. In addition, marital status is not an immutable characteristic. Further, the type of historical discrimination noted by the Supreme Court of Canada does not rise to the level of other groups receiving heightened scrutiny, such as sex and legal alien status. Similar to mental disability, age, economic class, and other characteristics connected to social prejudice, the U.S. Supreme Court would relegate marital status to rational relationship review. Because the Supreme Court has often
emphasized the importance of marriage in society, it is unlikely that it would find an attempt to promote that institution an act of irrationality. Thus, the levels of review approach would alter the outcome of this case if it were decided in the United States.

The U.S. Supreme Court unequivocally adopted the principle of intentional discrimination in *Davis*.\textsuperscript{400} This incident substantially affected the outcome of the case; the Court upheld a written personnel test for the District of Columbia's Police Department which had the effect of excluding a disproportionate number of black applicants. Unlike the U.S. Supreme Court, the Supreme Court of Canada has rejected the limitation of intentional discrimination under s.15(1). Thus, under the facts in *Davis*, the Supreme Court of Canada would be able to directly analyze the constitutionality of the disproportionate impact. Although highly speculative, the Court would probably find a s.15(1) violation by analyzing the social, political, and economic conditions surrounding the test. A lower court had already found that a higher percentage of blacks fail the test and that the number of black police officers was disproportionate to the percentage of blacks in the local population.\textsuperscript{401} Thus, this provision may have been discriminatory under s.15(1). If so, it would probably not survive s.1. Although ensuring applicants are qualified for such a high risk position would be

\textsuperscript{400} Washington v. Davis, 426 U.S. 229 (1976).

\textsuperscript{401} Id. at 235. However, the lower court also found that the test was not culturally slanted and that the police department had made a concentrated effort to increase the number of black police officers in the department. Id.
pressing and substantial, a test which discriminates against black applicants would have to impair the right to equality as little as possible and be proportional to the legislative objective. Unlike in the U.S. Supreme Court, s.1 would not allow an exception due to the potentially "far-reaching" implications for invalidating a nation-wide civil service exam.

E. Conclusion

The manner in which Canada and the United States analyze the constitutional meaning of equality differs dramatically. While the U.S. has limited the implications of the Fourteenth Amendment with such principles as colorblindness, levels of review, and intentional discrimination, the Supreme Court of Canada has given a more expansive reading to s.15(1) of the Charter. Unlike the U.S. Supreme Court, Canada is somewhat more willing to examine the social consequences of legislation. As a result, there is a greater opportunity for a more substantive form of equality.

This difference is also reflected in other areas of law which rely on principles of equality. Thus, this thesis next explores each country's reaction to governmental restrictions on hate speech and pornography, two forms of speech protected as freedom of expression but which potentially promote social inequality. Initially, however, it is important to place these cases in context of each country's overall position on freedom of expression.

---

402 Id. at 248.
Freedom of expression has long been acknowledged as a crucial component of democracy.\(^403\) In addition to its value as a means to establish and maintain a democratic government, many view freedom of expression as an end in itself.\(^404\) Thus, there are three general values embodied in the freedom of expression: 1) "marketplace of ideas", including concepts of advancement of knowledge and discovery of truth through free and vigorous exchange of a variety of ideas; 2) "furtherance of democracy," including participation in political decision-making and election of officials through expression of opinion and access to public records as well as resolving internal and interpersonal conflicts by open discussion so as to protect the peace and order of a democratic society; 3) "self-fulfillment," including the development of character, personality, and personal knowledge through receiving and expressing opinions and ideas.\(^405\) The first two of these values characterize speech as a means to achieving the societal goals of truth and democracy while the final concept, self-fulfillment, recognizes the value of speech

\(^{403}\) John E. Nowak, et al., CONSTITUTIONAL LAW, (2d Ed. 1983).

\(^{404}\) Tribe, supra note 283.

at an individual level.\textsuperscript{406} Each of these ideals have been recognized in both Canadian and American freedom of expression jurisprudence.\textsuperscript{407}

Another approach to free expression focuses on the interaction between each of these elements. Human beings exist in societies which require interaction in order to function. Because communication is an essential element of community life through self-determination, it receives constitutional protection.\textsuperscript{408} Thus, communication in a democracy symbolizes the need for interaction and interdependence in an individualistic society. As a result, expression should only be limited to the extent it negatively affects interdependence.

\textbf{A. United States}

In the United States, freedom of expression found constitutional protection immediately following independence under the Bill of Rights of 1791 in the First Amendment.\textsuperscript{409} In order to understand contemporary notions of free expression, it is necessary to examine the context in which the First Amendment was drafted. In England, speech was limited extensively by prior restraint through elaborate licensing schemes and seditious

\textsuperscript{406} See Nowak, supra note 403, at 863-864.


\textsuperscript{408} Moon, supra note 126, at 414.

\textsuperscript{409} "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging 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."
After licensing was abolished in the English Bill of Rights in 1688, freedom of the press was still only thought to imply the absence of censorship prior to publication.\textsuperscript{411} Blackstone, in reviewing the state of the law in the eighteenth century, voiced no general concern that subsequent punishment for a publication would effectively deter or chill future publications.\textsuperscript{412} As a colony of England, early American law reflected the English tradition of suppressing opinion.\textsuperscript{413}

Thus, the First Amendment was drafted in the context of English and colonial governmental repression of dissent and unpopular ideas.\textsuperscript{414} Probably resulting from this context, many currently regard freedom of expression as the most fundamental of the Bill of Rights.\textsuperscript{415} As a result, the United States Supreme

\begin{flushright}
\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{410} Leonard Levy, \textit{Legacy of Suppression: Freedom of Speech and Press in Early American History} (1960).
\item\textsuperscript{411} Id. at 14.
\item\textsuperscript{412} See id. at 15.
\item\textsuperscript{413} "The persistent image of colonial America as a society in which freedom of expression was cherished is an hallucination that ignores history." Id. at 18.
\item\textsuperscript{414} Levy proposed that the First Amendment's drafters held the same limited notions of free speech and press as Blackstone. Id. at 214-235. However, modern First Amendment jurisprudence rejects such an interpretation of the founders' views. See Nowak \textit{supra} note 403, at 862; see also Sedler, \textit{supra} note 62, at 1195.
\item\textsuperscript{415} See Nowak \textit{supra} note 403, at 870; Post \textit{supra} note 405; Matsuda \textit{supra} note 66; see also Brandenberg v. Ohio, 395 U.S. 444 (1969).
\end{enumerate}
\end{footnotesize}
\end{flushright}
Court has been very cautious when examining potential limitations on this right.\textsuperscript{416}

There are two principal approaches to the First Amendment as interpreted by the United States Supreme Court: 1) protected expression limited for various other purposes; and 2) expression which is not within the protection of the First Amendment.\textsuperscript{417} Under the first approach, beginning with cases involving the Espionage and Sedition Acts of World War I, the Supreme Court formulated a test for limiting expression which is constitutionally protected.\textsuperscript{418} In Schenck v. United States, Justice Holmes, recognizing the importance of freedom of expression, created the clear and present danger rule to analyze legislation on this matter: the expression to be limited must present a clear and present danger such that it will bring about the substantive evils that Congress has a right to prevent.\textsuperscript{419} Justice Holmes upheld a conviction of obstructing recruitment based on the defendant's distribution of a leaflet which asserted that the draft violated the Thirteenth Amendment.\textsuperscript{420} Holmes acknowledged that the leaflets were expression protected by the First Amendment but that the circumstances, largely the existence of the state of war, created a substantial enough harm for

\textsuperscript{416} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the basis by which the Supreme Court can review legislation on constitutional grounds); see Nowak, supra note 403, at 10.

