

INTRODUCTORY ESSAY:

A Few Things You Should Know Before Taking this Course, and Why You Should Take it

I. Why a Comparative Study of Australian, Canadian and U.S. Constitutional Law is a Worthy Endeavor

A comparative study, of course, allows the student to learn more about a neighboring country. With free trade and the globalized economy, a greater understanding of other major English-speaking trading partners has obvious professional value for lawyers. For those who will be working in the private sector, this has particular relevance as more businesses engage in cross-border ventures, and the ability of their counsel to do something other than refer their clients' legal matters to counterparts in the other country will be highly valued. For public lawyers and lawyers-as-citizens, examining the legal institutions and history of a similar country helps us evaluate our own institutions and values to identify areas of improvement, as well as those aspects of our own polity that might render impractical policy initiatives that may seem desirable in the abstract.

Most importantly, as a leading comparative constitutional law book notes, comparative law helps "to reveal as choices aspects of one's own legal system that appear simply to be 'natural' or 'necessary' practices." Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press 1999), at 144. Recognizing that critical aspects of law and politics are "choices" and not "natural" allows lawyers to better achieve the ideal of well-informed citizens.

From an academic perspective, two quite disparate approaches seem to animate scholars and students of comparative constitutional law. (These are inspired by a categorization by leading comparative constitutional scholar Mark Tushnet.) One approach, "normative universalism," seeks to study a wide variety of approaches to constitutional issues to identify the "best" practice that we can work to adopt everywhere. In terms of teaching law students,

such an approach allows advanced students to consider approaches from many countries – just as other seminars or courses might have students delve into journal articles by domestic law professors – all with an aim of reaching an improved normative understanding of what our own constitutional law should be. Tushnet’s own casebook in the field, co-authored with the distinguished comparative scholar Vicki Jackson, seems to adopt this approach, as does the other leading casebook, Dorsen, Rosenfeld, Sajo and Baer’s *Comparative Constitutionalism: Cases and Materials* (Eaton, MN: West Publishing, 2003).

The second major approach to comparative law is a “contextual” approach. Under this approach, the value in studying different countries is neither to preach to them nor to borrow from them, but to understand why it is that Australian, American or Canadian constitutional law has evolved in the way that it has. As we hope to demonstrate in the materials that follow, a study that focuses on those areas of difference in Australian, American and Canadian approaches to problems addressed by constitutional law reveals three major explanations for the differences:

- (1) there are many significant differences in the **origins of our political and legal institutions**; studying these differences helps expose the historical roots underpinning our respective constitutional doctrines;
- (2) in some important respects, Australian, American and Canadian society reflects **differing dominant cultural values**; studying these differences helps us understand the political ideologies that underlie constitutional judgments by the U.S. and Canadian Supreme Courts, and their Australian counterpart, the High Court of Australia;
- (3) Australia’s Constitution was drafted in 1897-98 and Canada’s Charter of Rights and other significant parts of the Canadian Constitution were enacted in 1982, and in some cases reflect the benefit of settled experience in the United States and elsewhere with difficult constitutional issues.

An inquiry seeking primarily to explain **why** doctrines and institutions that may superficially seem natural have been chosen in their particular country is, in our view, best served by a more careful study of a limited number of countries. To the extent that legal doctrine is inevitably context-specific, understanding why different countries have followed different paths requires at least a modest understanding of the history, values, and institutions that have created the doctrine.* Scientists who seek to explain differences observed in the world usually try to focus

* “Contextualism ... emphasizes the fact that constitutional law is deeply embedded in the institutional, doctrinal, social, and culture contexts of each nation, and that we are likely to go wrong if we try to think about any specific

their inquiry by “controlling” for as many variables as possible. “All else being equal,” they can then determine the effect some particular cause may create. In seeking to explain differences in legal doctrine, the best control group for the United States, Canada, and Australia are the two other nations. A common heritage, a federal system, geographic similarity, and knowledge of the experiences in the other country all make it easier to explain differences with some confidence.

Finally, there is much debate (albeit, to varying degrees in different countries) in constitutional politics over the extent to which judges should be “activists” or, alternatively, exercise “judicial restraint.” It is often difficult, however, to focus on this jurisprudential question in a manner distinct from the underlying constitutional issue – a difficulty exacerbated by the fact that many justices betray little consistency in their approach to activism or restraint, depending on the context. Studying issues that may arouse great passion elsewhere but less passion at home may provide some otherwise unavailable insights – useful examples being judicial interpretation of constitutional provisions to protect the rights of French-speaking Canadians and African-Americans, respectively.

II. A Few Basic Similarities and Differences to Understand at the Outset

A. History of Constitutional Democracy

The United States created a republic with a written constitution in 1789. In arguing for the ratification of the Constitution, Alexander Hamilton famously argued in Federalist Paper No. 78 for the benefit of judicial review as a means of protecting the liberty of citizens. This view was confirmed by the U.S. Supreme Court in the landmark decision in *Marbury v. Madison*, 5 U.S. 137; 2 L. Ed. 60; 1 Cranch 137 (1803 terms), where the Court held that the very notion of a written constitution assumed that the constitution was superior to laws or other conduct of legislative and executive branch officers. (This case is discussed below in Chapter Nine.) The

doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists.” Mark Tushnet, “Some Reflections on Method in Comparative Constitutional Law,” Conference on the Migration of Constitutional Ideas, Univ. of Toronto (October, 2004).

original Constitution included some protection of individual rights (these are discussed in Chapter 2), and the First Congress proposed and the states ratified ten amendments to the Constitution to entrench the Bill of Rights; these rights were further extended after the American Civil War to apply to the states as well. Thus, by the end of the 19th Century the principle of judicial review was firmly established in the United States.

The Australian constitution was drafted in the 1890s with a keen eye toward the insights and perceived mistakes of the American project. The framers understood that the judiciary would have the power to invalidate laws enacted by either the federal or state governments that were inconsistent with its terms, although they did not include an express constitutional provision for judicial review. Some rights, including individual rights, are protected (again, these are detailed in Chapter 2), but the principal challenges to constitutional validity were based on claims that the Commonwealth (federal) parliament had exceeded its powers. This remains the case, although claims that legislation has breached express limitations on the exercise of both Commonwealth and state power have always played an important role in Australia's constitutional case law, and claims for breach of implied limitations have grown in recent years.

In Canada, with no formal constitutional protection of individual rights before enactment of the 1982 Charter, most judicial review before that date concerned federalism. The enactment of the Charter of Rights represented, for Canadians, a fundamental shift from British view of parliamentary supremacy to the American view of judicial supremacy. The shift was not a full 180 degrees, though: Section 33 of the Charter permits legislatures to temporarily override judicial decisions. One of the topics we discuss below is whether it naturally follows that courts are the institution best suited to protect our rights and freedoms.

B. Significant cultural differences

Seymour Martin Lipset, *North American Cultures: Values and Institutions in Canada and the United States*

(Borderlands Monograph, Orono, ME 1990)

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Any effort to analyze the cultures or values of nations confronts the fact that statements about them are necessarily made in a comparative context. Thus, the statement that a national value system is egalitarian does not imply the absence of differences of power, income, wealth, or status. Rather, it means that, from a comparative perspective, nations classified as egalitarian *tend* to place more emphasis on universalistic criteria in judging others, and tend to de-emphasize the institutionalization of hierarchical differences.

What appear as significant differences when viewed through one lens may seem to be minor variations viewed through another. For example, Louis Hartz has argued that Canada, the United States, and other countries settled by groups emigrating from Europe, are all “fragment cultures” that lacked the privileged aristocratic class and its institutions that were found in the European “whole.” Over time, the absence of a traditional right transmuted the original liberal or radical doctrines into conservative dogmas of the “fragment.” It is impossible to build an ideological left in such cultures because there is no hereditary aristocracy against which to rebel, and because the philosophical bases on which an ideological left might be founded are already institutionalized as part of the received liberal and radical tradition of the society.⁵

*** By contrast, the perspective emphasized here sees a greater degree of continuity between the communitarian and elitist aspects of monarchical Britain and the character of Canadian value orientations than Hartz’s analysis suggests.

⁵ Louis Hartz, *The Founding of New Societies: Studies in the History of the United States, Latin America, South Africa, Canada, and Australia* (New York: Harcourt, Brace and World, 1974), 1-48.

It is precisely because Canada and the United States have so much in common that they permit the student to gain insights into the factors that cause variations. I strongly support Robin Winks in his view that

The historian [or social science analyst] of the United States who is ignorant of Canadian history [society] is ignorant of his own history [society] In short, the reason Americans should study Canadian history [society and politics] is to learn more about themselves.⁷

The converse, of course, holds for Canadians, although they need much less urging on the subject than Americans.

The Background

*** The ideology of the American Revolution has provided a *raison d'être* for the republic, explaining why the United States came into being and what it means to be American. Canada, by contrast, has continued to debate her self-conception up to the present. The country began as the part of British North America that did not support the Revolution, and Canadians have continued to define themselves by reference to what they are not - American - rather than in terms of their own national history and tradition. There is no ideology of "Canadianism," comparable to "Americanism."

By the end of the first decade of the American republic, the conservative, more elitist right-wing party - the Federalists - was declining, and ultimately it disappeared. The Jeffersonian Democrats, who were more egalitarian and more supportive of the French Revolution, came to power and remained dominant. Succeeding opponents of the Democratic party, the Whigs and the Republicans, chose names that identified them with the revolutionary and Jeffersonian traditions. The United States remained through the nineteenth and early twentieth centuries the extreme example of a classically liberal or Lockean society that rejected the assumptions of the alliance of throne and altar, of ascriptive elitism, or mercantilism, of noblesse oblige, or communitarianism.

⁷ Robin W. Winks, *The Relevance of Canadian History: U.S. and Imperial Perspectives* (Toronto: Macmillan Canada, 1979), xiii-xiv.

Both major Canadian linguistic groups sought to preserve their values and cultures by reacting against liberal revolution. English-speaking Canada exists because she rejected the Declaration of Independence; French-speaking Canada, largely under the leadership of Catholic clerics, isolated herself from the anticlerical democratic values of the French Revolution. After 1783 [Treaty of Paris ending the Revolutionary War] and 1789 [the French Revolution], the leaders of both cultures consciously attempted to create a conservative, monarchical, and ecclesiastical society in North America.

If early American history can be seen as a triumph of the more leftist Jeffersonian-Jacksonian tendencies, many Canadian historians and sociologists have emphasized that the conservative forces continued to win out north of the border until late in the twentieth century. Canada, of course, was no more politically homogeneous than the United States, but its nineteenth-century populist reform wings lost out while the equivalent groups in the United States were winning. Many of these more populist, more democratic, and more egalitarian groups – * * * viewed the United States in positive terms. They were in effect saying “our ancestors made a mistake.” Frank Underhill sums up this history:

Our forefathers made the great refusal in 1776 when they declined to join the revolting American colonies. They made it again in 1812 when they repelled the American invasions. They made it again in 1837 when they rejected a revolution motivated by ideals of Jacksonian democracy, and opted for a staid moderate respectable British Whiggism which they called “Responsible Government.” They made it once more in 1867 when the separate British colonies joined to set up a new nationality in order to preempt the northern half of the continent from American expansion. ... In fact, it would be hard to overestimate the amount of energy we have devoted to this cause.¹⁰

¹⁰ Frank H. Underhill, *In Search of Canadian Liberalism* (Toronto: McMillan Canada, 1960), 222. [Ed. note: Underhill’s reference to the events of 1837 warrants further explanation. The 1830s saw political control in both Upper Canada (Ontario) and Lower Canada (Quebec) in the hands of the English colonial governor and an aristocratic small group of advisors. Populists, led by William Lyon Mackenzie and Louis Joseph Papineau, sought to wrest control from the oligarchs and when reform efforts failed, took to armed rebellion. While the actual rebellion was crushed militarily, the British Colonial Office sent Lord Durham as the new Governor-General, and he filed a famous report recommending that the institutions of responsible government be instituted in Canada. (As detailed below in Part B, this is the Westminster system whereby the government must have the confidence of the popularly-elected lower house to govern.) It is noteworthy that this modest step was highly controversial – populist democracy was not universally accepted and many felt it wiser to avoid the American course and retain power in the hands of a few oligarchs. Nonetheless, despite implementation of Durham’s plan, political control did not pass to the populist rebels but instead more moderate forces that conserved many of the social, economic,

This sequence is understandable given the legitimization of conservatism in Canada flowing from the rejections of the liberal American and French revolutions, and from patterns of emigration and immigration that reinforced right-wing trends. These include the departure of bourgeois, rationalist, and Huguenot [French protestant] elements from Quebec after the British Conquest, and the arrival of conservative priests who fled France in reaction to adverse events there. In the English-speaking areas, most pro-Revolution Congregational clergy moved to New England, and an estimated fifty thousand Loyalists – including many Anglican priests – crossed the new border in the opposite direction.

