

Free Speech and Hate Speech:
The Development of Hate Speech Protections in the United States and Canada

Matthew Ghazarian

Professor Mark Graber

Government 98aq: Judicial Review and Democracy

9 January 2009

I. Introduction

Can a government that claims to protect free expression deny the use of that right to spread hate?

The line between the freedom of expression and the proper restraint of hateful ideas is far from clear, and there is no international consensus on where that line should be drawn. Many countries, especially developed democracies, have criminalized this type of speech for its negative effects. Currently, anti-hate speech legislation is in place in most of Continental Europe, the United Kingdom, Australia, Israel, Brazil, Canada, South Africa, Ireland, and many other countries. The United States is a major exception. America is extremely protective of hate speech, more so than any of its liberal democratic peers.¹

While many theorists debate whether the United States ought to protect such speech, few works explore the possible reasons *why* the US protects hate speech banned by other constitutional democracies. One might attribute America's exceptionalism to its unique history, constitution, or geopolitical position in the world. However, one would think that a country with which the US shares many similarities, Canada, would also protect hate speech in a similar way. Indeed, like the US, Canada occupies an area of relative geopolitical isolation. In addition, the Canadian nation is ethnically quite diverse; East Asian, Black, Latin American, and South Asian minorities together make up over 16% of Canada's population.² Moreover, unlike France and the United Kingdom, Canada has a constitution that guarantees freedom of expression like its

¹ The phrase "hate speech" covers a broad category of expression. For the purposes of this paper, it will be defined as words used to assault, degrade, demean, or otherwise damage a group identifiable by race, gender, sexual orientation, religion, or other features.

² Statistics Canada. "Visible minority groups, 2006 counts, for Canada, provinces and territories - 20% sample data."

<http://www12.statcan.ca/english/census06/data/highlights/ethnic/pages/Page.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Count&StartRec=1&Sort=2&Display=Page>.

American counterpart. The question lingers: what processes have caused America, in light of its many similarities with Canada, to apply its constitutional protections for free speech to hate speech, while Canada has made hate speech punishable by law within its constitutional system?

In order to answer the broader question of why American and Canadian hate speech protections differ, one must be able to explain how each country's legal developments in the 20th century account for their current practices. This paper argues during this period, each country underwent a major national crisis that triggered substantial changes in legal practice—what this paper will refer to as a “constitutional moment”—and that the different political conditions during and after each country's “constitutional moment” explain how each country's current hate speech practices developed.

In the US, the 20th century “constitutional moment” was the New Deal Settlement, an informal arrangement that arose throughout the presidency of FDR, namely in 1937 after Congress and the President clashed with the Supreme Court. The crisis that triggered this “constitutional moment” was the Great Depression. Frustrated with the Supreme Court as it struck down economic legislation, FDR and the newly elected Democratic Congress challenged the Court's power. The result was the New Deal Settlement, in which the Court yielded to Congressional legislation on economic and most other issues. The Court, however, reserved the right to more aggressively defend individual rights. This “constitutional moment” created America's two-tiered jurisprudence—a method of interpreting the law that distinguishes civil liberties cases from non-civil liberties cases. The Court generally leaves the latter to the Congressional judgment but aggressively defends the former. The Warren Court then carried on the results of the New Deal Settlement by expanding individual rights during the 50s and 60s. As

the Warren Court expanded speech rights, its protections grew to include most types of hate speech.

In Canada's 20th century "constitutional moment" was the ratification of the 1982 Charter of Rights and Freedoms, Canada's bill of rights. The conflict that triggered this moment was a national unity crisis, namely the Quebecois separatist movement. The separatist movement revitalized the previous attempts to entrench a national bill of rights. Many politicians believed that creating such a document would reverse provincial drift. Although the separatist problem inspired Canadians to re-evaluate their need for a constitution, the separatists were not the primary players in negotiating the Charter. The primary players were a group of hesitant provincial governments negotiating with pro-Charter members of the federal government. The provinces pushed for a Charter with flexible rights guarantees that would give provincial governments more chances to defend their authority from the judiciary. Meanwhile, interest groups and elites supported pro-Charter factions, who wanted a stronger Charter to more easily litigate rights violations and protect their privileged positions in society. The provinces won a major concession, Section 1 of the Charter, which was crucial in defining Charter rights guarantees. It states that rights can be violated in cases that are fit for a democratic society. Thus, even though anti-hate speech laws openly violate the freedom of speech, the Canadian Court still must judge whether anti-hate speech laws are permissible in a democratic society.

The differences that arose from these "constitutional moments" are crucial to understanding how current hate speech protections developed in the US and Canada. Both "constitutional moments" involved a movement during which the judiciary gained more power to defend civil liberties. The US "constitutional moment" vested such power in the Supreme Court, and the Court was able to defend its power in subsequent decades against states that had later

grown to oppose that power. On the other hand, the Canadian provinces were successful in compromising with their federal government. Together, they created a more flexible Charter that would allow mechanisms for provinces to retain more authority when dealing with civil liberties. This difference proved to be crucial in the development of Canadian hate speech protections because the flexibility of Section 1 allowed the Supreme Court of Canada (SCC) to uphold hate speech legislation despite the Charter's free expression guarantees.

Essentially, US hate speech protections were an unintended result of separating and enshrining civil liberties during the New Deal and the later success of the Warren Court in expanding speech rights specifically. Meanwhile, Canadian hate speech protections were the unintended result of putting Section 1 into Charter of Rights and Freedoms.

II. Identifying the Current Legal Differences

The US offers relatively absolutist protections to speech that do not fit into certain specifically defined categories. Canada, on the other hand, analyzes speech with a two-step process. First, the SCC determines whether speech laws violate freedom of expression. Then, the SCC determines whether such a violation is permissible a democratic society.

Currently the US has a relatively absolutist stance toward protecting speech, affording all but a few well-defined exceptions First Amendment protections. The First Amendment of the US Constitution states, "Congress shall make no law [...] abridging the freedom of speech." Exceptions to this relatively powerful language of the Constitution include "fighting words," obscenity, libel, and other narrowly defined categories. As long as one's speech does not fall into any of these legal definitions, one's speech is generally protected. Although it is theoretically possible for any government interest to be compelling enough to trump speech rights, the Court has never found such a government interest that was not part of its pre-selected definitions.

The US case *The Village of Skokie v. National Socialist Party of America* (1977) illustrates the US Supreme Court's approach to hate speech. The Village of Skokie, Illinois, tried to prevent a march planned by the National Socialist Party of America. City officials and locals claimed that the march would arouse "the passions of thousands of individuals of Jewish faith or ancestry within the Village [and] the passions of the survivors of the Nazi concentration camps who are taking measures unknown to the plaintiff to thwart the threatened march."³ The Court held, however, that the First Amendment protected the demonstrations, their offensiveness notwithstanding. It ruled that the march was not likely to cause violence. Thus, they could not classify the march's expression as "fighting words," nor could they consider speech that would provoke "imminent lawless action."⁴ As a result, they afforded the Neo-Nazis' First Amendment protection: "There is no testimony that anyone in the village of Skokie would consider the [Nazi] uniform itself as an abusive epithet which would provoke him to violent reaction." The Court held that without sufficient evidence that the uniforms would incite a violent reactions, that "the wearing of such a uniform must be considered, in the context of the instant case, as symbolic speech protected by the first amendment."⁵

It is crucial to note that the Court only needed to establish whether given expression fit the definition of one of US free speech law's exceptions. So, the Court only needed to decide whether or not the hate speech involved could be defined as "fighting words," or as "provoking

³ *The Village of Skokie v. National Socialist Party of America et al.* 51 Ill. App. 3d 279 (1977).

