# Contents

# Unit 1 Constitutional Politics in the U.S. and Canada

宪法是国家的根本法，是特定社会政治经济和思想文化综合作用的产物，集中反映各种政治力量之间的关系。作为国家法律体系的核心，宪法在世界各国都具有重要地位。美国和加拿大是北美地区的两个重要国家，其宪法在形式和内容上有着相似之处，同时也存在着显著的差异。

美国宪法强调的权利在历史上出现较早，体现了美国独立战争和建国初期的价值观。这使得美国社会具有强烈的个人主义色彩和权利意识，但也由此引发了一系列权利冲突和司法争议。加拿大宪法的发展更循序渐进。1982 年《加拿大权利与自由宪章》颁布后，加拿大对文化的多元性、平等性和包容性的重视更加明显，加拿大社会更加注重保护少数群体权益和促进社会和谐发展。

本单元主要分两部分介绍两国的宪法政治：Text A 总体介绍美加两国的宪法政治；Text B 主要介绍美加两国的宪法权利法学，探讨了两国在这方面的异同。

# Unit Goals

After learning this unit, you are expected to be able to:

- identify the features of constitutional politics in the United States and Canada
- understand the convergence and divergence of constitutionalism in the United States and Canada
- examine issues concerning constitutional politics in the United States and Canada critically and express views about them clearly

# Before You Read

1 **State the significance of a constitution to a country using your knowledge and the passage below. What similarities and differences do you find in the constitutional politics of the U.S. and Canada? What do you think is the significance of comparing the constitutional politics of these two countries?**

2 **How much do you know about originalism and noninterpretivism in terms of theories of constitutional politics? Read the passage below and do some research with the help of online materials. Then discuss with your partner the information you find, and present your ideas in class.**

## Theories of Constitutional Interpretation

Any constitutional theory entails a normative understanding of how the polity should be organized in accordance with those principles deemed to be "fundamental." The idea that a constitution is vital to organizing a political regime became the dominant view within the liberal political tradition. A rich literature has developed in the past decades among constitutional jurists, both Canadian and American, to describe these competing theories of textual interpretation. The underlying political implications of the various conceptions of textual interpretation can be best understood by focusing on the most extreme and diametrically opposed views.

## Originalism

At one extreme is an understanding of constitutionalism rigidly committed to a judicial doctrine embracing an "originalist" theory of textual interpretation. From this perspective, the constitutional text must be read *only* in light of its "original meaning." The commitment to originalism is manifested in several forms and variations, although they are underscored by related political objectives. Sometimes the objective is the search for the original meaning of the text. Sometimes the goal is to find the original intentions of the drafters or "Founding Fathers." For this reason, the theory is occasionally referred to as intentionalism, rather than originalism.

Most proponents of originalism share a common political concern: limiting the impact of the judiciary by imposing a restrictive method of textual interpretation upon the federal courts, thereby limiting the discretion afforded the courts within the arena of constitutional politics. The most sophisticated advocates of originalism recognize that the discretion of judges in interpreting the text can never be wholly eliminated. They understand that originalist interpretation is not easy and requires that judges make reasonable and persuasive arguments in favor of their interpretations of the text. Additionally, originalism can be a potent weapon as a judicial doctrine from the bench. To the extent that it is followed by the relevant political actors themselves, its impact on the direction of the federal judiciary will be important.

## Noninterpretivism

Noninterpretivist judicial doctrine is entirely opposed to the methods and intentions of originalism and its related theory of constitutionalism. Of course, those who would apply such a method to constitutional interpretation conceive of their goal precisely in terms of expressing contemporary conceptions (usually moral in content) through constitutional adjudication, rather than as an effort to preserve any original constitutional position.

To noninterpretivists, legal interpretation, no less than any other kind of textual interpretation, has a responsibility to translate archaic concepts into socially meaningful structures. From this perspective, there can be no permanent or fixed text any more than there can be a recovery of an "original" understanding, precisely because such an approach denies the possibility of transhistorical meaning. The text is a forum for pronouncing contemporary values as constitutional values, to be born anew with each successive progression of human experiences. Of course, this is the ultimate expression of the "living" or "unwritten" constitution, bound by nothing other than the contemporary conceptual

and moral framework of "living" justices. Such a theory of constitutional interpretation is yet another judicial doctrine—an ideological position inherently political in nature, expressed in the language of legal discourse revolving around constitutional interpretation. The nature of such a judicial function can be located at the opposite end of the political spectrum from originalism. The text itself is most open-ended in this area, allowing the courts greater discretion.