Unlike the United States, Canada evolved gradually as an independent nation. The unification of the provinces of British North America into the Dominion of Canada in 1867 was not an act in defiance of the British Crown; instead, it reflected the fact that the British had sought for some decades to give up much of their responsibility for the North American territories, while retaining them as part of the British Empire. The leaders of the confederation movement were mainly Conservatives who preferred strong ties with Great Britain. As William Stahl reports, “Devotion to the Crown was the one element that all the Fathers of Confederation shared.”

The link with Britain has persisted into the present day and has, to some extent, inhibited the emergence of a distinctive Canadian identity. Until 1982, the constitution of the Canadian confederation was the British North America Act, proclaimed by the Queen. From its passage in 1867 until the adoption of the Constitution Act of 1982, Canadians had to petition the overseas House of Commons for any amendment to the Act. Before 1949, the ultimate court of appeals for Canada was the Privy Council of Great Britain. Canadian lawyers had to go to London to argue constitutional cases as well as other kinds of appeals. The 1978 Immigration Act gave Canadians a distinct citizenship for the first time. The Maple Leaf only became the national flag in 1965, and not until 1980 did “O Canada” replace “God Save the Queen” as the national anthem.

A more enduring British influence has been Toryism, which took root, survived, and deeply influenced Canadian culture and policies:

and political vestiges of the oligarchic rule. Of more lasting benefit to Canadians, however, the moderate reformers under the leadership of Robert Baldwin and Louis Hippolyte Lafontaine demonstrated that English- and French-Canadians could work together in a bi-national government. *See generally* Gerald M. Craig, *The United States and Canada* (Cambridge, MA: Harvard Univ. Press 1968), ch. 9.]

Toryism was not reducible simply to an economic doctrine masquerading as a philosophy. ... The emphasis on *control* of the processes of national development, the element of the collective will of the dominant class expressed through the public institutions of the state, while seemingly anachronistic in an increasingly laissez-faire Britain, was crucially relevant to a thinly settled frontier colony struggling on the fringes of a growing economic and political power to the south.¹²

Some of the modern scholars who also see Canada as a more British-or European-type conservative society stress that the values inherent in monarchically rooted Tory conservatism give rise in the modern world to support for social-democratic redistribution and welfare policies.¹³ Gad Horowitz has noted that “socialism has *more* in common with toryism than with [classic] liberalism for liberalism is possessive individualism, while socialism and toryism are variants of collectivism.” A dominant laissez-faire Lockean tradition is antithetical to such programs.

A comparison of the frontier experiences of the two countries encapsulates the ways in which values and structural factors have interacted to produce different outcomes. Inasmuch as Canada had to be on constant guard against the expansionist tendencies of the United States, she could not leave her frontier communities unprotected or autonomous. “It was in the established tradition of British North America that the power of the civil authority should operate well in advance of the spread of settlement.” In the United States, by contrast, the Atlantic Ocean provided an effective barrier against the major locus of perceived threat – Britain – which helped sustain the American ideological commitment to a weak state that, until the post-World War II era, did not have to maintain extensive military forces.

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Law and Deviance

¹² Reg Whitaker, “Images of the State in Canada,” in *The Canadian State: Political Economy and Political Power*, ed. Leo Panitch (Toronto: Univ. of Toronto Press, 1977), 38.

¹³ Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt, Brace and World, 1955); Gad Horowitz, “Notes on ‘Conservatism, Liberalism and Socialism in Canada,’” *Canadian Journal of Political Science* 11 (June 1978): 390.

Many of the efforts to distinguish Canada and the United States have emphasized the greater respect for law, and for those who uphold it, north of the border. These variations are linked to the historical emphasis on the rights and obligations of the community as compared to those of the individual. The concern of Canada's Fathers of Confederation with "Peace, Order, and Good Government" implies control of, and protection for the society. The parallel stress by American's Founding Fathers on "Life, Liberty, and the Pursuit of Happiness" suggests upholding the rights of the individual. The American commitment to personal rights, including those of political dissidents and people accused of crimes, is inherent in the "due process" model, which involves various legal inhibitions on the power of the police and prosecutors. The "crime control" model, more evident in Canada and Europe, emphasizes the maintenance of law and order, and is less protective of the rights of the accused and of individuals generally.

The lesser respect for the law, for the rules of the game, in the United States may be viewed as inherent in a system in which egalitarianism is strongly valued and in which diffuse elitism is lacking. Generalized deference is not accorded to those at the top in the United States; therefore there is a greater propensity to redefine or ignore the rules. While Canadians incline toward the use of lawful and institutionalized means for altering regulations that they believe are unjust, Americans seem more disposed to employ informal and often extralegal means to correct what they perceive as wrong.

The greater lawlessness and corruption in the United States may also be attributed in part to a greater emphasis on achievement. As Robert Merton has noted, achievement orientation means that "The moral mandate to achieve success thus exerts pressure to succeed, by fair means if possible and by foul means if necessary." This suggests that, since Americans are more likely than their Canadian neighbors to be concerned with the achievement of *ends* – particularly pecuniary success – they will be less concerned with the use of the socially appropriate *means*. Hence we should expect a higher incidence of deviations from conventional norms south of the forty-ninth parallel.

That Canadians and Americans vary in this way is demonstrated strikingly in the aggregate differences between the two with respect to crime rates for major offenses. Americans are much more prone than Canadians to commit violent offenses such as murder, robbery, and rape, and to be arrested for the use of serious illegal drugs such as opiates and cocaine. For example, in 1987, the murder rate for Canada was 2.5 per 100,000 population; for the United States it was 8.3. The United States not only has a much higher rate of homicide than Canada but it also has a considerably higher level of political violence. Data reported in the *World Handbook of Political and Social Indicators* shows that Canadians were much less likely than Americans to engage in protest demonstrations or riots between 1948 and

1977. Although the American population outnumbers the Canadian by about ten to one, the ratios for political protest activities have been from two to four times as large, that is ranging from twenty to one to forty to one.

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In the United States, gun ownership has been regarded as a right linked to a constitutional guarantee established to protect citizens against the state. Canadian policy has been more restrictive, based on the belief that “ownership of offensive weapons or guns is a privilege, not a right.” Gallup surveys conducted in 1975 showed 83 percent of Canadians indicating support for “a law which would require a person to obtain a police permit before he or she could buy a gun,” compared to 67 percent of Americans. Canadian gun laws were tightened considerably in 1976. Handgun permits are only issued “after an investigation to determine the crime-free status and sanity of the applicant.” A representative of the Justice Department noted in 1986 that “It is almost impossible to get a permit to carry a handgun.”

Although the cross-national behavioral and attitudinal variations with respect to law and crime have continued to the present, Canada has been involved during the 1980s in a process of changing her fundamental rules in what have been described as American and due-process directions. The adoption of a comprehensive Charter of Rights and Freedoms in the new Constitution of 1982 was designed to create a basis, absent from the British North America Act, for judicial intervention to protect individual rights and civil liberties. Canadian courts have actively begun to practice the dictates of the Charter.

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Furthermore, the Charter is not the American Bill of Rights. While placing many comparable restrictions on government action, it still is not as protective of individuals accused of crime. As Edgar Friedenberg has noted:

The American Bill of Rights provides no person shall “for the same offense be twice put in jeopardy of life or limb.” A similar provision under Section 10(h) of the Canadian Charter of Rights and Freedoms is made ineffective in preventing what an American court would call “double jeopardy” by the inclusion of the word “finally” – “finally acquitted,” “finally found guilty” – since

the process is not considered final till the crown has exhausted its right to appeal [an acquittal] which, under American law, it wouldn't have in the first place.

Other differences include the fact that the Charter "does not protect generally the right to refuse to answer a question ... on the basis of possible self-incrimination," and that defendants have a right to a jury trial only in cases where the maximum sentence "is at least five years."⁶⁶ Property rights are also under less constitutional protection in Canada than in the United States. As John Mercer and Michael Goldberg note, in the Charter,

property rights (as distinct from human rights) were explicitly not protected. ... Such a state of affairs would be unacceptable in the United States where individual rights and particularly those related to personal and real property are sacrosanct.⁶⁷

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If Canadian law under the charter is somewhat more limited in its protection of individual rights than American law, it retains its traditional emphasis on collective rights. The 1867 Constitution had provisions protecting specific linguistic and religious minorities. The charter does protect many individual rights, but "The collective rights of minorities in particular language rights, will continue to enjoy pre-eminence." These include aboriginal rights and rights to sexual equality. The charter also authorizes affirmative-action programs. And, although individual rights may be overridden by Parliament or provincial legislatures, group rights may not. Thus, as Jose Woehrling concludes, the Canadian Constitution still reflects "a value system in which certain collective rights are of central importance."

The Economy

⁶⁶ Robert A. Sedler, "Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms," *Notre Dame Law Review* 59 (1983-84): 1217.

⁶⁷ John Mercer & Michael Goldberg, "Value Differences and Their Meaning for Urban Development in the U.S.A.," UBC Research in Land Economics, Working Paper No. 12 (Vancouver: Faculty of Commerce, UBC, 1982), 22.

The distinctive nature of Canadian society has affected the way her citizens have done business. In analyzing the basis of “a dynamic free enterprise culture,” Herschel Hardin argues that

Greed and hard work and ambition are not enough. ... It was .. Rough egalitarianism, practical education ... an the relentless psychic push to keep up in “Lockian race” that made the exceptional United States go.***⁷⁶

As a result, according to Hardin, Canadian entrepreneurs have been frequently less aggressive, less innovative, and less likely to take risks than Americans.

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Canadians are somewhat more hostile than Americans to private enterprise. Such sentiments are apparent in responses to surveys conducted in the early eighties by Wright and Myles. When asked to react to the statement, “Corporations benefit owners at the expense of workers and consumers,” 67 percent of Canadians agreed, compared to 58 percent of Americans. Almost half the Americans, 45 percent, compared to 36 percent of their northern neighbors, strongly disagreed with the opinion, “It is possible for a modern society to run effectively without the profit motive.” Canadians were more likely to agree that “one of the main reasons for poverty is that the economy is based on private ownership and profits”; 52 percent concurred as opposed to 47 percent of Americans. But this difference is largely the result of Quebec attitudes: 56 percent of Quebecers agreed, compared to 49 percent of English Canadians.

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The other side of the coin, with respect to the cross-national difference in dealing with the private sector and in economic behavior, is that Canadians have been much more disposed than Americans to call on the state to handle economic and other matters, as the next section indicates.

The Role of Government

⁷⁶ Herschel Hardin, *A Nation Unaware: The Canadian Economic Culture* (Vancouver: J.J. Douglas, 1974), 62.

