Clearly Canadian? *Hill v. Colorado* and Free Speech Balancing in the United States and Canada

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INTRODUCTION

On June 28, 2000, the United States Supreme Court handed down its decision in *Hill v. Colorado*,[1] upholding a Colorado statute that severely limits the activity of protestors or "sidewalk counselors" within one hundred feet of the entrance to a health care facility.[2] Released on the same day on which the Court struck down Nebraska's ban on "partial birth" abortions,[3] the decision was, unsurprisingly, treated as primarily about the scope of the abortion right.[4] But *Hill* was only partially about abortion; primarily, the case addressed the scope of the First Amendment free speech guarantee. While much surely will be said concerning *Hill*'s impact on abortion rights, we might also ask what the case suggests about how the Court may analyze free speech claims in the future. Does the presence of the abortion issue make *Hill* an anomaly, or is the case instead consistent with trends in First Amendment interpretation, and therefore instructive about the future?

Much of the debate concerning proper methods of constitutional

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1. 120 S. Ct. 2480 (2000)

2. *Id.* at 2484. The statute at issue was Section 18-9-122(3) Colo. Rev. Stat. (1999).

3. *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

4. *See, e.g.*, headlines reporting the decisions, Edward Welsh and Amy Goldstein, "Supreme Court Upholds Two Key Abortion Rights," WASH. POST, June 29, 2000, at A1. In his roundup of First Amendment cases for the National Law Journal's annual analysis of the Supreme Court's recent term. Prof. Bernard James did not mention *Hill*. Bernard James, "No Landmarks Among First Amendment Cases," NAT. L.J., August 7, 2000, at A27.

interpretation can be seen as a clash between those advocating adherence to absolute principle, and those contending that constitutional decision making must be a process of balancing competing interests. The scope of the debate is familiar by now: the dangers of indeterminacy versus the need for flexibility; the need to consider the empirical consequences of decisions versus the danger of a "slippery slope" eroding rules that have proven their practical value. Neither side of the debate has come close to vanquishing the other, in courtrooms or in the academic literature.

Perhaps this stalemate endures because the arguments on each side are evenly balanced, or perhaps it is due to the fact that the choice is essentially one of value preferences not subject to refutation. It is also possible, however, that the persistence of the dispute between absolute principle and balancing is a consequence of placing too much stock in the semantics of the distinction. If both balancing and adherence to principle are, to some extent, unavoidable, then the notion that one must choose between them becomes questionable at best. Further, if it becomes apparent that absolute principles emerge as the product of a process that suspiciously resembles balancing, and that conversely, balancing inevitably is done in the shadow of these principles and with the understanding of their origin in years of empirical testing, then the wall between the two approaches hardly seems sturdy.

One way to examine differences between the balancing and anti-balancing approaches is to compare the experience of Canadian courts in interpreting and applying the provisions of the Canadian Charter of Rights and Freedoms with the analogous work of the United States Supreme Court in its constitutional cases. The Canadian Charter explicitly instructs courts to engage in a form of balancing.[5] One might say that Canada has clearly rejected the idea of absolute principles. Or, one might say that Canada has adopted balancing itself as a principle, or at least a method that can be described as principled.

In contrast, the language of the United States Constitution often suggests the application of absolutes, and this has allowed American critics of balancing to charge that trimming the sails of principle is a

5. Part I of the Constitution Act, 1982, Canada Act, 1982, ch. 11, sched. B (U.K.)[hereinafter, Canada Act, 1982]. In pertinent part, Section One 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."

betrayal of the Constitution's purpose as a firm bulwark against governmental abuse. Yet even critics of balancing almost inevitably discover that they must sometimes resort to it. Sometimes this is done openly, with a sigh of regret that pragmatic concerns make the application of absolutes impossible. Other times this is accomplished through semantic gymnastics — by redefining the "absolute rule" to narrow it in largely the same way that balancing itself would.

In United States constitutional law, advocacy for absolute adherence to principle has been most vigorous and has had its most lasting effect on First Amendment free speech issues. While the Supreme Court has avoided speaking in absolutes, it has often constructed First Amendment tests that come very close to absolute rules, at least on their face.[6] Within such a free speech jurisprudence, *Hill* does seem somewhat anomalous. But this article will attempt to demonstrate that the contrast between an analysis that explicitly balances rights and interests and one that, on the surface, rejects such an approach is far less drastic than might be expected. As we will also see, however, this does not mean that the debate lacks significance. The level of enthusiasm that one has for judicial balancing may well have an effect on how that balancing proceeds. Even balancers will need to adopt at times some strategies from the anti-balancing camp in order to make their conclusions palatable.

An examination of United States and Canadian approaches to free speech issues reveals several things. First, constitutional language is only a limited restraint on the judicial function, at least in controversial cases. Absolute language does not preclude a court from balancing interests, nor does an explicit command to balance preclude a court from drawing bright lines. Second, the way in which balancing is done will differ depending on a society's history and expectations concerning the relative importance not only of individual rights and social interests, but also of the role of courts and legislatures in the lawmaking process. Third, while balancing tests are often criticized for giving courts too much power, they can just as easily be employed to bolster the final authority of the legislature.

6. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931) (articulating the extremely high standard for sustaining prior restraints) ([T]he protection . . . is not absolutely unlimited. But the limitation has been recognized only in exceptional cases."). *See also,* Brandenburg v. Ohio, 395 U.S. 444, 447, 450 (1969) (setting forth a vigorous version of the clear and present danger test)("[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 law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

And finally, we will see that *Hill* may not be anomalous at all, but rather that it signifies, along with other developments, a perhaps unacknowledged drift on the part of the United States Supreme Court toward the use of Canadian-style balancing in free speech cases, and away from bright-line tests with sharply-drawn categorical boundaries.

This article will begin with a description of *Hill v. Colorado* and a brief description of the traditional approach of the United States Supreme Court to free speech issues. Then this article will examine the basic structure of the Canadian Charter of Rights and Freedoms, focusing on its similarities to and differences from the Bill of Rights of the United States Constitution. This is followed by an examination of United States and Canadian responses to several current, controversial free speech issues. Finally, this article will compare recent Canadian and United States free speech decisions. It will analyze what they reveal about the role of balancing tests in constitutional rights cases and what *Hill* might say about the United States Supreme Court's overall approach to First Amendment claims, beyond the point at which they intersect with abortion rights.

I. *HILL v. COLORADO* — WRESTLING WITH LONGSTANDING UNITED STATES APPROACHES TO FREE SPEECH

The language of the First Amendment seems both clear and absolute. Congress and the states, through the amendment's incorporation into the Fourteenth Amendment,[7] shall make no law abridging freedom of speech.[8] But from the earliest days of First Amendment jurisprudence,[9] the Supreme Court has recognized that the provision cannot mean precisely what it says. Pragmatic concerns have led the Court to trim the amendment in order to accommodate pressing governmental interests. Even Justice Hugo Black, perhaps best remembered for his belief that the amendment was to be regarded as an absolute, was able to uphold government regulation in some cases by defining "speech" narrowly enough to eliminate some

7. In *Gitlow v. New York*, 268 U.S. 652 (1925) and *Whitney v. California*, 274 U.S. 357 (1927), the Supreme Court first applied the free speech guarantees to the states through the substantive part of the Fourteenth Amendment Due Process Clause, although, in each case the Court upheld the state statute in question.

8. U.S. CONST., amend. I.

9. *Schenck v. United States*, 249 U.S. 47, 51 (1919) is generally regarded as the starting point of significant Supreme Court free speech jurisprudence.

forms of expression from the scope of the amendment.[10]

But while Justice Black's call for First Amendment absolutism was never accepted by his judicial colleagues, the Court did have to address the strong language of the provision. If absolute protection of speech was to be rejected in favor of some sort of balancing of the right against government interests, then how was the balance to be struck? For the most part, the Court answered this question by creating categories of speech and of government action, and adopting tests that were more or less protective of each speech category. Some categories of cases would call for the application of strict scrutiny, a test that generations of lawyers came to regard as nearly insurmountable; others would call for the application of the low-level "rational basis" test, one that government was almost always assured of satisfying. Strict scrutiny or some variant of it would be appropriate where government attempted to censor[11] or punish speech,[12] or regulate it on the basis of its content;[13] low-level scrutiny would be used when government regulated in a "content-neutral" way. In addition, certain categories of speech were identified as being beyond the scope of First Amendment protection.[14] Through this process of categorization, the Court has been able to reconcile absolutism — or the near-absolutism of classic strict scrutiny — with the practical need to balance rights and interests (in the process of categorizing, rather than balancing in each case).

It is against this (obviously simplified) background that the Supreme Court addressed *Hill v. Colorado*. Hill and other "sidewalk

10. *See* Cohen v. California, 403 U.S. 15, 27-8 (1971) (Blackmun, J., dissenting) where Justice Black agreed that wearing a jacket with a vulgar slogan is "conduct" rather than speech; Tinker v. Des Moines School District, 393 U.S. 503, 515-26 (1971) (Black, J., dissenting) where Justice Black maintains that wearing an armband as part of an antiwar protest by public school students may be prohibited; Street v. New York, 394 U.S. 576, 594-605 (1969) (Warren, C.J. dissenting) where Justice Black joined in an opinion maintaining that flag desecration may be punished. *See also,* HUGO BLACK, A CONSTITUTIONAL FAITH 45-63 (1968) for a statement setting forth Justice Black's absolutism. and Barenblatt v. United States, 360 U.S. 109, 143 (1959) (Black, J., dissenting) for Justice Black's specific rejection of "balancing."

11. *See Near*, 283 U.S. at 721; New York Times Co. v. United States, 403 U.S. 713 , 714 (1971).

12. *See Brandenburg*, 395 U.S. at 448; Hess v. Indiana, 414 U.S. 105 (1973); NAACP v. Claiborne Hardware Co., 458 US. 886 (1982).

13. *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988) (content-based forum restriction subjected to strict scrutiny); Police Dep't. of Chicago v. Mosley, 408 U.S. 92 (1972)(same).

14. *See infra* notes 64-132 (commercial speech), notes 162-178 (hate speech); notes 220-232 (obscenity/pornography) with accompanying text.

counselors"[15] challenged the constitutionality of a Colorado statute[16] that, among other things, prohibited anyone within one hundred feet of the entrance of a health care facility from approaching another person, without consent, in order to distribute leaflets, display a sign, or "engage in oral protest, education, or counseling."[17] The statute did not explicitly refer to anti-abortion protesters, although activity outside the premises of abortion providers was the obvious cause of its enactment. Colorado's legislature stated the purposes of the act and explicitly spoke of the need to strike a balance: "the exercise of a person's right to protest or compel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner."[18]

Standard First Amendment analysis, as outlined above, calls for quick categorization of the restriction at issue. The statute does not bar or punish a message wherever it is delivered, therefore it should be analyzed as a restriction on the place and manner of delivery.[19] The crucial classification decision was whether the statute should be regarded as sensitive to the content, and even the viewpoint[20] of the speaker and therefore, subject to the near absolute condemnation that follows the application of strict scrutiny; or as content-neutral, subject to a much less stringent test.

The majority, focusing resolutely on the language of the statute, found it content-neutral.[21] After all, the statute applied to all viewpoints and all health care facilities.[22] Having reached this conclusion, the Court proceeded to apply the standard found in *Ward*

15. 120 S. Ct. at 2485 ("Sidewalk counseling" consists of efforts "to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature.").

