

ioned battle, the virtuous Mencken versus the Philistines. By 1926, and certainly by 1937, Mencken's melodrama failed to address the complexities of free-speech problems.¹⁰ In December of 1937, when he intended the manuscript for deposit in the New York Public Library, Mencken modestly wrote that it was "conceivable that this detailed narrative . . . may someday interest an historian of American culture in the early twentieth century." Eight years later, after he had determined that his private treasure trove of unpublished manuscripts, including the Hatrack typescript, would remain in Baltimore, he feared that they "are bound to be neglected as I pass out of memory, and some of them, in all probability will be forgotten," burned in a future war, or otherwise destroyed amidst the primitive fury of some radical revolution.

Mencken's manuscript, of course, survived and deserves to be read and remembered. Despite its lack of analysis, his narrative of the Hatrack case provides a revealing, insider's look at the legal-political dimensions of magazine publishing during the 1920s. More important, this manuscript and Mencken's other writings about free speech also merit consideration, if only as downbeat subtexts in the first-amendment canon. In this case, as elsewhere, Mencken may have underestimated his potential audience. Even at their grumpiest, Mencken's writings can still reward those who share his keen curiosity about American life and culture, even if they reject his skepticism about the importance of ongoing social struggles for freedom of expression.

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS. Second Edition. Edited by Gerald Beaudoin¹ and Ed Ratushny.² Toronto, Calgary, and Vancouver: Carswell. 1989. Pp. 841. \$103.25 (Cdn).

*Robert A. Sedler*³

With the promulgation of the Charter of Rights and Freedoms in 1982, Canada abandoned the inherited British tradition of Parliamentary supremacy in favor of the American model of entrenchment of individual rights in a written constitution. The implications of this change for Canadian constitutional scholarship have

10. See also P. MURPHY, *THE MEANING OF FREEDOM OF SPEECH* 105-09 (1972).

1. Professor of Law, University of Ottawa (Civil Law Section).

2. Professor of Law, University of Ottawa (Common Law Section).

3. Professor of Law, Wayne State University.

been enormous. Canadian constitutional commentators need no longer confine their labors to exploring the boundaries of federal and provincial power and other questions of "internal governance," but now, like their American counterparts, can turn their attention to the much more interesting and socially significant questions involving the constitutional protection of individual rights against governmental action.⁴

Indeed, as soon as the Charter was promulgated, a spate of books and law review articles appeared, in which Canadian constitutional commentators projected (and tried to influence) the development of constitutional protection of individual rights in Canada. One such book was *The Canadian Charter of Rights and Freedoms*, a collection of articles by fifteen authors under the editorship of Professor Gerald Beaudoin and Professor (now Judge of the Ontario Court of Appeals) Walter Tarnopolsky, both of the University of Ottawa Faculty of Law. The second edition, published in 1989, sees Judge Tarnopolsky replaced by Professor Ed Ratushny, also of the University of Ottawa, and the number of authors increased to twenty. More significantly, as the editors note, "[t]he vacuum of case law and corresponding speculation, which formed the context for the first edition, have been replaced by the fifty charter decisions rendered by the Supreme Court of Canada, as well as a torrent of Charter decisions flowing from other courts."

The book contains nineteen articles. Five deal with general questions of interpretation, applicability, and enforcement of rights, while the remaining fourteen concern the various areas of protection of individual rights under the Charter. Chapters 5, 6, and 7 cover "fundamental freedoms" (sec. 2), the Canadian equivalent of the American first amendment. Chapter 8 is about "democratic rights" (secs. 3-5), namely, the right to vote and the right of representation, and chapter 9 covers "mobility rights" (sec. 6), which in the American analogue, combine elements of the right to travel and prohibitions on discrimination against non-residents. Chapter 10 covers "fundamental rights and fundamental justice" (sec. 7), which is the Charter's closest equivalent of the American due process clause, although the nature of that equivalency is a matter of considerable dispute in Canada.