The Tory orientation and the smaller population relative to landmass north of the border have meant a larger role for the state in the Canadian economy since Confederation. As of 1982, the proportion of Canadian GNP in government hands was 47.3 percent, compared to 38 percent in the United States. Goldberg and Mercer report that, measured relative to either GDP or GNP, “government spending in Canada is, in proportionate terms, 24.4 per cent greater than in the U.S.” If we subtract defense spending – roughly 2 percent for Canada, and 5 to 6 percent for the United States – the gap between the two countries considerably widens.

While there is some government ownership of industry in both countries, it is much more common in Canada. A.J.T. McLeod notes “the frequent appearance of public ownership in Canada,” where “the state has always dominated and shaped the ... economy.” Mercer and Goldberg summed up the magnitude of government involvement in the Canadian economy as of 1982:

Of 400 top industrial firms, 25 were controlled by the federal or provincial governments. Of the top 50 industrialists, all ranked by sales, 7 were either wholly owned or controlled by the federal or provincial governments. For financial institutions, 9 of the top 25 were federally or provincially owned or controlled. ...

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Similar variations occur with respect to welfare policies. A detailed comparative analysis of the development of the welfare state in both countries by Robert Kudrle and Theodore Marmor concludes that specific welfare policies have generally been adopted earlier in Canada, and tend to be “more advanced in terms of program development, coverage, and benefits.” Seeking to account for these variations, Kudrle and Marmor stress the “ideological difference ... between Canada and the United States” that “appears to have made a considerable difference in welfare state development. ... Provincial-federal bargaining mechanisms have often allowed steadier and more advanced policy development once initial jurisdictional problems have been overcome.”

Most of the research based on opinion-poll interviews supports this contention. Summarizing surveys of high-level civil servants and federal, state, and provincial legislators, Robert Presthus reports a

sharp difference between the two [national] elites on “economic liberalism,” defined as a preference for “big government.” ... Only about 17 per cent of the American legislative elite ranks

high on this disposition, compared with fully 40 per cent of their Canadian peers. ... [T]he direction is the same among bureaucrats, only 17 per cent of whom rank high among the American sample, compared with almost 30 per cent among Canadians.⁹⁵

Differences related to party affiliation in both countries emphasize the cross-national variations. During the 1970s, more Canadian Liberal legislators than American Democrats favored economic liberalism, and more Canadian Conservatives were in favor of it than Republicans. More Conservatives and Republicans in each country tended to disapprove of economic liberalism than Liberals and Democrats, but *Canadian Conservatives approved it more often than American Democrats*.

The existence of an electorally viable social-democratic party, the New Democratic Party (NDP), in Canada has been thought by various writers to be an outgrowth of the Tory-statist tradition and stronger collectivity orientation north of the border. However, this thesis has been criticized on the grounds that socialist parties have been weakest in the most traditional parts of Canada: Ontario and New Brunswick. In answer to this line of argument, William Christian and Colin Campbell suggest that the emergence in the sixties and seventies of a social-democratic movement in Quebec, the Parti Quebecois, reflects the propensity for the leftist collectivism inherent in Canadian elitist values to appear after the bulwarks of the traditional system break down. They conclude that the development of socialist strength in Quebec is "hardly surprising" since "Quebec's stock of political ideas includes a strong collectivist element. ... Quebec's collectivist past provided receptive and fruitful soil for socialist ideas once the invasion of liberal capitalism had broken the monopoly of the old conservative ideology."

Stratification

Much of the comparative discussion of North America refers implicitly, if not explicitly, to variations in stratification, patterns of class sentiments, hierarchy, and inequality. Reviewing the evidence on the subject, Goldberg and Mercer argue that "Canadians are much more tolerant of ruling elites and oligarchs than Americans."

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⁹⁵ Robert Presthus, *Elites in the Policy Process* (London: Cambridge Univ. Press, 1974), 463.

Cross-national polls conducted over the last fifteen years have sought to estimate support for meritocracy in contrast to equality of result. There findings point to strong and continuing differences between Americans and Canadians on these issues. Reporting in 1974 on a survey of attitudes of college students in both countries, Milton Rokeach reported that “Canadians are less achievement-and competence-oriented” than Americans, while Canadians, (men, in this case) were “more for equality. ... than their American counterparts.”

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In nations that place the greatest value on individual achievement, we can expect greater concern for equality of opportunity, than with reducing inequality of conditions. Given the stronger achievement orientation south of the border, it is not surprising that Americans have placed more emphasis than Canadians on educational equality as the primary mechanism for social mobility, whereas Canadians have been more engaged in redistributive policies.

In the mid-sixties, the proportion of Canadians aged twenty to twenty-four enrolled in higher-education programs (16 percent) was much lower than that of Americans (32 percent). The educational literature of the time called attention to the more elitist character of the Canadian system, the fact that education in the north was more humanistic and less vocational and professional. The numbers of people attending institutions of higher education have increased greatly in both countries during the past two decades, but there is still a considerable gap. As of 1984, the percentage of that Canadian age cohort (twenty to twenty-four) in all of higher education had risen to 44, but the comparable American figure had increased to 57. Canada not only sharply increased the number of universities and places for students, but her higher-education institutions have incorporated practical and vocationally relevant subjects, expanded the social sciences and graduate programs, and placed greater emphasis on faculty scholarship. Some analysts of changes in Canadian universities have referred to these developments as “Americanizations.”

Nevertheless, Canadian elitism still exists, and shows up in the findings that Canada has resembled Britain in recruiting her business and political administrative elites disproportionately from those without a professional or technical education. This point is documented by Wallace Clement in his studies of business leaders, which reveals that Canadians not only have less specialized education than Americans, but also that the former are much more likely to have an elitist social background. As of the mid-seventies, 61 percent of Canadian top executives were of upper-class origin compared to 36 percent of their American colleagues.

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These findings about attitudes toward stratification and elite behavior are relevant to the cross-national variation in trade-union strength, and to the presence or absence of electorally viable socialist or social-democratic parties noted earlier. While Canada falls behind much of Europe on both items, her trade-union movement has encompassed a significantly larger proportion of the nonagricultural labor force than has the American one for most of the years from 1918 to the present. Furthermore, although the great majority of Canadian and American trade unionists once belonged to the same international unions, the affiliates in the two countries have varied in ways that reflect the diverse national traditions. American social structure and values foster the free market and competitive individualism, an orientation that is not congruent with class consciousness, support for socialist or social-democratic parties, or a strong trade-union movement. Canadian developments, by contrast, has been interpreted as an outgrowth of the influence of the Tory-statist tradition and the stronger collectivity orientation north of the border.

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Unlike their American counterparts, Canadian labor officials repeatedly endorsed the principle of independent labor political action from the turn of the century on, and were much more in favor of state intervention. In addition, the effects of the Great Depression and subsequent postwar economic growth on Canada have been quite different. After the Trades and Labour Congress (TLC) and the Canadian Congress of Labour (CCL) merged into the Canadian Labour Congress in the mid-fifties, they joined with the Cooperative Commonwealth Federation (CCF) to form the New Democratic Party (NDP) in 1961. The united Canadian union movement has contained officially to support the NDP.

In contrast to the American experience, the postwar economic boom did not precipitate a return to the values of classical liberalism in Canada because these values never constituted the national tradition north of the border. All Canadian political parties, including the now-governing Tories, remain committed to an activist welfare state, to communitarianism.⁺ Furthermore, in spite of improved

⁺ This was as of 1990. In the 1993 election, the governing Progressive Conservative party was soundly defeated, winning only two seats in the House of Commons. Thereafter, the party splintered, with leading Quebec Tories joining the separatist Parti Quebecois, and most western Tories revolting against the party's traditional communitarian bent to form a Reform Party with views more akin to the U.S. Republican Party. While Progressive Conservatives remained committed to an activist welfare state, their electoral failures in 1997 and 2000 led to a merger of these two right-of-centre parties into a "Conservative Party." This party, which sought to paper over remaining differences between the former Tories and former Reformers, was able to limit the Liberal Party to a minority government in 2004, which fell in 2005. The united Conservative Party, under Stephen Harper, now holds the most seats in the House of Commons and governs as a minority government. The extent to which this party will retain traditional Tory principles is unclear.

economic conditions, Canadian socialism has held its own nationally, generally obtaining between fifth and a quarter of the vote in English Canada. The NDP has been the governing or official opposition party in the five provinces west of Quebec. And, as noted, social democracy gained a new bastion in French Canada with the rise of the Parti-Quebecois to major-party status in the seventies. The Canadian labor movement reached new membership heights in the seventies – close to 40 percent of the employed labor force became members – and the trend continued into the eighties.

This analysis now turns to national unity, to the ways that sub-groups, ethnic and regional, behave in the two societies.

Mosaic and Melting Pot

A major Canadian self-image is that of a mosaic, a society that assures the right to cultural survival to diverse ethnic groups, as compared to the American notion of assimilation into the melting pot. The origin of these differences can be traced to the impact of the Revolution. American universalism, the desire to incorporate diverse groups into one culturally unified whole, is inherent in the country's founding ideology. Canadian particularism – the preservation of subnational group loyalties, as well as the greater independence of the provinces from their federal government than the states from their own – is rooted in the decision of the francophone clerical elite to remain loyal to the British monarchy as a protection against puritanism and democratic populism from across the border. As Canadian sociologist Morton Weinfeld notes,

The British North America Act of 1867 did not declare the absolute equality of all citizens. Rather, by recognizing certain rights for religious groups (Catholics and Protestants) and linguistic groups (English and French speakers), it legitimated a collectivistic approach to the notion of rights, in contrast to the American emphasis on individual liberties. The binational origin of the Canadian state paved the way for full acceptance of the plural nature of Canadian society.¹²¹

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¹²¹ Morton Weinfeld, "Canadian Jews and Canadian Pluralism," in *American Pluralism and the Jewish Community*, ed. S.M. Lipset [New Brunswick, N.J.: Transaction Publishers, 1990].

Canadian ethno-cultural groups have a more protective environment because of the official acceptance of multiculturalism. The country has been formally committed to helping all ethnic groups since the 1969 publication of the fourth volume of the *Report of the Royal Commission on Bilingualism and Biculturalism*. Following this report, in 1971, a multiculturalism policy was instituted, officially designating Canada as a country that is multicultural in a bilingual framework. In a policy announcement to Parliament, the government declared:

we believe that cultural pluralism is the very essence of Canadian identity. Every ethnic group has the right to preserve and develop its own culture and values within the Canadian context. To say we have two official languages is not to say we have two official cultures, and no particular culture is more “official” than another. A policy of multiculturalism must be a policy for all Canadians.¹²³

A cabinet ministry was established in 1973 with exclusive responsibility for multiculturalism, and government grants have been directed to the various ethnic minorities for projects designed to celebrate and extend their cultures. Multiculturalism is further protected by being entrenched in the Canadian Constitution; section 27 of the Charter of Rights and Freedoms says “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

The charter explicitly singles out “the Indian, Inuit and Metis people of Canada” for special protection. It guarantees “aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.” Canadian programs for native peoples “include priority in appointments to government jobs, government-built houses at virtually no cost, interest-free loans for equipment ... and exemptions from hunting restrictions and taxes.” And in 1988, Prime Minister Mulroney signed agreements giving northern indigenous peoples title to 260,000 square miles of land. The government has also “promised nearly \$1 billion in cash and a voice in the development of an additional 1.1 million square miles of the north.” The legal situation of American Indians has also improved, thanks in large measure to the enforcement by the courts of rights guaranteed in old treaties and affirmative-action

¹²³ Canada, *House of Commons Debates: Official Report*, vol. 8 (13 Sep.-19 Oct. 1971), 8580-81. Many francophones have preferred a two-cultures model, seeing in multiculturalism a way of denying the French in Canada equal status with the English. Richard Simeon & David J. Elkins, “Conclusion: Province, Nation, Country and Confederation,” in *Small Worlds: Provinces and Parties in Canadian Political Life*, ed. Elkins & Simeon (Toronto: Methuen, 1980), 287.

policies. But the Canadian aboriginal community, larger in size and supported by the values implicit in multiculturalism, have done better in political terms.