⁴ In *Chaplinsky v. New Hampshire* (1942), the Court defined fighting words as "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." The "imminent lawless action" standard is from the case *Brandenburg v. Ohio* (1969), discussed in detail later in the paper.

⁵ *The Village of Skokie v. National Socialist Party of America et al.* 51 Ill. App. 3d 279 (1977).

imminent lawless action.” Upon concluding that there was insufficient evidence proving these points, the Court upheld free speech protections.

This case illustrates that the Court has is limited in the amount of concerns it may balance. If the speech does not fit one of the aforementioned definitions, it is the likely the Court will defend that speech. In *Skokie*, although the Court acknowledged the fact that 40,500 of the village’s roughly 70,000 people were of Jewish descent, thousands of who were survivors of the Holocaust, it could not seriously take into account the harm that the National Socialist march would have on listeners. As long as the march would not provoke physical violence, the Court upheld speech protections.⁶ This extreme case demonstrates how the US’s definitional approach to hate speech allows for virtually no balancing of rights.

In contrast to the American system, the structure of Canada’s Charter of Rights requires judges to balance all breaches of rights that the Charter guarantees. Section 1 of the Charter states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁷ Thus, for each Case the SCC considers—after it has concluded whether there is a breach of rights—it must consider whether a breach of rights within “reasonable limits” that might be justified in a “democratic society.” As *Regina v. Keegstra* (1992) illustrates, the second consideration provides for a balancing of speakers’ and listeners’ rights in cases of hate speech. This rights balancing distinguishes the Canadian and American approaches to hate speech.

The case concerns James Keegstra, a high school teacher in Alberta. During his classes, he declared, among other things, that Jews “created the Holocaust to gain sympathy” and were

⁶ *The Village of Skokie v. National Socialist Party of America et al.* 51 Ill. App. 3d 279 (1977).

⁷ Canadian Charter of Rights and Freedoms. <http://laws.justice.gc.ca/en/charter/#garantie>.

“secretive and inherently evil.” Students had to reproduce his viewpoints on their tests; not doing so would damage their grades.⁸ The school discovered Keegstra’s conduct and dismissed him. In addition, the state charged him under a law banning the promotion of “hatred against an identifiable group.”⁹

After a series of appeals, the case came before the SCC. At first, the SCC’s findings seemed very similar to what the US Supreme Court might find. The SCC first determined whether the anti-hate speech law violated Section 2(b) of the Canadian Charter, which guarantees “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”¹⁰ The majority concluded that Section 2(b) of the Canadian Charter did indeed defend “communications which willfully promote hatred against an identifiable group”, despite the “repugnance” of their content.¹¹ Thus, the law in question did violate a Charter rights guarantee.

However, the SCC explained that even though the “freedom to express oneself openly and fully is of crucial importance,” Keegstra’s hate speech was not acceptable under Section 1 of the Charter. The SCC relied on Parliamentary findings that stated, “[T]he derision, hostility and abuse encouraged by hate propaganda” has a “severely negative impact” on the target’s “sense of self-worth and acceptance.” The studies concluded that hate speech can result in societal biases against and loss of the human dignity for groups that it targets.¹² The SCC opinion balanced the identified infringement of expression against the benefits to Canadians of identifiable groups who “surely gain a great deal of comfort from the knowledge that the hate-monger is criminally

⁸ *Regina v. Keegstra*. Supreme Court (Canada), 3 S.C.R. 697 (1990).

⁹ Dorsen et al. *Comparative Constitutionalism*. St. Paul: Thomson West, 2003. 899.

¹⁰ Canadian Charter of Rights and Freedoms. Accessed December 1, 2008
<<http://laws.justice.gc.ca/en/charter/#garantie>>.

¹¹ *R. v. Keegstra*. Supreme Court (Canada), 3 S.C.R. 697 (1990).

¹² *R. v. Keegstra*. Supreme Court (Canada), 3 S.C.R. 697 (1990).

prosecuted and his or her ideas rejected.” Using Section 1, it upheld the law even though it violated the Charter’s free expression guarantees. The SCC emphasized “[t]he value of equality and the worth and dignity of each human person” in its decision.

III. Analyzing the Differences

Skokie and *Keegstra* clearly illustrate the different approaches to hate speech in the US and Canada. The first part of the Canadian approach is similar to the American approach, but the second part illustrates how they differ. Like the US Supreme Court in *Skokie*, the SCC upheld that silencing hate speech is an infringement upon free expression rights, even though that free expression may be offensive. However, the second part of the SCC’s reasoning illustrates a rights balancing process that is absent in US jurisprudence. The SCC’s emphasis of the equality and dignity of the listeners stands in complete contrast to the US Supreme Court’s reasoning. In the US, even in the face of testimony of Holocaust survivors begging the Court to restrict the Neo-Nazi demonstration, the definitional approach of US jurisprudence trumped pleas for rights balancing. Unlike their American counterparts, the Canadian Supreme Court and the Charter provide for such rights balancing. As a result, the Court is relatively open to Parliamentary efforts to promote equality, even at the cost of rights as primary as speech.¹³ Thus, when a case comes before the SCC, it has the obligation to question whether a certain instance of hate speech is acceptable in a “free and democratic society.”

IV. The Two “Constitutional Moments”

To understand why these two countries have such different protections for hate speech, one must understand how the US Supreme Court definitional approach developed and the how SCC instead developed its two-step analysis. Exploring the history surrounding each country’s

¹³ Krotoszynski, Jr., Ronald J. *The First Amendment in Cross-Cultural Perspective*. New York: NYU, 2006. 56.

respective “constitutional moment” explains how each country has its respective method. Examining the legal developments in the US reveals the political and historical developments that led to a new two-tiered legal system. In this system, the Supreme Court examined civil liberties and non-civil liberties issues separately. In Canada, a crucial factor in legal developments was the power dynamic between provincial and federal governments. In the US, the states did not play a particularly significant role in the New Deal and later failed to reassert their power in the 50s and 60s. In contrast, the Canadian provinces—historically a major part of Canada’s relatively young jurisprudence and well positioned at crucial moments of 20th judicial developments—were successful in drawing compromises from Ottawa. These compromises created the two-step system in Canada today.

V. The US “Constitutional Moment”: The New Deal Settlement Creates the US Two-Tiered Court

To understand the development of speech rights in general, one must understand the legal developments of the 1937 “New Deal Settlement.” This informal arrangement resolved the disagreements that Congress and President Roosevelt had with US Supreme Court. The New Deal set the stage for the expansion of civil liberties protections by creating a two-tiered method of judicial review. In this two-tiered system, the Court divided issues into two groups: civil rights and non-civil rights. The Court generally deferred to Congress’ judgment with non-civil rights issues. However it implicitly retained the right to defend civil rights, political rights, minority rights, and other crucial issues in the political process.¹⁴ This right, through subsequent cases, manifested itself in the “strict scrutiny” standard used today. This section of the paper will

¹⁴ Kramer, Larry. *The People Themselves*. Oxford University Press, USA, 2005. 220.

describe the events and provide historical context necessary to understand the subsequent section's explanation of precisely why the events of the New Deal created the two-tiered Court.