The political debate over constitutional interpretation reflects the many contrasting positions expressed in the abstract (and often mystifying) academic discussions of textual interpretation. Within the boundaries imposed by mainstream liberalism and the dominant constitutional tradition, which emphasizes the importance of a written, binding text, such debate, when expressed in the judicial sphere, reflects much the same concerns as are expressed elsewhere in political discourse. The authority to interpret the text, the source of judicial power, is inherently a political power, and thus the debate is really a debate about politics, not interpretation.

# Text A

## Constitutional Politics in the U.S. and Canada[1]

1 Canada and the United States both have written constitutions and independent judiciaries that possess the exclusive legal authority to interpret those constitutions. Relatively little attention has been paid by political scientists to the comparative study of the American and Canadian Constitutions. This may be due to the fact that for a very long time they were fundamentally unalike.

2 The United States adopted a system of checks and balances separating the executive from the legislature and creating the judiciary as a third and coequal branch of government. The Supreme Court of the United States has performed the vital role of interpreting the Constitution. The American presidency is perhaps the most visible

1. See Stephen L. Newman, *Constitutional Politics in Canada and the United States* (Albany: State University of New York Press, 2004).

office in the U.S. political system, and a primary source of energy and direction in American government. All legislative power shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives. Congressional power stems from two sources: autonomy and popularity. Autonomy means the ability of members of Congress to set their own agenda, develop their own proposals, and make their own choices. Popularity, on the other hand, stems from behavior in a manner that is pleasing to politically relevant external actors—voters, party leaders, presidents, the news media, and interest groups.

3 Canada, which remained loyal to the British Empire after the United States declared its independence in 1776, has retained the British parliamentary system. Canada has a Westminster system of parliamentary government, in which the executive and legislative branches are fused together into a single Parliament. The Prime Minister and Cabinet make up the "active Executive" and the elected Members of Parliament (MPs) study, debate, amend, and vote on legislation in the House of Commons. For a bill to become law, it must pass through the House of Commons and the Senate in identical form. Though legislation can be introduced in either chamber, it is normally the case that bills are introduced by a Minister in the lower house. In order to govern legitimately, a government needs the confidence of a majority of MPs in the House of Commons. Though there is no law that spells out exactly how to measure confidence, or whether and when it has been lost, practitioners and experts tend to agree that a Speech from the Throne and a budget bill are always treated as "confidence votes." Constitutional convention holds that, if a government were unable to secure the support of a majority of MPs on a confidence vote, it must either resign or seek the dissolution of the House, which would trigger a general election.

4 Because the United States and Canada took such divergent historical routes to independence, it is not surprising that two different constitutional regimes should have evolved. Prior to achieving independence from Britain, the American colonists already had experienced a long history of written constitutions (or "charters"). The U.S. Constitution was conceived as a written charter of government describing the nation's basic political institutions, detailing their powers, and setting limits on the exercise of those powers. In essence, it codified the nation's fundamental constitutional rules.

5 However, the Canadian experience with constitutions and English colonialism was

quite different. Canada never experienced a radical break from Britain, only a long evolutionary movement toward independence. The nineteenth-century Canadian Constitution, on the other hand, was nowhere written down in one place. The closest thing Canada had to an American-style constitution was the British North America of 1867 Act (or B.N.A. Act), which created the Dominion of Canada out of what were then three separate provinces. Although drafted by the Canadian "Fathers of Confederation," the B.N.A. Act was formally enacted as an ordinary piece of legislation by the United Kingdom Parliament. Thus, unlike the American Constitution, the act was in no way symbolic of a people's aspiration to self-government. In keeping with Canada's subordinate political status the act did not provide for a domestic amending procedure, requiring Canadians to go back to the U.K. Parliament to effect constitutional change. And even after the creation of a Canadian Supreme Court in 1875, the Judicial Committee of the Privy Council in London remained Canada's highest court of appeal on constitutional questions until the mid-twentieth century. The passage of the Canada Act of 1982 terminated the authority of the U.K. Parliament and patriated the Canadian Constitution. Like the B.N.A. Act before it, the Constitution Act was a product of long and arduous negotiations among Canadian elites, who had been trying since 1927 to reach agreement on a domestic amending formula. The act adopted a compromise that had at last obtained the near unanimous consent of the provinces and the federal government (only Quebec demurred). In addition to specifying procedures for amending the Constitution, it declared a list of thirty acts and statutes, including the Constitution Act itself along with the B.N.A. Act (renamed the "Constitution Act, 1867"), to be the supreme law of Canada.