The differing organization of Jews in Canada and the United States also shows how the structure and behavior of an ethno-religious group may vary with national environments. The Canadian Jewish community is much better organized than its American counterpart. A single national organization, the Canadian Jewish Congress, represents all Jews in Canada; there is no comparable group in the United States. A much higher proportion of Jewish youth is enrolled in religious day schools in Canada than in the United States, while the intermarriage rate is lower north of the border in spite of the fact that the Jewish community there is much smaller than the American. The community size factor should have led to greater assimilation of Jews in Canada, but the emphasis on particularistic group organization subsumed in the mosaic seemingly helps to perpetuate a more solidaristic Canadian Jewish community.

During the past two decades, blacks have assumed a role within the American polity somewhat like that which the Quebecois have played in Canada. The call for "Black Power" has led the United States to accept particularistic standards for dealing with racial and ethnic groups. Much as francophones have legitimated cultural autonomy for other non-Angle-Saxon Canadians, the changing position of blacks has enabled other American ethnic groups, and women, to claim rights on a group basis. In effect, the United States has moved toward replacing the ideal of the melting pot with that of the mosaic.

* * *

Center and Periphery

Samuel Beer, a leading authority on comparative government, has asserted that political and economic modernization inherently lead to a growth in authority at the center and a decline in state and provincial power, and cites the United States as an example of this process. However, the Canadian experience has not conformed to this trend. As Donald Smiley has effectively pointed out:

Modernization had led not to centralization in the Canadian federal system but rather to the power, assertiveness, and competence of the provinces. Furthermore, the provinces where

modernization has proceeded most rapidly are the most insistent about preserving and extending their autonomy.¹³¹

The differences between the two countries in this respect show up strikingly in government revenue. While American federal authorities control most of the funds raised and spent by state and local governments, in fiscal terms Canada is a highly decentralized federation: the provinces and municipalities north of the border exceed the federal government in total spending and tax revenue. As of 1985, the federal share of total Canadian tax revenue, not including social-security funds, was 47.6 percent; the equivalent figure for the United States was 56.3 percent.

Canadian provinces have also been more disposed than American states to challenge the power of the federal government. Movements advocating secession have recurred in this century, not only in Quebec, but in part of the Maritimes, the Prairies, and British Columbia as well. The tensions between Ottawa and the provinces and regions are not simply conflicts among politicians over the distribution of power. Public sentiment in Canada remains much more territorial than in the United States. "Unlike the United States where voter turnout falls off precipitously in state elections, turnout in provincial elections historically has paralleled that in Dominion elections." In a comparative analysis of "voting between 1945 and 1970 in seventeen western nations, Canada ranked among the least nationalized," the most diversified regionally, "while the United States was the most nationalized." Three other studies, two dealing with elections in English Canada through this century and the third for all of Canada from 1878 to 1974, each concluded that provincial differences had not declined, or had actually increased over time.

Moreover, the provinces have steadily grown in strength, particularly from the 1960s through to 1987, when the Meech Lake Accord was signed. The opponents of decentralization have found little support in the national tradition. Even a New Democratic Party spokesperson such as Grant Notley, former leader of the Alberta party, have supported a decentralized model of Canada. Arguing against socialist centralizers, Notley emphasizes that regional variations offer Canadian socialists opportunities for experimentation. He argues that "the NDP must recognize that many Canadians do not want to be controlled from Ottawa, that in his home province, the majority of working people, as well as the majority of business men, identify with their provincial government." To accommodate such sentiment,

¹³¹ Donald V. Smiley, "Public Sector Politics, Modernization and Federalism: The Canadian and American Experiences," *Publius* 14, no. 1 (Winter 1984), 59. ***

article 38 of the new Constitution allows provinces to opt out of future constitutional amendments if these affect existing provincial powers.

In contrast, federal power in the United States had grown steadily from the Great Depression to the election of Ronald Reagan, and Reagan has only managed to slow down the trend. Social scientists have been led to ask what has accounted for this discrepancy between the experience of the two countries, to these contradictory developments. Two variables, both of which may be linked to the outcome of the American Revolution, appear to be most important. One is the role of the French Canadians, which was discussed earlier: smaller provinces, seeking to protect their autonomy, have been able to do so because Quebec has always been in the forefront of the struggle. The other is the effect of the difference between the American presidential-congressional system and the British parliamentary model. The greater propensity of Canadian provinces to engage in recurrent struggles with the federal government and to generate third parties may be explained by the fact that regional interests are not nearly as well protected in Parliament as they are in Congress. As I argued more than two decades ago,¹³²

Given the tight national party discipline imposed by a parliamentary as compared with a presidential system, Canadians are forced to find a way of expressing their special regional or other group needs. ... The Canadian solution has been to frequently support different parties on a provincial level than those which they back nationally,

so that provincial governments may carry out the representation tasks that in the United States are fulfilled by congressional interests blocs.

* * *

Conclusion

Some may argue that I have overemphasized the cultural differences between these two North American democracies, particularly between anglophone Canada and the United States. They may properly point out that the two countries are quite similar to each other when compared to European or

¹³² S.M. Lipset, "Radicalism in North America: a comparative view of the party systems in Canada and the United States." *Transactions of the Royal Society of Canada* 14 (Fourth Series), pp. 47-51.

other nations. I would not question such a judgment. This is an effort at a detailed comparison of two closely linked neighbors, not of cross-cultural variations on a broad, international scale. As Marcus Cunliffe has well notes, "*narrow comparison brings out dissimilarities, and broad comparison brings out similarities.*"¹³³

The United States and Canada remain two nations formed according to different organizing principles. Although some will disagree, there can be no argument. As Margaret Atwood concludes: "Americans and Canadians are not the same; they are the products of two very different histories, two very different situations."



Lianne George, *Maclean's Poll 2006: What We Believe*

Maclean's, July 4, 2006 (reprinted by permission)

We want to ban porn. We're unsure about abortion. But gay adoption is fine. Just how did we get here?

In late 2003, around the time our government began experimenting in earnest with legalizing gay marriage and decriminalizing marijuana, *The Economist* pronounced -- rather grudgingly, and with all sorts of caveats -- that Canada had become "rather cool." Not *cold*. Cool. It was a giddy moment, and we've grown quite attached to this view of our country, forgetting perhaps that Canada the Cool -- the Open-minded, the Progressive, the Inclusive -- is actually a very modern concept. As recently as the early '70s, nobody would have accused us of that. Back then, contentious issues were bubbling to the surface. Activists, academics and policy wonks squabbled over how to establish feasible guidelines for gender equality, bilingualism and multiculturalism overnight. In 1975, Reginald W. Bibby, then an assistant professor of sociology at York University, took this charged moment as a perfect opportunity to conduct one of the first-ever wide-scale surveys designed to map out the values, attitudes and beliefs espoused by Canadians. As it turned out, your average Canadian circa 1975 -- despite a probable affinity for Bad

¹³³ Cunliffe, Marcus. "New World, Old World: The Historical Anti-thesis." *Lessons from America* (Ed. Richard Rose, London: Macmillan, 1974), at 45.

Company and K.C. & The Sunshine Band -- was pretty square. More than a third of us, for instance, believed that a woman shouldn't work outside the home if her husband was capable of supporting her. Half of us believed that black people and white people should not marry. Three quarters of us believed homosexuality was aberrant -- and abhorrent. "The fact of the matter is," says Bibby, "the data back then really shows that bigotry was alive and well. We were pretty down on a lot of groups."

But even then it was clear that baby boomers -- born between 1946 and 1964 -- held markedly different views from their parents and grandparents. As a group, they were veering off into some trippy social territory. "In a number of areas, like homosexuality, there was a dramatic, geometric jump in approval," says Bibby, now a professor of sociology at the University of Lethbridge. He continued his research, now referred to as the Project Canada Survey Series, for the next 30 years, presenting boomers with the same questions every five years, and comparing their answers to those of Canadians younger and older.

Bibby's findings -- to which *Maclean's* was given exclusive advance access -- illustrate how, in only three decades, we have transformed ourselves from a relatively homogenous group into one of the most pluralistic societies in the world. More than anything, says Bibby, Canadians today identify personal freedom as our No. 1 goal -- above family life, friendship, a comfortable life, or a rewarding career. And because we demand the freedom to make our own choices, the thinking goes, we'd best be willing to grant the same privilege to others -- to live and let live. Which, it turns out, is what we've done. "Over a very short period of time," says Bibby, "we've taken a multi-everything outlook in Canada."

Today, we can see this philosophy starkly reflected in our views on non-traditional lifestyles and family configurations. Forty per cent of Canadians believe there is no one ideal family model. "Thirty years ago, there *was* only one type of family as far as most people were concerned: mother, father and 1.7 kids," says Alan Mirabelli of the Ottawa-based Vanier Institute of the Family. But the boomer generation and their children have grown familiar with divorced, single-parent and combined family scenarios, and Canadians are now less likely to say, with any certainty, that only the nuclear family model works. "By and large," says Mirabelli, "if people have had a good experience in their own family life growing up, they aspire to repeat that experience. If their family form was mother, father, 1.7 kids, then that's what they aspire to for themselves. If they've been through a divorce and had a step-parent relationship and it's been successful, they're more likely to say there is no ideal form."

This same attitude extends to our feelings about interracial and homosexual relationships. For example, in 1975, only 55 per cent of Canadians approved of whites and blacks marrying. Today, 94 per cent are perfectly happy with the idea. Likewise, approval of same-sex relationships hovered at only 28 per cent

then; today, more than two thirds of us approve. "From 1990 to 2005, there was just a dramatic shift there," says Bibby of gay issues in general. "We're one of the world leaders there. I'd like to think AIDS awareness had something to do with it. And there's a sense of more compassion. The media and a lot of high profile people have certainly gotten behind the rights and the difficulties of people who are gay and lesbian." Gay marriage, while it remains a contentious issue, has the wholehearted approval of almost half of all Canadians, and an additional 22 per cent who disapprove on a personal level say they accept gay marriage as a matter of civil rights. Similarly, 61 per cent of Canadians believe that gay couples should be able to adopt, including the 21 per cent who personally disapprove of the idea.

Many of these changes have come about as a result of Canada's official policies of multiculturalism, and from personal experiences. Then there's the XX Factor: Canadians have become more tolerant, Bibby argues, as a result of women's increased public influence. According to his findings, women are quantifiably the more compassionate sex. And as they've come to establish a stronger voice in public life, they've helped to guide and shape the broader public's views on "person-related" issues such as same-sex marriage, child abuse, pornography, poverty, and racial and gender discrimination. "Whether it was in 1975, or in any survey since," says Bibby, "the proportion of women who saw these issues as very serious would invariably exceed that of males." Only one third of boomer men approved of homosexuality in 1975, compared to over half of boomer women. Today, 76 per cent of Canadian women say they approve of or accept gay marriage, compared to only 63 per cent of men.

This trend continues to accelerate among the younger generation. "Teens in general simply are so much more accepting of diversity," says Bibby. "They're more compassionate in areas relating to things like capital punishment and euthanasia, and open to religion and spirituality. But they're led by young women." Today, 83 per cent of women age 18 to 34 accept gay marriage, the highest acceptance rate of any group surveyed.

Part of what differentiates modern Canadians from our American counterparts is the fact that we generally tend to embrace the notion of relativism -- the idea that when it comes to lifestyle choices, there are no absolutes. "Americans still believe in truth," says Bibby. "They really do maintain that there are some things that are true and some things that are false." Canadians, however, are more likely to see things in increments of right-ish and wrong-ish. The most important reason for this, he says, is the religious composition of our respective societies. Roughly a third of Americans identify themselves as members of evangelical or conservative Protestant groups (compared to eight per cent of Canadians), which leads them to adhere to very traditional family values. "That kind of composition simply translates into some very important differences," he says. "If you look at the evangelicals in the U.S. and Canada,

the percentage who are opposed to, say, gay marriage is almost identical. If you look at mainline Protestants here -- like Anglicans, Lutherans and Presbyterians -- and you match them up against their counterparts in the U.S., they come out very much the same. Catholics come out very much the same on both sides, too. So the thing that tips the scale is that American life is characterized by such a large number of evangelicals. They shape the overall picture."