The New Deal Settlement arose from a conflict between the Supreme Court and the other two branches of government. After being elected in 1932, the newly elected Franklin Roosevelt started to clash with the Supreme Court. At that time, the country was still in the throes of the Great Depression; the stock market had crashed just three years earlier and jobless rates were historically high. FDR and the Progressive Democrats in Congress tried to push through legislation to moderate the effects of the dismal economy. The Court, however, was not ready for the federal government to enlarge its role in the economy. For roughly the first 30 years of the 20th century, the Court frequently rejected federal and state legislatures' economic legislation, usually claiming that the legislation violated a combination of the Due Process and Equal Protection Clauses. Indeed, not including civil rights cases, the Court held over 150 state statutes unconstitutional under the Due Process and Equal Protection Clauses from 1899 to 1937. The Court more frequently struck down legislation concerning the economy, such as minimum wage, barrier to entry, child labor, and maximum hour workweek laws.¹⁵ Thus, there remained a good chance that Court would conflict with the legislative-executive convictions to take a larger role in pulling the country out of the Depression. FDR and the Democrats, however, tried to pass their legislation anyway. The Court resisted the federal government's attempt to expand its economic role. In 1935 and 1936, the Court struck down, among other things, the National Industrial Recovery Act, the Guffey Coal Act, the first Agricultural Adjustment Act, the Railroad Retirement Act, and a New York statute providing a minimum wage for women.¹⁶

¹⁵ Choper, Jesse H. et al. *Constitutional Law*. (2008). 167.

¹⁶ Powe, Lucas A. *The Warren Court and American Politics*. Cambridge: Harvard University Press, 2000. 2.

Frustrated with the Court's opposition to his economic policies, President Roosevelt confronted the Court after his landslide election in 1936. These developments brought about the New Deal Settlement. Roosevelt accused the Court of having "horse-and-buggy" interpretations of the law that were holding that nation back from repairing its broken economy.¹⁷ The newly re-elected FDR and a democratic Congress challenged the Court. This conflict was fraught with complexities; for the purposes of this paper, it will suffice to say that the combined effects of changing votes and changing members of the Supreme Court brought about changes that satisfied the executive and legislative branches. The Court repudiated its previous jurisprudence and started deferring to Congress' judgment on economic issues.¹⁸

In 1937, the Court upheld government economic regulations in *West Coast Hotel v. Parrish*. A year later in *Carolene Products v. United States*, the Court expressed the underpinnings of two-tiered jurisprudence, with which it would uphold Congress' power to regulate the economy but employ a stricter judicial scrutiny to cases dealing with political rights. This case concerned a law banning the shipment of "filled milk", or skimmed milk that had other types of fat re-added to it. The Supreme Court upheld a law prohibiting the interstate shipment of this type of milk. The decision to uphold the law was a break from the Court's previous decisions, which usually struck down economic regulations that were overly intrusive. More importantly, however, was the decisions assertion of the Court's power to defend political rights. The majority opinion's fourth footnote outlined a new "stricter" judicial scrutiny to be applied to individual and political rights. It explains that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" such

¹⁷ Jenkins, Roy, and Richard E. Neustadt. *Franklin Delano Roosevelt*. New York: Times Books, 2003. 90.

¹⁸ Kramer 218

as “the right to vote, on restraints upon the dissemination of information, interferences with political organizations, as to prohibition of peaceable assembly,” and other individual and political rights would be “subjected to a more exacting judicial scrutiny”¹⁹ This case demonstrates the Court’s new two-tiered method of judicial review. In it, the Court was relatively deferential to Congress’ economic regulations, but explicitly asserted its right to more strictly examine laws dealing with civil and political rights.

VI. Explanation of the New Deal Settlement: Why did the US Develop a Two-Tiered System?

Understanding the reasons for the two-tiered Court is important because this method of judicial review laid the groundwork for stronger individual rights in America and, ultimately, the hate speech protections in place today. A number of scholars have put forth many factors contributing to the birth of two-tiered judicial review in America. This paper will attempt to synthesize those authors’ ideas into two major factors: (1) a cogent scholarly framework emerged against the backdrop anti-war and anti-communist speech persecution and (2) civil liberties enjoyed a renewed importance among political activists, existing governmental bodies, and the economic elite. These two factors, in conjunction, were critical in leading to the Court’s distinction and enshrinement of individual rights, even while it was granting Congress deference on other issues.

One crucial factor of the Court’s enshrinement of civil liberties was Zechariah Chafee, a law professor and legal theorist who articulated the emerging political consensus on free speech. In his article “Freedom of Speech in War Time,” Chafee built on the work of other legal scholars, creating legal framework with which the Court could (1) separate civil rights from

¹⁹ *United States v. Carolene Products Co.* 304 U.S. 144 (1938).

economic rights and (2) provide civil rights with heightened protections. This framework was a paramount in the Court's repudiation of the less stringent "bad tendency" and "clear and present danger" tests that resulted in Red Scare speech restrictions.

The crucial factor of Chafee's work is that it was very powerful in influencing key political players, including the Supreme Court. Chafee was not an obscure scholar. In fact, he was a well-connected legal theorist and professor at Harvard Law School. His theories were well known by his peers in the legal profession, including the Supreme Court. Law Professor Michael Kent Curtis explains, "Chafee made lasting and substantial contributions to scholarship and to our understanding and protection of free speech." His book, *Freedom of Speech*, has been called the "Bible on civil liberties questions." In addition, Chafee was a good friend of Justice Frankfurter, who claimed no one in academia could match Chafee's influence on civil rights.²⁰

Before Chafee, the prominent test in free speech had been the "bad tendency" doctrine. Essentially, if speech had the potential for dangerous consequences, its protections under the First Amendment were at risk. These dangerous consequences need not be immediate, nor was any proof required that these dangerous consequences would certainly or even probably come to pass.²¹ In fact, it did not matter whether the expression was true or not. Chafee rejected "bad tendency." His writings emphasized the democratic importance of open debate and a search for truth in democratic society, which led him to distinguish free speech and open debate from other rights. Rejecting previous claims that freedom of speech ought to be in line with the narrower

²⁰ Graber 122

²¹ Curtis, Michael Kent. *Free Speech, "The People's Darling Privilege."* Durham: Duke University Press, 2000. 386.

original understanding of the Constitution, Chafee declared that speech of the 20th century would require more protections than speech did in the past.²²

The importance Chafee placed on free speech was central to his distinction between economic rights and civil liberties. He argued that free expression, unlike economic policy, is of serious social and political interest because it (1) provides the critical “search for truth” required in a democratic society and (2) is crucial for democratic processes to properly function. Unlike “bad tendency” doctrine, which disregarded whether statements were true or not, Chafee emphasized that any democratic society requires unlimited forums to pursue this crucial search for truth.²³ In addition to this “search for truth” concept, Chafee argued that the government ought to place an extremely high value on free speech because of its critical role in democratic processes. If people do not feel they can freely dissent, he claimed, ruling parties would be able to entrench their rule indefinitely and democracy would wane. Although he acknowledged that free speech had its time and place, he held that even in times of war and national crisis, the government must balance the dangers of a given expression against the importance of open debate.²⁴ Moreover, as the government struck this balance, it must bear in mind the great social utility and the First Amendment emphasis on free speech.²⁵ Essentially, Chafee’s framework outlined protections that required an exceedingly extreme interest to outweigh the importance of free speech.

²² Graber, Mark A. *Transforming Free Speech*. Berkeley: University of California Press, 1991. 140.

²³ Gower, Karla K. *Liberty and Authority in Free Expression Law*. New York: LFB Scholarly Publishing, 2002. 43.

²⁴ Feldman, Stephen M. *Free Expression and Democracy in America*. Chicago: University of Chicago Press, 2008. 270.