16. COLO. REV. STAT. § 18-9-122(3) (1999). Petitioners did not challenge the narrower provisions of subsection (2), which makes it a misdemeanor to "knowingly obstruct[ ], detain[ ], hinder[ ], impede[ ], or block[]" entry or exit from a health care facility. 120 S. Ct at 2485.

17. COLO. REV. STAT. § 18-9-122(3) (1999).

18. COLO. REV. STAT. § 18-9-122(1) (1999).

19. *See* 120 S. Ct. at 2494 (characterizing the statute as a time, place or manner restriction) and 2503-06 (Scalia, J., dissenting) (same, but arguing that it is not content-neutral).

20. *See* Perry Educ. Assoc. v. Perry Local Educators Assoc., 460 U.S. 37, 63-66 (1983). A government regulation that is viewpoint sensitive does not simply discriminate on the basis of the subject matter of a message, but goes further and discriminates against a particular viewpoint on an otherwise permitted subject.

21. 120 S. Ct. at 2491.

22. *Id.* at 2490.

v. Rock Against Racism.[23] This test, less severe than strict scrutiny, demands only that the government restriction be "narrowly tailored to serve a significant government interest,"[24] and leave open "ample alternative channels of communication."[25] Citing earlier cases that recognized the government's interest in protecting "captive audiences" from unwelcome messages, the Court found that Colorado's purpose "to protect those who seek medical treatment from... potential physical and emotional harm"[26] was valid and significant. The restrictions of the statute satisfied the requirement of narrow tailoring.[27]

The dissenters took issue with the Court's characterization of the statute as content and viewpoint neutral.[28] Looking beyond the language of the statute to the realities behind the enactment, they saw a provision aimed entirely at those who opposed abortion.[29] In light of this, they argued, the proper standard was the highest form of strict scrutiny, and since the statute banned polite, quiet, considerate "sidewalk counseling" as well as disturbing, offensive, and loud expression, the statute should be invalidated.[30]

The outcome of *Hill* was largely determined by the choice of the

23. 491 U.S. 781 (1989).

24. *Id.* at 791.

25. *Id.*

26. 120 S. Ct. at 2494. The Court cites, among other cases, *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (protecting a "captive audience" justifies ban on political advertising on public bus system); *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (restrictions on drive-in movie theaters went too far in protecting unwilling viewers) and, most strongly, *Frisby v. Schultz*, 487 U.S. 474 (1988). *Frisby* upheld an ordinance prohibiting targeted picketing of a particular residence. Although the statute in *Frisby* was also motivated by anti-abortion protests, the Court also treated the ordinance as content-neutral. The Court in *Hill* points out that both Justice Scalia and Justice Kennedy, two of *Hill*'s three dissenters, joined in the decision in *Frisby*. *See* 120 S. Ct. at 2494.

27. 120 S. Ct. at 2494.

28. 120 S. Ct. at 2503-4 (Scalia, J. dissenting).

29. *Id.* at 2503 ("I have no doubt that this regulation would be deemed content-based *in an instant* if the case before us involved antiwar protestors, or union members seeking to 'educate' the public about the reasons for their strike.").

30. *Id.* at 2511. Justice Scalia puts forward a hypothetical counselor who "wish[es] to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: 'My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you?'" *Id.* The majority obviously had a different mental picture of sidewalk counseling. They cite to testimony before the Colorado legislators that "protestors 'are flashing their bloody fetus signs. They are yelling 'you are killing your baby,' they are talking about fetuses and babies being dismembered, arms and legs torn off....' " 120 S. Ct. at 2486 n.7.

appropriate test to apply. If strict scrutiny had been applied, which in its strongest form is akin to a per se test of invalidity, then no doubt the dissenters were correct; the statute should fall. But the rejection of strict scrutiny and the application of the *Ward* standard provided the Court with much more flexibility. The *Ward* test, which does not preclude a court from striking the balance either for or against any but the most trivial or severe restrictions, would seem to be little more than a statement that the Court is authorized to engage in case-by-case balancing with all of its virtues and vices.

While the Colorado statute is seemingly content neutral, surely the dissenters are justified in seeing it as primarily, if not exclusively, concerned with the actions of advocates of a particular viewpoint. Yet to concede that point, under the standard rules applied to First Amendment categories, would mean that the Court would have to disregard the equally obvious fact that the statute is far from a severe restriction on general advocacy of anti-abortion views and that protecting people in stressful environments from unwanted harassment is hardly an obviously illegitimate government purpose. The majority recognized that this case seems to cry out for some sort of balancing, as opposed to an absolute or near-absolute approach, but in order to apply such a test, the Court had to strain within the boundaries of currently accepted First Amendment categories.

The *Hill* dissenters have little doubt about what is going on here. In their view, the majority's nearly fanatical obsession with protecting the abortion right has led to an outcome that flouts all accepted free speech principles.[31] But is *Hill*'s application of a flexible form of balancing entirely inconsistent with past and contemporary free speech jurisprudence? Or is it perhaps indicative of a trend toward such balancing? And just as important, if such a trend exists, to what extent is it a threat to important free speech values?

One helpful way of exploring these questions is to compare the free speech analysis of the United States under the First Amendment with the free speech analysis in Canada, a nation with which the United States shares much in common, yet where the system of judicial review expressly instructs courts to apply balancing principles.

31. *See id.* at 2503 (Scalia, J., dissenting) ("[*Hill*] is patently incompatible with the guarantees of the First Amendment," and it is part of "the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of [abortion].").

II. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A BRIEF INTRODUCTION

Before discussing specific free speech issues, it will be helpful to briefly sketch the general approach of the Canadian Constitution[32] to issues involving claims of individual rights. While many of the rights enumerated in the Canadian Constitution are the same found in the United States Constitution, there are significant differences in the way in which those rights are to be weighed and enforced. The Canadian Constitution was built upon the British foundation of parliamentary supremacy.[33] The legislature, then, is regarded as the final guardian of individual rights; unelected officials will hold subordinate, if still significant, roles.

The foundation document of Canadian constitutionalism, the British North America Act of 1867,[34] addresses the division of authority between national and provincial legislatures. Canadian courts over the years have invalidated legislation on the grounds that either level of government has invaded the powers of the other.[35] But, consistent with British notions of parliamentary supremacy, the Act does not limit legislative power when exercised by the proper unit of government.[36]

In the years following World War II, many Canadians became troubled by the sole reliance on ordinary legislation for the protection of individual rights.[37] This concern along with questions of federalism

32. The "basic framework of the Canadian constitution" which transferred, in stages, sovereign power from Great Britain to its former colony, consists of three British statutes: the Colonial Laws Validity Act of 1865, 28 and 29 Vict., Ch. 63 (U.K.); the British North American Act of 1867, 30 and 31 Vict., Ch. 3 (U.K.); and the Statute of Westminster of 1931, 22 George V., Ch .4. *See,* G. GALL, THE CANADIAN LEGAL SYSTEM 46 (1977). These statutes were joined in Part I of the Constitution Act, 1982, Canada Act, 1982, ch. 11, sched. B [hereinafter Canada Act, 1982], which contains the Charter of Rights and Freedoms.

33. The classic defense of parliamentary supremacy was put forward by A. Dicey, who contended that "the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the sovereign and the wishes of the subjects...." A. DICEY, THE LAW OF THE CONSTITUTION 83 (10th ed. 1959). *See also,* Roderick MacDonald, *Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice,* 39 U. FLA. L. REV. 217, 220-30 (1987) (discussing the legal culture underlying the Canadian doctrine of parliamentary supremacy).

34. *See* GALL, *supra* note 32.

35. *See generally* PETER HOGG, CONSTITUTIONAL LAW OF CANADA 29-46 (1985).

36. *See id.* at 197-203.

37. In 1960, Canada enacted a statutory Bill of Rights, an Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 1960, 8-9 Eliz. II, ch. 44 (Can. Stat.) [hereinafter Bill of Rights] § 1(c) – (f), which recognized most of the liberties found

and the desire to sever the final vestiges of colonial control by Great Britain (still extant in the BNA Act)[38] led to the adoption of the Constitution Act of 1982.[39] Adjusting the proper balance of power between the provinces and the national government, especially in light of Quebec's concern for the preservation of its French language and culture, was the most salient political issue in the constitutional debate.[40] But it was the adoption of the Charter of Rights and Freedoms[41] that most significantly altered the role of the judiciary.

Individual rights guarantees are set out in Sections Two through Twenty-Three of the Charter. Section Two protects those freedoms guaranteed by the First Amendment to the United States Constitution: freedom of religion, expression, assembly, and association.[42] Sections Three through Five deal with "democratic rights," protecting the right to vote and requiring that the House of Commons and provincial assemblies be elected at intervals of no more than five years.[43] Section Six secures "mobility rights," roughly comparable to what United States courts have called the right to travel.[44]

Sections Seven through Fourteen deal with "legal rights." Section Seven guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[45] Sections Eight through Fourteen deal with specific matters of criminal procedure, including the right to counsel,[46] security against unreasonable searches,[47] and prohibition of cruel and unusual punishment.[48]

Section Fifteen gives every individual "the right to the equal

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in the United States Bill of Rights. It had, however, most of the attributes of an ordinary act of Parliament; it could be repealed or amended through normal legislative processes. Bill of Rights § 2.

38. *See* GALL, *supra* note 32.

39. *Id.*

40. *See generally* DAVID MILNE, THE NEW CANADIAN CONSTITUTION 23-46 (1982).

41. Canada Act, 1982, §§ 1-33.

42. Canada Act, 1982, § 2.

43. Canada Act, 1982, §§ 3 – 5.

44. "Mobility rights" include the right to enter, remain in and leave Canada and the right "to move to and take up residence in any province." Canada Act, 1982, § 6. *Compare with* Edwards v. California, 314 U.S. 160 (1941) (right of interstate travel implied in the United States Constitution).

45. Canada Act, 1982, §7.

46. Canada Act, 1982, § 10(b).

47. Canada Act, 1982, § 8.

48. Canada Act, 1982, § 12.

protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability."[49] Sections Sixteen through Twenty-Three deal in great detail with language rights, a subject of great importance both to the Francophone minority nationwide and Anglophone minority in Quebec.[50]

In addition to these sections enunciating individual rights, several charter provisions are of great significance in establishing the framework for interpretation and enforcement of those rights. Section Thirty-Two provides that, unlike the earlier statutory Canadian Bill of Rights, the Charter limits both Parliament and the provincial legislatures.[51] Section One, on the other hand, provides a basis for judicial deference to legislative decisions. It establishes that Charter rights are not to be considered absolutes, but are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[52]

The most important departure from the United States model of constitutional protection of civil liberties is found in Section Thirty-Three of the Charter. In keeping with the Anglo-Canadian tradition of parliamentary supremacy, that section provides that Parliament or a provincial legislature may expressly declare in a piece of legislation that it will be effective "notwithstanding a provision included in section two or sections seven to fifteen . . . ."[53] Such a declaration expires in five years, unless it is re-enacted.[54] Thus, although Canada has established for the first time the power of courts to invalidate statutes based on their inconsistency with constitutional guarantees of individual rights, judicial decisions are the final word on the subject only in decisions concerning violations of democratic rights, mobility rights and language rights.[55]

49. Canada Act, 1982, § 15. In contrast to United States jurisprudence, a subsection permits affirmative action, that is, government activity "that has as its object the amelioration of conditions of disadvantaged individuals or groups." *Id.* § 15 (2).

50. Canada Act, 1982, §§ 16-23. *See* Joseph A. Magnet, *The Charter's Official Languages Provisions: The Implications of Entrenched Bilinguilism*, 4 SUP. CT. L. REV. 163 (1982).