\textsuperscript{417} See Tribe, supra note 283, at 580.

\textsuperscript{418} See Nowak, supra note 403, at 866.

\textsuperscript{419} 249 U.S. 47, 52 (1919).

\textsuperscript{420} Schenck, 249 U.S. at 52.
Congress to punish this expression.\textsuperscript{421} Holmes emphasized the need for a present danger or intent to bring about such a danger.\textsuperscript{422} This contained the notion that, presumptively, the state cannot prohibit or punish expression.\textsuperscript{423}

In \textit{Dennis v. United States}, this formulation was approved and expanded by the Supreme Court in reference to the Smith Act.\textsuperscript{424} This new use of Holmes' principle was adopted from Judge Learned Hand's interpretation: courts "must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech" in order to prevent the danger.\textsuperscript{425}

This usage of the clear and present danger rule disregarded Holmes' emphasis on the immediacy of danger and transformed the principle into a balancing of probabilities test.\textsuperscript{426} In addition, this usage seems to ignore the existence and importance of a war in Holmes' formulation. Even in \textit{Abrams v. United States},\textsuperscript{427} where the defendant was convicted of promoting

\begin{thebibliography}{99}
\small
\bibitem{421} Schenck, 249 U.S. at 51.
\bibitem{422} Schenck, 249 U.S. at 51.
\bibitem{423} See Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J. concurring).
\bibitem{424} 341 U.S. 494 (1951). The Smith Act was Congress' codification of McCarthyist principles illegalizing the formation of a communist party. Specifically, the statute prohibited inciting violence as a form of overthrowing the current government, but the application in Dennis, with very little evidence of violence incitement, shows the true scope of the Act to be against mere communist propaganda. See Nowak, supra note 403, at 875.
\bibitem{425} Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950).
\bibitem{426} See Nowak, supra note 403, at 880.
\bibitem{427} 250 U.S. 616 (1919).
\end{thebibliography}
communism and in which Holmes dissented, the majority relied on the notion that this activity would somehow interfere with the war effort against Germany.

In the late 1960's, the Supreme Court rejected the Dennis notion of the clear and present danger rule. In *Brandenburg v. Ohio*, 428 the Supreme Court reversed a conviction of a Ku Klux Klan leader for advocating violent political reform. The court held that the state could not prohibit advocacy of violence unless it was directed to inciting or producing an imminent danger.429 In addition, the court required that a statute be narrowly drawn and only follow as a result of a compelling state interest.430 This formulation focused on the objective immediacy of lawless action, similar to the Holmes and Brandeis version.431

Once the questioned activity is found to constitute expression for purposes of the First Amendment, there are two general standards for the justification of the government's limiting speech. First, if the state's regulation is not related to expression, then courts apply a less stringent test for noncommunicative conduct.432 Under this test, "a government


429 *Brandenberg*, 395 U.S. at 447.

430 *Brandenberg*, 395 U.S. at 460 (Douglas, J., concurring) (discussing the abuses of Holmes' formulation in stifling the free discussion of and opposition to World War I as well as the chilling effect accomplished by McCarthyism and the Smith Act as applied in *Dennis*).

431 See Nowak, supra note 403, at 885.

regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." However, if the regulation is related to expression, then it is subjected to strict scrutiny, and the government must demonstrate a compelling interest.

In addition to these principles, another line of cases has developed a second form of First Amendment analysis: finding that the expression itself is not protected by the First Amendment in the first instance. Beginning with Chaplinsky v. New Hampshire, a case upholding a conviction for inciting violence by using "fighting words," the Supreme Court found certain types of speech to be outside of the protection of the First Amendment: libel, certain commercial speech, and fighting words.

---


435 This distinction was recently clarified by the Supreme Court. Referring to the characterization of some expression as falling outside constitutional protection, the Court explained that "such statements must be taken in context, ... and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all.'" R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538, 2543 (1992) (quoting Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 615 n.146.). The Court continued, "[w]hat they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)--not that they are categories of speech entirely invisible to the Constitution. . . ." Id. (emphasis in original).

436 315 U.S. 568, 572 (1942).
Subsequently, the Supreme Court held obscenity to be outside First Amendment protection.\footnote{Roth v. United States, 352 U.S. 964 (1957).} Although \textit{New York Times Co. v. Sullivan}\footnote{376 U.S. 254, 273 (1964).} rejected Chaplinsky's dicta that libel was not constitutionally protected,\footnote{Tribe suggests that \textit{Times} has all but dissolved the notion that certain expression is outside First Amendment protection. See Tribe, supra note 283, at 670-671. However, \textit{Times} did not hold that libellous speech is constitutionally protected. Instead, it simply created procedural safeguards for defendants accused of defamation. Defamation, if proved to these standards, is still outside First Amendment protection. See New York Times, 376 U.S. at 273-280 (1964); see also R.A.V. v. St. Paul, 112 S.Ct. at 2551-52 (White, J., concurring in the judgment).} the court did not disturb the "fighting words" holding, and the obscenity proposition in \textit{Roth} was affirmed in \textit{Miller v. California}.\footnote{413 U.S. 15, 22 (1973).}

Currently, even though some argue that the United State's First Amendment law is somewhat confused and unpredictably applied,\footnote{See Collin v. Smith, 578 F.2d 1197 (7th Cir. 1976); Keegstra, 3 S.C.R. 697 (S.C.C. 1990); Derrikson v. Tomat, 88 D.L.R. 4th 401 (B.C.C.A. 1992); Matsuda, supra note 66, at 2350.} some principles remain constant: freedom of expression, although vitally important, is not an absolute right;\footnote{Although the First Amendment is worded in absolute terms, unlike other rights such as the Fourth Amendment's prohibition on unreasonable search, certain identifiable limitations to the right have been upheld as constitutional. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964); see also Symposium, supra note 66 (K. Mahoney, speaker).} a limited number of forms of expression are not within the scope of the First Amendment's protection; any law regulating expression shall be drafted narrowly and shall otherwise be void.
on its face; and the government must have an overriding and compelling interest in order to limit constitutionally protected expression and must proscribe expression to the least extent possible. When that compelling interest concerns a competing constitutional right, courts determine the degree of interference on expression and whether regulating expression promotes the competing value in an effective manner, as unintrusively as possible. Thus, it is clear that the United States places great value on freedom of expression and will only rarely tolerate limitations on this right.

American First Amendment law is strongly based on individualism. The state should not engage in regulating speech with respect to its truth and must remain content neutral. Because the state cannot distinguish between acceptable and unacceptable ideas, all ideas should remain unregulated unless harmful to others. This protection is necessary in order to promote principles of democracy and freedom. For example, the ideas of the Ku Klux Klan cannot be absolutely prohibited.

---

445 Sedler, supra note 62, at 1199; Cox Broadcasting, Inc. V. Cohn, 420 U.S. 469 (1975).
446 Symposium, supra note 66 (J. Cameron, speaker).
447 Police Department v. Mosley, 408 U.S. 92, 95 (1972) (stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas"); Major, supra note 28, at 19.
communism can be espoused without sanction, and the Nazi Party cannot be prohibited from marching in a town with a large Jewish population.

Nonetheless, the Supreme Court does take into account the social value and potential or actual harm of the speech. By holding certain speech unprotected by the First Amendment, such as speech which incites imminent lawless action, fighting words, child pornography, certain commercial speech, and obscenity, the Court has engaged in a balancing of social values against individual freedoms.


Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). Additionally, people may teach religions that others despise, misrepresent the views of the President in criticism, and seek to repeal constitutional amendments granting equal protection and voting rights to women and minorities. See American Booksellers Association v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

Major, supra note 28, at 73.

Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (based on the notion that the speech-caused harm is imminent and likely and, thus, cannot be prevented by more speech).


"From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538, 2543 (1992) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
B. Canada

Canada's law on freedom of expression developed quite differently than that of the United States. Prior to 1867, since Canada was a colony of England, its law on freedom of expression was derived from the English system.\textsuperscript{458} Thus, from the English Bill of Rights in 1688, Canada recognized the importance of freedom of expression.\textsuperscript{459} Even though Canadian law was fairly restrictive of speech, as with England, Canada began to accept fewer limitations on free speech as time progressed.\textsuperscript{460} Due to limited Constitutional power vested in the courts, many decisions based on \textit{ultra vires} grounds emphasized the importance of freedom of expression.\textsuperscript{461} Thus, even though free expression was not constitutionally recognized, Canada did acknowledge its importance to the democratic structure of government.\textsuperscript{462}

Under the Charter, Canada's first constitutional protection of the freedom of expression can be found in Section 2: "Everyone has the following fundamental freedoms: a. freedom of conscience and religion; b. freedom of thought, belief, opinion and


\textsuperscript{459} Strayer, \textit{supra} note 65, at 3.

\textsuperscript{460} See generally Strayer, \textit{supra} note 65; see also Nowak, \textit{supra} note 403, at 859 (stating that England accepted truth as a defense to seditious libel in 1843).


\textsuperscript{462} Sedler, \textit{supra} note 62, at 1198.
expression, including freedom of the press and other media of communication; c. freedom of peaceful assembly; and d. freedom of association."\textsuperscript{463}

This is textually similar to the First Amendment in that it is broadly phrased and open-ended. However, there is no anti-establishment clause included.\textsuperscript{464} In addition, the language is somewhat more comprehensive and specifically includes associational freedoms. In comparison, it was necessary for American courts to infer this protection from other rights articulated under the First Amendment.\textsuperscript{465} Currently, Canada views freedom of expression as one of the most fundamental values in a free and democratic state.\textsuperscript{466} In \textit{Edmonton Journal v. Alberta}, the Supreme Court of Canada recognized that "it is difficult to imagine a right more important to a democratic society than freedom of expression" and that "the vital importance of the concept cannot be over-emphasized."\textsuperscript{467} In addition, the Court recognized the significance and importance of the Charter's protection, similar to that of the First Amendment, being established through absolute wording.\textsuperscript{468} "If the guarantee of free expression is to be meaningful, it must protect

\textsuperscript{463} Canadian Charter of Rights and Freedoms, Constitution Act, 1982, pt. I.

\textsuperscript{464} Sedler, supra note 62, at 579.


\textsuperscript{466} Irwin Toy Ltd. v. Quebec (Attorney-General), [1989]58 D.L.R. 4th 577.

\textsuperscript{467} [1989]64 D.L.R. 4th 577, 605.

\textsuperscript{468} Edmonton Journal, 64 D.L.R.4th at 605.
expression which challenges the very basic conceptions about our society." Thus, Canada has a very broad notion of freedom of expression, perhaps even broader than the United States.

The Supreme Court of Canada uses a two-step analysis in determining the scope of s.2(b): 1) Does the matter in question constitute expression protected by s.2(b)? and 2) Is the purpose or effect of the legislation (used broadly to include any governmental interference) to restrict such expression.

For the initial question, Canada affords an extremely broad protection under s.2(b): all communications which convey meaning and all communications which attempt to convey meaning (excluding physical forms of communication involving violence) are protected by s.2(b).

Further, all content of expression is protected, and content is not a factor in determining whether the communication is protected by s.2(b) of the Charter. Once the communication is protected, the next step in the analysis is to determine that the legislation's purpose is to restrict expressive activity or that it has the effect of restricting

---


472 Zundel, 95 D.L.R.4th at 251.

473 Zundel, 95 D.L.R.4th at 251.
expressive activity.\textsuperscript{474} If the legislation meets this criteria, then the limitation infringes the freedom of expression.

However, finding a violation of the right does not terminate the analysis in Canada. Rather, as previously stated, the analysis shifts to s.1 of the Charter to determine whether the impugned provision is justified in a free and democratic society.\textsuperscript{475} Thus, even though the s.2(b) analysis may be broader than the First Amendment doctrine in the U.S.,\textsuperscript{476} Canada is nonetheless able to restrict expression to a greater degree than the United States.

Section 1 of the Charter allows Canadian courts to define expression in very broad and flexible terms so as to articulate Canadian values more freely without concern for undesirable results in individual cases. Additionally, because of the reverse onus on the government, the Charter is written in favor of expression. By contrast, American courts cannot state rights in an overly broad fashion because there is no s.1 provision in the Bill of Rights which would allow an exception in individual

\textsuperscript{474} See Canada (Canadian Human Rights Commission) v. Taylor, [1990] 75 D.L.R. 4th 577. The "good faith" or "bad faith" of the legislature is only considered under the §1 analysis of proportionality.

\textsuperscript{475} This provision has been interpreted as placing the burden of persuasion for limiting a right or freedom upon the government. See Edmonton Journal, 64 D.L.R. 4th at 594 (1989).

\textsuperscript{476} For example, this formulation of freedom of expression would protect speech that is defamatory, obscene, and that which incites to violence. These concepts are not protected as free speech under the First Amendment. See Times, 376 U.S. at 270 (1964); United States v. Roth, 354 U.S. 476 (1957) (holding that obscenity is not within the area of constitutionally protected speech or press); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that "fighting words" are not protected by the First Amendment).
cases. Instead, American courts must be very careful in defining rights so as only to encompass the specific facts before them. Thus, in Roth v. United States, the Supreme Court excluded obscenity from the protection of the First Amendment. Further, the U.S. Supreme Court was forced to disregard its earlier decisions in order to hold that libel actions deserve constitutional protection. By contrast, the Supreme Court of Canada held obscenity to be within the protection of s.2(b), but it was presently justifiable to limit this expression in a democratic society. As a result, Canada does not have to redefine the scope of constitutionally protected speech according to society's views. Instead, courts simply apply the s.1 analysis in individual cases while retaining a consistent definitional scope of free expression.

Although Holmes' clear and present danger rule contains a similar balancing process to s.1, the test does not have the same specificity and clarity of the Canadian provision. In addition, because s.1 is applied uniformly to all rights, it is easier to balance two distinct and conflicting constitutional rights due to the explicit, intelligible principles developed over numerous cases and constitutional decisions. Thus, although Canada has not had as many Charter cases interpreting freedom of

---

480 See id.
481 See Strayer, supra note 65, at 42.
expression as U.S. First Amendment decisions, Canada has more opportunity to refine s.1 balancing than the U.S. Supreme Court under the clear and present danger rule and other First Amendment doctrines.\textsuperscript{482}

While Canada holds freedom of expression in as high of regard as the United States, there is more opportunity to limit this right when competing societal interests demand under the s.1 analysis. In order to determine the extent to which this provision allows greater restriction on freedom of expression, it is necessary to compare American and Canadian perspectives on specific areas of expression. This next section focuses on hate speech and pornography due to their relationship with principles of equality and due to the opposite results of cases dealing with these issues in Canada and the United States.