²⁵ Feldman 271

One example of Chafee applying his theories to a political situation is a 1922 article he wrote, in which he berated the New York state government for trying to close a socialist school. He claimed that the government should not be trusted to sift through expression and decide what speech to permit.²⁶ Just a few years earlier, in the cases such as *Schenck v. United States* and *Debs v. United States*, the government had convicted and jailed socialist anti-war dissidents under sedition laws. However, Chafee still defended the rights of a socialist school on principle. This example illustrates Chafee's scholarly framework in action. He was prepared to defend even the most unpopular expression on extremely sensitive political issues; to him, only excessively overwhelming government interests could justify censorship and punishment. The fear of a remote socialist revolution did not meet this difficult standard.

The emergence of Chafee's new framework for free speech was also well timed because during the interwar period, civil liberties enjoyed a renewed importance in society. At that time, there were strong political constituencies associated with the New Deal that favored free speech rights. The newfound significance of individual rights contributed to the development of a two-tiered Court by providing a relatively welcoming context for the advancement of civil liberties. As a result of frustration with the loss of individual rights during and after World War I, looming labor disputes, and other factors, political groups, governmental organization, and economic elites all placed new emphasis on civil rights protections.

Political groups voiced their disagreement with the state of civil rights during and after World War I. It was during this time that the ACLU was founded. This group, through coordinated education and litigation, attempted to make more robust the American public's

²⁶ Graber 154

desire for civil rights protection and growth.²⁷ The American Bar Association (ABA) also took action, creating its Bill of Rights Committee in 1939. The formation of these two bodies demonstrates how civil liberties were growing more important for powerful non-governmental organizations.

In addition, government bodies were also forming to re-examine individual rights in American society. By 1935, Wisconsin Senator La Follette had created Civil Liberties Committee. This group conducted a four-year study of individual rights and labor organization. The committee's findings bemoaned what it considered inadequate civil liberties contributing to labor's relative weakness against big business. By 1939, the Department of Justice had created special civil rights watchdog group, the Civil Liberties Unit.²⁸

Moreover, many political and economic elites favored an expansion of civil liberties during this period. However, with the advent of the New Deal, this Protestant elite saw its protected economic status slowly eroded by Progressive wealth distribution policies. Meanwhile, former political outsiders—leftists, Irish immigrants, Eastern European laborers, and other members of the working class—experienced a blossoming of their economic rights protected by the Federal government. Thus, these elites sought to entrench individual rights to defend their property and influential positions in society. Perhaps more telling of this situation was a statement of ABA president Frank Hogan to his fellow lawyers. He reminded them that civil liberties protected both “the downtrodden” and the “wealthy and privileged.”²⁹ Thus, the idea of growing civil liberties found allies not only in political groups and governmental bodies, but in the traditional Protestant elite as well.

²⁷ Feldman 364

²⁸ Feldman 364

²⁹ Feldman 366

The popularity of protecting and expanding civil liberties was crucial to creating a society that was relatively welcome the growth of individual rights. Among political groups, governmental bodies, non-governmental political bodies, and economic elites, the desire for more stringent protections for civil liberties, including free speech, was gaining sway. In conjunction with Chafee's framework for distinguishing these civil rights with economic rights, it makes sense that the interwar period would be the time when the US would develop a two-tiered system that distinguished the two issues.

VII. The Results of the New Deal and Development of the Two -Court: The Warren Court Applies Two-Tiered Jurisprudence to Free Speech

The developments of the New Deal settlement laid the groundwork for the Warren Court to expand speech protections. The Warren Court adopted the two-tiered jurisprudence of the New Deal and applied it to free speech, creating the hate speech protections that exist today. It also expanded individual rights protections in many broad categories, including segregation (*Brown v. Board*) and criminal procedure (*Miranda v. Arizona*). Although these rights expansions provoked some opposition, the division of that opposition and the strength of the Court's political allies guaranteed the Court would retain its authority. Having weathered this opposition, the Warren Court was able to make its decisions in *New York Times Co. v. Sullivan* (1964) and *Brandenburg v. Ohio* (1969). These two decisions are absolutely crucial to examine because together they protect hate expression in America today. *NYT* greatly expanded protections for libelous speech; *Brandenburg* expanded protections for hate speech specifically. Tracing the success of the Warren Court in expanding speech rights and continuing on the path forged during the New Deal will explain how America's current hate speech protections developed the way they did.

From 1940 to 1960, the Court debated how much extra protection it would give to free speech. The Warren Court answered this question: a lot. Utilizing the powers vested in it by the New Deal, the liberal majority on the Warren Court acted to defend political speech rights, even for unpopular communists. *Yates v. United States* (1957) is an important case to mention. Although it was only statutory, it signaled that the new Warren Court disagreed with the status quo for free speech. In this case, communists were being tried for violation of the Smith Act, a law that prohibited political activities commonly associated with communists and communist doctrine.³⁰ The Court, however, reversed the convictions. Its decision rendered the Smith Act useless with an evidentiary standard that would be exceedingly difficult to meet.³¹ However, the Court did not define broader protections until subsequent cases. *Yates* was only a signal, declaring that the Warren Court was ready to use its New Deal powers to defend individual rights.

Of course, *Yates* and other cases provoked opposition—the failure of this opposition is critical to understand because it demonstrates how after the New Deal, even a relatively popular and powerful coalition of Southerners segregationists and Midwestern national security hawks were not able to effectively challenge the Court’s authority. After the Court’s decision in *Brown v. Board*, many Southern segregationists organized in opposition to the Court’s rulings. On “Red Monday,” June 17, 1956, the Court decided four decisions that had protected the rights of communists (including the previously discussed *Yates*). These decisions infuriated Midwestern security hawks, who joined the Southerners in opposition to the Court. This opposition coalition took political actions to challenge the Court’s decisions authority. For example, in response to Court’s attempts to expand Communist civil rights, many of these politicians, along with the

³⁰ *Yates v. United States* 354 U.S. 298 (1957).

³¹ Powe, Lucas A. Jr. *The Warren Court and American Politics*. Cambridge: Harvard, 2000. 95

Court National Association of Attorneys General and ABA, publically attacked the Court and its decisions with media criticisms media.³² Moreover, in response to the Court's attempts to expand the civil rights of African-Americans, every Senator and representative from the Deep South, and the majority from other Southern states, signed the "Southern Manifesto." This document insinuated that the Court was misusing its power and even indirectly challenged the Court's authority.³³

Although this coalition was united in its disagreement with the Warren Court's decisions, it was internally divided. Many members of this opposition coalition did not necessarily challenge the Court's authority. Law professor Larry Kramer explains that for the opposition "the problem with the Warren Court was simply that its decisions were wrong. Their protests were directed at the substantive interpretations of the liberal Justices, whom they saw falsely using the Constitution as a cover to deal with matters that constitutional law did not in fact address."³⁴ That is, many members of this opposition to the Court disagreed only with the Court's decisions, not its authority to make those decisions.

In the face of this divided opposition coalition, the Court had powerful allies among liberals, the "winners" of the New Deal Settlement; as a result, these dissenting politicians were unable to diminish the Court's authority. As political scientist Martin Shapiro describes it, at that point the Court's activist majority was carrying out its activism on "behalf of the winners and not the losers of American politics."³⁵ That is, the Court was carrying out the wishes of the one of the individual rights liberals, who were still powerful in American politics. And so, when the

³² Powe 99

³³ Powe 61

³⁴ Kramer 222

³⁵ Shapiro, Martin. "The Supreme Court from Early Burger to Early Rehnquist." in King, Anthony. *The New American Political System*. Washington: AEI Press, 1990. 52.

opposition proposed various legislation to limit the Court's power, the Court's allies—non-Southern Democrats and moderate Republicans in Congress—defeated these proposals.³⁶ For the first time in history, liberals looked at the Court as an ally, not an enemy, and they defended it as such.³⁷ And so, when the opposition coalition tried to hem the power of the Warren Court, they were too internally divided to challenge these political allies of the Court.