51. Canada Act, 1982, § 32.

52. Canada Act, 1982, § 1.

53. Canada Act, 1982, § 33 (1).

54. Canada Act, 1982, § 33 (3) – (4).

55. Thus, the override provision does not apply to §§ 3 – 6, and § 16. *See supra*, nn. 43-50 and accompanying text.

Section Thirty-Three, with its attempt to synthesize the power of judicial review with the principle of parliamentary sovereignty, is the clearest departure from the United States' approach to allocating final interpretive authority[56] and is also probably the most controversial aspect of the system established by the Charter of Rights and Freedoms.[57] These issues, however, are beyond the scope of this article. Instead, our principal focus will be on Section One, and its explicit call for a balancing approach in adjudicating rights claims.

For the most part, the Bill of Rights provisions of the United States Constitution do not speak in the language of balancing. With the exception of the Fourth Amendment language limiting unreasonable searches and seizures, the textual provisions seem to be absolutes. While this is true with respect to a number of constitutional provisions, it is perhaps most apparent in the language of the First Amendment, with its command that "no law" abridging the rights of free speech, press, or religion will be permitted.[58]

Based upon the language of the two documents, we would expect sharply different analyses, and presumably, sharply different outcomes, in cases involving free speech rights. An examination of the cases, however, shows that there is a surprising similarity in the actual application of these differing textual standards. In the United States, the utter impracticability of regarding the First Amendment as an actual absolute has led to the employment of balancing tests, often under the guise of categorization, rather than balancing. Thus, the language of absolute principle may be retained, while in reality something quite different is being employed. In Canada, we will see that even courts explicitly authorized to engage in balancing interests recognize the dangers of indeterminacy inherent in ad hoc decisionmaking. In response, balancing tests will be employed that will also suggest categorizations of cases and presumptions that lend some degree of predictability to the analytical enterprise.

In 1986, the Canadian Supreme Court attempted to set forth a general framework for the application of section one in *R. v. Oakes*.[59] Once a claimant has established that a Charter right had been limited,

56. *See* Cooper v. Aaron, 358 U.S. 1 (1958) (reiterating that the Supreme Court is the final arbiter of issues under the United States Constitution).

57. For examples of the debate over § 33, see CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER 199-211 (1993) and the sources cited therein.

58. U.S. CONST. amend. I.

59. [1986] 1 S.C.R. 103.

the burden of proof falls upon the government to establish "by a preponderance of probability" two general things. First, the government's objection "must be of sufficient importance to warrant overriding a constitutionally protected right and freedom" and it is "[n]ecessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important."[60] The second step, analyzing the means chosen to achieve the goal, itself involves three inquiries:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question .... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'[61]

On its face, the *Oakes* test is quite stringent; it bears an obvious resemblance to the strict scrutiny test set forth in United States Supreme Court decisions.[62] But since its enunciation, the *Oakes* test has come to be applied more flexibly, and therefore, less rigorously.[63] The analysis of Charter rights claims under Section One, then, has become rather openly a balancing test, with all the virtues and drawbacks that such a test provides.

With this general overview of the Canadian approach to the analysis of claims of individual rights as background, we can compare the explicit balancing of Canadian courts with the more covert balancing employed by United States courts in free speech cases. The next sections will compare the approach of United States and Canadian courts in deciding their respective leading cases in three

60. *Id.* at 138-39.

61. *Id.* at 139.

62. Justice Bertha Wilson, an advocate of strict application of the *Oakes* test, analogized application of the *Oakes* test to the analysis performed by the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Bertha Wilson, *Constitutional Advocacy*, 24 OTTAWA L. REV. 265, 267-68 (1992).

63. "I think it is now fair to say that, although the Court continues to pay lip service to the strict *Oakes* test, in many of its judgments it has in fact applied it in a less rigorous fashion," Wilson, *supra* note 62, at 269. *See also* Andrew J. Petter & Patrick J. Monahan, *Developments in Constitutional Law: The 1986-87 Term*, 10 S.C. L. REV. 61, 66("Faced with Charter claims that involve controversial social issues and challenges to judicial orthodoxy, judges have recoiled from all but the formal trappings of the *Oakes* test.").

areas of recent, and continuing, free speech controversy: commercial speech, hate speech, and obscene or pornographic speech.

III. THE PROBLEM OF COMMERCIAL SPEECH

A. The American Approach: Characterizing Advertising

Justice Hugo Black is perhaps best remembered for his insistence that the apparently absolute language of the First Amendment, which insists that Congress make "no law abridging free speech," should be taken literally.[64] And while his position was never adopted by a majority of the Supreme Court, its consistency with the strong libertarian strain in American political, and at least recently, legal thought,[65] has allowed it to leave its mark on First Amendment doctrine.

Most significantly, Black and other absolutists were compelled to define the categories of absolute protected speech much more narrowly than those who would apply more flexible balancing tests. Acts that threatened significant public harm could not be given absolute constitutional protection, even if speech that did the same could be protected. And so, the classification of activity as either speech or action would become crucial.[66] Non-absolutists would also feel compelled to classify types of speech, carving out categories, such as obscenity, which is unworthy of full, or perhaps any, constitutional protection.[67]

The earliest "commercial speech" cases categorized advertising as merely part of the act of carrying on a business, rather than as an independent act of communication. Thus, in *Valentine v. Christensen*,[68] the Court characterized the distribution of advertising

64. *See* HUGO BLACK, A CONSTITUTIONAL FAITH 45-63 (1968). *See also* Barenblatt v. United States, 360 U.S. 109, 143 (1959) (Black, J., dissenting)("Not only does [balancing in free speech cases] violate the genius of our *written* constitution, but it runs expressly counter to the injunction to Court and Congress made by Madison when he introduced the Bill of Rights.").

65. For a critical overview of this strain of thought, see MARY ANN GLENDON, RIGHTS TALK 1–17 (1991).

66. *See infra* notes 262-63 and accompanying text.

67. *See infra* notes 221-232, and accompanying text. *See also* Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948 (1982). (Professor Aleinikoff, recognizing that assigning a lesser weight to a category of speech was a form of balancing, adopted Professor Nimmer's label of "definitional" balancing to describe the creation of First Amendment categories, in contrast with the "ad hoc" balancing of interests on a case-by-case basis.).

68. 316 U.S. 52 (1942)(overruled by Payne v. Tennessee, 501 U.S. 808 (1991)).

handbills as "pursu[ing] a gainful occupation" and the local ordinance as the regulation of business activity.[69] Only a few years before, the Court had overruled the *Lochner*[70] doctrine requiring heightened scrutiny for government regulation of business activity under the due process clause of the fourteenth amendment.[71] It is unsurprising that the Court would see *Valentine* through the prism of the longstanding constitutional struggle over freedom to contract rather than the relatively new debate concerning free speech.[72]

In 1949, the Court upheld a New York City ordinance limiting advertising placed on business delivery vehicles without even discussing the First Amendment.[73] Instead, the Court's analysis addressed equal protection and general Fourteenth Amendment liberty concerns.[74] Advertising was not speech, at least not in the constitutional sense. But in the 1970's, this clear principle would first become murky and then become obsolete.

In 1975, the Supreme Court reversed a conviction of the managing editor of a Virginia newspaper under a statute making it a misdemeanor to advertise "or in any other manner, encourage or prompt the procuring of an abortion."[75] The paper had run an advertisement for a New York abortion clinic.[76] The Virginia Supreme Court held that as "an active offer to perform a service," the advertisement was commercial in nature, and therefore bereft of First Amendment protection.[77]

During the time between the initiating of the prosecution and the arrival of the case at the Supreme Court, *Roe v. Wade*[78] established that the state was constitutionally prohibited from banning abortion. Although the Supreme Court noted that "this is a First Amendment case" and "not an abortion case" its resolution did not ignore the fact that this was not a case involving typical product or service advertising.

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69. *Id.* at 54.

70. Lochner v. New York, 198 U.S. 45 (1905).

71. *Id.* at 58.

72. *See* Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993).

73. Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

74. *Id.* at 108-111.

75. Bigelow v. Virginia, 421 U.S. 809, 811-13 (1975).

76. *Id.* at 812. At the time of the advertisement, abortion was legal in New York, but illegal in most states. *See infra* note 78.

77. 421 U.S. at 814.

78. 410 U.S. 113 (1973)(recognizing constitutional right to obtain abortion).

After stating that *Valentine* should be read not as supporting "any sweeping proposition that advertising is unprotected per se"[79] but rather merely to affirm "a reasonable regulation of the manner in which commercial advertising could be distributed,"[80] the Court went on to analyze the message conveyed by the abortion advertisement. The Court noted that the advertisement "[d]id more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'"[81] The "mere existence" of a legal abortion clinic in New York was "not unnewsworthy" and since *Roe v. Wade*, the activity advertised pertained to constitutional interests."[82]

In addition, the Court characterized Virginia's statute as an attempt to "acquire power or supervision over the internal affairs of another state" and to indirectly regulate legal activity in New York.[83] Thus, the Court was unclear as to what extent this was a case that turned on the existence of a fundamental privacy right,[84] the existence of an element of "public interest" beyond commercial solicitation, the improper regulation of interstate commerce at the state level,[85] or merely the heretofore neglected First Amendment protection of advertising per se. In fact, the Court explicitly refused to "[d]ecide in this case the precise extent to which the first Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."[86]

A year later, the Court unambiguously announced that commercial speech was entitled to First Amendment protection, even in the absence of any "cultural, philosophical or political"[87] overtones. Virginia prohibited pharmacists from advertising price information for prescription drugs.[88] The Court characterized the expression involved as doing "no more than propos[ing] a commercial

79. 421 U.S. at 820.

80. *Id.* at 819.

81. *Id.* at 822.

82. *Id.*

83. *Id.* at 822-25.

84. 421 U.S. at 822 (referring to Roe v. Wade, 410 U.S. 113, as a constitutional interest).

85. "[A state] may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that state." *Id.* at 824-25.

86. *Id.* at 825.

87. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

88. *Id.* at 749-50. The statute was VA. CODE ANN. § 54-524.35 (1974).

transaction,"[89] merely communicating, "I will sell you the X prescription drug at the Y price."[90] Both the individual and society have "a strong interest in the free flow of commercial information"[91] sufficient to make it a part of the "exposition of ideas"[92] entitled to at least some constitutional safeguards. "So long as we preserve a predominantly free enterprise economy, the allocation of resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed."[93]

At the same time, the Court acknowledged "common sense differences" between commercial speech and non-commercial speech, differences that "suggest that a different degree of protection is necessary."[94] Yet apart from suggesting that states might limit false or deceptive advertising[95] the court did little to provide a framework for analyzing commercial speech cases.[96] That task would be undertaken in the 1980 case *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[97]

In *Central Hudson*, the Court articulated a four-part test for determining when the government may restrict commercial speech. The first part of the test is whether the commercial speech contains false or misleading information, and whether it solicits lawful activity.[98] If the communication in question fails this test, it will not be given any constitutional protection.[99] Second, in order for the government to restrict non-misleading speech concerning lawful activities, it must articulate a substantial government interest that can be achieved by the restriction.[100] Third, the substantial government

89. 425 U.S. at 762 (quoting Pittsburgh Press Co. v. Human Rights Comm., 413 U.S. 376, 385 (1973).

90. 425 U.S. at 761.

91. *Id.* at 764.

92. *Id.* at 762 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

93. 425 U.S. at 765.

94. *Id.* at 771 n.24.

95. *Id.*

96. *See id.* The Court suggested that the differences between commercial and non-commercial speech might justify compelling the commercial speaker to include additional information in his message, and also might "make inapplicable the prohibition against prior restraints."

