FREEDOM OF EXPRESSION IN CANADA - HOW FREE ?

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Freedom of expression and the press is considered to be the foundation of individual liberty in Western democratic theory. It has been characterized as "... the matrix, the indispensable condition of nearly every other form of freedom".[1] Without the freedom to exchange ideas, to seek access to information, and to criticize the policies of the governing body, an individual is incapable of participating in the operation of her state, and without individual participation a true democracy can neither exist nor flourish.[2] The drafters of the *Canadian Charter of Rights and Freedoms* seemed to recognize the significance of this freedom by including the guarantee of "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" in section 2 under the broader title of "Fundamental Freedoms". The recognition stopped there, however, because section 2 of the *Charter* is subject to a section 33 override if the Canadian Parliament or a legislature choses to do so in specific legislation.[3] One might well ask how a right can be considered fundamental if it is subject to a simple legislative override. In the entire context of the *Charter* it would appear that voting, mobility and language rights are regarded as more essential since they can not be overcome by an ordinary legislative majority. In fact, this anomaly stems from the political compromise necessary to achieve the accord necessary to entrench a charter in the Canadian constitution. It is a sorry beginning of a new era when fundamental values are compromised for the sake of political expediency.

Given this inauspicious beginning, Canadian courts are now faced with the awesome task of interpreting the guarantee embodied in section 2. It is no longer possible to rely solely on a division of powers analysis to resolve cases where allegations are made that the state has infringed upon a fundamental right. While the major task of the courts is to assess the validity of the purported limitations on guaranteed rights, it is essential that the courts view the rights themselves in a broad perspective rather than solely in the isolation of case by case analysis.

Strict adherence to a case by case analysis has its dangers. Courts do not tend to develop a comprehensive theory of the values served by a constitutional guarantee when they focus solely on the issue before them. Inconsistent decisions and changing rationales for these decisions can be

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1. Justice Cardozo giving the majority opinion in *Palko* v. *Connecticut*, 302 U.S. 319 at 327 (1937).

2. Edward Bloustein, "The Origin, Validity and Interrelationships of the Political Values Served by Freedom of Expression", (1981) 33 *Rutgers L.R.* 372.

3. Section 33(1) of the *Charter of Rights and Freedoms* provides:
> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

the result, as the American experience demonstrates.[4] Perhaps this was the inevitable result of the fact that courts must deal with specific cases and did not have the opportunity to indulge in the luxury of developing comprehensive theories. Then, too, it must be remembered that when the American courts began their analysis they did not have the current wealth of jurisprudence available to them.

While the analysis of issues through the mechanism of specific cases is necessary, Canadian courts now have the opportunity to depart from their self-imposed principle of limiting the decision to the specific issue before them. To minimize future inconsistencies the courts, when initially confronted with freedom of expression questions should attempt to articulate the values served by freedom of expression, for it is only when a clear theory is created that subsequent decisions can be made in a rational manner which is consistently related to the theory.

Our courts are perhaps more fortunate than their American counterparts because they have the benefit of almost two hundred years of jurisprudence developed by the American courts, jurisprudence developed by the European and American legal philosophers, and the recent jurisprudence of the European Court concerning free expression issues. That is not to say that our courts should slavishly follow the decisions of the American courts nor the theories of any one philosopher. Our systems and traditions differ but our jurists can benefit from the American mistakes and successes, and the philosophers' wisdom to create solutions which may be suitable to our Canadian problems.

One issue which troubled the American courts and theorists for some time was whether the right to free speech guaranteed by the First Amendment was absolute since there were no limitations placed on the right in the Constitution.[5] Some Supreme Court justices and theorists argued that freedom of speech was an absolute, while the majority preferred to permit limitations on the right.[6] Although the absolutist position was never accepted by a majority, the courts did adopt the principle that "freedom of press, freedom of speech and freedom of religion are in a preferred position".[7] This fundamental principle was derived essentially from the opinions of Justice Holmes. The essence of his position is summarized by Justice Frankfurter in *Kovacs* v. *Cooper*:

> The philosophy of his opinions on that subject arose from a deep awareness of the extent to which sociological conclusions are conditioned by time and circumstance. Because

4. Martin Redish expressed this aptly in "The Value of Free Speech", (1982) 130 *U. of Penn. L.R.* 591:
> There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression. These efforts have been characterized by 'a pattern of aborted doctrines, shifting rationales and frequent changes of opinion by individual Justices'.