Thus, the successes of this opposition were limited at best. The Court temporarily moderated its positions on certain national security and civil rights issues and even at times tried to avoid cases dealing with these and other sensitive issues.³⁸ In this way, the Court placated enough of the already divided opposition coalition to greatly diminish the threat it posed. As a result, the Court, with its allies, was able to maintain its power to aggressively defend civil liberties, even in the face of challenges to its authority. This is significant because it demonstrated that the Court's power to defend individual rights was not a fluke of the New Deal but a substantive and well-defended power it had gained.

This power having been retained, the Court finished the path it started with *Yates* by clearly defining a new standard for political speech protections. In two cases, *New York Times v. Sullivan* (1964) and *Brandenburg v. Ohio* (1969), it expanded protections that could apply to hate speech by creating a more specific definition of speech that might be denied First Amendment protections.

New York Times Co. v. Sullivan broadened protections for libel. In doing so, it also expanded protections for certain types of hate speech. In this case, the *New York Times* sought review of a libel case it had lost. A public official from the Alabama sued the *Times* for printing

³⁶ Powe 100-101

³⁷ Kramer 222

³⁸ Kramer 221

an ad containing some inaccuracies describing demonstrations taking place at Alabama State College. The Warren Court overturned the decision, holding that the First and Fourteenth Amendments protected *Times* from what it saw as minor deviations from the truth. It reasoned that the importance of free speech and a free press outweighed the charges brought against the *Times*. As a result, the Court outlined a new legal definition of libel: speech is legally libel only when there is “actual malice,” that is, if “the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false.”³⁹ This “actual malice” standard for libel also applies to hate speech. In the past, the Court had upheld the states’ right to create “group libel” laws to prosecute racist speech in a previous case, *Beauharnais v. Illinois* (1952). The broader protection of the “actual malice” standard applied to such “group libel” prosecutions. In such cases, the prosecution would have the burden of proving that the hate speech was made falsely or with reckless disregard for the truth, making it much more difficult to prosecute hate expression.

The second case to consider is *Brandenburg*. This case concerned an Ohio Ku Klux Klan member who had been tried and found guilty under the Ohio Criminal Syndicalism Law, which made illegal the activities of persons who “advocate or teach the duty, necessity, or propriety” of violent action “as a means of accomplishing industrial or political reform.”⁴⁰ The Court reversed the Ohio Supreme Court decision, protecting Brandenburg’s hate speech. It reasoned that the anti-Semitic and anti-black qualities of Brandenburg’s message did not forfeit his First Amendment protections because these protections apply to even the most unpopular political messages.

³⁹ *New York Times Co. v. Sullivan*. 376 U.S. 254 (1964).

⁴⁰ *Brandenburg v. Ohio*. 395 U.S. 444 (1969).

The Court in *Brandenburg* outlined a new, stricter definition of speech that would lose its First Amendment protections. The new speech standard that emerged in this case is the same one used today. The opinion explains this standard: “[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action to incite or produce such action.”⁴¹ By declaring that the intent *and* “likely” product of the speech must be “imminent lawless action,” the Court greatly expanded speech protections.

This expansion includes nearly all instances of hate speech. Proving one of these contentions is exceedingly difficult; proving both is almost impossible. Without an extremely heated situation, it is unlikely that the government can prove that lawless action is imminent. In fact, it was this stringent standard that protected the previously discussed hate speech in *Skokie*. The Village of Skokie could not prove that the intent and likely product of the Neo-Nazi march was imminent lawless action. Rather, the intent was plausibly a political message, and the result was merely the extreme discomfort for the listeners. Having not met the *Brandenburg* standard, the speech retained its First Amendment protections.

When the first liberal activist majority ascended to Court under Chief Justice Earl Warren, the judicial branch started to aggressively defend individual rights of political and racial minorities—it ultimately succeeded in defending and expanding those rights, which included political speech. The Warren Court built upon the developments of the New Deal by expanding speech rights and solidifying the two-tiered jurisprudence forged in that era. Although it faced opposition from states’ rights activists who challenged its authority, the Warren Court had powerful allies to defend it. As a result, these challenges did not successfully usurp the Court’s

⁴¹ *Brandenburg v. Ohio*. 395 U.S. 444 (1969).

authority. In the absence significant challenges to its authority, the Warren Court could expand protections for the civil liberties—including free speech—of its political allies. Even when it was not protecting its political allies (as in *Brandenburg*), the liberal democratic Vietnam and Civil Rights protests were still on the Court’s mind. And so, as political speech rights expanded, they grew to protect hate speech like that in *Skokie*. For these developmental reasons, the United States has the hate speech protections it has today.

VIII. The Canadian “Constitutional Moment”

Canada’s “constitutional moment” was the adoption of the 1982 Charter of Rights and Freedoms. This “moment” was largely the result of the Canadian national unity crisis, during which Quebecois separatism and other provincial drift threatened the integrity of the Canadian state. Although the Charter did empower the Supreme Court of Canada, it came about as the result of a different type of conflict than the US. Unlike the US New Deal Settlement, this crisis primarily concerned the provincial governments and the federal government, not merely the branches of the federal government. As a result, the provinces were in a prime position to demand compromises in return for ratifying the Charter. These compromises resulted in Charter with rights guarantees that were more flexible. Section 1, discussed earlier, provided the Court with a way it could permit certain rights to be violated if such violations were justified in a “democratic society.” Section 33 provided a legislature with the power to overrule SCC decisions. These sections were required to placate uneasiness with the growing power of the Federal government and SCC. The resulting flexibilities also created free speech jurisprudence that requires more significant rights balancing than in the US. This rights balancing system, in turn, allows the Court to uphold hate speech restrictions, despite the Charter’s guarantee of free expression.

The largest and best known part of Canada's national unity crisis was the Quebecois separatist movement. The movement traces its roots back to the mid-1960s. By October of 1970, it had grown more intense. Separatist terrorists kidnapped British Diplomat James Cross and kidnapped and murdered Quebec cabinet Minister Pierre Laporte. In responses, then Attorney General Pierre Trudeau re-implemented the 1914 War Measures Act, allowing the government to censor speech and suspend civil liberties to deal with the terrorists.⁴² The movement gained even more popular support by 1976. A member of the separatist Parti Quebec (PQ), René Lévesque, became the province's Premier. His platform included a promise to hold a referendum on Quebecois sovereignty.

The "national unity problem" was by no means a solely Quebecois issue. The Western provinces, especially Alberta, also had reasons to drift away from the Ottawa government. The Western provinces had long been on the political periphery of the federal politics, which central and eastern provinces dominated. However, this power dynamic shifted in 1973. While most areas in Canada suffered from the OPEC oil embargo that year, the Western provinces experienced an economic boom. As economic preponderance of Toronto waned, Calgary's blossomed. Political power, however, remained in the East.⁴³ Western provinces resented this preponderance of eastern Canada. Although there were no significant separatist movements, the discontent alone was alarming in the context of the Quebec situation.

Canada's national unity crisis was enough to inspire politicians to revive the failed attempts to patriate a Canadian constitution. These previous attempts aimed add a new act to complement the 1867 British North America (BNA) Act, which at that time formed the

⁴² Gibbons et al. "Canadian Federalism, the Charter of Rights, and the 1984 Election." *Publius* 15. No. 3 (1984). 156.

