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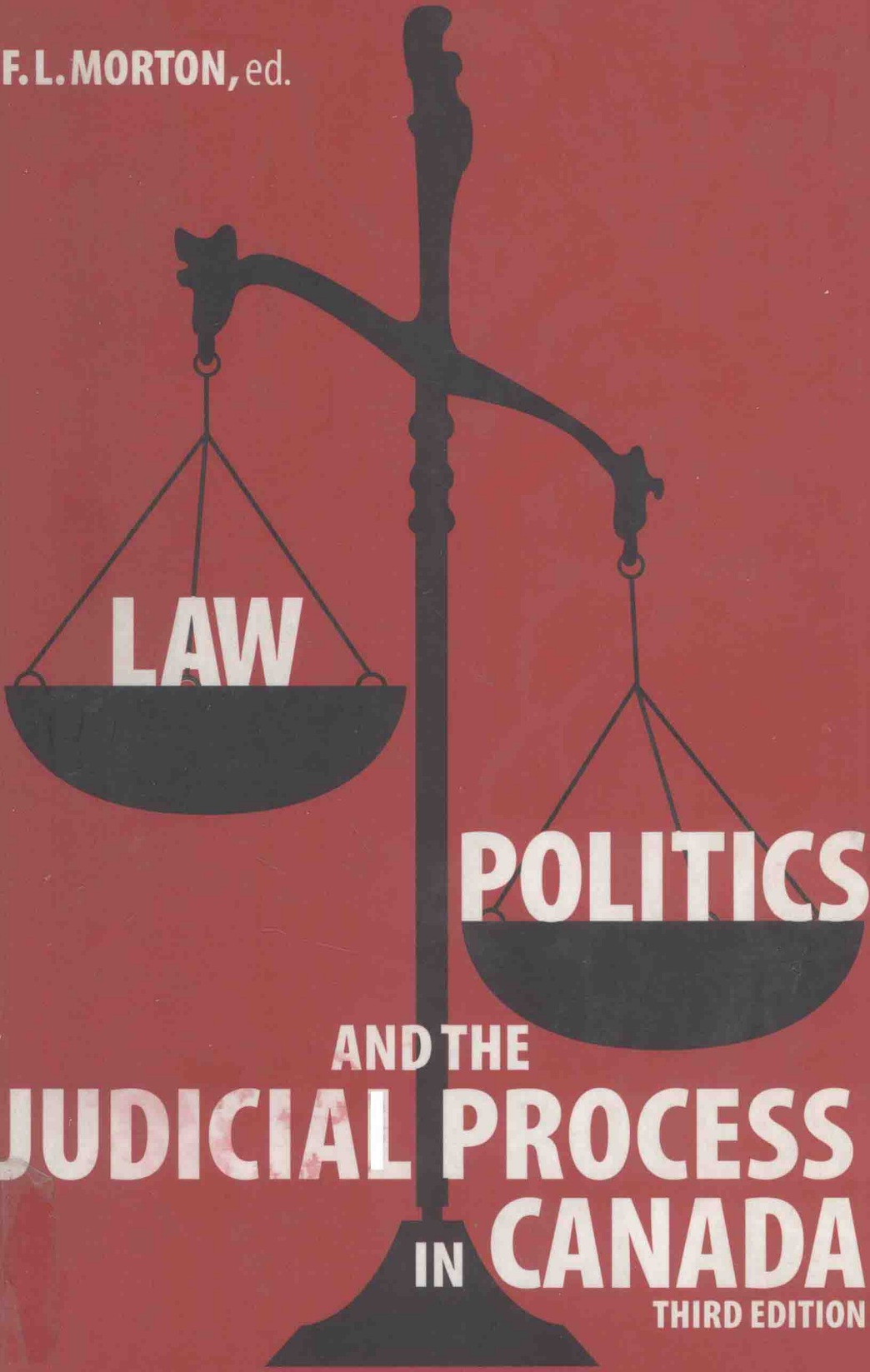

LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA

THIRD EDITION

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Preface

2002 marks the twentieth anniversary of the *Canadian Charter of Rights and Freedoms*. I completed the first edition of this book in May, 1984, the month the Supreme Court issued its first *Charter* decision. In the preface to that first edition, I speculated that the adoption of the *Charter* was going to "force the Canadian judiciary into a much more explicit political function than it had previously exercised." This was indeed speculation. No one knew at the time what the *Charter* would hold. The impact – if any – of the *Charter* would be a function of judicial interpretation and choice. Given our judges' history of deference to elected governments and provincial opposition to the *Charter* (especially Quebec's), there were ample reasons to suspect no more than modest deviation from the *status quo ante*.