6 The Canadian Constitution is still more capacious and more loosely defined than its American counterpart. Nonetheless, there are striking similarities. Most notably, both have federal structures and have long struggled with problems that arise when local constituent governments remain semiautonomous. Strife between the federal and local governments has been a hallmark of the histories of Canada and the United States. It has fallen to the judiciaries of both countries to delineate the boundaries between the two levels of government, as well as to define the rights of national citizenship.

7 In 1867, the drafters of the new Canadian Constitution had before them the prime example of the United States—especially with respect to its federal system of

government. The constitutional text provides the only real guidance for courts attempting to delineate the boundaries between the federal and provincial governments. Unlike the U.S. Constitution, the Constitution Act, 1867 provides quite specific lists of apparently limitless and "exclusive" powers for *both* levels of government. Unless otherwise stated, these powers are mutually exclusive, rather than concurrent or shared.[2] Section 91 grants the federal government exclusive authority over issues of national importance.[3] At least on paper, the drafters of the Canadian Constitution created a stronger federal government than had their counterparts in the United States. For instance, the Canadian federal government has jurisdiction over all "trade and commerce," not just interstate commerce—the more limited power granted to the U.S. Congress. Likewise, criminal law and family law was federalized in Canada, rather than retained as a power of the local governments, as in the United States.

8 The Supreme Courts of Canada and the United States have performed the important role of interpreting and enforcing their respective constitutions. Interpreting a constitution would seem to involve the same basic activity wherever there is a written constitution. Where the text is indeterminate, the courts are called upon to fashion a meaning. How the highest courts in these two countries came to assume this role in interpreting the constitutional text was greatly influenced by the decisions of John Marshall, chief justice of the U.S. Supreme Court from 1801 to 1835. It was not until Chief Justice John Marshall supplied his justifications of the power of judicial review that the potential was fully revealed for utilizing the authority to interpret the text as a powerful political tool.[4]

9 Marshall established the foundation for the American constitutional tradition in which the written constitutional text is regarded as the source of a "supreme law," and it is the Supreme Court's exclusive responsibility to interpret the text. According to Marshall, for the Supreme Court to exercise its delegated authority under Article 3, the power

2. Sections 92(3) and 95 of the Constitution Act, 1867 make clear that the drafters recognized that in some cases, jurisdiction would be concurrent.
3. These national powers are enumerated in twenty-nine specific paragraphs, and include the unlimited power to tax and borrow, and provide for the national "defense," as well as the authority to regulate "trade and commerce," Indians and their lands, currency, banking, bankruptcy, marriage and divorce, criminal law, and so on.
4. For a history of American judicial review from 1776 through the end of Marshall's long tenure on the Court, see Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990).

to review and interpret the Constitution was necessarily a judicial function. Marshall developed a broad structural theory of the judiciary and its role vis-à-vis the other branches of government. In *McCulloch v. Maryland*,[5] Marshall demonstrated how a theory of interpretation could support a different political vision as he read the words "necessary and proper" from Article 1, Section 8, in a much broader fashion to sustain a significant extension of federal power over state government. Marshall knew that reading the text cannot be divorced from broader political questions. Marshall's political vision distinguished between exercising the judicial power *within* the federal government vis-à-vis the other two branches and the use of judicial power on behalf of the federal government *against* the state governments. Marshall's description of the art of textual interpretation in *McCulloch* supports an expansion of the federal government, even without stating that as an explicit goal. Obviously, such a method of textual interpretation supports and reflects an underlying political vision and is simply the same view of politics articulated in a different language—the language of constitutional law.

10 In Canada, the judiciary had the opportunity to emulate Marshall's broad reading of the "necessary and proper clause." The preamble to section 91 of the Constitution Act, 1867 grants the federal government the authority to enact all laws for the "peace, order and good government" of the country. This broad language would seem to grant the federal government a good deal of discretion over the provincial governments. Arguably, the preamble creates a catchall power justifying federal intrusion into any policy area not expressly reserved to the provincial governments. This reading of the text follows Marshall's interpretation of the "necessary and proper" clause as bestowing on the federal government broad and expansive powers to carry out its plenary powers. There was one problem with this interpretation of the "peace, order and good government" clause. Nothing in the Constitution Act, 1867 expressly states