⁴³ Gibbins et al. 157

fundamental law of Canada. In 1971, these attempts came extremely close to success with the Victoria Charter, a set of amendments for the BNA act. However, then Prime Minister Pierre Elliott Trudeau could not convince then Quebec Premier Robert Bourassa to accept the document, and the negotiations fell apart. Bourassa feared that many Quebecois would oppose attempts to reinforce Quebec's association with the Ottawa government, an association that in its current weaker state was already in question.⁴⁴ However, over the next ten years, Quebecois separatism and other provincial drift continued. By 1982, Trudeau and other power centers in Canada pushed to reinvigorate attempts to patriate a Canadian constitution, believing an entrenched bill of rights could halt and even reverse the trend of provincial drift.

IX. Why the Charter Reemerged

The growing national unity crisis inspired the government to revitalize its attempts to patriate a constitution. Prime Minister Pierre Elliot Trudeau, a bilingual former mayor of Montréal, Attorney General, was an avid Charter advocate. Trudeau opposed Quebec separatism—as mentioned earlier, he was the PM who unleashed the War Powers Act in Quebec in 1970 to quell its growing separatist terrorism problem. He had originally been a supporter of past attempts to entrench individual rights. The national unity crisis, then, presented him with a chance to solve current Canadian problems by implementing his past political goal of a bill of rights with the Charter.

Trudeau and many Charter advocates claimed that the Charter could diffuse national unity issue by shifting individual rights debates such as the sensitive Quebec language issue to the national arena. That way, the provinces—instead of drifting away from Ottawa—could use Ottawa and its newly empowered Supreme Court to defend civil rights. For instance, while the

⁴⁴ Trudeau, Pierre Elliott. *Memoirs*. Toronto: McClelland & Stewart, 1993. 232-233.

Charter was being written, Anglophone and Francophone rights advocates were clashing in Quebec.⁴⁵ Quebec had passed laws promoting the French language through display ordinances mandating French be printed larger than English, and making French school compulsory for many children of Anglophone parents. In response, an Anglophone opposition arose, appealing to the federal government for protection of their rights. Such appeals frustrated pro-sovereignty factions, driving up their resentment of Ottawa. An entrenched Charter ratified by the provinces would provide a standard framework that would nip such disagreements in the bud. If certain language rights had been settled beforehand, then Quebec would neither need to nor have been able to pass the contested laws. Any contention with linguistic minority rights would have been resolved through litigation and a Charter rather than provincial legislation and lobbying. Because the national government would become a necessary player for rights protections, provincial debates would shift to national debates. This shift would reduce calls for self-determination from within provinces, namely Quebec, because they would be utilizing the federal system rather than resenting it. That is, because Charter would make the national government crucial to protecting rights, the provinces would seek out rather than defy the power of the federal government.⁴⁶ As a result, provincial drift could come to a halt and even reverse course.

Another reason for the rise of the Charter was that the Trudeau government was joined by two groups in Canada who had their own reasons for pushing for an entrenched bill of rights: interests groups and elites. These interest groups were an array of single-issue special interests, including everything from art societies to abortion groups. These groups favored the Charter because it would place certain rights outside the reach of the legislature. Doing so could offer

⁴⁵ Alexander, E. R. "The Supreme Court of Canada and the Charter of Rights and Freedoms." *The University of Toronto Law Journal* 40, no. 1 (1990): 22.

⁴⁶ Hirshl, Ran. *Towards Juristocracy*. Cambridge: Harvard University Press, 2007. 75.

them a less difficult way of repealing legislation unfavorable to their causes. With no Charter, interest groups would be forced to lobby the legislature to repeal a law. However, with the Charter, interest groups could argue that certain laws were unconstitutional. The Charter, then, offered a way to substitute litigation for lobbying. Indeed, just days after the Charter was ratified, interest groups took their issues to the SCC. Some examples include newly formed film groups challenging censorship laws and pro-abortion groups challenging abortion regulations.⁴⁷ These interest groups saw that more stringent protections of civil liberties could benefit them, so they pressured the federal government to establish such protections.

Elites were typically from the Anglo-Protestant establishment. They also pushed for the Charter as a way to enshrine individual rights and protect their privileged positions in society. There is consensus among many Canadian scholars that the Charter was successful in part because elites offered their support, fearing democratic processes might diminish their rights in the future.⁴⁸ These elites feared that provincial drift could result in provincial laws like Quebec's that would further infringe upon the status quo. By entrenching certain rights federally, they could safeguard their positions in society against whims of legislatures. These Protestant Anglophone elites especially feared the agitation from predominantly Catholic and Francophone Quebec. Similar to their US counterparts in the 1930s, they feared that majoritarian politics might reduce their power economically.

Thus, the Charter re-emerged because the national unity crisis had grown more intense, provoking desires to create an entrenched bill of rights from various power centers: the federal government under Trudeau, interest groups, and the Anglophone Protestant elites. Each power

⁴⁷ Gibbons et al. 163

⁴⁸ Hirshl 77

center had its own reasons for wanting the Charter: the government wanted unity, interest groups wanted the ability to litigate their issues, and elites wanted to safeguard their privileges.

X. The Canadian Compromise and Its Critical Differences: The Theoretical

Framework and Bargaining Position of the Provinces

At this point, one must ask: (1) in what ways were the US and Canadian “constitutional moments” different, and (2) what, if anything, did these differences contribute to the differences in their systems jurisprudence? To understand the answers to these questions, one must know how and why Section 1 of the Charter developed the way it did. As mentioned before, Section 1 creates a loophole for Charter rights guarantees, allowing the some laws to violate the Charter if they fit in a “free and democratic society.”⁴⁹ Understanding why Section 1 developed will allow one to understand why the two-part jurisprudence of Canada developed. In turn, understanding why Canada’s jurisprudence the two-part test developed will explain why Canada’s hate speech protections differ from America’s.

The previous section described and explained the development of the movement to create the Charter. However, two crucial differences in the American and Canadian “constitutional moments” must be addressed: (1) the different theoretical frameworks of the US and Canadian rights guarantees and (2) the different roles of provincial (or state) governments.

In the US, Zechariah Chafee had provided a theoretical framework for a two-tiered system of rights guarantees. Given the political context of Great Depression, it made sense that the US government was ready to adopt a theory that allowed federal government to take an enlarged role in the economy but still safeguard political rights. In Canada, however, the political context was different. Past attempts to entrench a bill of rights had failed because the provinces

⁴⁹ Canadian Charter of Rights and Freedoms. Accessed December 1, 2008
<<http://laws.justice.gc.ca/en/charter/#garantie>>.

rejected the propositions. Thus, when the government was hard pressed to create the Charter, it was ready to adopt a framework with which provinces would feel comfortable. This framework was that of Barry L. Strayer, a legal scholar who had designed Section 1 as a correction to Canada's previously failed constitutional attempts. As this section will discuss later, Strayer's framework became the successful compromise that included Section 1 in the Charter.

Another critical difference between the American and Canadian "constitutional moments" was the role of Canada's provincial governments; they were a main player in the Charter ratification process and used their important position to seek the compromises of Strayer's framework that that would safeguard their rights. In contrast, US state governments at first did not significantly challenge the Supreme Court's two-tiered system of jurisprudence. In the 50s and 60s, a movement against the Court did arise, but, as discussed earlier, it was unsuccessful in diminishing the Court's authority; by that point, the states, relative to their counterparts in Canada, were in no position to force the Court to grant concessions of power. The variation in the state-judiciary power dynamics was a crucial difference that resulted in Canada's different system of jurisprudence because the Canadian provinces were able to get Section 1 included in the Charter. The inclusion of Section 1 had the unintended consequence of creating Canada's unique approach to hate speech.