C. Governmental Regulation of Pornography

Pornography refers generically to the description or depiction of sexual activity.\textsuperscript{483} However, in the context of governmental regulation, it has been described much more narrowly. Pornography as a legal concept is the "graphic, sexually explicit depiction of rape or other forms of male subordination of females."\textsuperscript{484} One regulation defined pornography more specifically as the graphic sexually explicit subordination of women, men, children, or transsexuals, whether

\textsuperscript{482} See Strayer, supra note 65, at 43; cf. Nowak, supra note 403, at 885.

\textsuperscript{483} Sedler, supra note 62, at 593.

\textsuperscript{484} Tribe, supra note 283 at 920.
in pictures or in words, that also includes one or more of the following: 1) presentation as sexual objects who enjoy pain or humiliation; 2) presentation as sexual objects who experience sexual pleasure in being raped; 3) presentation as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; 4) presentation of being penetrated by objects or animals; 5) presentation of scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or 6) presentation as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.\(^{485}\) In Canada, the federal criminal law defines pornography as "any publication a dominant character of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence."\(^{486}\)

Although there have been attempts to regulate many types of sexually explicit material, some regulations target obscenity, while others focus on the above description of pornography. There are three primary distinctions between obscenity and pornography, largely relevant for purposes of American First


Amendment decisions. First, the focus of pornography is on sexual coercion rather than the mere depiction of sexuality under obscenity. Second, the regulation of pornography seeks to prevent and redress harm caused by the material, whether against women as a group or the participant depicted in a degrading manner. Obscenity laws, by contrast, merely seek to protect society from morally offensive material. Finally, while obscenity is viewed as a violation of public morals, pornography is, in addition to this, a violation of civil rights.

The U.S. Supreme Court has distinguished pornography from obscenity in terms of First Amendment protection. While the Court has held that obscenity is not speech within the protection of the First Amendment, it has failed to extend this doctrine to pornography. Obscenity is defined as something which: 1) the average person, applying contemporary community, or local, standards, would find that the work, taken as a whole, appeals to a prurient interest; 2) depicts or describes, in a patently offensive way, sexual conduct specifically defined by the

487 Major, supra note 28, at 56.
488 Id. at 56-57 (quoting Elizabeth Spahn, On Sex and Violence, 20 NEW ENGL. L. REV. 639, 631-33 (1984-85)).
489 Id. at 64.
490 Id. at 57.
491 Id.
applicable state law; and 3) taken as a whole, lacks serious literary, artistic, political, or scientific value. Because governmental regulations of obscenity do not reach the viewpoint of the particular material, these laws do not abridge the requirement of content-neutrality.

The constitutional approach to the protection of sexually explicit material articulated in Miller developed at a time when legislatures focused on offensiveness to public morality rather than on degradation and dehumanization. Since that time, both Canada and the United States have become more tolerant of sex and nudity in films and magazines. Thus, the primary contemporary objection about sexually explicit material surrounds sexual violence, the degradation of women, and child pornography. As a result, the concern with protecting the public morality from "patently offensive" material has shifted to a concern about the types of harm produced by the depiction of women in a subordinating manner.

Pornography has been characterized as producing many different types of harm against a number of different victims. The most direct harm attributed to pornography is the use of coercion and violence against the women who participate in the making of the material. Additionally, there have been numerous research projects which have studied the relationship between

495 Sedler, supra note 62, at 595.
496 Hudnut, 771 F.2d at 325 ("[T]he statute [regulating pornography] is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness."); Sedler, supra note 62, at 596.
pornography and sexual violence. This form of harm is, perhaps, the most controversial claim against pornography. Further, pornography, like obscenity, has been characterized as offensive. However, the type of offensiveness differs from obscenity in that pornography produces feelings of embarrassment, shame, and inferiority in women. Finally, many have argued that pornography's depiction of women promotes social inequality. These theorists believe that concepts of equality and nondiscrimination should supersede individualist notions of free expression.

The U.S. Supreme Court, through memorandum affirmance of a Court of Appeals decision, has invalidated an ordinance

---

497 Major, supra note 28, at 71; Catherine MacKinnon, Pornography, Civil Rights and Speech, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Hudnut, 771 F.2d at 325 ("Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to unacceptable attitudes and discrimination in the workplace and violence away from it."). Pornography has been compared to hate speech as a communication of an untrue message which expresses or promotes hatred against women. SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION, 1 PORNOGRAPHY AND PROSTITUTION IN CANADA 319 (1985).

498 Major, supra note 28, at 68; SPECIAL COMMITTEE ON PORNOGRAPHY, supra note 497, at 20 ("As long as rights in the liberal glossary mean liberty in the sense of being free to act without restraint, they have little value in a society in which fundamental inequalities exist. Thus, for women, the fact that on the formal level they enjoy the liberty to do certain things is of little consequence if the social environment prevents the exercise of those rights, and there is no correlative duty on the part of others to see that the rights are exercisable. The distinction is one between "privilege" or "liberty" rights, which merely raise an obligation on others not to infringe, on one hand, and on the other, "claim" rights which generate positive responsibility to see that the claimant is enable to exercise her rights.").
prohibiting pornography based on First Amendment grounds.\footnote{American Booksellers Association v. Hudnut, 721 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986).}

Unlike the equivalent Canadian criminal provision, the ordinance created a civil cause of action for those who are injured by pornography against a person trafficking pornography, coercing others to perform in pornography, or forcing pornography on another person.\footnote{Id. at 325.} The procedure for instituting the action was identical to civil rights litigation.\footnote{Id. at 326.}

The Court of Appeals accepted the premise that the depiction of subordination in the material at issue tends to perpetuate subordination of women at a broader societal level.\footnote{Id. at 329.} As a result, the subordinate status of women causes "affront and lower pay at work, insult and injury at home, battery and rape on the streets."\footnote{American Booksellers Association v. Hudnut, 721 F.2d 323, 329 (7th Cir. 1985).} However, pornography does not fit neatly within any of the exceptions to the First Amendment\footnote{Major, supra note 28, at 75-79.} and, specifically, does not comply with the Supreme Court's definition of obscenity.\footnote{But see Sedler, supra note 62, at 596-97 ("[A]ll the sexually violent and degrading and dehumanizing pornography that in Canada has been held to be obscene under §159(8) would be held to be obscene under the Miller test as well.") (emphasis in original).}

Rather, the ordinance restricted a particular
point of view instead of neutrally regulating relevant concepts such as coercion and assault.\footnote{Hudnut, 721 F.2d at 332-333. "The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way--in sexual encounters 'premised on equality'--is lawful no matter how sexually explicit. Speech treating women in the disapproved way--as submissive in matters sexual or as enjoying humiliation--is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole." Id. at 325 (citation omitted).}

Under the Supreme Court's interpretation of the First Amendment, any regulation of speech must be neutral with respect to viewpoint.\footnote{Id. at 327 ("[T]he government must leave to the people the evaluation of ideas."}). The court specifically rejected the notion that content neutrality should not apply in situations in which false assertions cannot be effectively answered.\footnote{Id. at 330-31.} Noting that the importance of finding truth is one of the purposes of freedom expression, the court concluded that it was not the role of the government to select the truth among viewpoints.\footnote{Hudnut, 721 F.2d at 331 (stating that freedom of expression means that "there is no such thing as a false idea, so the government cannot restrict speech on the ground that in a free exchange truth is not yet dominant") (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)).} The court pointed to other potential harms to society created by speech that is protected under the First Amendment: totalitarian government through communist speech, social collapse and revolution through speech which demonstrates a disrespect for the government, bigotry through racist speech, and increased violent crime through television programs.\footnote{Hudnut, 721 F.2d at 329-30.}
regulation of these forms of speech based on their social impact would make the government "the great censor and director of which thoughts are good for us." Social conditioning, for the court, is the ultimate product of most forms of speech, and it is this power of speech which requires governmental absence in the search for the truthful position. Overall, the court invalidated the law, despite potential harmful effects of the material, because the definition of pornography was unconstitutionally broad, content oriented, and without some exception for works with literary, artistic, political, or scientific value.