5. It began when the Congress established the Second Bank of the United States in 1816 to stabilize the economy. Maryland, opposing the federal bank, passed a law in 1818 imposing a tax on all banks not chartered by the state, specifically targeting the federal bank. James McCulloch, a cashier at the Baltimore branch of the Second Bank, refused to pay the tax, leading Maryland to sue him in state court, which ruled in favor of the state. McCulloch appealed to the U.S. Supreme Court, where Chief Justice John Marshall delivered the landmark decision in 1819. The Court ruled that Congress had the constitutional authority to establish a national bank under the "necessary and proper" clause, which allows implied powers to fulfill its enumerated duties. Additionally, the Court held that Maryland could not tax the federal bank, as this would violate the Supremacy Clause, which establishes that federal laws are supreme over state laws.

the supremacy of federal law over provincial law, or even of the Constitution itself over statutory law. This flaw in the structure of the federal system was not rectified until the entrenchment of the Constitution Act, 1982, which provides that: "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."[6] Echoing Marshall in *McCulloch*, the federal courts took the position that in cases of conflict between federal and provincial law, "the federal law is paramount and the provincial law is inoperative to the extent of the conflict."[7] The text itself does not expressly state this, but the courts discerned this result in the overall structure of the Canadian constitution.

11 A further difference between American and Canadian constitutionalism had to do with the role of the courts. In the United States, with its written constitution that delineates the institutional boundaries within the federal structure and defines the rights and privileges of U.S. citizenship, interpreting the constitutional text has been the preeminent activity of the Supreme Court for nearly two hundred years. American courts, armed with the power of judicial review, soon emerged as powerful political actors in the new republic. In recent times, the American judiciary's willingness to apply the protections of the Bill of Rights aggressively and to expand rights claims beyond the plain language of the Constitution has had an enormous impact on public policy. In contrast, throughout the nineteenth century and into the modern era, Canadian courts were inclined to show deference to the federal and provincial legislatures, largely eschewing judicial activism in favor of judicial restraint.

12 The major difference between American and Canadian constitutionalism is not so much theoretical as experiential. The multicultural Canadian experience, which defies the assimilationist tendencies of American pluralism, leads to a more profound appreciation of social difference. Politically, this recommends an open-minded approach to negotiating constitutional arrangements that provide linguistic and cultural groups with a reasonable degree of autonomy, including in some cases a limited measure of self-government. This makes Canada a model for the postnationalist age of the twenty-first

6. Section 52(1) of the Constitution Act, 1982.
7. See Patrick Macklem, *Canadian Constitutional Law*, 2d ed. (Toronto: Emond Montgomery Publications, 1997).

century in which uninational nation-states will increasingly give way to multinational civic nations. If this is right, a more culturally diverse and less well unified United States may one day be looking to Canada and the Canadian Constitution for inspiration.

## Notes

1. House of Representatives (美国众议院): The House of Representatives is the lower chamber of the two legislative bodies in the United States federal government. As conceived by the framers of the Constitution, it was to represent the popular will, and its members were to be directly elected by the people.
2. House of Commons (加拿大众议院): The House of Commons is the center of political power in Canada. The Prime Minister and his or her Cabinet receive their authority through the confidence of the House. The House of Commons is also where most government legislation is introduced, and where Members of Parliament meet to debate policy, vote on key legislation, and hold the government to account.
3. British North America Act (also B.N.A. Act)《英属北美法案》: The British North America Act was drafted by Canadians at the Quebec Conference on Canadian Confederation in 1864 and passed without amendment by the British Parliament in 1867. The B.N.A. Act creates the Dominion of Canada and is now referred to as the Constitution Act, 1867, as it is the basis of the country's constitution.
4. Fathers of Confederation (加拿大联邦之父): Fathers of Confederation are the 36 men representing British North American colonies at one or more of the conferences that lead to the creation of the Dominion of Canada on July 1, 1867.

## I. Understand the Text

**1 Discuss the following questions with your partner.**

1. Which institution in the United States is responsible for interpreting the Constitution?
2. What are the primary sources of congressional power in the United States?
3. Who normally introduces bills in Canada?
4. What would happen if a government were unable to secure the support of a majority of MPs on a confidence vote according to the constitutional convention of Canada?
5. Who drafted the B.N.A. Act and which institution formally enacted it as an ordinary

piece of legislation?