As such, the two countries' views on social and sexual diversity remain notably different. For instance, more than a quarter of Americans disapprove of marriage between blacks and whites. In the U.S., only 64 per cent of people believe that immigration is good for the country, compared to 78 per cent of Canadians. And while 60 per cent of Canadians approve of homosexual relations, only 38 per cent of Americans feel the same way. "There is a much stronger pocket of American society that holds what can still legitimately be called highly Puritan values toward sexuality, which are closely linked to taboo and shame," says Alexander McKay, research coordinator for the Sex Information and Education Council of Canada (SIECCAN) in Toronto. "That's why something like the exposure of Janet Jackson's nipple [on TV] would be seen as an inherently harmful thing, whereas here, we might scratch our heads and wonder what's the big deal."

When it comes to marijuana, that most contentious of plants, Canadians are, if anything, more in favour of legalization now than ever. Sixty-three per cent of us say we accept recreational pot use in general (including 29 per cent who wholly approve of the practice). Support jumps even higher -- to a whopping 93 per cent acceptance rate -- when it comes to the legal use of marijuana for medicinal purposes. By contrast, only about a third of Americans say they would support legalization.

And yet, while Canadians are collectively more open-minded than our southern neighbours, we still tend to aspire to very traditional lifestyles for ourselves. Most of us say that, ideally, we envision ourselves belonging to a traditional nuclear family. We plan to marry and have children, and we plan for those marriages to last forever. "Despite the family experiences of many Canadians in the post-1960s," says Bibby, "what is changing are the outcomes -- not the aspirations."

We also wish the same for our children. For instance, 73 per cent of Canadians approve of the idea of couples living together without being married; when it comes to their own child, however, only 53 per cent of people say they would approve. Similarly, while 70 per cent of people approve of divorce in the general population, only 41 per cent say they would approve of their own child getting a divorce. But there's an important distinction between "approve" and "accept": even if Canadians say they don't *approve*, the overwhelming majority of us say we would be willing to *accept* our children's choices. "The family is the most adaptive institution in the world," says Mirabelli. "It's very much like an elastic band. It stretches and contracts depending on the economy and the culture which surrounds it."

Another significant shift has appeared in our attitudes towards pornography. "We've seen a gradual increase in favour of banning the distribution of pornography since the '70s," says Bibby. Currently, more than 40 per cent of the population -- and almost half of adult women -- would have us not just regulate, but prohibit pornography entirely. Younger women, age 18 to 34, are more open-minded about it than boomer women and, perhaps not surprisingly, men are far more likely than women to indicate approval of such pastimes as phone sex and viewing pornography on the Internet. "My hunch is that many people have linked pornography and phone sex with their concerns about things like child abuse and sexual assault," says Bibby. "But younger women, I think, are not as willing to waive individual rights -- even in an area such a pornography."

Of course, McKay points out that the findings may have a lot to do with how our interpretation of the word "pornography" has evolved. "I think many people today -- when you use the term 'pornography' -- are going to associate it with images that are clearly harmful, such as child pornography and sexually violent material," he says. "Whereas in the 1970s, when you mentioned pornography, that could include everything from *Playboy* to *Lady Chatterley's Lover*."

Perhaps the only area in which there has been very little movement is on the subject of abortion. In Canada, 43 per cent of adults agree that women should have the option of a legal abortion upon demand, up from 37 per cent in 1985. (Only a quarter of Americans feel the same way.) In Canada, however, levels of support tend to climb depending on the woman's reason for opting for abortion. For example, if she comes from a very low-income family and cannot afford more children, 58 per cent of people approve. If there is a strong chance of a serious defect in the baby, 86 per cent approve. If a woman's health is seriously endangered by the pregnancy, 92 per cent approve. These numbers, amazingly, remain virtually unchanged since 1975. "When you get into these specific kinds of areas, it seems like people are just locked into them," says Bibby. "Obviously the religious factor is an important one, but other people who are not necessarily actively involved in religious groups are still very much anti-abortion. It's simply an area where there hasn't been much movement over time.

What makes Australian identity distinctive has been the subject of a long historical debate in Australia, and has attracted much analysis and commentary over the years. The growth of Australian nationalism in the second half of the nineteenth century -- in particular the recognition that Australians were different from the British -- encouraged the idea of Australian national government, and eventually fed into the federation movement at the end of the century. By the 1890s, the majority of the Australian population was "native-born", and all the Australian colonies (with the exception of Western Australia, which gained "responsible government" in 1890) had several decades experience of self-government. Australians were also representing themselves as distinctive in sporting and cultural fields, especially in international competitive cricket, and in producing distinctive Australian 'voices', like that of the internationally-acclaimed soprano, Nellie Melba. British attitudes in the 1880s -- in particular Britain's lack of sympathy for Australian fears about European incursions in the South Pacific, and British reluctance to support the colonies' race-based immigration laws -- contributed towards an Australian

desire to control the nation's own destiny. The growing labour movement in Australia, and the extension of democratic initiatives (a wide franchise, and the payment of MPs, for example), combined with progressive legislative 'experiments' (such as industrial arbitration) in several colonies, also supported an idea that Australia was a 'social laboratory', where values of fairness, egalitarianism, and openness to change could be put into effect, even institutionalized. At the same time, Australians did not want to break with Britain (the 19th century Republican movement was short-lived); they wanted to retain a 'British' identity and retain their cultural and emotional links with the 'Mother Country', along with close trade and defence ties. By the 1890s, when the Constitution was written, much of the disaffection between Australians and the British Colonial Office had been assuaged. Australians were increasingly comfortable with a sense of themselves as (in the words of Alfred Deakin, one of the Constitution's framers, and the second Australian Prime Minister) "Independent Australian-Britons." The Constitution, adopted in the Australian colonies in referendums, and then enacted by the Imperial Parliament in 1900, was an original blend of Australian, British, and American approaches and institutions. To adapt another expression of Deakin's, it was a "platypus Constitution," an unusual but successful combination of parts borrowed from many different sources, along with some unique elements. Reflective of Australian values, the Constitution was (institutionally, at least) both more conservative than the American in retaining the Monarchy, and more democratic than either the British or American. It also contained several important provisions (in particular s 51 (xxxv) which anticipated national industrial arbitration and centralized regulation of awards and wages) that were to feature for decades in Australians' commitment to the "fair-go". The exception to this picture of democratic values and fairness, was the position of the Aboriginal people. The Constitution did not recognize them as part of the "Commonwealth", and for many years afterwards, Aboriginal Australians were not accorded the democratic rights or standards of fairness that were granted to other Australians, and held as core Australian values. Race-based immigration restrictions were (as in America and Canada) also enforced. The new Commonwealth was a white person's democracy.

Reading: Henry Albinski, "Australia and the United" *Daedalus*, Vol 114, no. 1, 1985 (at end of Chapter)



C. Constitutional ideology

A useful comparator of constitutional theory is grounded in examining competing ideological visions of political and social life and seeing how these visions play out in constitutional doctrine. University of Toronto Professor Patrick Macklem, in *Constitutional Ideologies*, 20 Ottawa L. Rev. 117 (1988), identifies these as (1) Toryism; (2) Classical Liberalism; (3) Pluralist Liberalism; and (4) Socialism.

Toryism “sees order necessary to hierarchy and hierarchy necessary to order.” This is a hierarchical organic vision of the relationship between the individual and the community that “spawns a deferential approach to political life; the rulers of society are figures of authority and, as such, should be treated with trust and respect. In turn, political leaders owe duties to their constituents to act in their best interests and further the common good, which is something more than the sum of the more particular interests of individuals and groups in society.” In contrast to the American ideology of, in Lincoln’s famous words, a government “of the people, by the people, and for the people,” the Tory view is a “government by the ministers of the Crown for the people.” [Note the distinction between Toryism and modern view of right-wing parties. A populist democratic party might support progressive or highly individualized politics, while Tories might well support a strong social safety net if elites believed this was good for society as a whole. The phrase is still used to describe the Conservative Parties in Britain and Canada. The Australian Centre-right parties are the Liberals (in the 19th-century sense of being more market- and individualistically-oriented than Labour) and the rural-based National Party. This view of the relationship of government and the individual supports notions of parliamentary supremacy and a weaker view of claims of the individual against the state.

Classical liberalism imagines society “as an aggregation of rights-bearing individuals, each absolute with his or her sphere of authority.” Classical liberals view the judiciary “as a constitutional umpire,” drawing a line between conflicting assertions of power to act. They do so by reference to law, which is separate from politics – the latter being the process by which the public interest is articulated, not as something which transcends private interests, but merely as the sum of its parts.

More specifically, political life is pictured as an arena in which private interest clash with each other in an endless series of struggles between and among individuals, each attempting to

use government to serve his or her interests. But political life is not imagined as possessing an immanent ordering principle which would contain and check the potential for domination. Thus there is need for exogenously-imposed limits upon political life to protect the individual from the spectre of group tyranny. This desire to protect the dignity of the individual and enhance his or her opportunity to realize his or her conception of the good manifests itself in law in the discourse of rights. Rights are viewed as individual trump cards which protect the individual from the collectivity or collectivities in areas most central to the individual's self-definition. In the classical liberal vision, this protection is accorded by law primarily through individual economic activity. The classic argument here is John Locke's *Two Treatises of Government* (1689)

Unlike the classical version, "the pluralism liberal political vision pictures social life as complex and highly interdependent, laced together by the competing and overlapping demands of its individual members." While political life is still seen as a competition among individuals and groups seeking to further their interests and conceptions of the good, pluralists reject the view that the marketplace is "the means by which individual initiative and self-reliance will be axiomatically rewarded in a fair and just manner; pluralist liberalism acknowledges that if left on its own, the economic market will generate injustice and inequality." Thus, "economic liberty is as much of a threat to, as it is facilitative of, principles of individualism and autonomy. The content of constitutional law at the level of the discourse of rights thus shifts from an emphasis on individual economic liberty to a political inquiry. That is constitutional protection of the individuals against legislative initiatives is conceived less in terms of an inquiry into the effect of economic redistribution upon an individuals's ability to realize his or her conception of the good through property and contract, and more in terms of a need to facilitate and protect the individual's formal ability to enter the political marketplace and participate therein."

Finally, "socialist discourse, like toryism, is collectivistic. The individual is imagined not as a self-determining atomistic entity; he or she is seen as a member of a community, with the public good treated as something more than the sum of the parts. *** But like liberalism, and unlike toryism, there is a deep commitment in socialist discourse to egalitarian principles. Whereas liberalism sees equality largely in terms of equality of opportunity, facilitating every individual's capacity to further his or her personal conceptions of the good, socialist discourse is rooted in notions of equality of condition." Thus, socialists tend to view constitutional law instrumentally as part of the assistance in the realization of a more egalitarian and collectivist

society. Indeed, there is a great debate among leftist constitutional scholars in Canada, between those who see it as a vehicle for progressive social change, and those who see it as protecting individual rights that are obstacles to such change and limiting the ability of leftist legislatures.

We can also identify an approach we might call “internationalism” or “cosmopolitanism”. This approach promotes constitutional norms, allegiances, and even laws that transcend the nation state. Individuals and courts, from this perspective, are seen as members of a global, humanist community. The cosmopolitan influence in constitutional jurisprudence can be seen in the view that courts should draw inspiration from the judgments of foreign courts as well as from international law. In Australia, the former High Court Justice, Michael Kirby was closely identified with the view that international law and norms should provide the guiding principles for constitutional interpretation.