5. Justices such as Douglas and Black have argued that the right is absolute. See for example, *Konisberg* v. *State Bar of California*, 366 U.S. 36 (1961). Some commentators have argued that freedom of expression is absolute, when the expression concerns the activities of government; see Alexander Meiklejohn, "The First Amendment is an Absolute", [1961] *Sup. Ct. Rev.* 245.

6. But see *Schneider* v. *State*, 308 U.S. 147 (1939) where the majority of the Court affirmed that First Amendment rights were absolute. See also, Thomas I. Emerson, *The System of Freedom of Expression*, (1970).

7. *Murdock* v. *Pennsylvania*, 319 U.S. 105 at 115 (1943).

> of this awareness Mr. Justice Holmes seldom felt justified in opposing his own opinion to economic views which the legislature embodied in law. But since he also realized that the progress of civilization is to a considerable extent the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other beliefs, for him the right to search for truth was of a different order than some transient economic dogma. And without freedom of expression, thought becomes checked and atrophied. *Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.*[8]

In effect, the result of a preference doctrine was a direction to the courts not to engage in greater scrutiny of legislation which potentially infringed upon First Amendment guarantees. Justice Holmes' views reflected the Supreme Court's retreat from their excessive scrutiny of legislation under the substantive due process doctrine to a position where they primarily regarded the due process clause as procedural in nature. In that retrenchment from an earlier activism the Court was expressing the belief that government must control and is the best judge of economic and social matters, while the courts are the guardians of the fundamental enduring principles guaranteed in the *Constitution*, such as freedom of speech, which do not change with the times. Modes of expression may have changed over time, but the fundamental significance of the right to a modern democratic state remains unabated, if not more essential, in modern North American society.

The *Canadian Charter of Rights and Freedoms* makes it clear in section 1 that all of the rights guaranteed therein are subject to limitations.[9] This should foreclose the need for a debate of the nature that occurred in the United States. But section 1 does not resolve the issue of the interrelationship of freedom of expression and other values of importance in our society. Should it be given a preference by the adoption of a doctrine which would require closer scrutiny of any limit on freedom of expression than would be given to the restriction of other rights? Section 1 seems to require that all legislation or governmental action be subject to the same scrutiny, in each case requiring a determination of whether the limitation is reasonable, whether it is prescribed by law, and whether it can be demonstrably justified in a free and democratic society. Since there is a threefold requirement of scrutiny there does not appear to be a need for a specific preference doctrine. However, it can be argued that it should be more difficult to justify limitations on freedom of expression than on other rights because of free expression's significance to the effective functioning of a democracy. Therefore, the importance of the right and the legitimacy of the objective of the limitation are essential matters to consider when faced with a purported limitation. While *de jure* there is nothing to indicate

8. 336 U.S. 77 at 95 (1948), emphasis added.

9. Section 1 provides:

> 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.

a preference, the result may be a *de facto* difference if the courts determine that the maximum possible freedom of expression is essential to the continued existence of Canada as a democratic state. Whether such a differentiation results will depend upon the importance placed by the courts upon the value served by the right to freedom of expression.

The Value of Freedom of Expression

While in Canada there has always been an assumption that freedom of expression and the press are central to our democratic system, there have been few attempts to articulate its theoretical foundations. In contrast, Europe and the United States are replete with writings expounding the philosophy which justifies the primacy of the right to freedom of expression in a democratic society. Unfortunately these theories tend to be inconsistent and contradictory as to the values served and the extent of protection needed to preserve them. It was the writings of Milton, Locke, John Stuart Mill, Bagehot, Jefferson and Madison that took the root of the theory, planted as early as Roman times in Cato's letters, and nurtured it to accord with the flourishing of the modern liberal democratic state.[10] Mill's theory was premised upon the assumption that individual liberty must be protected from the tyranny of the majority.[11] Part of the essence of liberty is the freedom to express opinions because this is a fundamental means for seeking the truth. Mill was of the firm belief that wrong opinions would ultimately yield to fact and argument, but this could only occur if their propagators were exposed to alternative views.[12] Therefore, it was essential to a democratic society that the right to expose opposing views, even if only held by a few, be protected. Mill recognized the need for protection of free speech most poignantly when he said:

> The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations, as a rule of conduct on others is so energetically supported by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.[13]

Although Mill's marketplace theory has been strongly criticized it still has had a substantial impact on modern thinking and heavily influenced the debates that followed his work *On Liberty*.