6. What are the striking similarities between Canada and the United States in terms of their constitutions?
7. What examples are used to prove the statement in Paragraph 7 that "At least on paper, the drafters of the Canadian Constitution created a stronger federal government than had their counterparts in the United States"?
8. Whose decisions greatly influenced how the highest courts in Canada and the United States assumed their role of interpreting the constitutional text?
9. Which act provides that the Constitution of Canada is the supreme law of Canada?
10. How do the courts of Canada and the United States play different roles in their own constitutionalism?

**2 Discuss with your partner whether the following statements are true (T) or false (F).**

1. Both Canada and the United States have written constitutions and independent judiciaries that possess the exclusive legal authority to interpret those constitutions. ( )
2. The United States adopted a system of checks and balances separating the executive from the legislature and creating the judiciary as a third and coequal branch of government. ( )
3. Canada did not retain the British parliamentary system even though it remained loyal to the British Empire after the United States declared its independence in 1776. ( )
4. For a bill to become law, it only needs to pass through the House of Commons in Canada. ( )
5. The U.S. Constitution was conceived as a written charter of government describing the nation's basic political institutions, detailing their powers, and setting limits on the exercise of those powers. ( )
6. The closest thing Canada had to an American-style constitution was the Canada Act of 1982, which created the Dominion of Canada out of what were then three separate provinces. ( )
7. The supreme law of Canada is the Constitution Act itself, which was a product of long and arduous negotiations among Canadian elites. ( )
8. The Canadian Constitution is still less capacious and less loosely defined than its American counterpart. ( )

9. Strife between the federal and local governments has been a hallmark of the histories of Canada and the United States. ( )
10. The Constitution Act of 1867 expressly states the supremacy of federal law over provincial law, and even of the Constitution itself over statutory law. ( )

**3 Paragraphs 2 and 3 discuss the organization of the political systems in the U.S. and Canada respectively. Summarize each with one sentence.**

The U.S. (Paragraph 2): _____

_____

Canada (Paragraph 3): _____

_____

**4 Work in pairs to develop an outline of Text A with all the possible details, and then present your understanding of the structure and main idea of the text in class with the outline.**

## II. Learn More

**1 Paragraph 5 records an evolutionary history of the Constitution of Canada. Read the paragraph and fill in the following table to complete a timeline of the process. Then present and discuss it in class.**

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|---|---|
| 1867 | _____ established the Dominion of Canada but it was formally enacted as an ordinary piece of legislation by _____ who wanted to keep Canada's _____ political status. |
| 1875 | _____ was created but _____ remained Canada's highest court of appeal on constitutional questions until _____. |
| 1982 | _____ marked the final step in patriating Canada's Constitution from the United Kingdom. A list of thirty acts and statutes, including _____, became the supreme law of Canada. |

**2 Paragraph 6 points out that both Canada and the U.S. have federal structures and have long struggled with problems that arise when local constituent governments remain semiautonomous. Work in pairs to collect more information about the strife between the federal and local governments in Canada and the U.S., and deliver a short report.**

## III. Probe Together

**1** **Work in pairs and learn about the separation of powers in the U.S. and Canada. Discuss the advantages and disadvantages of such separation of powers and report your discussion to the class.**

**2** **Paragraph 2 indicates that in the U.S., autonomy and popularity are the two sources of congressional power. Popularity is pleasing politically to voters, party leaders, presidents, the news media, and interest groups. Does the popularity principle also apply in presidential election campaigns in the U.S.? Work in groups of three or four students to analyze this principle critically, collect more information about its advantages and disadvantages, and make a speech.**

**3** **Both the U.S. and Canada have federal structures, which are indicated but not illustrated in detail in the text. Work in groups of three or four students and develop a presentation centering upon the divergence of American and Canadian federal structures so as to better understand the differences between the two countries' polities.**

# Text B

## Constitutional Rights Jurisprudence in the U.S. and Canada[1]

1 The question of whether patterns of constitutional rights jurisprudence in Canada and the United States are converging appears to be clear-cut. Most observers would agree that the 1982 constitutionalization of rights and fortification of judicial review in Canada have not only ushered in a new era in Canadian constitutional law and politics, but have also elevated the level of judicial activism and the scope of constitutional rights jurisprudence in Canada to the level and scope seen in the United States throughout the post-*Brown* era (1954 to present). However, a closer look at prevalent patterns of judicial interpretation of rights in Canada and in the United States suggests

1. See Stephen L. Newman, *Constitutional Politics in Canada and the United States* (Albany: State University of New York Press, 2004).

that the answer to the question of convergence in the two countries' constitutional rights jurisprudence is more nuanced than it might initially seem. In analyzing recent Canadian and American constitutional rights jurisprudence, the traditional distinction between negative rights, positive rights, and group rights continues to provide an organizing principle for understanding prevalent patterns of convergence and divergence in the two countries' contemporary rights jurisprudence.