4. The promulgation of the Charter of Rights has also enabled some American constitutional commentators, like the present writer, to mine the new field of comparative American-Canadian constitutional law. See e.g., Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191 (1984); Sedler, *The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis*, 20 CASE W. RES. J. INT'L L. 577 (1988).

Chapters 11-13 cover the "legal rights" provisions of the Charter (secs. 8-14), providing procedural protections for persons accused of crime. Chapter 14 deals at length with what many Canadian commentators consider to be the most important provision of the Charter, section 15's guarantee of "equality rights." Chapters 15-18 cover those aspects of Canadian constitutionalism that have no direct equivalency in the American constitutional system, because they reflect the distinctly binational and multicultural political character of Canada: language rights (secs. 16-22), minority language educational rights (sec. 23), the rights of the aboriginal peoples of Canada (secs. 25 and 35), and multicultural heritage (sec. 27).

The book is very valuable reading for anyone who wants to gain an understanding of the current status of constitutional protection of individual rights in Canada. Each chapter is comprehensive and heavily footnoted, reviewing all the decisions of the Supreme Court of Canada and the major lower court decisions in that area. The reader will come away with a clear picture of the Canadian approach to constitutional interpretation and an analysis of how the Charter has been interpreted to resolve the questions that have arisen thus far under the various sections of the Charter, and of the important constitutional issues that are likely to arise in the future. The book also contains a detailed bibliography, listing virtually everything that has been written about the Charter.

Canadian constitutional scholarship tends to be more lawyer-like than modern American constitutional theory. The exploration of constitutional questions takes place primarily within the conventional legal framework of text and judicial interpretation. The focus is on the approach to Charter interpretation that has been taken by the Supreme Court of Canada and on how that Court and the lower courts have resolved the particular questions that have thus far arisen. The commentators try to set forth the "present state of the law," and to predict how future issues will be resolved in light of the Supreme Court's interpretative approach and the doctrine it has promulgated.

What most Canadian constitutional commentary lacks are the "grand theories" of constitutional interpretation that are so much a part of the contemporary American scene. While many American constitutional commentators appear to be "lecturing" the United States Supreme Court on how it should interpret the Constitution and debating the "legitimacy" of what the Court has been doing (or, as it appears sometimes, largely talking to each other, with scant attention to the Court), Canadian constitutional commenta-

tors seem to have a much more modest and traditional view of their function. *The Canadian Charter of Rights and Freedoms* would come across to American constitutional commentators as more akin to a multi-author hornbook than a collection of essays by distinguished constitutional commentators.

In part, the more modest view of the function of constitutional scholarship in Canada may reflect a cultural phenomenon. Canadian commentators, like Canadian lawyers, tend to be more deferential to the position of the judiciary in the constitutional and legal system than their American counterparts.⁵ While Canadian commentators are at times critical of the Supreme Court of Canada, the criticism is somewhat muted and usually takes the form of suggesting that the Court reached an incorrect result in a particular case or that it should modify a particular approach or doctrine. It is difficult to imagine a Canadian commentator saying that the approach to constitutional interpretation taken by the Supreme Court of Canada is "completely lawless and unprincipled," that the Court has promulgated "clearly improper doctrines," and that "broad areas of constitutional law ought to be reformulated."⁶ This more deferential view of the position of the judiciary in the legal universe may have the effect of inhibiting Canadian commentators from setting forth "grand theories" of constitutional interpretation and from trying to tell the Supreme Court of Canada how it should be interpreting the Charter in light of the commentators' own grand theories.

This difference may also be due to the fact that Canada is still in an early stage of constitutional development with a number of basic constitutional issues yet to be resolved, and with much constitutional doctrine still in incipient form. Canadian commentators may quite reasonably conclude that at this point it is more important to explain what is happening—how the Supreme Court of Canada and the lower courts are interpreting the Charter and building constitutional doctrine—than it is to criticize what the courts have done and to set forth the commentator's own views on what the courts should be doing.