97. 447 U.S. 557 (1980).

98. *See id.* at 564-65.

99. *See id.* at 566.

100. *See id. at* 564.

interest must "directly advance" the articulated government interest.[101] Finally, if "the governmental interest could be served as well by a more limited restriction on commercial speech," then the restriction must be struck down.[102] This test, as articulated in *Central Hudson*, appears to provide something close to the traditional strict scrutiny analysis, at least on paper.[103]

Subsequent cases seriously eroded *Central Hudson's* apparent rigor. In *Board of Trustees v. Fox*,[104] the Court upheld the State University of New York rule prohibiting commercial activity such as Tupperware parties in dormitories.[105] More significant than the holding was the fact that Justice Scalia, writing for the Court, held that the final step of *Central Hudson* did not require the state to adopt the least restrictive means of achieving its purpose. Instead, there need only be a showing that the restriction is "narrowly tailored."[106] At the same time, the Court specifically warned that narrow tailoring was "far different" from mere "rational basis" analysis.[107] *Fox* seemed to call for a case-by-case balancing test, with all of the indeterminacy that such a test entails.[108]

And in *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*,[109] the Court demonstrated how sharply the balance might be weighed in favor of a substantial state interest. The subject of the suit was a Puerto Rican statute that permitted legalized gambling in Puerto Rican tourist locations, at the same time prohibiting any "gambling room ... to advertise or otherwise offer their facilities to the people of Puerto Rico."[110] The prohibition on all advertising addressed to residents of Puerto Rico arguably violated at least the

101. *See id.*

102. *Id.*

103. The classic formulation of "strict scrutiny" requires that the government demonstrate that it is pursuing a "compelling" interest and that the challenged statute or practice is "necessary" to achieve that purpose. *See, e.g.*, Wygant v. Jackson Bd. of Education, 476 U.S. 267, 280 (1986).

104. 492 U.S. 469 (1989).

105. *Id.* at 471-72. The regulation was State University of New York Regulation 66-156 (1979).

106. *Id.* at 476-78.

107. *Id.* at 480 ("Here we require the government goal to be substantial, and the cost to be carefully calculated.").

108. The outcome in *Fox* is difficult to reconcile with cases decided shortly thereafter. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 889-890 (1997).

109. 478 U.S. 328 (1986).

110. *Id.* at 331-33.

final step of the *Central Hudson* test. The Court held, however, that where "the government could have enacted a wholesale prohibition on the underlying conduct," it must be authorized "to take the less intrusive step" of banning advertising.[111] *Posadas* and *Fox* seriously weakened the protection given to commercial speech. Very shortly thereafter, the pendulum would swing back once again.

In 1993, the Court invalidated a Cincinnati ordinance that banned the distribution of free advertising material from "freestanding" newsracks located on public property.[112] The ordinance did not ban the use of similar newsracks by traditional newspapers.[113] The Court found a lack of reasonable fit between the city's purpose of promoting the safety and aesthetics of public streets, and the banning of only commercial, and not noncommercial, newsracks. With respect to the government's purpose, there was no valid distinction between the two types of newsracks, and the commercial newsracks constituted only a small percentage of the total number on the streets.[114] In 1995, the Court struck down a federal statutory provision that prohibited beer labels from stating alcohol content.[115] The statute was justified as prohibiting "strength wars," that is, beer sellers competing on the basis of having a stronger product than the competition,[116] but the Court found that the statute did not directly promote that interest. In his concurring opinion, Justice Stevens suggested that that part of advertising that merely accurately describes the product should be entitled to full First Amendment protection.[117]

In 1996, the Court struck down a Rhode Island statute that prohibited price advertising for liquor.[118] The Court's decision in *44 Liquormart Inc. v. Rhode Island* was unanimous, but the justices' differing rationales revealed a divided Court. Four justices[119] adhered

111. *Id.* at 346.

112. City of Cincinnati v. Discovery Network, 507 U.S. 410, 413 (1993).

113. The part of the ordinance cited by the city applied only to "commercial handbill[s]." *Id.* at 413, n.3.

114. *Id.* at 425-26. The Court stressed that a municipality that demonstrated relevant differences between commercial and non-commercial publications might be successful in justifying disparate treatment, but that Cincinnati relied on no more than the "bare assertion" that commercial speech was "low value" speech. *Id.* at 428.

115. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

116. *Id.* at 483.

117. *Id.* at 491-98 (Stevens, J., concurring).

118. *Id.*

119. *Id.* at 528-34 (O'Connor, J., concurring). Chief Justice Rehnquist and Justices

to *Central Hudson*, but with less deference to the state than the Court demonstrated in *Posadas*. "The ready availability of . . . alternatives" such as legislating minimum prices or increasing taxes on liquor, "demonstrates that the fit between ends and means is not narrowly tailored."[120] Thus, the *Posadas* rationale that would allow a ban on advertising merely upon a showing that the state might rationally ban the underlying activity was rejected.[121]

Three justices[122] went a step further, rejecting the notion "[t]hat all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression."[123] According to these justices, there are only two distinct types of commercial speech, and only one of them is subject to a reduced level of First amendment protection:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according weaker constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.[124]

Justice Thomas went a step further, rejecting *Central Hudson* completely, "at least when . . . the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark."[125] Thus, Justice Thomas came close to advocating full First Amendment protection for commercial speech.[126] Justice Scalia, in a separate concurrence, voiced his dissatisfaction with *Central Hudson*, but at the same time stated that in the absence of any attractive

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Souter and Breyer joined Justice O'Connor's concurrence.

120. *Id.* at 530 (O'Connor, J., concurring).

121. "Since *Posadas*, however, this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it . . . ." *Id.* at 531 (O'Connor, J., concurring).

122. Justice Stevens, who delivered the opinion of the Court, was joined in this part of the opinion (Part IV), by Justices Kennedy and Ginsburg only. *Id.* at 489.

123. 517 U.S. at 501.

124. *Id.*

125. *Id.* at 523 (Thomas, J., concurring).

126. "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 522 (Thomas, J., concurring).

alternative test, "our existing jurisprudence" should resolve the case.[127]

The current precise status of commercial speech in the United States is somewhat unclear. But a few things are evident. Early cases, apparently assuming an "all or nothing" position toward free speech protection, reacted to the differences between advertising and other forms of speech by categorizing commercial speech, and declaring it outside the scope of the First Amendment. Subsequent cases have progressively eroded the wall between the category of commercial speech and the universe of fully protected speech. Still, the Supreme Court has not eliminated the category entirely. Instead, it has adopted a sort of balancing test. Although the justices are divided on just what the terms of this test should be, it is surely less protective than rigorous strict scrutiny, and it is also less determinate.

In this case, the movement from clear rules to a less determinate balancing test has resulted in much stronger protection for the speech in question than was once the case. But with the Court divided on just how much protection commercial speech deserves, we can confidently say little more than that. We now turn our attention to recent decisions of the Canadian Supreme Court concerning constitutional protection for commercial speech. How different is the analysis of this area under a constitution that explicitly instructs courts to balance rights and government interests?

B. The Canadian Approach: Balancing

In 1989, the Supreme Court of Canada was called on to apply the *Oakes* test, and Section One in general, to the area of commercial speech. The case of *Irwin Toy, Ltd. v. Quebec*,[128] is particularly interesting insofar as it addresses the question of advertising aimed at children, a particular matter of concern in the United States. The Quebec Consumer Protection Act[129] prohibited, among other things, most commercial advertising directed at children under the age of thirteen.[130] The ban was challenged by Irwin Toy, Ltd., as a violation

127. *Id.* at 518 (Scalia, J., concurring).

128. [1989] 1 S.C.R. 927.

129. *Id.* at 939.

130. *Id.* The section 248 of the Act provides: "Subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons under thirteen years of age," and section 249 provides: "To determine whether or not an advertisement is directed at persons under thirteen years of age, account must be taken of the context of the presentation, and in particular of (a) the nature and intended purpose of the goods advertised, (b) the manner of presenting such advertisement; (c) the time and

of the Charter guarantee of freedom of expression.[131]

Initially, the Court held that commercial speech was within the scope of the expression protected by the Charter.[132] It did so by invoking a broad definition of the term: "if the activity conveys or attempts to convey a meaning it has expressive content and prima facie falls within the scope of the guarantee."[133] Thus, the Court not only brought all categories of speech within the scope of the Charter, but also took a liberal view of the "speech-conduct" distinction so perennially troublesome in United States jurisprudence.[134] With the singular significant exception of violence,[135] even wordless physical activity that clearly has "expressive content" receives protection.[136]

The Court was unanimous on this initial point.[137] The next question was whether the infringement was justified under Section 1. The Court found that "[t]he protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising"[138] was a "pressing and substantial" objective.[139] While the evidence that children at or close to age thirteen are particularly vulnerable was weaker than that involving children younger than seven, the Court held that the legislature must have some leeway in setting the precise line at which children will be protected.[140]

The Court had no trouble finding "that a bar on advertising directed to children is rationally connected to the objective of protecting children from advertising."[141] On the less obvious question of whether the means chosen impaired the right of expression "as

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place it is shown."

131. *Id.* at 938.

132. *Id.* at 967-71.

133. *Id.* at 969.

134. *See supra* note 10.

135. "While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection . . . it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen." [1989] 1 S.C.R. at 970.

136. *Id.*

137. *Id.* at 967-71 & 1007 (McIntyre, J., dissenting).

138. *Id.* at 987.

139. *Id.* at 986.

140. "If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess." [1989] 1 S.C.R. at 990.

141. *Id.* at 991-96.

little as possible," the Court chose something less rigorous than an insistence on the least restrictive option. "While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment... require legislatures to choose the least ambitious means to protect vulnerable groups."[142]

Under this standard, one remarkably similar to that employed by the United States Supreme Court in *Fox*, the Court held that the ban on advertising directed to children was justified, particularly in light of the fact that advertisers could still direct their message to adults, the presumed actual purchasers of the goods.[143] In a sentence that is interesting for its reminder of the connection between communication and action, the Court noted "[t]he real concern animating the challenge to the legislation is that revenues are in some degree affected."[144] This is reminiscent of *Valentine*; a regulation of the act of selling poses far fewer constitutional problems than a regulation of speech. Where does advertising fit in this dichotomy?