2 A well-known distinction has been drawn by political theorists between negative (or "first generation") rights, positive (or "second generation") rights, and collective (or "third generation") rights. Negative rights consist of fundamental freedoms such as freedom of speech, religious tolerance, freedom from arbitrary arrest, and so on. Positive rights traditionally consist of social rights such as the universal right to services that meet basic human needs (e.g. healthcare, basic housing, education, social security and welfare, and an adequate standard of living). The term "positive rights" is often used to describe these basic social rights, as they require the state to act positively to promote the well-being of its citizens, rather than merely refraining from acting or restraining other individuals from acting. Thus, a positive right is a claim to something, whereas a negative right is a call either for the prohibition of some action or for the right not to be interfered with. Collective rights, or third-generation group rights, have to do with communities, entire peoples, or individuals who are members of a specific group, rather than with individual persons as such. These rights include minority language and education rights, group rights to self-determination and autonomous jurisdiction over matters pertaining to that group's traditions, or some forms of affirmative action designed to advance the status of historically disenfranchised groups through the enhancement of their members.[2]

3 The recent trends in American and Canadian rights jurisprudence are related to criminal due process and legal rights, freedom of religion and association, privacy and formal equality rights (classic "first generation" negative liberties); subsistence social

2. For thorough discussions of the classic distinction between these three types of rights, and of the major normative justifications for protecting positive and collective rights, see Charles Fried, *Right and Wrong* (Cambridge: Harvard University Press, 1978); Cecile Fabre, *Social Rights Under the Constitution* (Oxford: Clarendon Press, 2000); Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980).

rights ("second generation" positive rights); and language rights, affirmative action and aboriginal peoples' rights ("third generation" collective rights). Two points can be paid attention to. First, over the past decades, the rights jurisprudence of the two countries has converged rapidly in matters that deal with the Lockean-style "negative liberty" aspects of constitutional rights. Second, in spite of the powerful centripetal forces of convergence found within Canadian and American constitutional rights jurisprudence, there still remains a significant difference between the two countries' constitutional rights adjudication pertaining to group rights. Over the past decades, certain types of group rights—primarily minority language and education rights, aboriginal peoples' rights, and affirmative action guarantees—have been awarded wider constitutional recognition and relatively more generous judicial interpretation in Canada than in the United States.

## Convergence: Due Process Rights and the Private Sphere

4 Due process rights are usually thought of as classic civil liberties. These rights include, inter alia, constitutional guarantees against unreasonable search and seizure, as well as against arbitrary detention or imprisonment. They also guarantee protection of the right to counsel, the right to be tried within a reasonable period of time, the right to a fair trial, and so on.

5 The U.S. Supreme Court's series of important rulings pertaining to the rights of the criminally accused has been seen by many as the pinnacle of American constitutional rights jurisprudence over the past few decades. From *Mapp v. Ohio* (defining the inadmissibility of illegally obtained evidence) to *Miranda v. Arizona* (establishing the right to remain silent) to *United States v. Wade* to *Gideon v. Wainright* (establishing the right to counsel), the Warren Court (1953–1969) significantly expanded the rights of the criminally accused with its broad interpretation of the various due process provisions of the Bill of Rights.[3] From a quantitative point of view, cases involving the

3. *Mapp v. Ohio*, 367 U.S. 643 (1961): no evidence of guilt could be used if it was obtained in the course of an illegal search and seizure; *Miranda v. Arizona*, 384 U.S. 436 (1966): once a suspect has been taken into police custody, that person must be warned of certain rights, including the right to remain silent, and be granted an attorney during questioning; in *Gideon v. Wainright*, 372 U.S. 335 (1963), the Warren Court established the Sixth Amendment-based right to counsel, as well as the right to government-provided attorneys to indigent defendants in state trials.

rights of the criminally accused accounted for over two-thirds of the U.S. Supreme Court's rights agenda during the 1960s, and have never since fallen below 40 percent of the Court's rights cases.[4]

6 It has been similar in Canada during the Charter era. The greater part of judicial activity under the Canadian Charter of Rights and Freedoms has concerned the questions of criminal procedure—questions that have also formed the bulk of U.S. constitutional litigation for years. These criminal due process and legal rights cases include a spate of SCC rulings concerning the right to counsel and to an interpreter; the right to a fair trial and to fair administrative hearings; the right to be tried within a reasonable period of time; inadmissibility of improperly obtained evidence; and guarantees against unreasonable search and seizure, as well as against arbitrary detention, arrest, or imprisonment. Canadian constitutional jurisprudence pertaining to procedural due process rights has rapidly converged with the fairly progressive due process standards set by the U.S. Supreme Court over the past few decades.