In a speech to the American Society of International Law in 2005, Kirby J stated:

...The transitions and perils, challenges and opportunities of the present age require of lawyers everywhere an equal freshness of thinking and a willingness to consider not only the economics and politics of globalisation but also the values and ethics "that shape our conception of the global world". ...

This is a time to acknowledge the role that international law plays, and will increasingly play, in the constitutional jurisprudence of nation states. If it is true that the courts of the international legal order have not yet sufficiently adapted to the challenges and opportunities to hold a dominant role in the application of international law, the answer to this predicament is neither despair nor contempt about international law. It is not a retreat behind the exclusive walls of local jurisdiction. ..

Drawing upon sources found in international law, not as binding rules but as contextual principles, judges of municipal courts in this century will assume an important function in making the principles of international law a reality throughout the world. We cannot leave this function to international courts and tribunals alone. To survive, humanity must globalise and diversify.... ..

[This] movement.. is a source of analysis and ideas. It is a font of shared wisdom. It is irreversible, as human reason itself is. Its momentum is unstoppable. It identifies the next phase in the advancement of international law and the international rule of law.

What carries us forward is the memory of the terrible wrongs to human rights and knowledge of the dangers for the world we live in, absent international law. It is not too much to say that the interaction of international and national law constitutes one of the largest challenges for the law in the century ahead. Its outcome is critical for the future of international law. That future is, in

turn, critical for the future of human life. It is vital that national judges should be aware of this challenge and alert to the need, individually and institutionally, to respond....¹

III. Brief overview of the enactment of each nation's constitution

A. The United States of America (1789)

Having declared independence from Britain in 1776 and secured George III's recognition of this fact after the Treaty of Paris of 1783, American states labored under a weak government operating pursuant to Articles of Confederation. After continuing problems and crises, the legendary and victorious George Washington lent his name to the effort to re-craft a new governing document, agreeing to chair the constitutional convention. Meeting in secret, the delegates created an innovative system of government, with clearly divided powers between the legislative, executive, and judicial branches, and with powers divided between the federal governments and the states. In addition, compromises between large and small states led to creation of a bi-cameral legislature with a House of Representatives elected for two-year terms based on population and a Senate chosen (until changed in 1917 to popular vote) by state legislatures with two per each state, serving six-year terms. Likewise, compromises between slave and free states led to a 20-year ban on congressional power to stop the slave trade; to census calculations with slaves as 3/5 of a person; and to provisions requiring return of fugitive slaves. A central government that was independently elected, with an elected President serving as commander-in-chief, and with a Congress empowered to pass laws regulating interstate and foreign commerce, addressed the primary defects in the weak Articles of Confederation.

By its terms, the Constitution required ratification by $\frac{3}{4}$ of the states (although by its terms, the Articles of Confederation could only be changed unanimously). During the debates, many complained about the absence of protection for individual rights. Supporters of the Constitution promised to rectify this promptly, and the First Congress proposed the Bill of Rights, including amendments barring the federal government from infringing on freedom of

¹ 7th Annual Grotius Lecture, delivered to the American Society of International Law in Washington on March 30 2005.

religion or expression or establishing a religion, regulating police practices regarding searches and seizures, protecting property rights, and a variety of other legal rights.

B. Canada (1867 and 1982)

The settled areas of what we now call Canada were in 1867 the colonies of Newfoundland (which did not join confederation until 1949), New Brunswick, Prince Edward Island, Nova Scotia, and Canada (consisting of modern-day Ontario and Quebec). The maritime colonies were discussing some form of union, when a broader confederation was proposed by the premier of the province of Canada, John A. MacDonald. A Tory, he had organized a “grand coalition” with his arch-rival, Ontario liberal George Brown, and the Quebecois Parti Bleu leader, Georges Cartier. These leaders desired a stronger centralized government to deal with national defence issues in the wake of declining British interest, the withdrawal of free trade by the United States in 1865, to assume provincial debt, and to facilitate the construction of a railway linking the maritimes with the rest of the country. They also needed to solve ongoing governance problems because the *Imperial Act of Union, 1840* re-united predominantly English “Upper Canada” (Ontario) with predominantly French “Lower Canada” (Quebec) in a legislature where each area had equal representation, in spite of population growth in the Anglophone area.

Meetings in Charlottetown, PEI and Quebec City led to agreement on confederation under a federal model. Principally focused on the English/French divide, the framers agreed to a federal parliament based entirely on population, but the assignment to each province of those matters where Quebecois feared Anglophone dominance. Hence, education and the civil law system were assigned to provinces. However, with an eye to both Ontario and Quebec, the rights of Quebec Protestants and Ontario Catholics were specifically protected. In general, the framework was designed to avoid the perception that the American Civil War was precipitated by the constitutional weakness of the federal government; Parliament was given the residual power over all matters not specifically assigned to provinces, and indeed given the power (which fell into disuse by 1900) to disallow provincial laws. All agreed on maintaining strong links with the Queen and the United Kingdom; the Queen (in reality, the Colonial Secretary) retained the power to disallow any provincial or state law (the British government disavowed use of this power in 1926). Further negotiations in London led to passage by the Imperial Parliament of the *British North America Act* in 1867, and Queen Victoria proclaimed the new country’s existence to take effect on July 1 of that year.

Formally, the statute was an ordinary statute of the UK Parliament, with no provision for amendment other than by that Parliament. With the advent of the constitutional convention (announced in 1926 and codified in the 1931 *Statute of Westminster* that the British government would not interfere in the domestic affairs of Australia, Canada, or New Zealand, this machinery became increasingly problematic. On a number of occasions, the Canadian government would seek an amendment of the statute, which would be routinely effectuated by the British government. (This is detailed in the *Patriation Reference* in chapter nine.) As well, the post-World War II public concern with human rights led for increasing calls for constitutional entrenchment of basic rights. Hence, there was very strong support for the “repatriation” of the basic constitutional act to Canada.

The push for a Charter of Rights came to fruition under the rule of Prime Minister Pierre Elliot Trudeau. Articulate in both English and French, the former law professor firmly believed that the solution to the duality of Canadian “nationhood” was through legislation making Canada officially bilingual and in entrenching constitutional rights for linguistic minorities (Anglophones in Quebec, Francophones everywhere else). In a long process detailed in *Patriation Reference*, he eventually secured agreement with all provincial premiers save the separatist leader of Quebec, Rene Levesque, on a document duly submitted and ratified by the UK Parliament in 1982.

C. Australia (1900)

In the 19th century, the Australian states were all self-governing colonies, with their own democratic parliaments and judicial systems. They were attached to Britain, sentimentally and legally, but after 1865, British powers to override colonial legislation were limited by the *Colonial Laws Validity Act*. (Appeals from colonial Supreme Courts to the UK Privy Council were retained, however, in order to keep the common law uniform around the Empire.) Proposals for a federal union of the colonies were first heard in the 1840s, but it took until 1885 for a concrete step to be taken, with the establishment of the “Federal Council of Australasia”. Like the American Articles of Confederation, however, the powers granted to the Federal Council were weak, and it proved unsuccessful as a source of unity. In the 1890s, the process of federating the colonies finally began in earnest. At a Federal Conference in Melbourne in 1890s, representatives of all the colonies (including New Zealand) agreed to hold to Convention, for the purpose of writing a Constitution. They met in Sydney the following year, and a full draft Constitution was completed. The idea was that it would be adopted by the colonial parliaments, and then sent to Britain for enactment. However, federation did not proceed.

Only after popular pressure was put on the colonial premiers did the movement begin again. In 1895, the Premiers adopted the so-called Corowa Plan, which entailed the direct election of delegates to a new Convention, the writing of a new Constitution, and its adoption by the voters in colonial referendums, before its enactment by the British Parliament. These steps were all followed. An elected Convention met, with three sessions, spanning a full year, 1897-1898 (New Zealand was no longer involved). The new draft Constitution was submitted to the voters in all colonies, and (after some setbacks) approved. It was taken to Britain, where, after a significant struggle between Australia's delegates and the colonial authorities over appeals to the Privy Council, it was passed as the *Commonwealth of Australia Constitution Act 1900* (Imp). The Commonwealth was inaugurated on 1 January 1901. The High Court of Australia was established two years later. What prompted federation in the 1890s, when previous proposals had, one after the other, come to nothing? There was no war or other emergency, no struggle for independence, no pressure from outside. A combination of factors must be taken into account: fears that the colonies would be militarily weak without unity; a shared commitment to keeping out "coloured" immigrants; long-standing dissatisfaction with the varied tariff regimes across the colonies; an interest in coordinating services, like the post and telegraph, quarantine, and lighthouses. But these were just the material reasons for federation, and they had always been in the background. To these we must add the growing sense of Australian nationalism, the optimism engendered by the approaching new century, the emergence of a generation of highly skilled leaders, and the fact that by this stage, the majority of the population were now "native-born" and (since the colonial education Acts of the 1870s) also literate. The example of the United States also continued to inspire Australians. Many wanted to do at the end of the 19th century what the Americans had done at the end of the 18th: forge a new constitutional nation, and take their part among the leaders on the international stage.

IV. Basic Comparisons of the Legislative Process

Any understanding of public law requires some basic appreciation for the process by which a nation establishes its laws. Like substantive legal doctrines, the different processes used to enact legislation in Australia, Canada and the United States reflect each nation's history and values.

A. A Brief Introduction to the American Legislative Process

The United States Constitution contains two essential requirements for the enactment of statutes. The legislation must be passed with a majority of a duly constituted quorum of the 435 members of the

House of Representatives (elected on the basis of population for 2 year fixed terms of office) and the 100 members of the Senate (two elected from each state for 6 year fixed terms). The legislation must then be approved by either the President (elected nationally⁺⁺ for a fixed four-year term and limited to two terms of office) or by a two-thirds “override” of a presidential veto by each house.

Discussion of a particular piece of legislation cannot be divorced from political reality. Passing a bill requires that at least a majority of representatives, a majority of senators, and the President are at least open to persuasion on the issue. The key to understanding the American political process is that it is filled with “veto gates”⁺⁺⁺ by which individual legislators or sub-groups can potentially block proposals that may even have strong majority support. The President is clearly the most powerful “lobbyist” in Washington. The President’s ability to sign or oppose legislation and to appoint congressional friends to patronage positions gives the President strong bargaining leverage with Congressmen (the colloquial name for Members of the House of Representatives) and Senators. And, of course, controversial legislation almost certainly could not pass in the face of a credible Presidential threat to veto the legislation. Moreover, strong support from the relevant cabinet secretary (i.e. minister) can provide a bill’s supporters with important expertise in drafting the statute, marshaling factual arguments in support of their cause, and providing publicity to create momentum in support of their legislation.

Nonetheless, presidential support is not sufficient to enact legislation. Influential as the President may be, the White House exercises no formal control, and only weak informal control, over the Members of Congress. Indeed, since the end of World War II, the President’s party controlled a majority in both houses only 40% of the time. Moreover, Senators and Representatives usually have their own basis of political support, so that the endorsement and support of a popular President is helpful, but not essential, and the backing of an unpopular President is completely unnecessary.⁺⁺⁺⁺ Thus, although it would be a major boost to achieve Presidential support, as long as the President was not unalterably opposed to proposed legislation, advocates would proceed by securing the introduction of legislation by prominent legislators.

Because, even where the President’s party is in the majority, individual legislators exercise independent political power, numerous ways exist to defeat legislation. Legislation is always referred to a substantive standing committee, sometimes more than one. (To use an example featured in the cases

⁺⁺ Actually, voters in each state select “electors” who formally elect the President. As we now know well, it is possible for a candidate to win a majority of electors but lose in the popular vote.

⁺⁺⁺ See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 Geo. L.J. 705 (1992).