The debate in the United States is premised upon the assumption that freedom of expression is worthy of protection. It is only the degree of protection and the values served by free expression that are an issue. Meiklejohn and Kalven have argued that the protection of freedom of expression is justified only when the expression deals with government.[14]

10. This is not meant to be an exhaustive list of philosophers who have written on the subject of freedom of expression.

11. John Stuart Mill, *On Liberty*, (1869).

12. *Ibid.*, at 41.

13. *Ibid.*, at 31.

14. Meiklejohn, *supra*, n. 5; Harry Kalven Jr., "The New York Times Case: A note on 'The Central Meaning of the First Amendment'", [1964] *Sup. Ct. Rev.* 191 at 221; see also Alexander Meiklejohn, *Free Speech: And Its Relation to Self Government*, (1948) 107; Robert Bork, "Neutral Principles and Some First Amendment Problems", (1971) 47 *Ind. L.J.* 1.

According to their theory it is essential to the functioning of a democracy that free expression concerning the activities of government be protected from limitations by the state, so that every individual can be free to form his or her own beliefs and to communicate these without fear of reprisal. It is assumed by their argument that the truth will appear if all facets of an argument are presented. That this latter view was premised on Mill's "market-place of ideas" is apparent in a discussion by Justice Douglas in his dissent in *Dennis* v. *The United States*:

> When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.[15]

Meiklejohn's theory assumes that the primary value served by the First Amendment is the guarantee and enhancement of the democratic process. If an individual does not have the ability to freely discuss the merits or demerits of government activities, the principle of democracy would soon wither and die. Since he regarded this liberty as the only true value served by the First Amendment guarantees, there was no place in his theory for an extension of the protection to the realm of literature, scholarship, and the arts. He did relent somewhat in his later years from this narrow position to concede that the protection may extend to philosophical or literary expression, but only if it contributed to the furtherance of the democratic system of government.

In contrast, commentators such as Zechariah Chafee, Jr. and Thomas I. Emerson rejected Meiklejohn's narrow thesis in relation to the First Amendment.[16] They believed that freedom of expression is valued not only for its political functions, but as an end in itself, and that free expression is essential to the dignity of all individuals. As a consequence, expression in the political, artistic, social and cultural context must be protected unless it becomes action which the state may have a legitimate interest in prohibiting. Another commentator, Martin Redish, has argued that the only value that free speech serves is individual self-realization — that is, the fostering of individual development and the making of decisions that affect the lives of individuals.[17] In this analysis, Redish argues that other values such as the "market place of ideas" and the "political process" are really sub-values of individual self-realization. He argues that the "moral norms inherent in the choice of our specific form of democracy logically imply the broader value, self-realization".[18] Therefore any form of expression that furthers the self-realization value is to be protected. Under such an analysis only the individual can make the choice of what form of communication will be valuable in developing her potential. As a

15. 341 U.S. 494 at 584 (1951).

16. See for example, Zechariah Chafee, "Book Review: Alexander Meiklejohn's Free Speech and Its Relation to Self-Government", (1949) 62 *Harv. L. Rev.* 891, and Emerson, *supra*, n. 6.

17. Redish, *supra*, n. 4.

18. *Ibid.*, at 594.

result, unless there is harm to other competing social values the individual must be free to make choices. The attraction of Redish's theory is that it eliminates the need for the elaborate doctrines and excluded categories of speech that have developed in the American jurisprudence. Instead each purported limitation must be appraised in the context of its impact on individual self-realization and weighed against the asserted need by the state to impose this limitation.

While it has been argued that the values served by the right to freedom of expression can be reduced to one generalized value with four subcategories or four values as Professor Emerson articulated,[19] the general theme is that knowledge is advanced, self-fulfilment is achieved and the society is enriched by protecting the right to free expression. Altough the case was decided on a division of powers analysis, Mr. Justice Cannon's statements in *Reference re Alberta Statutes* were a recognition by the Canadian courts that a significant value is served by free expression:

> Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the state within the limits set by the criminal code and the common law.[20]

The Court made no attempt to fully articulate the values served by free expression, beyond its importance for the governmental process, nor did it have to balance interests. So long as the authority to restrain free expression rested with a legislature the doctrine of parliamentary supremacy left the choice and manner of limitations on the right to it.