The dissenters in *Irwin Toy*[145] and other cases demonstrate that this Section One balancing test can be applied in ways favorable to commercial speech. In *Ford v. Quebec*,[146] the Court struck down Quebec's statutory requirement that public signs and commercial advertising be only in French.[147] Clearly, this was an impairment of expression, and so the case turned on Quebec's attempt to justify it under Section One.[148] While the Court accepted the objective of the protection of the French language in Quebec as "substantial and pressing,"[149] it found that the outright prohibition of any language other than French was neither necessary nor proportional to achieving the goal.[150] "Thus, whereas requiring the predominant display of the French language, or even its marked predominance would be proportional... requiring the exclusive use of French has

142. *Id.* at 999.
143. *Id.* at 1000.
144. *Id.*
145. *Id.* at 1005-9 (McIntyre, J., dissenting).
146. [1988] 2 S.C.R. 712.
147. *Id.* at 787-88.
148. *See* [1988] 2 S.C.R. at 754-68.
149. *Id.* at 777.
150. *See id. at* 779.

not been so justified."[151] Requiring all signs to include French, perhaps in a more prominent way than other languages, would be an easily achieved alternative.[152]

In *Rocket v. Royal College of Dental Surgeons*,[153] the Court considered serious restrictions placed on advertising by dentists pursuant to authority granted to the Royal College by the Health Disciplines Act.[154] The regulation limited advertising to the name, address, telephone number and office hours of a dentist, and also regulated the "means and manner" of advertising, prohibiting any conduct that would be reasonably seen as "disgraceful, dishonorable or unprofessional."[155] The Court had "no difficulty" in holding that the objectives of maintaining high levels of professionalism and protecting the public from misleading advertising were sufficiently important to justify infringement of the right of free expression.[156] However, the Court found that the regulation was disproportionate to its objectives, particularly in its limitation of the amount of accurate information that a dentist could convey.[157] Again, the Court noted that the motive of the advertiser is "primarily economic."[158] But, at the same time, "expression of this kind does serve an important public interest by enhancing the ability of patients to make informed choices."[159] Commenting on the best way to approach commercial speech cases, Justice McLachlin wrote:

> These two opposing factors — that the expression is designed only to increase profit, and that the expression plays an important role in consumer choice — will be present in most if not all cases of commercial expression. Their precise mix, however, will vary greatly, which is why I believe it is inadvisable to create a special and standardized test for restrictions on commercial expression, as has been done in the United States.[160]

Thus, the Canadian Supreme Court declined to create categories of speech entitled to lesser forms of constitutional protection. But the

151. *Id.* at 779-780.
152. *See id.*
153. [1990] 2 S.C.R. at 232.
154. *Id.* at 237-39.
155. *Id.* at 237.
156. *Id.* at 250.
157. *See id.* at 250-51.
158. *Id.*
159. *Id.* at 247.
160. [1990] 2 S.C.R. at 247.

test that all speech is subject to, including speech that United States courts would categorize as commercial speech, is one that permits a significant amount of leeway in balancing interests against free speech rights. The language of *Oakes* is quite similar to the language of strict scrutiny. Yet, *Irwin Toy* indicates that, as applied, the *Oakes* framework is something less than full-blown strict scrutiny as found in United States jurisprudence. Still, in light of the other leading Canadian decisions striking down restrictions on commercial speech and the current unsettled nature of United States case law on this subject, it is not clear that there is a sharp difference between Canadian and United States courts in the way in which they would dispose of cases involving commercial speech. Justice McLachlin's reference to the use of a "standardized test" in United States commercial special cases suggests much more determinacy than we have seen in the last twenty years of American commercial speech jurisprudence. While we might speculate that *Irwin Toy* would have been decided differently in the United States, it is quite possible that most, if not all, of the other leading cases involving commercial speech regulation in North America would have resulted in the same outcome regardless of whether they had arisen in the United States or Canada. A process of case-by-case balancing seems to be employed by the Supreme Courts of each nation, and this leads to outcomes that, while not entirely consistent, are also not radically different.

We will, however, see a much sharper difference in outcomes when we turn our attention from commercial speech to the far more contentious subject of "hate speech."

IV. THE PROBLEM OF "HATE SPEECH"

A. The American Experience

Words can hurt. They can cause not only psychological harm, but they can also incite people to physical harm and other antisocial acts. While this truism has been emphasized recently, it has been recognized since the earliest days of First Amendment jurisprudence. The several variations of the "clear and present danger" test[161]

161. The phrase was introduced by Justice Holmes in *Schenk v. United States*, 249 U.S. 47, 52 (1919). A conviction based upon spoken or printed words could be sustained when "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.*

employed by the Supreme Court over the years[162] have attempted to reconcile this fact, and the power of government to prevent concrete harm, with the First Amendment command that "no law" abridge free speech.

The principle that speech may be punished when it presents a "clear and present danger" of serious harm may be viewed in two ways. On the surface, it may be seen as a clear choice of some form of balancing test over an attempt to frame absolute rules. But, in its stronger and currently invoked form, it may appear as an attempt to preserve absolute protection of speech through categorizing some utterances as acts, rather than "pure speech." Both Justice Holmes' original formulation of the "clear and present danger" test[163] and its current manifestation[164] are strikingly similar to the common law test for attempt.[165] In other words, the thing being punished here might be seen not as the utterance in itself, but rather an attempt to bring about some non-speech outcome. Thus, "pure speech," that is, speech not so closely linked to action that it becomes merely a part of a non-speech act, may still be seen as receiving absolute protection.

When the Supreme Court first dealt with what we now call hate speech, it did so not by balancing, or by reference to the generally applicable "clear and present danger" test, but rather by explicitly carving out a category of unprotected speech. In *Chaplinsky v. New Hampshire*,[166] the Court held that "fighting words," words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace,"[167] were not within the scope of First Amendment protection. Such words "are of such slight social value

162. In *Abrams v. United States*, 250 U.S. 616, 619 (1919) and *Gitlow v. New York*, 268 U.S. 652, 671 (1925), the Court, over Holmes' dissent, held that the legislature could determine that a category of speech presented real dangers, and could therefore be criminalized. By the 1950's, the Court had disavowed *Abrams* and *Gitlow*, and returned to insistence on a case-by-case analysis of the nature of the potential harm posed by the speech, but in *Dennis v. United State*, 341 U.S. 494, 509-11 (1951), the Court held that an extremely grave potential danger could justify state intervention long before harm was imminent. In 1969, the Court adopted a stringent form of "clear and present danger," holding that that speech could be punished only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

163. *See supra*, note 155.

164. *See Brandenburg*, 395 U.S. at 447.

165. *See* OLIVER W. HOLMES, THE COMMON LAW 44-45 (1881). As a judge, Holmes insisted that an attempt, to be punishable, had to be "very near to the accomplishment of the substantive offense . . . ." *Commonwealth v. Peaslee*, 59 N.E. 55, 56(1901).

166. 315 U.S. 568, 572 (1942).

167. *Id.*.

as a step to truth that any benefit which may be derived from them is clearly outweighed by the social interest in order and morality."[168]

The language of *Chaplinsky* is intriguing. Although it stands for the proposition that a category of speech is simply unprotected by the First Amendment, the reasoning that benefits are "clearly outweighed" by social interests, invokes the language of balancing. Subsequent cases have raised serious questions whether, and to what extent, there really is a "fighting words" exception to First Amendment protection. In 1952 the Supreme Court narrowly affirmed the conviction of a white supremacist under a statute making it a crime to distribute material that "portrays depravity, criminality, unchastity, or lack of virtue to a class of citizens of any race, color, creed or religion," or which exposed such citizens "to contempt, derision or obloquy."[169] The decision in *Beauharnais v. Illinois*,[170] tenuously upheld the power of states to punish "group libel," a concept that draws upon traditional libel law (each member of the group is harmed by the slur against the group as a whole) as well as the rationale for banning "fighting words" or "hate speech;" verbal attacks upon distinct groups of citizens can lead to civil unrest.[171]

But since *Beauharnais,* the scope of the state's power to prohibit hate speech has been consistently narrowed. The Supreme Court has held that "fighting words" do not include words that are merely "menacing, insulting... or profane."[172] Courts and commentators generally take the position that the "group libel" principle of *Beauharnais* is no longer good law.[173]

Most recently, in *R.A.V. v. St. Paul*,[174] the Supreme Court struck

168. *Id.*

169. *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952) (quoting ILL. CRIM. CODE, ILL. REV. STAT. 1949, c.38, § 471).

170. 343 U.S. 250 (1952).

171. Thus, the Court relies on the language and rationale of *Chaplinsky*. *See id.* at 255-57 (citing *Chaplinsky*, 315 U.S. at 572); *see supra* text accompanying note 160-62. The Court also speaks of the damage to the reputation of members of the group involved, in traditional libel terms: "a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits," *Id.* at 263.

172. *Plummer v. City of Columbus*, 414 U.S. 2 (1973).

173. "It may be questioned... whether the *tendency to induce violence* approach sanctioned implicitly in *Beauharnais* would pass constitutional muster today." *Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978). But the case has never been expressly overruled. *See generally* Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281.

174. 505 U.S. 377 (1992).

down an ordinance criminalizing the placement on public or private property of a symbol "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . ."[175] Four concurring justices concluded that the ordinance was overbroad, extending its scope beyond the unprotected "fighting words" exception, and should be invalidated for that reason.[176]

The majority opinion took a different approach, finding that by criminalizing only some, and not all, types of "fighting words," the City of St. Paul had violated the First Amendment.[177] Most significantly, this opinion explicitly rejected the notion that the "fighting words" category of speech is entirely outside the scope of First Amendment protection. Instead, the categorization of the speech limits the degree of protection; the Court held that within the category of "fighting words," the government was required to maintain neutrality.[178]

Thus, the category of "fighting words," now more commonly designated as "hate speech," like commercial speech no longer lies clearly outside the scope of First Amendment protection. Instead, the categorization of speech merely gives guidance as to the type of balancing to be undertaken. As with the commercial speech, the shift from categorization to balancing has meant a broader scope of protection for speakers. And, as was the case for commercial speech, it remains an open question whether this is merely a stage in a shift to full First Amendment protection, or whether *R.A.V.'s* principle of "no favoritism within the category" is as far as the Court will go.

B. The Canadian Experience

Since the enactment of the Charter, the Canadian Supreme Court has considered several cases involving government attempts to punish "hate speech." These cases have primarily involved various forms of anti-Semitism, neo-Nazi or Holocaust denial propaganda. The Canadian court has been more willing than its United States counterpart to permit government activity to punish such speech but, consistent with the overall approach of the Charter, has not denied

175. *Id.* at 380 (quoting ST. PAUL BIAS-MOTIVATED CRIME ORDINANCE, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

176. *Id.* at 397-415 (White, Jr., concurring); 415-416 (Blackmun, J., concurring); 416-36 (Stevens, J., concurring).

177. *Id.* at 384-86.

178. *Id.*

that such speech is entitled to some degree of constitutional protection.

The leading Canadian case is *R. v. Keegstra*.[179] Keegstra was a high school teacher for twelve years in Alberta.[180] During that time, he taught his students that Jews were "deceptive, secretive, and inherently evil,"[181] that they were "child killers," hungry for money and power, who were responsible for wars, depressions, and other social catastrophes.[182] Students were expected to echo these teachings on exams and in class.[183]

Keegstra was convicted of violating Section 319 of the Criminal Code, which in relevant part, subjects to prosecution "[e]very one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group."[184] Section 319 does provide several defenses, most importantly that the statement was true or believed to be true and "relevant to any subject of public interest, the discussion of which was for the public benefit. . . ."[185]

In considering Keegstra's appeal, the Supreme Court quickly held that Keegstra's comments were within the scope of the Charter's protection of free speech.[186] Following the standard set forth in *Irwin Toy*,[187] the only necessary inquiry, easily answered in the affirmative, is whether the words " convey a meaning and are intended to do so by those who make them."[188] Thus, unlike the "hate speech" analysis applied in the United States, there is no issue of categorization; "the type of meaning conveyed is irrelevant," and the fact that "the expression . . . is invidious and obnoxious is beside the point."[189] Although acts of violence intended to express ideas — "violence as a form of expression" — will not qualify for any Charter protection, even "threats of violence" are not excluded.[190]

179. [1990] 3 S.C.R. 697.
180. *See Keegstra*, [1990] 3. S.C.R. at 713.
181. *Id.* at 714.
182. *Id.*
183. *See id.*
184. *Id.* at 714-5.
185. *Id.* at 716.
186. *Keegstra.* at 729-30.
187. *See* [1989] 1. S.C.R. 927; *see supra* text accompanying notes 126-134.
188. *Keegstra*, [1990] 3 S.C.R. at 730.
189. *Id.*
190. *Id.* at 732-33, quoting *Irwin Toy*, [1989] 1 S.C.R. at 970.