In spite of the efforts of elites and interests groups who would benefit from a more powerful Charter, the pro-Charter factions of Canadian society needed provincial approval for ratification. This fact gave the provinces a collective veto on the Charter, offering them a powerful position to demand concessions from the Federal government. Although many politicians recognized the value of a bill of rights, provincial governments and Parliament both feared losing their authority to the Supreme Court, many provincial leaders feared that the

Charter would place too much power in the federal government and undermine their provincial authority. So, they negotiated for loopholes to allow for a more flexible Charter. The concessions they received included specific sections in the Charter that weakened the document's entrenchment of individual rights, such as Sections 1 and 33. Section 1 was discussed earlier. Section 33, a so-called "notwithstanding clause," allows provincial and federal legislatures certain powers to override the SCC's decisions. Although pro-Charter politicians feared Section 1 and 33 would hamstring federal attempts to protect rights, the provinces demanded safeguards against an overly powerful Charter. Thus, these measures were necessary to convince the provinces to ratify the document.

Similar to the US—in which Chafee's theoretical framework provided a way to reconcile both deference to economics issues and the aggressive defense of civil rights issues—Canada's Professor Barry L. Strayer created a framework that could reconcile the desires of pro-Charter politicians and their interest group-elite supporters with the desires of hesitant legislatures to safeguard their power.

During the New Deal, American theorists and politicians were preoccupied with protecting individual rights. In contrast, throughout attempts to entrench a Canadian bill of rights, Canadian theorists were preoccupied with finding a middle ground that could defend individual rights but still safeguard legislative powers that had previously prevailed in the country. Naturally, in 1967 when then Justice Minister Trudeau called on constitutional law professor Strayer to develop a proposal for coming up with a way to create a Canadian Bill of Rights, Strayer outlined a version that had both rights guarantees and safeguards for legislative power. Specifically, he acknowledged that the provincial and federal legislatures would need more flexibility if they were ever to approve the Charter: "[One] advantage of a constitutional

bill over the Canadian Bill of Rights of 1960 [was including] the possible need for limitations on rights of the sort ultimately embodied in Sections 1 and 33 of the Charter.”⁵⁰ That is, Strayer altered the previous constitution proposals to include provisions that would provide safeguards for provincial authority while only minimally undermining the Charter’s rights guarantees.

However, it was not until the national unity crisis had grown more severe that enough pro-Charter sentiment started to reemerge. By 1980, the Parti Quebec held a referendum on the separatism issue. Although the separatists lost, this extreme act was enough to galvanize Ottawa into action.⁵¹ The Trudeau government moved to hold constitutional conferences to address the problem of provincial drift. During the 1981 negotiations that ensued between the provinces and federal government, Strayer’s framework resurfaced. Provinces demanded a more flexible Charter within this framework. The leaders of the provinces were particularly vocal in their push for more flexibility in areas of legislation about which reasonable people might disagree.⁵² Specifically, Saskatchewan’s Alan Blakeney and Manitoba’s Sterling Lyon were both instrumental in these negotiations. They stressed that the Charter rights guarantees would be a dead letter without provincial support, and that the provincial governments wanted to safeguard their legislation concerning less concrete issues. So the Charter, they argued, ought to be limited and flexible so that if a province had vehement opposition to a judicial decision, that province could take action to reject the decision.⁵³ Eventually, the sections presented in Strayer’s framework, Section 1 and Section 33, were added to the Charter. Section 1 would allow exceptions to the rights guarantees in the Charter, making rights balancing necessary for the

⁵⁰ Department of Justice of Canada. Accessed December 13, 2008.
<<http://canada.justice.gc.ca/eng/dept-min/pub/jc/vol2/no2/page4.html>>.

⁵¹ Gibbons et al. 156

⁵² Gibbons et al. 167

⁵³ Gibbons et al. 168

Supreme Court. As seen in *Keegstra*, these exceptions would be paramount in upholding some laws that might conflict with rights guaranteed in the Charter. As mentioned before, Section 33 would provide legislative overrides to SCC decisions. Section 33 would be crucial in the future, when Quebec's parliament would use it to reject the SCC's later decisions concerning language rights in late 80s.

Although Trudeau in theory opposed these measures—he and other pro-Charter groups feared that the Charter might grow too weak if hamstrung by loose language and legislative overrides—in practice they were crucial to achieve necessary provincial approval. Unlike their US counterparts, the Canadian provinces occupied a powerful position in the process of empowering their Supreme Court to defend individual rights. Of course, the provinces were not all-powerful. They too had to agree on what they demanded from the federal government, lest their collective bargaining position weaken. For example, even after the additions of Sections 1 and 33 to the Charter, Quebec still refused to ratify the document. This Quebecois dissent notwithstanding, the Federal government pushed the legislation through with the approval of all the other provinces. Although they were not all-powerful, this Charter negotiation process still demonstrates the favorable position that the provinces occupied. Because they were necessary to ratifying the Charter, they were able to draw concessions from the federal government in the form of a more flexible Charter using Strayer's framework.

In contrast to the well-positioned Canadian provinces that successfully drew compromises from their federal government, in the US, state governments were not successful in demanding similar compromises from the US government. The New Deal Settlement had implied that the Court had relatively sweeping powers to defend civil rights. When a new opposition coalition started challenging the Court in 50s and 60s, it was too weak and internally

divided to force a compromise, allowing the Warren Court to expand the judiciary's protections of civil liberties. Unlike the Canadian provinces, which were necessary to ratification and thus well positioned to negotiate compromises for a flexible Constitution, the US states were already bound to the Constitution. They were in no position make demands on the Court.

XI. Effects of the Compromise: Two-Step Jurisprudence Emerges in *Oakes*

The results of Canada's "constitutional moment" are visible in the Oakes Test, which defines the criteria by which the government may invoke Section 1 of the Charter to override the Charter's guaranteed rights. Similar to *Carolene Products* for the United States, the case *Regina v. Oakes* (1986) put into law the results of the 20th century "constitutional moment." The Oakes Test is crucial to understand in the context of hate speech laws because such laws interfere with the free expression rights guaranteed by the Charter. Whenever the SCC evaluates a hate speech case censorship case, it must use the Oakes Test to decide whether it will uphold hate speech laws in question.

Regina v. Oakes (1986) concerns David Edwin Oakes, who was accused and convicted of narcotic possession. Under Section 8 of the Narcotic Control Act, conviction of narcotic possession presumes the intent of possession was trafficking unless the defendant can prove otherwise. Oakes rebutted that Section 8 violated the presumption of innocence guaranteed by Section 11(d) of the Charter. In response to this claim, the SCC rejected Oakes' argument and defined the specific criteria that allowed the government to invoke Section 1. The SCC outlined two criteria for Section 1 to allow an override Charter rights guarantees. Firstly, "the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom." To ensure this, "[a]t a minimum" the objective of limiting a right should be "pressing and substantial in a free and democratic

society.” Secondly, “the party invoking [Section 1] must show the means to be reasonable and demonstrably justified” with a three-part proportionality test. The three criteria for the second part of the Oakes test are the following:

- (i) “[T]he measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.”
- (ii) “[T]he means should impair the right in question as little as possible.”
- (iii) “[T]here must be a proportionality between the effects of the limiting measure and the objective.” That is, the more severe the limitation, the more important the objective must be.