Today, twenty years down the road into "Charterland," Canadians live in a different legal and political world. There have been more than four hundred *Charter* cases decided by the Supreme Court of Canada and thousands more by lower courts. The list of public policies shaped by the courts' interpretation of the *Charter* is long and still growing: aboriginal rights and land-claims, abortion, bilingualism, capital punishment, criminal procedure, electoral distribution, family law, gay rights, immigration and refugee determination, judicial ethics, judicial salaries, labour law, Quebec separatism, pornography, prisoner voting rights, Sunday closing laws.

While the Supreme Court's *Charter* decisions are the most visible and often dramatic indicators of the impact of the *Charter*, they represent only the tip of the iceberg of *Charter*-induced activities. The courts' *Charter* activism has been both a cause and an effect of numerous other changes in the legal and political systems: the docket and decision-making procedures of the Supreme Court, judicial appointments, law schools, legal scholarship, interest group activity, and government expenditures. These changes are recounted in the revised introductions to each chapter and the twenty-seven new readings that have been selected for the third edition. The merits of these changes have become a topic of growing debate, a debate reflected in many of the new readings chosen for the third edition.

In a 1991 study of judicial activism in ten different democracies, Canada was ranked second only to the United States.[1] England, the model followed by Canadian jurists until recently, was ranked ninth. Had the same survey been done twenty years ago, when the Canadian Court was still "the quiet court in the unquiet country," Canada would have taken its place next to the mother country. No longer! Indeed, a strong case can now be made that the Supreme Court of Canada is more activist than the contemporary American Supreme court. The heydays of American judicial activism are long gone, stopped if not reversed by the judicial appointments of more recent Republican presidents and senates.

In the preface to the first edition, I also hazarded the observation that the study of the judicial process in Canada had been relatively neglected because it was "too political for law professors but too legal for political scientists." There is hardly any danger of this today. The *Charter* has dissolved any bright-line distinction between law and politics and produced a new generation of political scientists who are analyzing and writing about judicial politics. The works of some of these new scholars are included in this new edition.

I am indebted to many people who assisted in the production of this third edition. I would like to thank all the contributing authors, without whom there would be no book. In particular, I would like to thank Glenn Blackett and Adrian Ang, graduate research assistants who worked long hours in the preparation of the manuscript and without whom I would not have finished. Finally, I want to thank the staff at the University of Calgary Press, especially John King, my capable and patient editor. For any errors of omission or commission, I take full responsibility.

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1 Kenneth Holland, *Judicial Activism in Comparative Perspective* (London: Macmillan, 1991).

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* Reprinted elsewhere in the book.

1 The Rule of Law in the Canadian Constitution

On December 4, 1946, Frank Roncarelli was informed by the Quebec Liquor Commission that the liquor licence for his Montreal restaurant had been revoked "forever." Mr. Roncarelli had not violated any Liquor Commission guidelines, nor had he been charged with or convicted of any criminal wrongdoing. The licence was revoked because, as Mr. Roncarelli and indeed everyone else knew, Maurice Duplessis, the Premier of Quebec, wanted to punish him for his membership in and financial support of the Jehovah's Witnesses. The Jehovah's Witnesses are an evangelizing, fundamentalist protestant sect, who had outraged Duplessis and the French Catholic majority in Quebec through their outspoken criticisms of the Catholic Church and its priests. The Duplessis government had begun a campaign of legal harassment against the Witnesses by arresting them for distributing their printed materials without a licence. Roncarelli frustrated this plan by regularly providing bail money for his arrested fellow-believers, who would then return to the streets. Roncarelli thus became a special target of the harassment policies of the Quebec government.

After a thirteen-year legal battle, the Supreme Court of Canada finally ruled that the government of Quebec's treatment of Roncarelli had been arbitrary and illegal. Moreover, Duplessis could not hide behind the civil immunity normally enjoyed by state administrators under Quebec law. By grossly abusing his administrative discretion, Duplessis was deemed to have acted outside the law and was thus subject to being sued by Roncarelli for damages[1] (Reading 1.1). A majority of the Court held that in Canada there is a general right not to be punished by the arbitrary exercise of government power. A government, federal or provincial, can only move against an individual in accordance with known rules, and the Duplessis government had failed to meet this standard. In so ruling, the Supreme Court

1 For an excellent account of both the Roncarelli Case and the larger conflict between the Jehovah's Witnesses and the Quebec government, see William Kaplan, *State and Salvation: The Jehovah's Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989).

re-asserted one of the fundamental principles of the "unwritten constitution" of Canada – "the rule of law."