But this merely leads to, rather than resolves, the central question of whether the statute's infringement of free speech is justified "as a reasonable limit in a free and democratic society."[191] Chief Justice Dickson began by cataloging the values protected by the guarantee of free speech. Initially, Dickson observed that "[a]t the core of freedom of expression lies the need to ensure that truth and the common good are attained...."[192] A position of complete skepticism with regard to truth would lead to a position of absolute protection of speech, since it is "impossible to know with absolute certainty which factual statements are true, or which ideas contain the greatest good."[193] But the Chief Justice, while recognizing the need for caution, still concluded that "[t]here is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world."[194] Even this cautious statement will be rather jarring to the student of United States free speech doctrine; aside from the area of commercial speech, United States courts feel compelled to refrain from assessments of the truth of protected First Amendment speech.[195]

A second value promoted by free speech is "the vital role of free expression as a means of ensuring individuals the ability to gain self-fulfillment by developing and articulating thoughts and ideas as they see fit."[196] Once again, while this value is clearly important, it cannot be unlimited without resulting in a regime of absolute protection of expression contrary to the balancing called for by Section One.

Finally, free expression is "a crucial aspect of the democratic commitment," allowing everyone to participate in debate on public policy, and "the use of strong language in political and social debate — indeed, perhaps even language intended to promote hatred — is an unavoidable part of the democratic process."[197] Yet, Dickson

191. *Id.* at 734.

192. *Id.* at 762.

193. *Id.*

194. *Keegstra*, [1990] 3 S.C.R. at 763.

195. Chief Justice Dickson discusses the American position on hate speech, [1990] 3 S.C.R. at 738-744. He stated that while he "found the American experience tremendously helpful," he was "dubious as to the applicability" of American precedent in cases involving hate speech. *Id.* at 741. Dickson also points out that even in American jurisprudence, the process of categorizing speech to decide whether it deserves full or limited protection is not entirely "content neutral," but "at least impliedly involves assessing the content of the activity in light of free speech values." *Id.* at 742. In other words, even in First Amendment cases, some form of balancing is taking place.

196. *Keegstra*, [1990] 3 S.C.R. at 763.

197. *Id.* at 764.

observed, this is not unlimited, since hate speech can be used "to undermine our commitment to democracy when employed to propagate ideas anathemic to democratic values."[198]

Concluding that hate propaganda of the sort disseminated by Keegstra did relatively little to further the goals of the free expression guarantee, Justice Dickson found the prohibition rationally connected to the "legitimate Parliamentary objective of protecting target group members and fostering harmonious social relations in a community dedicated to equality and multiculturalism."[199] The most problematic part of the balancing test was the requirement that the legislation minimally impair the right. Keegstra argued that the concept of "hatred" was vague and overbroad. But the Chief Justice rejected that argument, on the grounds that the provision "possesses a stringent *mens rea* requirement, necessitating either an intent to promote hatred or knowledge of the substantial certainty of such, and... the meaning of the word "hatred" is restricted to the most severe and deeply felt form of opprobrium."[200] Thus, the Court held the provision, and Keegstra's conviction, valid.[201]

Justice McLachlin dissented, finding that the means employed by Parliament were not proportionate to the ends of maintaining "social harmony and individual dignity."[202] She concluded that the statute was disturbingly vague and overbroad and also that experience in other countries indicated that prohibiting hate speech had little actual positive effect on reducing the incidence of hatred.[203]

Several months after *Keegstra* the Supreme Court considered Section 13(1) of the Canadian Human Rights Act, which declares that "[i]t is a discriminatory practice... to communicate telephonically... any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that the person or those persons are identifiable on the basis of a prohibited ground of discrimination"[204] The defendants[205] had been convicted of contempt for violating a cease and desist order issued by the Federal Court of Canada finding

198. *Id.*

199. *Id* at 767.

200. *Id.* at 786.

201. *See id.* at 795-96.

202. *Id.* at 848 (McLachlin, J., dissenting).

203. *Keegstra*, [1990] 3 S.C.R. at 854.

204. *Canada Human Rights Commission v. Taylor* [1990] 3 S.C.R. 892, 906-07.

205. John Ross Taylor was the leader of the Western Guard Party, a group disseminating an anti-Semitic "white power" message. *Id.* at 904.

that they had violated Section 13(1).[206] In an opinion closely tracking *Keegstra*, Chief Justice Dickson upheld the conviction and the provision,[207] while once again, Justice McLachlin dissented.[208]

However, the balancing test is not always applied in a way that upholds the statue or conviction in question. In 1996, the Supreme Court overturned the conviction of a defendant who published a pamphlet denying the existence of the Holocaust.[209] This time, prosecution was under Section 181 of the Criminal Code, providing that "[e]very one who willfully publishes a statement . . . that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offense. . . ."[210] Writing for the majority this time, Justice McLachlin initially noted that *Keegstra* was not controlling, since this case involved a different statute prohibiting "a much broader and vaguer class of speech."[211] Unlike the relatively new statute upheld in *Keegstra*,[212] Section 181 could be traced back to the thirteenth century.[213] The purpose of Section 181, held Justice McLachlin, was originally "to protect the mighty and the powerful from discord or slander," not to protect vulnerable minority groups.[214] And even if social harmony were accepted as a justification of Section 181, "the breadth of the section is such that it goes much further than necessary to achieve its aim."[215] A vast penumbra of statements is prohibited well beyond those attacking vulnerable groups, "merely because they might be thought to constitute a mischief to some public interest. . . ."[216]

Justices Cory and Iacobucci dissented, arguing that a criminal statute limited to the deliberate publication of false facts likely to seriously injure a public interest, where each element must be proven beyond a reasonable doubt, was no more than a "minimal intrusion on the freedom to lie,"[217] comparable to "provisions dealing with

206. *See id.*
207. *See id.* at 912-944.
208. *See id.* at 944-976 (McLachlin, J., dissenting).
209. *See R. v. Zundel* [1992] 2 S.C.R. 731.
210. *Id.* at 743.
211. *Id.*
212. *See* [1990] 3 S.C.R. 697; *see supra* text accompanying notes 173-197.
213. *See Zundel* [1992] 2 S.C.R. at 744-45.
214. *Id.* at 765.
215. *Zundel*, [1992] 2 S.C.R. at 768.
216. *Id.* at 772.
217. *Id.* at 832 (Cory and Iocobucci, JJ., dissenting).

fraud, forgery, false prospectuses, perjury and defamatory libel. . . ."[218] But the decision of the Supreme Court here indicates that, as was true in the case of commercial speech, the balancing test does not invariably lead to affirming government action

When dealing with hate speech, then, the Canadian Supreme Court has reached decisions in its leading cases that, while not always upholding government restrictions, are more reminiscent of United States decisions from the earlier era of *Chaplinsky* and *Beauharnais* rather than the more recent precedent. These more deferential Canadian decision have been reached through application of the *Oakes* balancing test, while the early, deferential, United States decisions, in contrast, were reached through the process of categorizing "fighting words" or "group libel" as being simply beyond the scope of First Amendment protection.

V. THE OBSCENITY/PORNOGRAPHY PROBLEM

A. United States Responses

As we have already seen, in recent years the United States Supreme Court has abandoned, or at least seriously compromised, the notion that certain categories of speech are not entitled to any First Amendment protection. One excluded category remains, however; it is still black letter law that obscene speech is unprotected. But the surface simplicity of that statement has hardly led to clarity and predictability. The Supreme Court, maintaining the language of categorization, has struggled with the obvious necessity of balancing interests in this area, and has produced results that have failed entirely to satisfy either side of this issue.

In 1957, for the first time the Supreme Court was presented with the issue of whether obscene speech constituted a distinct category outside of the protection of the First Amendment.[219] The Court endorsed the long-assumed idea that obscenity was unprotected, but felt obligated to put forward a reason for that conclusion. Obscenity, the Court held, did not deserve protection because it was without any redeeming social value.[220] In defining obscenity, the Court narrowed the common law meaning, and defined it as material which, taken as a whole, appeals to the "prurient interest," that is "a shameful or

218. *Id.*

219. *See Roth v. United States*, 354 U.S. 476 (1957).

220. *See id.* at 484-5.

morbid interest in nudity, sex, or excretion. . . ."[221]

In the 1960s, the Court's initial explanation for why obscenity was unprotected became a crucial part of the definition of the category. Obscenity was now to be defined as material that not only appealed to the prurient interest in a way patently offensive to community values, but also was "*utterly* without redeeming social value."[222] This standard was highly protective of offensive speech, too much so for the majority of the Court in the 1970s.

In the 1973 case of *Miller v. California*,[223] the Court set forth the current definition of obscenity:

> whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[224]

By making the assessment of serious value, rather than the presence of any value at all, a crucial part of the definition, the Court expanded the scope of obscenity. This also clearly blurred the lines between categorization and balancing. The value of the work in question must be weighed, but rather than stating that this value would be balanced against the likely harm or offense caused by the work, the Court would instead determine whether the work was entitled to full or no First Amendment protection. Certainly the question of whether a work has serious social value is hardly less indeterminate than the question of whether a work's value is outweighed by legitimate social concerns.

Still, balancing requires weighing something against something else. If *Miller* is in fact a balancing test, what is the social value of the work to be weighed against? A suggestion can be found in the second of the Court's pair of 1973 obscenity decisions, *Paris Adult Theatre v.*

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221. *Id.* at 487, n.20 (quoting A.L.I. MODEL PENAL CODE §207.10(2) (TENT. DRAFT NO. 6, 1957)).

222. *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966). Although only three justices (Justices Brennan and Fortas and Chief Justice Warren) joined in the opinion setting forth this test, it became the dominant test for obscenity, since Justices Black and Douglas, who took even more protective positions with respect to obscenity, could be counted on to vote along with the Brennan group to strike down prosecutions of any material not meeting the standard.

223. 413 U.S. 15 (1973).

224. *Id.* at 24.

Slaton.[225] Earlier cases, searching for a rationale for excluding obscenity from First Amendment protection, spoke of the value, or lack thereof, present in the work at issue. This supposedly confines analysis to the examination of the work, in some way, apart from its social environment. But *Paris Adult Theatre* at least suggested that the conclusion that obscenity was unprotected speech could rest not upon a finding that obscene material had no value, but rather upon evidence that it caused negative social effects.[226] While the evidence of the causal link between obscene material and concrete social harm, including but not limited to, sexual violence, is sharply disputed,[227] the fact that the Court felt the need to point to it seems to indicate that despite the language used by the Court, the determination of whether to suppress allegedly obscene work is, on one level, a balancing test.

While *Miller* and *Paris Adult Theatre* clearly gave state and local government more freedom to regulate obscenity, it is not necessarily easy to satisfy the *Miller* test. Much material that a locality may find offensive will still be found to have significant social value.[228] Local legislation that has attempted to criminalize or create civil liability for the dissemination of a broad category of pornography (going beyond legally defined obscenity) on the grounds that it bears a causal relationship to gender based violence or discrimination, has been invalidated.[229]

But at the same time, where government seeks to regulate without imposing criminal sanctions, the Court has been willing to weigh more explicitly the value of the expressive activity against competing social interests. Thus, "indecent" speech may be regulated as to time and place in a manner that is sensitive to content without satisfying a rigorous test of strict scrutiny.[230] On its face, this would

225. 413 U.S. 49 (1973).

226. *See id.* at 58-60. The opinion draws on the minority report of the President's Commission on Obscenity and Pornography for its contention that there is an arguable link between obscene material and crime or other "antisocial conduct."