By contrast, the Supreme Court of Canada has upheld a criminal obscenity statute which includes pornography. The Court focused on the harm caused to society as a whole. Under this analysis, the Court held that the portrayal of sex with violence will ordinarily be an undue exploitation of sex, dehumanizing or degrading explicit sex can be an undue exploitation, and explicit sex with neither violence nor degradation or dehumanization will typically not constitute undue

511 Id. at 330.
512 Id. at 329-30.
513 Hudnut, 721 F.2d at 331-32 ("The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works.").
515 Id. at 485 ("The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure.").
exploitation under the statute.\textsuperscript{516} Thus, within these limits, the relevant consideration is the risk of harm to society.

Under this definition of pornography, the Court found a violation of §2(b) of the Charter. The Court stated that "activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed."\textsuperscript{517} Nonetheless, the Court found the statute to be a demonstrably justifiable limit in a free and democratic society under §1 of the Charter. However, the Court rejected as the basis for the §1 analysis the notion of public morality based on a common understanding of good and evil.\textsuperscript{518} Rather, the Court distinguished its analysis as relying on political morality, the safeguarding of the values which are integral to a free and democratic society.\textsuperscript{519} As a result, the type of harm produced by pornography which justifies limiting freedom of expression relates to notions of equality as an essential principle in a democracy.\textsuperscript{520} This harm, the Court concluded, was significant

\textsuperscript{516} Id.

\textsuperscript{517} Id. at 488.

\textsuperscript{518} Id. at 492 ("To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms.").

\textsuperscript{519} Id. Thus, this notion of political morality does not legislate governmental and majoritarian notions of right and wrong. Instead, the focus is on the basic underlying principles of democracy and whether infringement of the right inhibits or furthers the degree of freedom in society as a whole.

\textsuperscript{520} Id. at 497 (stating that "if the true equality of male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to . . . violent and degrading material").
enough to support a limitation of freedom of expression under §1.\(^{521}\) Under the proportionality test of §1, the Court held that there was sufficient evidence of harm for Parliament to conclude that regulation and prohibition of pornography was necessary for its prevention.\(^{522}\) Further, the Court held that, even though protected under §2(b), pornography does not embody the core principles of freedom of expression.\(^{523}\) Additionally, the statute only limited that material which could result in harm, and there were not less restrictive means available.\(^{524}\) Finally, the Court held that the objective of promoting equality among men and women was sufficiently important to supersede the minimal limitation of freedom of expression.\(^{525}\) Thus, without the principle of content neutrality and with the flexibility of s.1, the Supreme Court of Canada can incorporate notions of equality into the pornography analysis.

---

\(^{521}\) Id. at 496-497 ("A society which holds that egalitarianism, non-violence, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description, or advocacy which violates these principles.").

\(^{522}\) Butler, [1992] 1 S.C.R. at 502 ("While a direct link between obscenity and harm may be difficult, if not impossible to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.").

\(^{523}\) Id. at 500.

\(^{524}\) Id. at 504-507.

\(^{525}\) Id. at 509-510.
D. Governmental Regulation of Hate Speech

The U.S. Supreme Court's content-neutrality doctrine has also affected other areas of freedom of expression. Recently, the U.S. and Canada have attempted to alleviate racial and religious discrimination through the regulation of hate speech. This form of communication contains matter that excites or promotes hatred against an identifiable group of people.\textsuperscript{526} This issue is of such importance that international organizations have denounced this type of expression.\textsuperscript{527} There are several identifiable harms resulting from hate propaganda: 1) intrinsic harm that this speech is evidence of and promotes inequality; 2) harm to specific identifiable groups, such as racial, ethnic, or religious group; 3) harm to individuals, such as defamation, invasion of privacy, and psychological trauma producing feelings of humiliation, isolation, and self-hatred; and 4) harm to the marketplace of ideas by affording less opportunity to minority groups to express ideas due to inequality.\textsuperscript{528}

The topic of hate speech is a relatively new concept in American law. \textit{Chaplinsky v. New Hampshire} was the first case which could support the notion of a hate speech regulation by holding that "fighting words," words which incited another to violence, were not protected under the First Amendment.\textsuperscript{529} Following this decision, the U.S. Supreme Court upheld the


\textsuperscript{527} Article IV of the International Convention on the Elimination of all Forms of Racial Discrimination.

\textsuperscript{528} Post, supra note 405, at 269.

\textsuperscript{529} 315 U.S. 568 (1942).
constitutionality of a criminal statute prohibiting hate speech. However, it is currently uncertain whether this decision remains valid in light of other Supreme Court cases. In *Garrison*, the Supreme Court declared a sedition statute unconstitutional. Justice Douglas stated that "*Beauharnais* should be overruled as a misfit in our constitutional system." However, the majority merely stated that nothing in *Beauharnais* foreclosed the restriction of sanctions for criticism of a public official. In *Brandenburg*, the Supreme Court held that a state could not forbid advocacy of violence unless it was directed to inciting or producing imminent lawless action and was likely to produce such a result. Even though *Brandenburg* concerned a Ku Klux Klan member, the decision was not applied to a hate speech provision. The basis for the Supreme Court's

---

530 *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding an Illinois statute, later repealed by the Illinois legislature, which provided: "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . .") ; see Matsuda, *supra* note 66 (analyzing the continuing validity of the case).


532 Id.

533 Id. Subsequently, the court held the *New York Times* standard applicable to criminal actions.


535 This decision was based on a statute similar in content to that in *Dennis*. The legislation in *Brandenburg* illegalized the advocacy of violent political overthrow. Thus, because this
decision was the overbreadth of the statute in not being related to the likelihood of a breach of the peace.\textsuperscript{536}

A U.S. Court of Appeals considered whether \textit{Beauharnais} was valid and concluded that the case was limited to a narrow holding as a form of the \textit{Chaplinsky} "fighting words" doctrine.\textsuperscript{537} This decision invalidated a municipal ordinance prohibiting public demonstrations which incite violence, hatred, abuse, or hostility toward a person or group based on religious, racial, ethnic, or national affiliation.\textsuperscript{538} This provision was applied to the American Nazi Party to prevent a march in Skokie, Illinois, a town with a large population of holocaust survivors.\textsuperscript{539} There have also been recent attempts to regulate hate speech by American universities. For example, in \textit{Doe v. University of Michigan}, the court struck down a regulation prohibiting the stigmatization or victimization of individuals or groups based on race, ethnicity, sex, and many other factors.\textsuperscript{540} The court, while emphasizing the importance of free expression, found the regulation to be overbroad and overly vague.\textsuperscript{541} Thus, lower decision did not overrule \textit{Beauharnais}, it should not stand for Douglas's overbroad assertion that hate speech regulation is unconstitutional. See Garrison, 379 U.S. at 64 (1964); Brandenburg, 395 U.S. 444 (1969).

\textsuperscript{536} Brandenburg, 395 U.S. 444.

\textsuperscript{537} Collin v. Smith, 578 F.2d 1197 (7th Cir. 1976).

\textsuperscript{538} Id.

\textsuperscript{539} Id.


\textsuperscript{541} Id. at 868.
courts appear to have rejected the notion of hate speech regulation under the reasoning of Beauharnais.