7 However, neither the U.S. Constitution nor the Canadian Charter of Rights and Freedoms explicitly protect positive social welfare rights. Several provisions of the constitutional catalogs of rights in Canada and the United States can be interpreted by the national high courts of these countries as protecting fundamental subsistence social welfare rights (such as the right to basic education, healthcare, basic housing, access to safe water, and so forth). However, such positive rights have been effectively deprived of their binding force by the U.S. Supreme Court as well as by the SCC, and are regarded by neither court as essential components of full citizenship.

8 In sum, a clear pattern of convergence emphasizing the "negative liberty" aspects of constitutional rights has established itself over the past decades in Canadian and American constitutional rights jurisprudence. In spite of the open-ended wording of the constitutional catalogs of rights in Canada and the United States, the national high courts of these two countries tend to understand the purpose of rights as protecting the private sphere (human and economic) from interference by the "collective."

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4. See Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

## Divergence: Group Rights

9 In spite of the powerful forces of convergence in American and Canadian constitutional rights jurisprudence, there remains a major difference between the two countries' constitutional recognition of group rights. Whereas no collective rights are directly protected by the U.S. Constitution, or have been unequivocally protected by the U.S. Supreme Court, at least three categories of such rights—minority language and education rights, rights of aboriginal peoples, and a constitutional shield for affirmative action programs—are recognized and affirmed by the Canadian Constitution Act, 1982, and have been further established by the SCC's Charter-based constitutional rights adjudication.

10 Language rights in Canada are protected by Sec. 133 of the Constitution Act, 1867, and by Secs. 16–23 of the Charter. Over the past decades, the SCC has become one of the crucial arenas for translating the constitutional provisions into a set of practical guidelines for protecting minority language and education rights in Canada. In the 1985 *Manitoba Language Rights Reference*, for example, the SCC declared unconstitutional an 1890 Manitoba Act that set down that only English could be the language of the legislature and the courts in that province, further stipulating that Manitoba be granted five years "to translate, reenact, and publish" all its legislation in French as well as in English.[5] In its landmark decision in *Mahe v. Alberta*, for example, the Court held that in accordance with Sec. 23 of the Charter, the Alberta provincial government was responsible for actively providing and funding educational facilities and intensive instruction in French for the francophone minority in that province, as well as for ensuring proportional representation of French-speaking parents in the management of their children's French-language education.[6] In a recent ruling the Court reaffirmed its decision in *Mahe*, holding that Sec. 23 mandates that provincial governments do whatever is practically possible to preserve and promote minority language education.[7]

11 In stark contrast to the gradually expanded recognition of group rights by the SCC,

5. *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.
6. *Mahe v. Alberta*, [1990] 1 S.C.R. 342.
7. *Aresenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3.

there has been significant erosion of the U.S. Supreme Court's willingness to recognize and affirm such rights over the past decades. The U.S. Supreme Court has decided to remain silent on the issue of minority language rights by denying numerous applications for leave to appeal against rulings that reject claims to a constitutional and statutory right to bilingual education and against various English-only public services. The Court has hostility toward bilingualism and affirmative action, let alone more comprehensive attempts to promote multiculturalism at the expense of the traditional U.S. assimilationist approach.

12 A clear illustration of this trend is the U.S. Supreme Court's gradual disqualification of group-targeted affirmative action schemes in the name of not violating the Fourteenth Amendment's Equal Protection Clause. In its landmark ruling in *Bakke*—an Equal Protection Clause challenge to a public university's policy admitting a specific number of minority applicants, even at the expense of rejecting white applicants who had better qualifications—the U.S. Supreme Court held that affirmative action programs that set quotas for particular racial or ethnic groups violated the Equal Protection Clause. The Court held that specific racial and ethnic backgrounds might permissibly be deemed advantageous by universities seeking to assemble a diverse student body, but it added that minority status could not be the only factor determining admissions outcomes.[8] Nevertheless, however ambiguous the Court's ruling in *Bakke* (both in its reasoning and implications), it has come to be viewed by proponents of affirmative action as a form of constitutional approval, however implicit and tentative, for implementing such programs.