So too, the Canadian commentators may have concluded that they will have more influence on the courts by taking an essentially expository and analytical approach to constitutional scholarship.

5. When I have judged moot court competitions involving both American and Canadian law schools, I could always tell which teams were from Canadian law schools: the mooters would be unduly deferential to the court—by our standards—and almost obsequiously respectful in their presentations.

6. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. J.* 1, 11 (1971).

The United States Supreme Court has expressed virtually no interest, at least in its written opinions, in the grand theories set forth by American constitutional commentators. Most citations to academic writings by the Court are in the form of string cites, ("for academic commentary on this matter, see . . ."), or to compendiums like Tribe's *American Constitutional Law* for general propositions.⁷ The Justices sitting on a nation's highest court, whether in the United States or in Canada, are in the business of deciding cases, and most of the constitutional doctrine and principles they formulate take place within that context. They are more likely to pay attention to the views of an academic commentator (to the extent that they do so at all) if those views relate to how particular constitutional questions should be resolved and have been developed within the analytical framework of existing doctrine. The approach taken by Canadian constitutional commentators thus makes their work more useful to the Supreme Court of Canada and the lower courts in the process of deciding actual cases than the more theoretical approach favored by many of their American counterparts.

The chapter on "equality rights" by Professors Black and Smith perhaps best epitomizes the nature of current Canadian constitutional scholarship. At the time the chapter was written no case involving the "equality rights" provisions of section 15 had been decided by the Supreme Court of Canada. Section 15 differs from the equal protection clause of the fourteenth amendment in that it refers to the "right to equal protection and equal benefit of the law without discrimination" and sets forth particular kinds of discrimination on the basis of group membership that are proscribed "in particular," which are race, national or ethnic origin, color, religion, sex, age or mental or physical disability.⁸

Professors Black and Smith identify the major "equality issues" that will have to be resolved by the Supreme Court of Can-

7. As a practical matter, what academic works get cited by the Court probably depends on the law clerks' familiarity with these works or their "name recognition" of the author. It may also be queried how carefully, if at all, the law clerks have read most of the works, especially those appearing in string cites.

8. Equality between men and women is also specifically guaranteed by section 28, which provides that, "[n]otwithstanding anything in the Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." A major purpose of section 28, going beyond section 15, is to prevent the "override" of judicial decisions invalidating sex-based discrimination. Under section 33 of the Charter, Parliament and the provincial legislatures may provide that laws operate notwithstanding certain Charter provisions, which effectively insulates those laws from judicial review. See the discussion of "override" by Professor Tasse (at 102-08) and in Sedler, *Constitutional Protection of Individual Rights in Canada*, *supra* note 3, at 1233-35, 1241-42. Professors Black and Smith carefully discuss the effects of section 28 in relation to section 15, including the effect of preventing "override" (at 598-602).

ada, and propose solutions derived from the text of section 15, the “purposive” approach to Charter interpretation adopted by the Supreme Court,⁹ institutional considerations, such as “reconciling judicial review and democracy,” and lower court decisions interpreting that section. Among their conclusions are that (1) the protections of section 15 are limited to the grounds enumerated in section 15 and analogous grounds,¹⁰ (2) section 15 reaches actions that have an unintended discriminatory effect on a protected group, and (3) there should not be differing levels of scrutiny, depending on the particular form of discrimination involved.

After the chapter was written, but before it went to press, the Supreme Court of Canada came down with the seminal “equality rights” decision in *Andrews v. Law Society of British Columbia*.¹¹ In holding unconstitutional a provincial ban on the admission of aliens to the practice of law, the Court resolved some of the major equality issues discussed by Professors Black and Smith. Most importantly, the Court held that the protections of section 15 are limited to “enumerated and analogous grounds,” and that section 15 reaches the unintended discriminatory effects of a facially neutral law. The *Andrews* decision prompted an addendum to the chapter, in which the authors discuss the extent to which that decision “contradicts or confirms” the approach to section 15 that had been proposed by the authors. *Andrews* will now be the starting point for any future analysis of “equality rights” by Canadian constitutional commentators.