227. *See, e.g.*, GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY 74-108 (1988); RONALD J. BERGER, PATRICIA SEARLES & CHARLES E. COTTLE, FEMINISM AND PORNOGRAPHY 93-109 (1991).

228. *See, e.g., Jenkins v. Georgia*, 418 U.S. 153 (1974) (local standards cannot be used to find award-winning mainstream Hollywood film to lack serious value); *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992) (reversing obscenity conviction of sellers of major label rap recordings).

229. *See* American Booksellers Ass'n. v. Hudnut, 771 F.2d 323 (7th Cir. 1985); *aff. mem.*, 475 U.S. 1001 (1986).

230. *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50 (1976) (approving restrictive zoning of theatres exhibiting "adult" movies); *FCC v. Pacifica Foundation*, 438

appear to be an attempt to create a third category somewhere between unprotected obscenity and fully protected non-obscene speech. But by declaring that sexually oriented speech, though not without value, "is of a wholly different and lesser[] magnitude" than other types of expression,[231] and creating another category, the Court does seem to move in the direction of balancing on a case-by-case basis, and away from the application of clear, categorical rules. Still, as we will see, the United States Supreme Court has not gone as far as the Canadian Supreme Court in explicitly weighing the potential benefits of sexually oriented expression against its potential social harms.

B. The Canadian Response

In light of the Canadian Supreme Court's approach to the issues of commercial speech and hate speech, it should come as no surprise that Canada has also given legislatures broader powers of regulation with respect to obscene speech. The leading case under the Charter on this issue is the 1992 decision of *Butler v. The Queen*,[232] a case both praised and denounced for its receptiveness to recent feminist anti-pornography arguments.

The Criminal Code of Canada prohibits the possession, sale and public display of obscene material.[233] The statutory definition of obscenity is: "any publication a dominant characteristics of which is the undue exploitation of sex or of sex and any one of the following subjects, namely, crime, horror, cruelty or violence."[234] The use of the word "undue" quite obviously creates serious vagueness problems, but Canadian courts have attempted to provide "workable tests"[235] to determine the scope of that concept. Two of these tests are somewhat reminiscent of concepts in United States obscenity law. First, a depiction may "unduly" exploit sex in that it violates the contemporary community standard of toleration.[236] One interesting aspect of this test is that, unlike United States courts, Canadian courts

U.S. 726 (1978) (non obscene but "indecent" speech may be limited by FCC to hours when children are unlikely to hear the broadcast); *Barnes v. Glen Theatre Inc.*, 501 U.S. 560 (1991) (public indecency statute may be applied to nude dancing).

231. City of Erie v. Pap's A.M., 529 U.S. 277, 294 (2000) (quoting *Young*, 427 U.S. at 70).

232. *See* [1992] 1 S.C.R. 452.

233. *See* Criminal Code, R.S.C., ch. c-46, § 163 (1985) (Can.).

234. Criminal Code, R.S.C.,ch. C-46, § 163(8) (Can.).

235. *Butler*, [1992] 1 S.C.R. 475-76.

236. *See id.* at 476-78.

have stressed the distinction between that which offends the viewer himself, and "what Canadians would not abide other Canadians seeing. . . ."[237] Only the latter, not the former, will violate this test.[238] Also, whether the treatment of sex is "undue" may be subject to the "internal necessities" test.[239] This would seem to bear some relation to the United States' concept of significant redeeming value, but once again, frames the question in a somewhat unique way. The question here is "whether the exploitation of sex has a justifiable role in advancing the plot or theme, and . . . does not merely represent 'dirt for dirt's sake' but has a legitimate role when measured by the internal necessities of the work itself."[240]

The third test, one without a clear analogy in United States law,[241] is the "degradation or dehumanization test."[242] Perhaps less a separate test than a subpart of the test of community standards, this inquiry asks whether the material constitutes "the portrayal of persons being subjected to degrading or dehumanizing sexual treatment."[243]

Initially, of course, the Canadian Supreme Court determined that offensiveness could not remove obscenity from the protection of the Charter's speech provision.[244] But once again, this leads not to automatic invalidation of the prohibition, but rather to application of the Section One balancing test. While the Court rejected the contention that Parliament could justify infringement of a Charter freedom by invoking merely "legal moralism,"[245] (the use of the law to "impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community,")[246] it accepted as legitimate the Parliamentary goal of combating violence "degradation, humiliation" and the maintenance of gender inequality.[247] Having found that the prohibition of obscenity was

237. *Id.* at 477 (quoting *Towne Cinema Theatres, Ltd. v. The Queen* [1985] 1 S.C.R. 494, 508-09).

238. *See id.* at 478.

239. *Id.* at 481-83.

240. *Butler*, [1992] 1 S.C.R. at 483.

241. *See supra* notes 213-25 and accompanying text.

242. [1992] 1 S.C.R. at 478-81.

243. *Butler*, [1992] 1 S.C.R. at 479.

244. *See id.* at 486-89.

245. *Id.* at 492-93.

246. *Id.* at 492.

247. *Id.* at 493 (quoting the REPORT ON PORNOGRAPHY by the Standing Committee on Justice and Legal Affairs (MacGuigan Report) at 18:4 (1978)).

rationally related to such goals, the Court turned to the question of whether it advances them with minimal impairment to the free speech right.

The Court concluded that the statute satisfied the test.[248] In doing so, it reviewed the existing tests for determining whether a work is "undue exploitation," and concluded that under a synthesis of the tests, only a minimal amount of material would actually be proscribed. Here, the Court's balancing test employs its own process of categorization, not to determine whether obscenity is entitled to some Charter protection, but rather to determine whether the questioned work falls within a statute reasonably limited to cause minimum impairment of the free speech right. Justice Sopinka stated that "[p]ornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing."[249] Pornography that falls into the first category "will almost always constitute the undue exploitation of sex;"[250] work that falls into the second category "may be undue if the risk of harm is substantial;"[251] material in category three "is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production."[252] In addition to all of this, the Court noted that "materials which have scientific, artistic or literary merit" do not constitute undue exploitation of sex; "the court must be generous in its application" of this defense.[253]

Both sides of the obscenity/pornography debate recognize that *Butler* seems to grant Canadian legislative bodies far more leeway to outlaw offensive material than exists in the United States.[254] At first glance, this seems puzzling. United States courts, as we have seen, continue to maintain that obscenity is a totally unprotected speech category; there is no such category under the Charter. While worded differently, the tests used to determine what is obscenity, constitutionally or statutorily, employ quite similar categorization

248. *See id.* at 504-509.

249. *Butler*, [1992] 1 S.C.R. at 484.

250. *Id.* at 485.

251. *Id.*

252. *Id.*

253. *Id.* at 505.

254. Compare *Butler*, [1992] 1 S.C.R. at 452 with *American Booksellers' Ass'n.*, 771 F.2d at 323.

tests. And while Canadian courts employ categories within an overall balancing test, United States court clearly engage in some degree of balancing within the inquiry into how to categorize a challenged work. Are the contrasting outcomes inevitable consequences of constitutional language differences and differences in longstanding modes of constitutional analysis? Are they inevitable consequences of something else? Or are they not at all inevitable? In order to answer these questions about the obscenity problem and other free speech issues, we will now step back from examining particular United Sates and Canadian cases on particular topics, and try to formulate some general conclusions.

VI. FREE SPEECH BALANCING: RHETORIC, REALITY AND CONSEQUENCES

For decades constitutional theorists have debated the relative importance, both in theory and practice, of several factors in constitutional interpretation.[255] As complex as this debate is, it is itself ancillary to an even more controversial question: how much power should non-elected judges have in shaping the law in a democratic society.[256] For the most part, modes of constitutional interpretation are supported or opposed on the assumption that they will provide more or less restraint on judicial discretion.

Over the years, a number of analytical tools have been put forward as providing not only the most theoretically justifiable, but also the most effective restraints on judicial discretion. Some advocate strict adherence to the constitutional text.[257] Others look to history, either the intent of the framers[258] or judicial precedent.[259] Still

255. Among the most prominent factors are the constitutional text, see Symposium *Textualism and the Constitution*, 66 GEO. WASH. L. REV. 1081 (1998); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23-47 (1997); history and "original intent," see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); LEONARD LEVY, ORIGINAL INTENT AND THE FRAMER'S CONSTITUTION (1988); moral reasoning, see RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); pragmatism, see Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996).

256. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); LEARNED HAND, THE BILL OF RIGHTS 1-15 (1958); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Rebecca L. Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531 (1998).

257. *See, e.g.*, Scalia, *supra* note 248; Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

258. *See, e.g.*, Edwin Meese, *Toward a Jurisprudence of Original Intent*, 11 HARV. J. L. & PUB. POL. (1998); Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the*

others suggest that the Constitution contains one or more overriding values, and that maximizing these values is the proper interpretative goal.[260] To a greater or lesser extent, all of these theorists hope to eliminate, or at least minimize, the ability of courts to engage in the notoriously indeterminate process of balancing. Balancing, it is thought, simply gives judges too much power to engage in the type of decisionmaking properly left to accountable legislators.

The contrast between Canadian and United States approaches to free speech questions provides us with interesting, if limited, insights into certain questions. How important is constitutional text in shaping outcomes and limiting judicial discretion? Is it really possible to eliminate, or even sharply limit, the power of courts to engage in balancing through either adherence to text or clearly defined, judicially created analytical tests? Is balancing a threat because it gives judges too much power, is it a threat for some other reason, or is it no threat to democratic valves at all? And to return to where we started, what does our examination of these approaches tell us about the recent Supreme Court decision in *Hill*? Is it an anomalous decision that has no meaning outside of the context of the abortion issue, or does it indicate something significant about the Supreme Court's approach to a broader range of free speech, and perhaps other types of issues?

Lesson #1: Some Form of Balancing is Unavoidable

The Canadian Charter of Rights and freedoms explicitly calls for courts to engage in balancing. While certain provisions of the United States Bill of Rights, such as the prohibition of "unreasonable" searches,[261] provide a textual basis for balancing, others, such as the seemingly absolute language of the First Amendment, do not. But it is quite clear that the United States Supreme Court has not rejected balancing as a mode of First Amendment analysis. Even Justice Black, known for his First Amendment "absolutism,"[262] was able to maintain that position only by categorizing some expressive activity

Intent of the Framers in Constitutional Theory, 63 B.U. L. REV. 811 (1983).

259. *See, e.g.*, Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994).

260. *See, e.g.*, Ely, *supra* note 249 ("representation reinforcement"); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (popular sovereignty).

261. U.S. CONST. amend. IV.

262. *See supra* note 64.

as non-speech.[263] Categorization itself would seem to be a process of balancing, but on a wholesale, rather than a retail level. How valuable, in light of the overall purposes of the free speech clause, is this type of activity, and how detrimental is it to legitimate, non-speech related social interests? And, of course, not merely the "absolutist" Justice Black, but the majority of the Supreme Court has engaged in the "wholesale balancing" of categorization over the years, by creating categories of unprotected and lesser protected speech, such as obscenity or commercial speech.[264] As we have seen in looking at obscenity/pornography cases, the United States Supreme Court asks many of the same questions when categorizing that the Canadian Supreme Court does in balancing.

Even in cases where speech is not excluded from First Amendment protection, the Supreme Court has not taken an absolutist position. Instead, it has employed one or another test that employs some type of balancing. Balancing may be employed in a number of different ways, with more or less weight placed upon the competing values. Thus, traditional strict scrutiny is a form of balancing, not a per se test. Lesser forms of scrutiny are also types of balancing tests. The choice is not between whether or not to use balancing, but rather what form the balancing will take. To what extent is this controlled by the text of either the constitutional document, or another test articulated by the jurisdiction's highest court?