The United States Supreme Court has had a recent opportunity to decide the validity of hate-related expression regulations. In _R.A.V. v. St. Paul_, the Supreme Court held that an ordinance criminalizing fighting words aimed at particular groups was unconstitutional under the First Amendment. The Court held that even though fighting words may be proscribed by a state, the limitation of this statute to particular types of fighting words amounted to an unconstitutional proscription based on the content of the speech. The Court emphasized that it was not invalidating a provision which prohibited speech directed at specific classes of people, but rather, it was invalidating

---


543 The ordinance provided as follows: "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor." _St. Paul Bias-Motivated Crime Ordinance_, St. Paul, Minn. Legis. Code §292.02 (1990) (cited in _R.A.V._, 112 S.Ct. at 2541). Although this ordinance could have a much broader interpretation, the Minnesota Supreme Court limited the ordinance's scope to the "fighting words" identified in _Chaplinsky_, and the United States Supreme Court was bound by this interpretation. _R.A.V._, 112 S.Ct. at 2541-42.

544 _R.A.V._, 112 S.Ct. at 2547.

545 Id. at 2547 ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects"). Four members of the Court concurred in the judgment, relying instead on overbreadth principles. Id. at 2550 (White, J., concurring in the judgment) (joined by Justices O'Connor and Blackmun); id. at 2560 (Blackmun, J., concurring in the judgment); id. at 2561 (Stevens, J., concurring in the judgment).
the ordinance for selecting bias-motivated messages based on virulent notions of racial supremacy as the only type of fighting words which would not be allowed.\textsuperscript{546} The type of content preference by government creates "the possibility that the city is seeking to handicap the expression of particular ideas."\textsuperscript{547} Additionally, the Court distinguishes the "secondary effects" of other types of regulated speech from this ordinance: "listeners' reaction to speech are not the type of 'secondary effects' we referred to in \textit{Renton}."\textsuperscript{548} Secondary effects are those which happen to be associated with the particular type of speech but have nothing to do with its content.\textsuperscript{549} However, this statement seems to overlook both defamation and emotional distress doctrines. Under defamation, a listeners reaction to the speech causes reputational harm.\textsuperscript{550} Similarly, emotional distress torts based on speech are characterized by psychological harm resulting from listening to the speech.\textsuperscript{551} Further, under some definitions of assault, speech could be considered criminal based

\begin{itemize}
\item \textsuperscript{546} Id. at 2548.
\item \textsuperscript{547} Id. at 2549.
\item \textsuperscript{548} Id. at 2549 (quoting Boos v. Barry, 485 U.S. 312 (1988), and referring to Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)).
\item \textsuperscript{549} Boos, 485 U.S. at 314.
\item \textsuperscript{551} See \textit{Hustler Magazine, Inc. v. Falwell}, 485 U.S. 46 (1988) (holding that intentional infliction of emotional distress of a public figure requires a showing of actual malice under the \textit{New York Times} standard, but accepting the tort for normal citizens).
\end{itemize}
on the listeners' subjective interpretation of the words. \textsuperscript{552}

Nevertheless, the Court finally determined that the interest in
promoting equality and preventing discrimination were not
sufficiently compelling to outweigh the "danger of censorship"
presented by a facially content-based statute. \textsuperscript{553} Although the
Court never mentioned \textit{Beauharnais}, the reasoning of this case and
the similarity of the ordinances involved makes an overruling
implicit.

Even though this statute was invalid under the First
Amendment, \textit{R.A.V.} did not foreclose other possible methods of
preventing hate speech. \textsuperscript{554} Nonetheless, under the current state

\begin{quote}
\textsuperscript{552} See N.M. Stat. Ann. §30-3-1 (Michie 1994) ("Assault
consists of . . . B. any unlawful act, threat, or menacing
conduct which causes another person to reasonably believe that he
is in danger of receiving an immediate battery. . . ") (emphasis
added).

\textsuperscript{553} \textit{R.A.V.}, 112 S.Ct. at 2549.

\textsuperscript{554} See generally Elena Kagan, \textit{Regulation of Hate Speech and
\textit{Wisconsin v. Mitchell}, the Supreme Court upheld a criminal
sentencing enhancement provision which considered whether the
defendant selected the victim because of race, religion, color,
disability, sexual orientation, national origin or ancestry.
the statute because it was based on conduct unprotected by the
First Amendment rather than expression considered in \textit{R.A.V.} Id.
at 2200-01. Violence is not protected as expression under the
First Amendment. \textit{Roberts v. United States Jaycees}, 468 U.S. 609,
628 (1984); \textit{NAACP v. Claiborne Hardware Co.}, 458 U.S. 886, 916
(1982). Additionally, there have been many lower court
decisions which have applied the principles in \textit{R.A.V.} and
\textit{Mitchell} to the application of statutes to hate expression. In
\textit{U.S. v. Hayward}, the court upheld the use of a federal arson
statute and a federal housing statute to prosecute the defendant
for cross burning. United States v. Hayward, 6 F.3d 1241 (7th
Cir. 1993), \textit{cert. denied}, 114 S.Ct. 1369 (1994). The Court held
that the act of cross burning "promotes fear, intimidation, and
psychological injury" and, therefore, lacks First Amendment
protection. Id. at 1250. Further, the purpose of the housing
statute is "to protect the right of an individual to associate
of law in the United States, any direct regulation of hate speech must be content neutral and regulate conduct.\footnote{555}

By contrast, the Canadian view of hate speech is clear: hate speech regulations violate section 2(b) of the Charter, but if the legislation is narrowly drawn and specific, then it will be seen as a reasonable limit in a free and democratic society under section 1. This was the precise analysis used in \textit{R. v. Keegstra},\footnote{556} which upheld section 319(2) of the Criminal Code,\footnote{557} as a reasonable limit under §1 of the Charter.

freely in his home with anyone, regardless of race." Id. To achieve this goal, the statute, in a content-neutral manner prohibits the conduct of intimidation based on race and, thus, does not regulate speech. Id. Thus, under the \textit{O'Brien} test, the governmental objective is sufficiently justified and constitutional under Congress' Thirteenth Amendment power to eradicate all incidents and badges of slavery. Id. at 1250-51.

By contrast, another lower court held that the application of a conspiracy statute to a cross burning violated the First Amendment. United States v. Lee, 6 F.3d 1297 (8th Cir. 1993), cert. denied, 114 S.Ct. 1550 (1994). The Court held that the statute focuses on the conduct's communicative impact, and the harm was not a secondary effect unrelated to that communication. Id. at 1301. "Although there is an important governmental interest in protecting the exercise of the black residents' right to occupy a dwelling free from intimidation, we cannot say that . . . the governmental interest is unrelated to the suppression of free expression." Id.


\textit{556} [1990] 3 S.C.R. 697 (addressing the conviction of a high school instructor convicted for teaching students that Jews were "treacherous," "subversive," "sadistic," "child killers," who created the Holocaust in order to gain sympathy).

\textit{557} The Criminal Code reads as follows: "319. . . . (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against an identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years." "318. . . . (4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin."
In Keegstra, the Court noted the importance of affording a "large and liberal interpretation of s.2(b)" and to only balance freedom of expression with "contextual values and factors in s.1." Thus, the specific value of hate speech in society did not influence the determination that this form of expression is protected under s.2(b). Instead, the harmful nature of the speech was evaluated under s.1.