My second observation goes to the use of American cases and American constitutional doctrine and theory by Canadian constitutional commentators. In constitutional law, as in so many other areas of Canadian life, the influence of the United States cannot be ignored. It attracts, but at the same time it repels. The end result is a high degree of ambivalence toward “things American,” and this is as true of American cases and constitutional doctrine and theory as of our television programs.

Obviously the Bill of Rights and the fourteenth amendment of our Constitution served as the primary structural model for the

9. “[The Charter’s] purpose is to guarantee and protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.” *Hunter v. Southam*, [1984] 2 S.C.R. 145, 155 (Dickson, J.). See the discussion of the “purposive” approach by Professor Pentney in Chapter 2, “Interpreting the Charter: General Principles” at 22-28.

10. Under this view, section 15 would not authorize constitutional challenges to general classifications contained in legislation, as is permitted under the fourteenth amendment’s equal protection clause, and which has given rise to the two-tier standard of equal protection review in the United States.

11. [1989] 1 S.C.R. 143.

Charter. Some of the provisions of the Charter, like the analogous provisions of the United States Constitution, are broadly-phrased and open-ended. The "fundamental freedoms" provision of section 2, for example, is very similar to the first amendment. Likewise, the "fundamental rights and fundamental justice" provision of section 7, although apparently intended by the drafters to avoid the "judicial activism" that has characterized the due process clause in the United States (and pointedly omitting "property rights" from its coverage), is sufficiently broadly-phrased and open-ended as to require a similar degree of judicial interpretation and judicially-imposed value choices as its American counterpart. And like our counterpart, it has been used to strike down restrictive abortion laws.¹²

On the other hand, precisely because the Charter is a contemporary document, the drafters were able to learn from the constitutional experience of the United States and could resolve certain constitutional questions in the text of the Charter somewhat differently from the way that they had been resolved by constitutional interpretation in the United States. The Charter, for example, textually expresses a value choice in favor of gender equality (§ 28 is the textual equivalent of the failed ERA), and specifically authorizes affirmative action programs (§ 15(2)). And many of the "legal rights" provisions resolve questions about constitutionally-required procedures in criminal cases differently from the way they have been resolved in the United States, providing on the whole a lesser degree of protection than has been afforded under judicial interpretations of analogous provisions of our Constitution.

These factors pull in opposite directions in regard to the relevance of American constitutional decisions in Charter litigation in Canada. This opposite pull has been recognized by the Supreme Court of Canada, which has in effect said that the American constitutional experience is relevant in Charter interpretation, but that its relevance is circumscribed. Thus, the court has said on the one hand that, "[t]he courts in the United States have had almost two hundred years experience at this task [interpreting the individual rights provisions of the Constitution] and it is of more than passing

12. R. V. Morgentaler, [1988] 1 S.C.R. 30. In the chapter on "Fundamental Rights and Fundamental Justice," Professor Garant expresses some concern about the courts going "too far" in extending the protections of section 7: "We believe that it is necessary to accept a fairly broad concept of the notion of security, one encompassing a state of physical, mental and social well-being. Nonetheless, it is necessary to distinguish the ideal proposed to the state as political authority from the much more limited task imposed on the state as judicial authority. While the political branch may attempt to embrace all aspects of human well-being, it is not for the judicial branch to play this role, even in a secondary way" (at 352).

interest to those concerned with these new developments in Canada to study the experience of the United States courts,"¹³ and on the other hand, that, "American decisions can be transplanted to the Canadian context only with the greatest caution."¹⁴ The direct relevance of American decisions in Charter interpretation has spawned a good deal of commentary in Canada.¹⁵