Lesson #2: Language, Although Not Unimportant, Is Not Necessarily Determinative

When the text suggests absolute protection of speech, as in the United States, but practical considerations mitigate against absolutism, we might expect some courts to adopt a form of balancing likely to result in a great deal of protection for the individual. Indeed, where state or federal government target speech based on content, the Supreme Court is likely to employ the language of strict scrutiny.[265] Here, then is where the text has its impact; explicit endorsement of balancing will lead to a more lenient form of balancing, absolutist language will lead to a more stringent standard

263. *See supra* note 10.

264. *See supra* text accompanying notes 64-125; 213-225.

265. Except, of course, where the Court has initially categorized the speech at issue to be "non-speech" or speech entitled to less than full protection. *See* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.07 (1984).

of review.

But this theory must confront the fact that the Canadian Supreme Court, in addressing the way in which its new powers of balancing were to be employed, adopted a test in *Oakes*[266] that on its face is almost exactly that employed in the United States under the banner of strict scrutiny. Yet under this test, the Canadian Supreme Court has been significantly less protective of several types of speech than has the United States Supreme Court. The stern words of strict scrutiny, then, are no guarantee of an exceptionally high hurdle for governments to clear.

And this is evident not only in Canadian jurisprudence. Venturing outside the confines of the speech clause of the First Amendment, we find a definite trend in United States constitutional jurisprudence away from the notion that the invocation of strict scrutiny is almost invariably fatal to the government's defense of a statute or practice. From 1972 to 1990, the United States Supreme Court employed the language of strict scrutiny in its analysis of claims under the First Amendment clause guaranteeing free exercise of religion;[267] yet the Court consistently during this period sustained government actions that had a negative impact on religion.[268] When, in 1990, a sharply divided Court abandoned the language of strict scrutiny in free exercise cases, this history of deference to government interests enabled Justice Scalia, writing for the majority, to claim that the Court had never really adopted strict scrutiny in these cases at all.[269] In recent cases involving challenges to affirmative action programs, the Court has adopted the language of strict scrutiny. Nonetheless, Justice O'Connor has gone out of her way to note that strict scrutiny was not the equivalent of per se invalidity; instead, strict scrutiny is a test that government may, in certain cases, satisfy.[270]

At the same time, cases have emerged that challenge the notion that application of low level scrutiny will invariably lead to judicial

266. *See* U.S. CONST. amend 1; [1986] 1 S.C.R. 103; *supra* text accompanying note 2.

267. The strict scrutiny standard was established in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

268. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding military uniform regulations against free exercise claim of right to wear a yarmulke); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1027 (1997) ("Other than the employment compensation cases and *Yoder*, the court during this period never found another law to violate the free exercise clause.").

269. *See Employment Division v. Smith*, 494 U.S. 872, 882-84 (1990).

270. "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

affirmation of the government action in question.[271] When we add these holdings to the emergence of "middle-tier" scrutiny as an appropriate constitutional test in some cases,[272] we can see that the use of easy categorization in American constitutional law cases, while by no means a thing of the past, is gradually losing ground. And it is being replaced in these cases by a type of analysis that focuses on the particular facts of the case at hand, an analysis that certainly may be regarded as a balancing test.

A very recent example of the United States Supreme Court's growing tendency to prefer case-by-case balancing is the Court's recent invalidation of the state of Washington's statute providing for court orders of child visitation rights to non-parents.[273] Many saw this as an opportunity for the Court to clarify some questions regarding the scope of parental rights. Is a parent's right to make child-rearing decisions a fundamental right, triggering the application of strict scrutiny? If so, is the furtherance of the broadly defined "best interests of the child"[274] a compelling state interest sufficient to override that right? But the Court left these questions open, holding only that the specific statute in question went too far in granting third-party rights.[275] The analysis and outcome would be one that easily could have been provided by a Canadian court confronting a claim of parental rights.[276]

Does this mean that constitutional language is of no importance,

271. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (zoning restriction struck down as failing low-level rationality test); *Romer v. Evans*, 517 U.S. 620 (1996) (state constitutional provision presenting legislature from passing anti-discrimination laws protecting homosexuals struck down as failing rational basis test).

272. Most prominently, in cases involving gender discrimination, see *Craig v. Boren*, 429 U.S. 190 (1976). *See also, Clark v. Jeter*, 486 U.S. 456 (1988) (applying "intermediate" scrutiny to statute distinguishing between marital and non-marital children).

273. *Troxel v. Granville*, 120 S.Ct. 2054 (2000).

274. *See generally*, Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984), critiquing the use of the "best interest" test.

275. Although *Troxel* does speak of the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 2060, the Court states that it "need not [] define . . . the precise scope of the parental due process right." *Id.* at 2064 since the statute can be invalidated because it is "breathtakingly broad." *Id.* at 2061.

276. Recognizing the existence of a fundamental right, but then balancing it to determine whether it is limited in a way proportionate to the state's legitimate goals is, of course, the essence of the *Oakes* test. *See* U.S. CONST. amend. 1; [1986] 1 S.C.R. 103; *supra* text accompanying notes 58-61.

or that courts are free to make any issue indeterminate? We need not go that far; surely the language of constitutional documents makes many questions into "easy cases,"[277] where, apart from cute mental and linguistic gymnastics,[278] courts will be constrained. But it is not these cases that draw attention. Where cases are controversial and stakes are high, the language of the constitution will leave room for judicial balancing. Perhaps this was done intentionally, though the conscious use of ambiguous language,[279] perhaps this will be a consequence of judicial recognition that literal application of language will lead to wildly impractical results. This latter instance seems clearly to have been the case with respect to the United States Supreme Court's attitude toward the seemingly absolute language of the First Amendment. But the First Amendment's absolute language, and the absence of any language authorizing a court to balance might well account for the force that judicial balancing has taken in the past. Balancing through categorization, and through the frequent use of strict scrutiny at least gives the appearance that it is something other than merely weighing conflicting interests. Constitutional language, then, will have an effect on the way in which the inevitable balancing of interests is carried out.

Lesson #3: Balancing Does Not Necessarily Increase Courts' Power Over the Legislature

Language, whether that of the constitutional text, or of various "strict scrutiny" formulations, will be interpreted in light of a nation's history and legal culture. A comparison of United States and Canadian Supreme Courts' approach to free speech balancing reveals one striking point. Often, criticism of judicial balancing in the United States has been associated with the position that balancing gives courts too much power to frustrate legitimate majoritarian decisions.[280] But in Canada, judicial balancing has been used to justify

277. *See* Schauer, *supra* note 250.

278. *See, e.g.*, Jordan Steilker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995) ("proving" textually that no president since Zachary Taylor has been constitutionally eligible to serve in that office).

279. The most notable statement of the position that the framers intended to leave later generations the freedom to develop the meaning of constitutional provisions is H. Jefferson Powell, *The Original Understanding of the Original Intent,* 98 HARV. L. REV. 885 (1985).

280. Thus Robert Bork argues that where judges may make choices among values, it may easily lead to "minority tyranny." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Edwin Meese argues that to permit courts to

sustaining majoritarian decisions on controversial free speech questions. Unsurprisingly, Canadian criticism of judicial balancing has come from the libertarian side of the political spectrum.[281]

Judicial balancing, then, is clearly a two-edged sword. In Canada, with its history of parliamentary supremacy, it is often used to limit the scope of individual rights claims. In the United States we see a different picture. In cases involving commercial speech and hate speech, replacing allegedly clear categorical rules with more open-ended balancing-type analysis has led to stronger protection for the free speech right. But the Canadian cases remind us that case-by-case analysis will not always lead to more libertarian outcomes. Adding this insight to those outlined above will lead to our final conclusion.

Lesson #4: *Hill* Is Not Inconsistent With the Overall Trend of United States Free Speech Analysis

To the extent that First Amendment law is thought to consist of sharply defined categories that lead to the application of highly determinate analytical tests, *Hill* will seem troublesome. Although not content-sensitive on its face, the statute at issue would seem to clearly be content-sensitive in purpose and effect, calling for the application, as the dissenters maintain, of strict scrutiny.

However, in several free speech contexts, the walls of previously defined categories are breaking down, or being stretched. Previously unprotected categories of speech, such as commercial speech and hate speech, are now given some degree of protection. The sharp distinction between the unprotected obscene and the fully protected non-obscene has blurred, as the Supreme Court has wrestled with "indecent" speech. At the same time, both in First Amendment and other contexts, the consequences of applying strict scrutiny have become less clear than before. The distinction between an always-fatal strict scrutiny, and a never fatal rational basis test, that many lawyers have long assumed, is no longer valid.

What seems to be happening in United States free speech analysis, and perhaps elsewhere, is a drift toward the position explicitly provided for in the Canadian Charter. Rights claims must

make constitutional decisions on the basis of imprecise calculations of fairness or decency poses an unacceptable threat to legitimate majoritarian decisions. *See* Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986).

281. *See supra* notes 62-63.

be given a serious hearing, but serious countervailing social interests may overcome them. Clearly, this is what the majority in *Hill* recognize. Whether it is defined as privacy, health and safety, or the abortion right itself, there is a powerful counterweight to set against the limitation on free speech in this case. *Hill* is not an anomaly resting entirely on the majority's commitment to abortion rights, but rather one of a number of indications that United States free speech law is moving away from a reliance on clear categorical rules, and in the direction of case-by-case balancing. This will not necessarily mean consistent victory for the government or for rights claimants, but it will lead to a jurisprudence that will hesitate to make quick judgments, whether they be libertarian (*e.g.,* all content-based restrictions are invalid) or majoritarian (*e.g.,* hate speech has no constitutional protection). In short, we can expect that free speech analysis in the United States will become more like that used by the Canadian courts. In light of different history and constitutional traditions, this may not mean that outcomes will be the same, but sharp distinctions between the explicit balancing approach of Canadian jurisprudence and the more categorical approach of United States courts can be expected to recede.

CONCLUSION

There is no reason to believe that the United States Supreme Court has consciously looked to Canadian free speech jurisprudence for guidance as it approaches controversial speech related issues. Indeed, it is extremely unlikely that that is the case. Although it is common for Canadian, and other common law countries, to draw on United States precedent for persuasive argument,[282] United States courts rarely return the favor. When Justices Breyer and Stevens recently cited foreign authority in a dissenting opinion,[283] the majority quickly dismissed the reference with an assertion that non-United

282. *See L.S.U.C. v. Skapinker* [1984] 1 S.C.R. 357, 367: "The courts of the United States have had almost two hundred years experience ... and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts." This, of course, does not necessarily mean that Canadian courts will follow United States precedent:

> While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages ....

R. v. Rahey [1987] 1 S.C.R. 588, 639.

283. *See Printz v. United States*, 521 U.S. 898, 976-78 (Breyer, J., dissenting).

States sources were of absolutely no help in interpreting the United States constitution.[284]

But foreign sources, particularly those from jurisdictions that share much in the way of legal and non-legal culture with the United States, can often provide insight, not only into alternatives to current United States legal approaches, but also into explanations of current United States decisions that may not be obvious on their face. While *Hill* is problematic in light of much United States free speech precedent, it is entirely consistent with the type of Charter balancing that a Canadian court would apply. When lawyers and scholars ignore developments in other nations with systems of judicial review, they deny themselves access to potentially enlightening material.

284. *See id.* at 921 n.11.