The Court introduced the s.1 analysis by quoting the judgment in Oakes with respect to the meaning of the phrase "free and democratic society." In finding the legislative goal of the promotion of equality to be pressing and substantial, the Court noted statistical analyses of the degree of harm caused by hate speech in Canada and focused the s.1 analysis on the Canadian and international commitment to protect

---

559 Id. at 734.
560 A free and democratic society includes "respect for the inherent dignity of the person, commitment to social justice and equality, accommodation of a variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society." R. v. Oakes, [1986] 26 D.L.R. (4th) 200.
561 Keegstra, [1990] 3 S.C.R. at 756 (stating that s.319(2) "seeks to ensure the equality of all individuals in society").
562 Id. at 746 (The "presence of hate propaganda in Canada is sufficiently substantial to warrant concern.").
563 Id. at 755 ("[S]s. 15 and 27 represent a strong commitment to the values of equality and multiculturalism.").
564 Id. at 750 (noting that two international human rights documents forbid the dissemination of hate propaganda).
equality.\textsuperscript{565} Based on these reasons, the Court specifically rejected the American approach subsequently adopted in \textit{R.A.V.}

"The international commitment to eradicate hate propaganda and most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression."\textsuperscript{566} The Court clearly rejected the form of content neutrality applied in the U.S. Supreme Court. In particular, the Court objected to the content of the speech\textsuperscript{567} and its usefulness in light of the purposes of freedom of expression under the Charter.\textsuperscript{568}

In \textit{R. v. Zundel},\textsuperscript{569} the Supreme Court of Canada held that a provision which imposed criminal sanctions for the wilful publication of a known falsehood violated freedom of expression under §2(b). In addition, even though it was argued that this provision sought to prevent hate speech and racial discrimination, the provision was found to be so overbroad as to punish false statements that did not constitute hate speech and

\begin{quote}

\textsuperscript{566} \textit{Keegstra}, [1990] 3 S.C.R. at 743.

\textsuperscript{567} Id. at 761-62 (finding the speech to be "deeply offensive . . . misleading . . . and antithetical to the furtherance of tolerance and understanding in society").

\textsuperscript{568} Id. at 765 (denouncing the "unparalleled vigour with which hate propaganda repudiates and undermines democratic values. . . .").

\textsuperscript{569} [1992] 95 D.L.R. at 240.
\end{quote}
which may contribute to the marketplace of ideas.\textsuperscript{570} Thus, although preventing harmful speech is a valid objective of Parliament, this provision of the Criminal Code failed to satisfy the second aspect of the §1 analysis; the legislation did not impair free expression as little as possible and was, therefore, not proportional to Parliament's objective.\textsuperscript{571} Overall, the Supreme Court of Canada does acknowledge and endorse the importance of limiting hate speech, but it is clear that these provisions must be drafted narrowly so as not to infringe on permissible discourse.

The U.S. Supreme Court would have reached the opposite conclusion if faced with the statute upheld in \textit{Keegstra}. In fact, the U.S. Supreme Court would not go further than the law's objective as stated by the Supreme Court of Canada. The purpose of s.319(2) was "to restrict the content of expression by singling out particular meanings that are not to be conveyed."\textsuperscript{572} Under the reasoning of \textit{R.A.V.}, this form of viewpoint regulation, especially as targeted against speech about "identifiable groups," offends the principles of content neutrality required by the First Amendment. Thus, as with the U.S. Supreme Court's application of content neutrality to invalidate the pornography regulation in \textit{Hudnut}, the Court would not address the degree of harm in society or the relative value of the speech with respect to the purposes of freedom of

\begin{itemize}
\item \textsuperscript{570} Id.
\item \textsuperscript{571} Id. at 241.
\item \textsuperscript{572} Keegstra, [1990] 3 S.C.R. at 730.
\end{itemize}

152
expression in the United States. Overall, content-neutrality under the First Amendment has resulted in an inability to promote principles of equality through freedom of expression through the regulation of hate speech and pornography in the United States. In comparison, the Supreme Court of Canada has applied s.1 in conjunction with s.2(b) of the Charter to protect the value of freedom of expression while accounting for notions of harm and the importance of equality in the hate speech and pornography context.
Chapter 5

The Role of Government: Aggressor, Protector, or Bystander

An alternative conception of equality represents the distinguishing characteristic between American and Canadian constitutional jurisprudence. There is a significant difference in the manner in which the right to equality has been interpreted under the Fourteenth Amendment and under s.15 of the Charter. Further, even though equality is constitutionally protected under the Fourteenth Amendment in the U.S., this principle has had very little impact in the area of free expression, generally, and in cases concerning hate speech and pornography regulation, specifically.

Differences in the textual content of the Equal Protection Clause and s.15(1) alone cannot explain the extent to which the respective high courts have disagreed about the interpretation of the notion of equality as a constitutionally protected right. The United States Supreme Court has held that any challenge of discrimination must first demonstrate either an intent to discriminate or a facial reference to the grounds of discrimination. In addition, the U.S. Supreme Court has applied a lower standard of scrutiny to discrimination on the basis of sex and characteristics other than race. Finally, through the principle of colorblindness, the Supreme Court has severely limited affirmative action plans by governments in the United States.

By contrast, the Supreme Court of Canada has focused on the effects of legislation, rather than requiring an intention to
Even though some Canadian interpretations, such as the analogous grounds approach and a potential presumption of discrimination for distinctions based on protected grounds, mirror aspects of the U.S. analysis, the Supreme Court of Canada's rejection of the doctrines of colorblindness, levels of review, and intentional discrimination has resulted in a form of equality beyond the mere identical treatment by government. Thus, the contrast between the United States and Canada in equality law is one of formal equality versus relative substantive equality. In Canada, "the promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect, and consideration." While Canadian law focuses on equality as a social reality, American law has retained a narrow focus on governmental equality. Thus, although both countries value equality, the United States Supreme Court has been unwilling to tolerate governmental attempts to affirmatively combat social inequality.

Similarly, the United States Supreme Court has applied the First Amendment with extreme caution in not allowing the government to express its viewpoint. Thus, in freedom of expression cases, the U.S. Supreme Court has adopted a principle of content-neutrality which precludes government from regulating

574 Mahoney, supra note 178, at 241.
576 Major, supra note 28, at 89.
the viewpoint of any form of speech. Consequently, the U.S. Supreme Court, while allowing prohibitions on obscenity, has not been receptive to laws regulating and prohibiting pornography. In addition, the U.S. Supreme Court has revised its position with respect to hate speech. The Court now regards these regulations as content-based and as impermissible attempts at legislating morality.

By contrast, the Supreme Court of Canada has allowed positive governmental action to prevent the harmful effects of some forms of speech. Canada has determined that there is sufficient harm to women and society caused by pornography to justify the limitation on free expression. Additionally, the Supreme Court of Canada has emphasized the harmful effects of hate speech on minorities and society as a whole. As with pornography, these effects are viewed as sufficiently harmful that limitations on freedom of expression have been tolerated and approved.

There is a fundamental dissimilarity in the two countries' approach to constitutional protections of equality and freedom of expression. Because pornography and hate speech impede equality, freedom of expression in this context does not promote notions of democracy. In fact, the principle of equality is the primary

impetus for the regulation of pornography and hate speech in both countries.\textsuperscript{580} The Supreme Court of Canada, in \textit{Keegstra}, found that equality is an overriding principle found throughout the Charter and is possibly the most fundamental right expressed therein.\textsuperscript{581} As a result, the Supreme Court relied heavily on s.15, as well as the multicultural protection found in s.27, to uphold the hate speech provision in the Criminal Code.\textsuperscript{582}

The difference in equality and freedom of expression doctrines suggests alternative views of governmental power in the United States and Canada. In addition, the historical context in which individual freedoms developed differs greatly between the United States and Canada. Canadian history contains much less emphasis on the individual and on governmental distrust than that of the United States. "[T]he American national character has been shaped by the violent, armed assertion of independence, whereas Canada has been shaped by a reaction against the American tradition."\textsuperscript{583} The absence of a constitutional guarantee of rights until 1982 demonstrates that Canada, although concerned with individual freedom, possessed much more confidence in the

\begin{flushright}
\end{flushright}

\textsuperscript{580} MacKinnon, supra note 444, at 800. Some have argued that hate speech and pornography are direct harms similar to an assault, which can be a completely verbal crime based on the perceptions of the victim. See Matsuda, supra note 66; MacKinnon, supra note 444. However, the courts in both countries have failed to introduce this concept into the hate speech analysis.