⁺⁺⁺⁺ In this respect, the relationship between each Member of Congress and the President of the same party might be analogized to the relationship between a Canadian/Australian Prime Minister and a provincial/state Premier of the same party.

in the following chapters, criminal provisions of abortion control legislation would probably be referred to the Judiciary Committee, while regulatory provisions would be reviewed by the Commerce Committee.) The Committee Chair wields considerable power in blocking consideration of the bill, or facilitating quick hearing and passage. Depending on the political strength and prowess of a chair, members of the committee might or might not follow her lead in voting on amendments. It is not uncommon for a faction in the majority party to join with legislators in the minority to pass compromise legislation, or to add or delete important provisions from the bill. (On some occasions, the chair and a few loyal stalwarts may actually join with the minority to pass legislation over the objection of a most of her own party!)^{*****}

Legislation approved by a House committee does not automatically warrant deliberation before the full House of Representatives. The next step in the process is the Committee on Rules. This committee – which in recent times has been composed of 10 members of the majority party and 5 members of the minority party who are generally selected for their ability to follow the party leadership’s wishes – will determine when and under what conditions the House will consider the legislation. Each bill is considered under its own special “rule” that sets forth any exceptions to parliamentary procedure that will apply, the length of debate permitted, and, most importantly, whether the bill will be open to any amendment, or whether only certain specific amendments may be authorized. This may be critical. Strong supporters of controversial legislative provisions may recognize that the entire membership of the House may support the bill but prefer these provisions to be modified; these supporters might prevail on the Rules Committee to prevent modifying amendments being offered, where they were optimistic that these “soft” votes would, faced with an all-or-nothing choice, vote for the committee’s bill. Likewise, the Rules Committee could simply fail to produce a “rule,” effectively killing the bill.

At this point, the House then proceeds to consider the legislation and permitted amendments, and will vote on final passage. Individual members are inclined to follow their party leadership, but won’t hesitate to vote against their party if their strong personal convictions dictate, or if the vote is particularly unpopular either back home to their constituents or to major political supporters. *This is because members will often seek re-election based on their own, rather than their party’s, accomplishments.* Significantly, members raise a significant percentage of their campaign funds independently of the party, either from local or other personal supporters, or also from cross-donations from other individually powerful members. Indeed, because so many congressional districts are “safe” for one party, senior representatives can raise huge campaign chests unnecessary for their own re-election to be dispensed to create their own power base independent of the Speaker or the President

^{*****} Under Republican Speaker Dennis Hastert, the majority caucus has displayed uncommon discipline, in part due to his un-traditional policy of refusing to allow legislation to be brought up for a vote on the floor of the House unless a majority of the Republican caucus is in favor.

A bill that passes the House then proceeds to the Senate. Like the House, the Senate does most of its work in committee. The committee process in the Senate is similar to the House, although committee chairs tend to be less dictatorial in their approach, because of the ability of any individual senator to threaten to tie up any legislation through extended debate. The Senate's floor procedure is decidedly different from that of the House. Absent unanimous consent, or a "cloture" vote requiring the votes of 60 senators, debate is unlimited. Moreover, any senator may offer any amendment, including ones that have nothing to do with the underlying bill. (In 2000, when the Senate Democrats were stifled by the then-Republican leadership's refusal to consider legislation raising the minimum wage that would probably have attracted a handful of Republican votes sufficient for passage, Sen. Edward Kennedy proposed the minimum wage proposal as an amendment to every single piece of legislation brought to the Senate floor.) But this also means that a bill's advocates are not as subject to the power of the committee chairs. If a committee was not acting with sufficient speed on legislation, the provisions of the proposed bill could be added, for example, to a "must-pass" bill (farm subsidies are always attractive vehicles). Advocates of controversial legislation must not only secure at least 50 votes to reject weakening amendments, but also at least 60 votes to shut off a filibuster and bring the legislation to a final vote.

Finally, assuming the legislation passes both houses of Congress, it must be approved by the President. If not, supporters would need to muster two-thirds support in each house. As a result, at each step in the process, supporters will need to take account of the President's views on the subject.

B. A Brief Introduction to the Canadian Legislative Process

[Ed. note: The following is a very basic description of the legislative process in recent years. It assumes, as has been historically the general case, a majority government. In June, 2004, Canadians elected a Parliament with no majority party. Liberal leader Paul Martin governed as Prime Minister for slightly more than a year at the sufferance of the opposition parties, who (when they thought the time was right) then brought down the government and insisted on a new election. In 2005, the united Conservative Party under Stephen Harper won the most votes, and Harper took office as Prime Minister of another minority government, and he was returned to power with a minority in 2008. Many of the conclusions herein may not apply to new legislation enacted by minority governments, although they did apply to almost all the statutes under review in these materials.]

Although the formal requirements for enactment of Canadian law are quite similar to the American system – legislation must pass the House of Commons and the Senate and be approved by the executive – the language of the *Constitution Act, 1867* (before 1982 known as the *British North America Act*), and what is omitted from the Act, reflects important differences with its American counterpart. Most importantly, nations governed by the "Westminster" system of parliamentary democracy developed in Great Britain follow a system of constitutional "conventions": unwritten rules, not to be enforced judicially, that prescribe the way in which legal power is to be exercised. Thus, although the Constitution confers significant power upon the Queen and her personal representative in Canada, the

Governor General, the convention of “responsible government” provides that this power must always be exercised pursuant to the advice of ministers who are members of the legislative branch and who enjoy the support of a majority of the House of Commons. Thus, there is no real separation of power between the executive and legislative branches, as occurs in the United States. Another significant difference between the Westminster and American systems is the existence of fairly strict party discipline: members of the House of Commons elected under the banner of a political party will follow the party leadership on any significant vote, especially when the party is in the majority and the leadership forms the government.

These various conventions provide a result that may seem unusual for American eyes – the most powerful figure in Canadian government is the Prime Minister, who is the leader of the majority party in the House of Commons – yet there are only two minor references to the Prime Minister in the entire Constitution. Rather, the PM’s power exists through his ability to direct the Governor General in how to exercise executive power, and his ability to control his party to secure necessary support in the House of Commons.

Similarly, the formal role of the Canadian Senate differs sharply from both its conventional (real) role, and with that of the United States Senate. Canadian senators are appointed based on a formula giving somewhat more weight to smaller provinces than the House of Commons, and serve until a mandatory retirement age of 75. They are appointed by the Governor General pursuant to advice from the governing Prime Minister. By convention, the Senate does not block legislation passed by the House of Commons (although there are some notable exceptions).

Like the American system, discussion of a particular piece of legislation cannot be divorced from political reality, but the generalizations made about American politics must be significantly modified for the Canadian context. Thus, while to proceed with legislation in the United States simply requires that the President keep an open mind, it is much harder to progress very far without approval of the powerful Prime Minister’s Office (PMO). Moreover, legislative supporters do not face the sort of American “veto gates,” where individual legislators or sub-groups can block proposals that have strong majority support.

In Canada, the support of the Prime Minister is much more important than support of the American President for securing the passage of legislation. The Prime Minister does not need to rely on the powerful tools of lobbying that the U.S. President must employ – he can rely on party discipline to achieve his ends in the House of Commons.

Another major factor in Canadian legislation is the civil service. Canadian ministers have very small staff of political appointees and the major operations of a ministry are conducted under the direction of

a career Deputy Minister.⁺⁺⁺⁺⁺⁺ Moreover, central cabinet operations are subject to influence both by the political appointees in the PMO as well as by the civil servants in the Privy Council Office (PCO).

Assuming a Minister wanted to move ahead with legislation, she would first present it to a committee within the Cabinet known as the Priority and Planning Committee. Because staffs are smaller and these officials are elected, deliberation in that committee is often vigorous, expert, and substantive. Major objections to proposed legislation may require reevaluation by the Minister proposing the bill and reconsideration; if the bill is unlikely to attract full cabinet support, it might be shelved here. Unlike the American system however, no single objector (save perhaps the Prime Minister) can prevent the proposal's continued progress.

With support from this committee, a Memorandum to Cabinet will be proposed. Skilled ministers usually present the cabinet with options (although one insider suggested that the alternatives presented are often to do nothing, adopt a wildly extreme measure, or to follow the Minister's recommended course of action!) and will detail the principles to be included in the legislation. Approval of the cabinet is required before the bill will be formally drafted by ministry experts and introduced in the House of Commons.

The Prime Minister's role in legislation is flexible. Proposals may emanate from the PMO, who will closely monitor the progress of the proposal in the ministry and cabinet. Other ideas may be aggressively endorsed by the PM, or a word from the PM to the minister might stop a proposal in its tracks. Often, however, the Prime Minister will allow the process to take its course without active PMO involvement; the Prime Minister's endorsement is not necessary until the proposed legislation is submitted to cabinet for approval.

Once the legislation has been formally drafted, it would be introduced in the House of Commons and presented for First Reading. The Commons would then vote on whether the legislation should proceed. Because the government controls a majority in Commons, this vote, and a similar one on Second Reading, would be a formality, with one major exception. On important "conscience" issues, the government may permit a "free vote" where members vote their consciences regardless of party (this indeed was followed on the actual 1991 vote on abortion legislation). After Second Reading, the bill would be referred to committee.

Although there are ways for non-government bills to pass in theory, as a bill originating in the Senate or as a private member's bill, these cannot be passed without the government's approval (either backing

⁺⁺⁺⁺⁺⁺ In contrast, in the U.S. Department of Justice, the Deputy Attorney General, the Assistant Attorney General responsible for criminal law, and the Deputy Assistant Attorney General responsible for criminal legislation would all be political appointees.

or willingness to not use “the whip”, i.e. party discipline). In minority governments, private members’ bills might move forward, but then the proponents risk forcing a new election if the Prime Minister announces that he opposes the bill and considers the vote on passage to be a “confidence vote.”

Parliamentary committees enjoy far less power than congressional ones.^{*****} While congressional committees play a vital role in screening out legislation that does not warrant further attention, the full House of Commons fulfills that role in the First and Second Reading votes. Thus, parliamentary committees would not ordinarily fail to report legislation back to the House for Third Reading. Nor does the committee chair have particular power. Indeed, committee chair assignments are the left-overs given to junior or disfavoured MPs who have not been chosen to participate in cabinet or to act as a parliamentary secretary (who stands-in for a minister in her absence). Committees will conduct a detailed review of legislation, but many problems that are corrected at this point in the American system have already been vetted by the ministry’s professional staff. The proceedings are open to the public and sometimes televised, so opposition MPs (who hold seats based on their percentage of the overall House) can offer amendments for political purposes; rarely will these amendments be accepted. The majority of the committee will vote in a disciplined fashion in accord with the Minister’s wishes. Significantly, committees are bound to maintain the key principles of each legislation; although this is obviously a subjective constraint, it does clearly prevent committees from significantly altering the bill the way American legislators often do.

After the bill emerges from committee, it proceeds to Third Reading, amendment, and final passage. Unlike the U.S. House of Representatives, the majority in the Canadian House of Commons cannot limit the opposition’s ability to offer potentially embarrassing amendments. However, party discipline will preclude any amendments from passing. Unlike the U.S. Senate, the opposition cannot engage in dilatory debate; a majority can stop debate.

If the bill was initiated in the House, it then proceeds to the Senate. The Senate follows the same procedures used by the House; however convention dictates that the Senate will not obstruct the will of the elected house. The Senate does play an important role, however, in proposing amendments. Realistically, the House can reject the amendments and the Senate will acquiesce, but this comes at a political cost, and well-taken amendments are often accepted by the minister.

^{*****} This may prove a huge difference in the current minority Parliament. With no majority government, committees reflect the partisan make-up of the entire House, and American-style individual lobbying and deal-cutting may become more prevalent. However, the party leaders always must face the risk that the Prime Minister will assert that any vote is a “confidence” vote, and thus put them to the test of acquiescing in the Conservative government’s program, or facing a new election. Currently, internal political disputes make that a unpleasant prospect for both the Liberals and the Bloc Quebecois.

After passing both Houses of Parliament, the bill is presented to the Governor General for Royal Assent. As noted earlier, this assent is always going to be given since the bill received the support of the House of Commons.