The Roncarelli case was just the most recent chapter in a living tradition that can be traced back through the nineteenth-century writings of A.V.C. Dicey (Reading 1.4); the American *Declaration of Independence* of 1776 (Reading 1.3); the political theory of the seventeenth-century philosopher John Locke (Reading 1.2); and back to the fields of Runnymede in June of 1215, when the English nobles forced King John to sign *Magna Carta* and to agree to rule *per legem terrae* – according to the laws of the land.[2]

Magna Carta marked the beginning of the "rule of law" tradition. The "Glorious Revolution of 1688" deposed the Stuart kings and established the supremacy of Parliament over the Crown. This landmark event initiated the practice of government that we now take for granted (too much so!) – representative government, or government by consent of the governed.

The second reading is from the writings of John Locke, often referred to as the "theorist of the Glorious Revolution." Locke's *Second Treatise on Government*, first published in 1690, has been the most influential defence and advocacy of "government by consent," or liberal democracy, ever written. In it, we find not only a defence of "government by consent of the governed," but also a restatement of the principle of *per legem terrae*. Locke explicitly declares that even the new sovereign, the legislature, must rule "by declared and received laws ... interpreted by known authorized judges."

A careful reading of the passage from Locke reveals that, in addition to these procedural restrictions, he imposes a second major restriction on the legislative, or "law-making," power of the state – "the law of Nature." This substantive restriction means that, not only must laws be duly enacted and fairly administered, but also that the laws themselves must not violate the "natural rights" of individuals that exist by the "law of Nature." This law of nature is understood to transcend human society and to exist independently of the positive law of any given state.

This double limitation on just government was given its most striking and memorable articulation in the American *Declaration of Independence* of 1776, written primarily by Thomas Jefferson (Reading 1.3). The Americans justified their revolution, and subsequently founded their new republic, on the

2 The full text of s.39 of Magna Carta reads as follows: "No freeman shall be taken or (and) imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgement of his peers or (and) by the law of the land." This 700 year-old rule is the direct ancestor of the 1982 *Charter of Rights and Freedoms*, whose preamble declares: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." Section 7 of the *Charter* essentially restates the modern formulation of *per legem terrae*, that no person can be deprived of his life, liberty, or security of the person, except according to the due process of law. Sections 8 through 15 then elaborate specific aspects of due process.

two fundamental principles of Locke's political theory: that "all men are by Nature equal," and that they possess "certain inalienable (i.e., natural) rights." There is a critical tension between these two fundamental concepts of equality and liberty. The principle of natural equality essentially means that no person (or group of persons) is so inherently superior as to rule others without their consent. This banishes the traditional claims of priests, kings, and nobles to rule on the basis of their alleged natural superiority, and replaces it with government by consent of the governed. In practice, this has meant some form of "majority rule" democracy. The principle of natural rights means that a just government cannot violate these rights, since the very purpose of government is to secure such rights. The tension arises from the fact that "majority rule" does not always produce laws that respect the rights of individuals or groups that are not part of the majority.

This tension is more of a theoretical problem than a practical one. Most of the time, the combined practice of "government by consent" and "the rule of law" is a strong guarantee that the twin requirements of equality and liberty will both be met. It is unlikely that a governing majority will ever (knowingly) consent to policies that are destructive of their rights. The "rule of law" provides additional safeguards by detering rulers from pursuing ends and using means that "they would not like to have known by the people, and own not willingly."[3] But what happens when the majority consents to laws that are destructive of the natural rights of a minority? What happens when government by the "consent of the governed" no longer "secures these rights"? Neither Locke nor Jefferson answered this question. The practical problem of reconciling "majority rule" with "minority rights" was left to the founders of new liberal democracies such as the United States and Canada.

Historically, there have been two principal approaches to giving institutional expression to the principles of equality and liberty in modern liberal democracies: the British parliamentary or Westminster model and the American "separation of powers" model. Because of two major differences in the parliamentary and American systems, the courts in each system have very different functions and characteristics. The American model is ultimately based on and organized by a single basic document – a written constitution. This single document sets down in writing "the rules governing the composition, powers and methods of operation of the main institutions of government, and the general principles applicable to their relations to the citizens."[4] By contrast, the Westminster model is based on an "unwritten constitution" – a combination of historically important statutes, the common law, and numerous unwritten conventions and usages. (In 1998, Britain took a step in the direction of the American model by making the *European Convention on Human Rights* justiciable in British courts. See below.)

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3 See Locke, *The Second Treatise*, Ch. 1. Reading 1.2.