\textsuperscript{581} [1990] 3 S.C.R. 697; see also Major, supra note 28, at 88.

\textsuperscript{582} [1990] 3 S.C.R. at 740.

\textsuperscript{583} Kopel, supra note 99.
democratic structure of government. Canada did not reject the political system of England, so there was no attempt to suppress individual rights in Canada in order to prevent a revolution. Accordingly, some authors contend that Canadians have a more communitarian interpretation of rights compared to an American individualist ideology.

Indeed, whereas the United States Supreme Court has developed principles limiting governmental interference in both expression and equality contexts, the Supreme Court of Canada has repeatedly chosen to defer to legislative judgment and societal interests. While this may imply each society's relative trust in government, it does not provide a comprehensive explanation for either position. In fact, as previously stated, ideological differences between these two countries are very complex and difficult to simplify with generalization. Thus, rather than focus on the societal level, I analyzed the alternative conceptions of the role of government as characterized by the respective national supreme courts.

Although the U.S. has been characterized as individualistic and equalitarian, the ideological discourse of antistatism best explains American interpretations of equality and liberty as compared to those of Canada. Under an individualist theory, rights can only be exercised when not violative of the rights of others. Thus, notions of harm in freedom of expression cases would provide sufficient cause for restricting certain types of speech. Similarly, an equalitarian theory would insist that individuals have an equal opportunity to exercise their rights. Such a commitment would include the recognition of the importance
of equality of result. Thus, formal equality and the rejection of equality concerns in free speech cases would be contrary to this position. By contrast, under a antistatist ideology, courts limit government involvement as much as possible. In expression cases, the U.S. Supreme Court's content-neutrality principle ensures limited governmental involvement. As well, the notion of formal equality precludes government action in many situations where the existence of discrimination is contentious.

Both of these principles, content-neutrality and formal equality, represent the American Revolution's strong distrust of external governmental control internalized against governments within the United States. However, rather than as an immediate reaction to the revolutionary attitude of the 18th century, this internalization evolved slowly. Differences in the constitutional protection of equality and freedom of expression should ultimately be viewed as a 20th century shift in the United States Supreme Court away from governmental power over individual rights, a shift which has not occurred in Canada. This explanation becomes clear when placed in the context of federalism.

Both countries operate under a federalist regime which has historically defined the content of individual rights. Both the Bill of Rights and the Charter of Rights and Freedoms were drafted in the context of a federalist debate. Thus, one of the primary concerns of each document centered on the proper source of legislative power in the regulation of individual liberties. However, unlike the Charter, the Bill of Rights, through the U.S. Supreme Court's incorporation doctrine, has been extended beyond
the dispute between federal and local governments to prohibit many effective advancements in the substantive protection of equality and liberty. In Canada, the federalist debate continues to define the most contentious of Charter cases. Within the context of affirmative action and the regulation of hate speech and pornography, however, the lack of such a debate has allowed the federal government to exercise its power so as to further notions of equality. Thus, although these two countries originated in different circumstances suggesting alternative views of government, the rationale for contemporary rights analysis has a very modern cast. The United States Supreme Court has slowly constructed a system of interpretation which has progressively removed government further from the rights sphere. Thus, in constitutional interpretation, the United States Supreme Court follows its own narrow contemporary vision of the country's individualist political and social foundations; it has interpreted the Fourteenth Amendment both too narrowly, as a protection of equality, and too broadly, as a protection of liberty.

In Canada, there is a liberal tradition similar to the United States. However, there has never been an extreme sense of distrust against governmental involvement in society. Rather, the government has been a necessary and integral part of the society's evolutionary growth. Thus, in the context of liberty and equality, the government has a much stronger role to play.

Legislatures are permitted to regulate the content of speech in order to protect larger societal concerns. Additionally, in equality law, there is much more emphasis on substantive equality because the evaluation of governmental motives and effects is a legitimate exercise in constitutional oversight. Thus, the Supreme Court of Canada has interpreted a potentially antistatist document in a manner which allows government a significant role in the promotion of rights. While the Charter suggests a distrust of governmental abuse, the Supreme Court of Canada has upheld several regulations which give the government a role as a protector of rights. Despite a substantial communitarian influence in Canadian political and social history, the Supreme Court of Canada's interpretation of the Charter does not reflect a strictly communitarian approach. While the Court's emphasis on societal harm in these cases may, at a surface level, imply a reliance on a communitarian theory of a common good, its reasoning is more complex. For example, in applying s.1 of the Charter, the Court rejected a public morality basis in Butler. Rather, the Court established a principle of political morality. Under this analysis, the Court focused more directly on the importance of equality in society.

Ultimately, positive governmental protection of rights is permissible to a greater extent in Canada than in the United States. While the United States places too little emphasis on the social reality in which liberty and equality are in jeopardy.

585 See Note, supra note 38, at 691 n.69 (discussing the communitarian nature of the ordinance struck down by Hudnut in recognizing that pornography injures women through group denigration).
by relying too heavily on a perceived governmental aggressor, Canada places a great deal of power and faith, as demonstrated through judicial deference, in governmental bodies which have the potential for abuse. Nonetheless, the Supreme Court of Canada does appear more willing to evaluate the actual costs and benefits of legislation in the context of existing social relationships than the United States Supreme Court. Although the U.S. Supreme Court has attempted to formulate balancing tests equivalent to s.1 of the Charter, it does not trust its own ability, nor that of the legislature, to distinguish between positive and negative social legislation. Although such an analysis in the Supreme Court of Canada is not flawless, it demonstrates the advantages of a more thorough inquiry. The U.S. Supreme Court recently summarized its own position in this matter by endorsing a "commitment to the law's neutrality where the rights of persons are at stake."\textsuperscript{586} In taking this position, the U.S. Supreme Court has relegated government, often perceived as a threat, to the role of bystander in the face of social inequality.

Democracy is characterized by equal freedom and independence of its citizens.\textsuperscript{587} In order to achieve these goals, there must be equal rights of self-determination and equal participation in the political process. The focus is on the freedom of each person to make rational decisions and freely pursue individual

\textsuperscript{586} Romer v. Evans, 64 U.S.L.W. 4353 (1996).

interests as well as to equally participate in collective decisions promoting societal interests. 588 "The equal political condition of individuals is intimately connected to their freedom." 589 Whether a society chooses to be individualist or communitarian, the protection of individual rights, including freedom of expression, can only be effective in the context of a certain level of equality in society. 590 In trying to strike a balance between governmental overreaching of individual rights and governmental protection of equality, both the United States and Canada can benefit from each other's experience in the constitutional interpretation of equality and freedom of expression.

588 Ramraj, supra note 29, at 314 ("Individuals must not be prevented from contributing either to the community or to the wider social discourse merely because of non-procedural constraints.").

589 Id. at 316.

590 See Mill, supra note 30, at 75 ("[E]very one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest."); Post, supra note 405, at 277.