13 The divergence of recent Canadian and American constitutional rights jurisprudence pertaining to group rights is further illustrated by the emerging role of the Canadian Constitution and Supreme Court in recognizing and affirming the rights of aboriginal peoples. Although judicial protection of American Indians' recognized right to self-government has waxed and waned over time, the U.S. Supreme Court's recent adjudication has been markedly unpredictable, if not downright reactionary, on the question of aboriginal self-government. In fact, in the process of a spate of decisions by the conservative Burger Court (1969–1985), the U.S. Supreme Court has struck crushing blows to American Indian sovereignty.

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8. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

14 The role of the Canadian Constitution and courts has been relatively more positive. Sec. 35 of the Constitution Act, 1982 formally recognizes and affirms "existing" aboriginal and treaty rights, defines the "Aboriginal Peoples" as including Indians, Inuit, and Metis, and provides that modern land-claim agreements are "treaties" within the meaning of this section. Sec. 35 is therefore the main constitutional source for protecting the rights of the aboriginal peoples of Canada.

15 In short, from a constitutional jurisprudence standpoint, it would be fair to say that the SCC has been quite generous in its interpretation of aboriginal peoples' rights at the declarative level. That said, there is little doubt that over the past decades, American and Canadian constitutional recognition and interpretation of aboriginal peoples' rights, as well as of other groups' collective rights, have taken different directions.

### Conclusion

16 Whereas the United States' tradition of active judicial review and constitutional rights jurisprudence spans over two centuries, the Canadian constitutional rights revolution is still in its formative stages. Canada has converged with the United States with respect to the scope of its constitutional rights jurisprudence. The same constitutional rights provisions are given a generous interpretation by the two countries' Supreme Courts in the context of negative rights claims, but a much narrower interpretation in the context of positive rights. Certain types of group rights have been awarded much wider constitutional recognition and relatively more generous judicial interpretation in Canada than in the United States.

## Notes

1. Bill of Rights《权利法案》: The Bill of Rights includes the first 10 amendments to the U.S. Constitution, which were adopted as a single unit on December 15, 1791, and which constituted a collection of mutually reinforcing guarantees of individual rights and of limitations on federal and state governments. The Bill of Rights derives from the Magna Carta (1215), the English Bill of Rights (1689), the colonial struggle against British authority, and a gradually broadening concept of equality among the American people.
2. Canadian Charter of Rights and Freedoms (also known as the Charter of Rights and Freedoms, or simply the Charter) (《加拿大权利与自由宪章》): It is a bill of rights

entrenched in the Constitution of Canada. It forms the first part of the Constitution Act, 1982.

3. SCC (加拿大最高法院): The Supreme Court of Canada is the court of last resort for all legal issues in Canada, including those of federal and provincial jurisdiction. Founded in 1875, it was at first subject to being overruled by the Judicial Committee of the Privy Council in Great Britain and has had the final judicial say on legal and social issues in Canada since 1949.

## Understand the Text

**Discuss the following questions with your partner.**

1. What is the main difference between positive rights and negative rights?
2. What do collective rights include?
3. What group rights have been awarded wider constitutional recognition and relatively more generous judicial interpretation in Canada than in the United States?
4. What do due process rights include?
5. What are the three categories of group rights recognized and affirmed by the Canadian Constitution Act, 1982?
6. What has become one of the crucial arenas for translating the constitutional provisions into a set of practical guidelines for protecting minority language and education rights in Canada?
7. How does the U.S. Supreme Court deal with the issue of minority language rights?
8. What is the main constitutional source for protecting the rights of the aboriginal peoples of Canada?

# Suggested Reading

1. Carty, R. K., William Cross, and Lisa Young. *Rebuilding Canadian Party Politics*. Vancouver: UBC Press, 2000.
2. Maisel, L. S. *American Political Parties and Elections: A Very Short Introduction*. Oxford: Oxford University Press, 2007.
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4. Savoie, Donald. *Governing from the Centre: The Concentration of Power in Canadian Politics*. Toronto: University of Toronto Press, 1999.
5. Watson, Robert P., and Colton C. Campbell. *Campaigns and Elections: Issues, Concepts, Cases*. Boulder: Lynne Rienner Publishers, 2003.
6. Wayne, Stephen. *The Road to the White House, 2004: The Politics of Presidential Elections*. Belmont: Wadsworth, 2003.