4 Sir Ivor Jennings, *The Law and the Constitution*. 5th ed. (London: University of London Press, 1959), p. 33.

The second difference is that the "written constitution" of the Americans includes an enumeration of the fundamental rights and liberties of the individual against government, known collectively as the *Bill of Rights*. While individuals enjoy basically the same rights and freedoms under the British parliamentary model of democracy, they are not "spelled out" in any single, basic document of government, i.e., they are not "constitutionally entrenched."

The result of these two differences is that, under the American model of democracy, the courts, and especially the Supreme Court, play a more explicit and influential political role. Ever since the 1803 case of *Marbury v. Madison*, American courts have assumed the function of interpreting and enforcing "constitutional law" just as they do all other law. This "judicial review" of legislative and executive actions is intended to ensure that the latter conform to the procedures and limitations laid down in the Constitution. If government laws and actions do not conform, the court declares them to be "unconstitutional," invalid and therefore without legal effect.

It is easy to see how, in theory at least, combining the American practice of judicial review with an entrenched bill of rights resolves the tension between liberty and equality, majority rule and minority rights. If the majority enacts a law that infringes a person's constitutional right, the individual can go to court and ask the judges to strike down the law as unconstitutional. This approach to protecting civil liberties was particularly effective in promoting racial justice in American society during the 1950s and 1960s. While the more "democratic" (majoritarian) institutions of government refused to take action, the American Supreme Court used the Bill of Rights guarantee of "equal protection of the laws" to strike down the legal barriers of racial discrimination in American society. However, as the American Supreme Court expanded its "judicial activism" into more and more areas of public policy and local government, serious questions began to arise about the "undemocratic" character of its use of judicial review. In protecting the "individual rights" side of the liberal equation, the Court was perceived as neglecting and even violating the equality requirement of government by consent of the governed.[5]

The British model of parliamentary supremacy combined with the "rule of law" tradition avoids this problem. There are no written constitutional prohibitions for the British courts to enforce against Parliament, and the courts do not interpret or enforce constitutional conventions, the "unwritten constitution."[6] The critics of parliamentary democracy, however, contend that it is prone to the opposite problem – that there is no adequate mechanism

5 This problem is the subject of Chapter 13.

6 The Canadian Supreme Court's decision in the 1981 *Constitutional Amendment Reference* was contrary to this generally accepted practice and is probably best understood as an exception to an otherwise still valid rule.

to protect individuals or minorities from democratic majorities that violate their rights. While this may be true in theory, in practice it has not proven to be a serious problem in either Great Britain or Canada. While Canada's civil liberties record is far from perfect,[7] it remains much better than the vast majority of modern nation states.

The key to the practical success of the British parliamentary system is conveyed in the reading from Dicey on "the rule of law," and especially his quotation from Tocqueville (Reading 1.4). Comparing the governments of England and Switzerland, Tocqueville observed that, "In England there seems to be more liberty in the customs than in the laws of the people," while the opposite holds for Switzerland. For both Tocqueville and Dicey, the British condition is far preferable. For, in the long run, the customs, habits, beliefs – the moral quality public opinion – of a society is a more dependable guarantee of just laws than the "paper barriers" of constitutional "guarantees." Put very simply, a written constitution cannot "guarantee" that the laws of a democratic society will be any more just or fair than the people who make up that society.

The government of Canada was basically modelled after the British parliamentary system. The one important exception is the federal form of the union of the Canadian provinces, and the defining of the forms and limits of this union in a single, written document – the *British North America Act, 1867*, now known as the *Constitution Act, 1867*. This aspect of Canadian government is especially important for the courts because it has thrust upon them the function of judicial review, or "umpire" of the federal system.[8] Federalism aside, both levels of government in Canada were formed after the Westminster model, which meant parliamentary supremacy within their respective spheres of jurisdiction.

Accordingly, Canada, until very recently, followed the British approach to the protection of civil liberty – parliamentary supremacy combined with "the rule of law," and a healthy self-confidence in the basic sense of fairness and toleration for diversity in the Canadian people. Inevitably the proximity of the United States has prompted constant comparisons. One of the most eloquent and forceful defences of the Anglo-Canadian approach to protecting civil liberties was given by the dean of Canadian political science, R. MacGregor Dawson. In discussing the various components of Canada's unwritten constitution, Dawson argued:

> The mere fact that a constitutional doctrine is not explicitly enunciated and formally committed to writing may affect the external appearance but not disturb the genuineness or force of that doctrine. Thus the broad tolerance which will permit differences of opinion and will disapprove of punitive

7 See Thomas Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Vancouver, BC: Clarke, Irwin, and Co., 1981).

8 This is the subject of Chapter 10.

> or repressive measures against the dissenters is of as great constitutional significance and may conceivably under some circumstances afford an even more assured protection than an explicit guarantee of freedom of speech, written into a constitution, yet with no solid conviction behind it.[9]