C. A Brief Introduction to the Australian Legislative Process

Like Canada, Australia has a parliamentary system based on the Westminster model of “responsible” government, meaning that all members of the executive government are also elected members of parliament (this is required by s 64 of the Constitution). Unlike in Canada, however, both of the Australian Houses of Parliament – the House of Representatives and the Senate – are directly elected. Governments are formed by the party or parties that “command the confidence” of the House of Representatives, and the Prime Minister is the leader of the majority party; he or she is always a member of the House. The Australian Constitution has many provisions governing elections, but does not mention the Prime Minister or the Cabinet, or the principle that the government is formed in the House. These are conventions. For a range of reasons, governments often do not control the Senate: the reasons include the fact that the Senate is elected by Proportional Representation whereas members of the House of Representatives are elected in single member constituencies, through a preferential voting system. This often results in the election to the Senate of candidates from small or single-issue parties, and occasionally Independents; sometimes these Senators hold the balance of power, and are willing to join with the Opposition to defeat or amend a government bill that has come up from the House of Representatives. It is not at all unusual for bills to be delayed, or amended, or blocked in the Senate. The Senate is a “states house”, half the size of the House of Representatives (s 24 of the Constitution), and with equal number of Senators per state regardless of population; they serve a six year term, half the Senate being elected every three years. This means that the composition of the Senate may, to some degree, reflect the political climate of the previous election, whereas the House will always be the product of the most recent. With the rare exception of so-called “conscience votes”, party discipline is strongly enforced, and Senators almost always vote along party lines, but there is still a sense that they are representatives of their home state, or that they serve an important role in reviewing and restraining government policy. Australian voters will sometimes, even often, vote differently for the Senate from the way they vote for the House, sometimes strategically to “send a message” to the government that they are not happy with its performance, but not yet ready to turn it out. Voting has been compulsory in Australia since 1924, and this is enforced by law, and supported by a majority of the Australian people who regard it as an Australian institution.

A Bill for an Act of parliament must be passed by both Houses. With the exception of revenue, or “money” bills which cannot originate in or be amended by the Senate (s 53 of the Constitution), bills can be introduced in either House, and must go through three “readings” in each. Contentious bills will often be sent to a Committee for multi-party consideration and sometimes public submissions, before being

returned for passage. Committees are not powerful, however; their role is only to review and recommend. Almost all bills come from cabinet, and are presented in the House of Representatives by the relevant Minister. A bill that does not have government support – a so-called “Private Member’s Bill” – is very unlikely to be passed. As in Canada, all bills require the assent of the Governor-General to become law. According to the Constitution (s 2), the Governor-General is the Queen’s representative in Australia, but in practice is always (these days) nominated by the Prime Minister. The office is popularly regarded as an Australian institution, and the Governor-General is thought to represent the nation. Unlike in Canada, however, the Governor-General does at least have the potential to exercise some independent political power. Although she or he almost always follows government advice to sign Bills into law or issue executive orders or proclamations, the prospect remains of a Governor-General’s exercising “reserve powers”; that is, acting without, or contrary to, the advice of the government. This occurred, very controversially, in 1975, when the Governor-General dismissed the government because the Senate had failed to pass the government’s supply bills, and the Prime Minister refused to call an election. Future use of the reserve powers has never been ruled out. These powers are not codified in the Constitution

The Constitution is clear, however, for cases where there is a deadlock between the House of Representatives and the Senate over the passage of a bill. Section 57 sets out the procedure that may be followed if the Senate twice refuses to pass a bill within a specified period of time. The Prime Minister may advise the Governor-General to call a “double dissolution” election; both the House and Senate are dissolved, and elections are held for all positions. After the election, a joint sitting of both Houses may be convened, to vote on the deadlocked bill(s). Such elections are very rare and a joint sitting has only once been held (in 1974). They remain a possibility, however, always hanging over the heads of recalcitrant non-government Senators. The differences in the relationship between the Australian and the Canadian Houses reflect the preference of the framers of Australia’s Constitution for an American style of federalism, marrying this with Westminster parliamentary government, in a unique combination that the political scientist, Elaine Thompson famously dubbed the “Washminster Mutation”.¹ Some at the time of federation predicted that the two could never co-exist; that either federalism would kill responsible government, or responsible government would kill federalism. So far, neither has happened.

¹ Elaine Thompson, “The ‘Washminster’ Mutation” (1980) 15 *Australian Journal of Political Science* 32

[insert above at page 28]: Australia, as compared to the United States

[Ed. note: Because of differing copyright rules, the entire text of Albinski's essay will be summarized below for North American students. Coincidentally, the author, who passed away in 2003, served on the Penn State faculty from 1982-98 and then moved to the University of Sydney!]

Australian history and society have been profoundly affected by the United States. Australia was settled by British convicts after American independence precluded the practice of expatriating Britons to Georgia. As one historian noted, "George Washington may have been the father of the United States: he was assuredly the stepfather of New South Wales."⁺ Australia was also profoundly changed by World War II and the close alliance forged in the war in the Pacific. Significant differences, however, remain. Albinski identifies a number of them:

1. Constitutional origins. The United States was formed in "overtly political acts – a declaration of independence, war, and the crafting of a novel constitutional document." Australian federation "was a leisurely process, inspired mostly by considerations of efficiency." As a result, "Australia slipped into formal nationhood, almost unobtrusively; it had not a specific legacy of emotive political symbols; it lacked heroic figures, and has not developed them since.

2. NOT "E Pluribus Unum". The American experience with assimilating "great numbers of diverse immigrants" and "the regionalism of the country" reinforced a "nationalism that ... helped create a climate of energy and optimism, or individualism and competitiveness." In contrast, Australia, "already homogenous, evolved into nationhood without comparable sharp differences. Over time as well, Australia "has not developed the regional and sub-cultural identities that are common in America. This has strengthened Australian homogeneity, making it easier to live with the sense of there being an all-Australian community." American diversity, in contrast, "has etched its own, all-American, national/patriotic myth, emphasizing the success of its melting pot." The political power of Australian states and the smallness, isolation, and artificiality of the capital in Canberra has "accentuated the weakness of the federal government as national spokesman and image-builder" and "hindered the growth of nationalism."

3. Outlooks re authority and the role of government. There are ironies on both sides of the Pacific. "Australia, generally portrayed as an almost archetypical anti-authority society where

⁺ Thomas Dunbabin, address to the Australasian Ass'n for the Advancement of Science in the *Report* of the 19th meeting (1928), at 250, cited in Albinski at p. 418 n.1.

there is little respect for government, in fact tolerated considerable governmental intervention.” Americans place a “high regard” on political institutions but continue to demonstrate public discomfort with excessive or unnecessary government intervention, continuing a tradition of “romanticizing the idea that the government that governs the least is the one that governs best.” As with Canada, the Australian government was “*the prominent agent*” of settlement and consolidation, due to convict origins, the smallness of the population, and limited skills and capital that inhibited private development. As detailed further below, the “social ethos that emphasized socioeconomic egalitarianism – in some respect, collectivist principles – made the state its natural instrument.” This was manifested in the early development of Australian state-owned railways and legislation protecting employment, social assistance, and industrial arbitration and conciliation.

Australians developed distinctly adverse attitudes toward elitism, in part as a reaction against the class-based English society that many had left. As Albinski notes, “cultural traits of leveling, egalitarianism, and mateship are seen as evidence of the public’s concern to ‘lop off the tall poppies,’” including the very authority on which Australians relied. Thus, there is a “reluctance, more noticeable than any in the United States, to recognize and to reward superior ability.” Americans have been “partial to lawyers” in elective politics: with “no tradition of denigration or fear of institutions of political authority, personal high-status achievement such as that demonstrated by a highly trained lawyer is admired.”⁺ In contrast, Australian party leaders historically came from respective support constituencies: the Labor Party looking to trade-union officials, the rural Country Party to farmers and graziers.

4. The politics of organized labor. The Australian Labor Party had emerged as a political force before federation, and helped foster nationhood through an ideology of nationalism informed by social purpose. Having one of the major parties embrace “the special interests of the working-class, rural industry, and specific urban business constituencies” created a stake in government intervention, ownership, and regulation and an opposition to *laissez faire*. In contrast, weak American political parties have never tried to effect sweeping social change. Even the most active examples of American governmental intervention have been incremental and “couched in terms that defend private rather than state enterprise.” In the 1920s, when America was governed by Republican Presidents whose ideology was encapsulated by President

⁺ This was written in 1985; of the four American Presidents elected since then, one was a Yale-educated Rhodes scholar and another was President of the Harvard Law Review. American lawyer-presidents include both Adamses, Jefferson, Madison, Monroe, Lincoln, and F.D. Roosevelt.

Calvin Coolidge's famous maxim that the "business of America is business," Labor governments at the Commonwealth and state levels were entrenching significant redistributive programs that have not been historically dismantled by the other parties when they came into power.

5. Approaches to individual political rights. Albinski finds Australian and American differences here to be nuanced. On the one hand, the Australian ethos emphasizing social and collectivist interests over individual interests has limited the focus on individual rights; on the other hand, Australian voters rejected changing the constitution to ban on the Communist Party in 1951 when such a proposal certainly would have been supported by a majority of American voters. A key aspect to understanding Australian culture in this regard is that the preference for egalitarianism in the "Australian social-nationalist myth" emphasized "likeness rather than diversity." During much of Australia's history, this gave effect to "disdain for the Aboriginal population and by the perceived threat to Australia's racial and sociopolitical integrity created by the country's position as an outpost, on the edge of a densely populated, almost certainly covetous Asia." Albinski concludes that, while the U.S. "has also had its fair share of nativist and xenophobic outcroppings," America is "too large, diverse, self-confident, and far removed from potentially hostile forces to cultivate habits that could overturn its individualistic ethic."

6. Different ideals of equality. Albinski observes that although "American culture evolved a myth of equality, of the *process* of opportunity – from rags to riches, from log cabin to White House – equality's texture in Australia became one simply of *being*. Optimism about human nature is shown in American survey data to "foster interpersonal trust and the extension of voluntaristic, cooperative action. In Australia, a more egalitarian socioeconomic ethos has produced an essentially relaxed, detached, and not especially aspirational/optimistic attachment." Thus, a common Australian approach is "live and let live and allow a fair go" in contrast to "life, liberty, and the pursuit of happiness." In Albinski's view, American egalitarianism, as featured in streaks of populism, the New Deal, and the Great Society, still focus largely on the individual right to economic opportunity and achievement. Australia developed "something approaching not a *classless* but a *one-class* society, in which privilege, social gradations, and elitism were deprecated, where similarity of income and lifestyle were prized." Income disparities are far narrower in Australia than in the U.S., and "distinctions in wealth and status are more conspicuous and seemingly more acceptable" in the U.S. than in Australia. In part because Australian settlers required state support rather than *laissez faire*, the "Australian inclination towards a collectivist style expressed the society's version of an egalitarianism that preferred the norm of redistributive social justice to that of personal autonomy.

7. Who pays attention to whom? As with Canada, Australia is far more outward looking than the United States. According to the leading Australian historian N. D. McLachlan, America's most important contribution to Australia has not been to provide a glamorous pattern for successful nation-building, but

“a measure against which whatever was distinctly Australian could come to be recognized and cherished.”⁺

[Ed. note: A key aspect to modern history comes from an event famous to many Australians but unknown to all but the most savvy of Americans. At the outset of American involvement in World War II, the British imperial command sought to persuade Australia’s government to send their troops to Burma to protect India. With Japanese armed forces having landed in Papua New Guinea (imagine Nazi soldiers in Newfoundland), Prime Minister John Curtin famously declared: ““Without any inhibitions of any kind, I make it clear that Australia looks to America, free of any pang as to our traditional links or kinship with the United Kingdom.”]

⁺ Noel D. McLachlan, ‘The Future America: Some Bicentennial Reflections,’ *Historical Studies*, vo. 17 (April 1977), p. 383.