Regardless of the direct relevance of American decisions in Charter interpretation, American cases and American constitutional doctrine pervade Canadian constitutional commentary. As Professor Pentney points out: "American authorities are being relied on extensively, perhaps more than in any other area of our law, in Charter interpretation, both judicial and academic." For the Canadian constitutional commentator, American cases and American constitutional doctrine are almost invariably a point of comparison, especially with respect to those Charter provisions that are broadly-phrased and open-ended, like their American analogues, such as section 2's "fundamental freedoms" provision. This comparison is thus extensive in the "fundamental freedoms" chapters of *The Canadian Charter of Rights and Freedoms*, Professor Cotler's discussion of freedom of conscience and religion in chapter 5, Professor Beckton's discussion of freedom of expression in chapter 6, and Professor Norman's discussion of freedom of peaceable assembly and freedom of association in chapter 7. It also appears to varying degrees in other chapters, such as Professor Chevrette's discussion of unreasonable search and seizure in chapter 11.

More interesting perhaps is the use of American decisions and constitutional doctrine by Canadian commentators in advocating particular *results* under the Charter. Here the ambivalence about making use of "things American" is compounded by ideological concerns. In my view, Canadian commentators tend to be "result-selective" in their use of American decisions and constitutional doctrine. To the extent that American decisions and doctrine support the result that commentators favor they are invoked enthusiastically.

13. *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 367 (Estey, J.).

14. *Hunter v. Southam, Inc.*, [1984] 2 S.C.R. 145, 161 (Dickson, J.).

15. See particularly Cameron, *The Motor Vehicle Reference and the Relevance of American Doctrine in Charter Adjudication* in CHARTER LITIGATION 69, 90 (R.J. Sharpe ed. 1987). As Professor Cameron States: "Certain lines of inquiry should be pursued whenever American doctrine is being considered. A review of structural, textual and contextual differences between the Canadian and American instruments is the first step to take in any such case. A consideration of the evolution of doctrine would be next. The third step involves assessment of the rationales for the doctrine under consideration. Reflection of the practical and institutional consequences of adopting American-style doctrinal solutions is the fourth and final step in the analysis." See also Cameron, *Liberty, Authority, and the State in American Constitutionalism*, 25 OSGOODE HALL L.J. 257 (1987); *The First Amendment and Section 1 of the Charter* (forthcoming).

cally, but when commentators favor an opposite result, they generally refer to the differences between the Charter and the analogous provisions of the American Constitution.

This ambivalence over the use of American cases and constitutional doctrine by Canadian constitutional commentators may be expected to continue. For those Canadian commentators who favor an "activist" interpretation of the Charter, the American constitutional experience is close at hand and may serve as a model for the development of Canadian constitutionalism along activist lines.¹⁶ At the same time, there is a concern for the collectivist tradition of Canada, a tradition that recognizes governmental responsibility to promote the well-being of the Canadian people and requires that in some circumstances, individual rights be sacrificed for the collective good. A "too activist" interpretation of the Charter would be inconsistent with the collectivist tradition, and the always appealing argument that "we shouldn't be like the Americans" may be invoked in Canada in opposition to judicial activism.

This is a very exciting time to be a Canadian constitutional commentator. In reviewing *The Canadian Charter of Rights and Freedoms*, and making some observations about Canadian constitutional commentary, I suspect that I have also reflected my own enthusiasm about the opportunity for American constitutional commentators to observe comparative constitutionalism, which is now as close as the open border to our north.

16. To a degree, however, the entrenchment of individual rights in the Charter has resulted in an "inherent judicial activism." As Professor Hogg points out: "The Supreme Court of Canada. . . has articulated and implemented a generous interpretation of Charter rights leading inevitably to active judicial review, involving frequent holdings of invalidity. The reason for the change in attitude is not difficult to ascertain. The adoption of the Charter was preceded by a prolonged and public debate which created a public expectation that a significant change in the Canadian Constitution occurred with the adoption of the Charter. The judges could not easily ignore the deliberate and open decision to enhance their powers *vis-a-vis* the eleven elected governments" (at 17).