The SCC held that Parliament’s objective of suppressing drug trafficking and its negative effects was “pressing and substantial” enough to justify the limitation of rights. It also determined that the measures employed were proportional and fair. With both criteria of the newly defined Oakes Test met, the SCC upheld Section 8 of the Narcotic Control Act under Section 1 of the Charter. The Oakes Test demonstrates the results of the Charter ratification compromises and loopholes of Strayer’s framework in action. In this case, the SCC used Section 1 to uphold a law that would have otherwise violated the Charter. Thus, the *Oakes* decision clearly defined how the legislature could violate the Charter’s provisions with the newly created Oakes Test.⁵⁴

The creation of the Oakes Test is crucial to understand because it defined the second part of Canada’s current two-part jurisprudence. First, the SCC decides whether legislation violates a Charter right. Then, it determines whether that violation is permissible with the Oakes Test. Before *Oakes*, the application and use of Section 1 of the Charter was undefined. Afterward, the SCC had a clear test to decide whether Charter rights violations were permissible. This two-part

⁵⁴ *Regina v. Oakes*. Supreme Court (Canada), 1 S.C.R. 103 (1990).

jurisprudence is the way in which the SCC decided *Keegstra*, discussed earlier. First, the SCC determined that Alberta had indeed infringed upon his Charter right of free expression. However, it then determined that this infringement was justified in a free and democratic society under the criteria of the Oakes Test.

XII. Conclusion

This paper attempts to provide an explanation of how 20th century legal developments affected the current differences of American and Canadian approaches to hate speech. Specifically, it seeks to answer how these developments affected American hate speech protections by contrasting America's 20th century "constitutional moment," the 1937 New Deal Settlement, with that of Canada, the 1982 ratification of the Charter of Rights and Freedoms.

In America, a two-tiered method of judicial review emerged in the aftermath of the New Deal. Using this two-tiered method, the Supreme Court yielded to Congress on all issues except civil liberties. Concerning civil liberties, the Court was more aggressive in defending individual rights. The states were not well positioned nor did they have significant motivation to obstruct the provisions of the New Deal Settlement in 1937. The Court had never had a liberal activist majority and had a long history of conservative and even reactionary decisions. Moreover, the preponderance of civil liberties at that time gave many states reason to support and Court that could more strongly defend these rights. It was not until the advent of the Warren Court and its subsequent defense of civil liberties for blacks and communists that opposition arose. However, that opposition was internally divided on the question of whether to challenge only the Court's decisions or the Court's authority to make those decisions. Weak from its divisions, this opposition also faced the newfound political allies of the Court, namely non-Southern Democrats

and moderate Republicans. The result was a failed attempt by this opposition to revoke the Court's power to aggressively defend civil liberties. The Warren Court, having retained its power to defend civil liberties, was later able to decide *New York Times Co. v. Sullivan* and *Brandenburg v. Ohio*, in which it outlined criteria for restricting free expression that excluded most hate speech. As a result, the Supreme Court still aggressively defends free speech, even hate speech, under the stringent standard set by these cases.

In contrast to America, Canada developed a two-step method of jurisprudence. This two-step method emerged as a result of the ratification of the Canadian Charter of Rights and Freedoms. An unintended consequence of this two-step jurisprudence was the ability of the SCC to uphold hate speech laws in spite of the Charter's hate speech guarantees. In the 1980s, the Trudeau government, concerned with a national unity crisis, wanted to ratify an entrenched bill of rights that it believed would help reverse provincial drift. To ratify this bill of rights, the Trudeau needed the approval of the provinces. Thus, the provinces were well placed to demand compromises from the federal government. Using the framework of Barry L. Strayer, this compromise emerged in the form of certain sections of the Charter that created loopholes and legislative "notwithstanding" powers. The provinces and parliament viewed these sections as a way to defend their authority from judicial intrusion. Later, in the case *Regina v. Oakes*, the SCC specifically defined how it would apply Section 1's loophole to the Charter's rights guarantees. The resulting Oakes Test specifically defined criteria by which legislation may violate Charter rights. Thus, in cases such as *Regina v. Keegstra*, the SCC was able to uphold anti-hate speech legislation even though it conflicted with the Charter's guarantee of free expression.

Interestingly, Canada's Section 1 does not have a perfect record of defending hate speech laws. In some recent cases, the SCC has struck down anti-hate speech regulation that it held did

not meet the criteria of the Oakes Test.⁵⁵ This begs the question of whether Canada's rights guarantees will evolve over time to include hate speech like America's did. Perhaps Canada, like the America, will go through another national crisis that will alter the definition of the Oakes Test. Such an alteration would drastically change the SCC's approach to hate speech. It will be interesting to see if the SCC will start protecting hateful expression or it will continue to uphold anti-hate speech laws through the next century.

⁵⁵ Krotoszynski 66

Works Cited

- Alexander, E. R. "The Supreme Court of Canada and the Charter of Rights and Freedoms." *The University of Toronto Law Journal* 40, no. 1 (1990).
- Brandenburg v. Ohio*. 395 U.S. 444 (1969).
- Canadian Charter of Rights and Freedoms. Accessed December 1, 2008.
<<http://laws.justice.gc.ca/en/charter/#garantie>>.
- Choper, Jesse H. et al. *Constitutional Law*. (2008).
- Curtis, Michael Kent. *Free Speech, "The People's Darling Privilege."* Durham: Duke University Press, 2000.
- Department of Justice of Canada. Accessed December 13, 2008.
<<http://canada.justice.gc.ca/eng/dept-min/pub/jc/vol2/no2/page4.html>>.
- Dorsen et al. *Comparative Constitutionalism*. St. Paul: Thomson West, 2003.
- Feldman, Stephen M. *Free Expression and Democracy in America*. Chicago: University of Chicago Press, 2008.
- Gibbons et al. "Canadian Federalism, the Charter of Rights, and the 1984 Election." *Publius* 15, no. 3 (1984).
- Gower, Karla K. *Liberty and Authority in Free Expression Law*. New York: LFB Scholarly Publishing, 2002.
- Graber, Mark A. *Transforming Free Speech*. Berkeley: University of California Press, 1991.
- Hirshl, Ran. *Towards Juristocracy*. Cambridge: Harvard University Press, 2007. 75.
- Jenkins, Roy, and Richard E. Neustadt. *Franklin Delano Roosevelt*. New York: Times Books, 2003.
- Kramer, Larry. *The People Themselves*. Oxford University Press, USA, 2005.

Krotoszynski, Jr., Ronald J. *The First Amendment in Cross-Cultural Perspective*. New York: NYU, 2006.

New York Times Co. v. Sullivan. 376 U.S. 254 (1964).

Powe, Lucas A. *The Warren Court and American Politics*. Cambridge: Harvard University Press, 2000.

Regina v. Keegstra. Supreme Court (Canada), 3 S.C.R. 697 (1990).

Shapiro, Martin. "The Supreme Court from Early Burger to Early Rehnquist." in King, Anthony. *The New American Political System*. Washington: AEI Press, 1990. 52.

Statistics Canada. "Visible minority groups, 2006 counts, for Canada, provinces and territories - 20% sample data." <<http://www12.statcan.ca/english/census06/data/highlights/ethnic/pages/Page.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Count&StartRec=1&Sort=2&Display=Page>>.

Trudeau, Pierre Elliott. *Memoirs*. Toronto: McClelland & Stewart, 1993.

United States v. Carolene Products Co. 304 U.S. 144 (1938).

The Village of Skokie v. National Socialist Party of America et al. 51 Ill. App. 3d 279 (1977).

Yates v. United States. 354 U.S. 298 (1957).