The force of Dawson's argument notwithstanding, Canadian political leaders have been increasingly attracted to the American approach to protecting civil liberties. In 1960, the Diefenbaker government enacted the Canadian *Bill of Rights*. It took the form of a statute, not a constitutional amendment, and applied only to the federal government and not to the provinces.[10] Partly because of dissatisfaction with this document and partly in response to political developments within Canada during the 1970s, the Trudeau government undertook a major program of constitutional reform in 1980. Prime Minister Trudeau's constitutional agenda included "patriating" the *B.N.A. Act*, an amending formula, and a new *Charter of Rights* that applied to both levels of Canadian government. After a year and a half of political maneuvering, confrontation, and finally compromise, modified versions of all three objectives were achieved.

The adoption of a constitutionally entrenched *Charter of Rights* (reproduced in Appendix C) fundamentally altered the Canadian system of government by placing explicit limitations on the law-making power of both levels of government. Parliament was no longer supreme; the Constitution was. Or almost. The *Charter* was not adopted in its original "pure" form. Attachment to the tradition of parliamentary supremacy, combined with provincial suspicion and opposition, forced an important compromise. Added in the eleventh hour of constitutional negotiations between the federal government and the provinces, section 33 of the *Charter* allows both levels of government to "override" certain *Charter* provisions if they deem it necessary. Parliamentary supremacy was thus preserved, albeit in a qualified form.

In 1998, the United Kingdom took a step in the direction of its two former North American colonies by incorporating the *European Convention for the Protection of Human Rights and Fundamental Freedoms* into English domestic law. This legislation allows the rights enumerated in the European Convention to be asserted and adjudicated in British courts. However, UK political leaders were reluctant to abandon their 300-year tradition of parliamentary sovereignty. In the end, they chose not to give British courts the power to declare laws invalid. Instead, the courts are instructed to interpret legislation in accordance with the Convention "as far as it is possible." However, if a judge finds a irreconcilable conflict between a statute and a provision of the Convention, the most the judge can do is issue a

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9 R. MacGregor Dawson, *The Government of Canada*. 4th ed. (Toronto: University of Toronto Press, 1963), p. 70.

10 This is discussed in greater detail in Chapter 11.

"declaration of incompatibility." This "finding" does not invalidate the law in question or prevent it from being enforced. However, it triggers a "fast track" procedure for Parliament to remedy the legal problem identified by the courts. In the final analysis, however, it rests with the government of the day whether or how to respond to a "declaration of incompatibility."

At the outset of the twenty-first century, Canada finds itself somewhere between the British and American models of liberal democracy. Each nation has given its courts a role in interpreting and enforcing constitutional rights but have structured the division of labour between courts and legislatures differently. In each instance, elected governments can have the final word, but with different degrees of difficulty. For the Americans to reverse a Supreme Court ruling on their Bill of Rights requires either a constitutional amendment or "packing the Court" with new appointments committed to overturning the disputed precedent. While there are several examples of both, neither occurs frequently. In theory, Canadian governments are armed with a more usable "check" on perceived judicial error – the section 33 "notwithstanding" clause. In practice, Canadian governments other than Quebec have been increasingly reluctant to invoke their section 33 power. However, they have used the less drastic remedy of simply re-enacting the impugned legislation with amendments. In the UK, a judicial declaration of incompatibility does not alter the legal status quo, so it remains at the discretion of the government of the day whether or how to respond.

As a result, the debate over which form of liberal democracy is best designed to protect the liberties of its citizens remains very much alive. The truth of this debate lies somewhere between the two contending positions, for as Dawson pointed out: "Written law and the conventions will normally complement one another and each becomes necessary to the proper functioning of the other."[11] The implications of these different divisions of labour between courts and legislatures is the focus of the "dialogue theory" discussed in chapter 13. While this debate is ongoing, there is one undisputed fact about the effect of enumerating individual rights in a written constitution: it thrusts the courts, and the judges who constitute them, into a more explicit and influential political role.

How to strike the right balance between legislatures and courts is a long-standing issue. The power of judges is also influenced by a more recent debate: whether constitutional rights (and thus judicial review) apply only to what the government does or whether they extend to the actions of private citizens and businesses. This new debate is the focus of Thomas Bateman's contribution in Reading 1.6.

Traditional liberal constitutionalism drew a sharp distinction between the public and the private, between state and civil society. The purpose of constitutionalism (and especially constitutional rights) was to protect the latter from the former. Constitutional rights applied only to "state action" – laws

11 Dawson, p. 71.