Now the Canadian courts face the challenge of ascertaining acceptable limitations. But before they engage in this process they should attempt to agree upon the value or values served by the right to free expression. The approach taken in *Reference re Alberta Statutes,* while of some significance, is not adequate since it only deals with the relationship between free expression and the governmental process. A Meiklejohn political process approach is not adequate in Canada for several reasons. First, it is extremely difficult to distinguish speech which affects the political process from that which doesn't, and attempts at making such distinctions result in the drawing of artificial boundaries. Indeed, if the political process is given its widest definition, virtually all speech would have an impact on it. Secondly, even if speech is not directly related to the political process, undue limits placed upon such speech would be harmful. The very essence of a democracy is that its individual members be free to grow and to participate in the governmental process. Participation becomes difficult when forms of communication are limited without reference to other overriding interests.

19. Emerson, *supra*, n. 6 at 6-7, where the author recognized the four values served by the First Amendment's protection of expression as:
    1. assuring individual self fulfilment;
    2. advancing knowledge and discovering truth;
    3. provid[ing] for participation in decision making by all members of society; and
    4. achieving a more adaptable and hence a more stable community ... maintaining the precarious balance between healthy cleavage and necessary consensus.

20. [1938] S.C.R. 100 at 146.

It is my submission that our courts should adopt a liberal approach to recognizing the values served by freedom of expression — values that are conducive to individual growth and development, and not merely to participation in the political process. It can be argued that in order to participate fully in the political process an individual must have the maximum allowable freedom in all aspects of her life. This approach is most likely to foster an effective and meaningful democracy where freedom is truly protected, not merely espoused as an ideal. Such an approach would probably avoid the pitfalls encountered by the United States Supreme Court when faced with categories of speech, such as obscenity, which arouse intense emotions, yet are a part of human development. To assist this analysis I will briefly examine the American concept of "content distinction", as it has been designated by many commentators, to point out some of the problems experienced by the American courts.[21]

The Content, Subject Matter Distinctions

Part of the complexity of the American courts' approach to the interpretation of the First Amendment stems from the manner and degree of judicial review given to different types of state regulation of expression. In one category, regulations which relate to the content of expression have been subjected to strict scrutiny by the Supreme Court, while minimum scrutiny has been given to non-content based limitations on expression.[22] In addition, the courts have excluded entire categories of speech, such as commercial speech and obscenity, from the protections of the First Amendment,[23] generally on the assumption that these are of such little value that they do not warrant protection. While the Supreme Court has retreated somewhat from the excluded categories approach, at least as related to libel and commercial speech,[24] there is still a legacy of confusion and a continued dilemma when the courts are confronted with restrictions on purportedly obscene expression. Certainly, the Court's exclusion of

21. Some of the major commentators and examples of their comments are: L. Tribe, *American Constitutional Law*, (1978) 580-601 and 682-688; J.H. Ely, "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis", (1975) 88 *Harv. L. Rev.* 1482; D. Farber, "Content Regulation and the First Amendment: A Revisionist View", (1980) 68 *Geo. L.J.* 727; K. Karst, "Equality as a Central Principle in the First Amendment", (1975-76) 43 *U. Chi. L. Rev.* 20; G. Stone, "Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions", (1978-79) 46 *U. Chi. L. Rev.* 81.

22. *Ibid.*

23. With respect to obscenity, see *Chaplinsky* v. *New Hamphshire*, 315 U.S. 568 (1942), where the Supreme Court excluded "obscenity" as a category from the protection of the First Amendment. While these statements were broad, the Supreme Court, in its first major decision on obscenity, *Roth* v. *United States*, 354 U.S. 476 (1957), affirmed that position, stating:

> [I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

The commercial speech exclusion originated in *Valentine* v. *Chrestinsen*, 316 U.S. 52 at 54 (1942), where the Court stated:

> This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

This doctrine has been recently rejected by the Court in a series of three decisions: *Pittsburg Press Co.* v. *Pittsburg Commission on Human Relations*, 413 U.S. 376 (1973); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976).

24. With respect to commercial speech, see *ibid*; with respect to libel, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) where the Court required that the states safeguard freedom of speech and of the press in their libel laws, as was required by the First Amendment.

obscene speech from protection permitted a majority, or perhaps a vocal minority, to impose its views on the remainder of society. This approach also detracted from a unified theory of protection of freedom of expression. The Supreme Court made a value judgment that all obscenity was of slight social importance without any evidence. Furthermore, the Court did not appear to ascertain whether there were any important values that would be harmed by permitting obscene expression nor did it appear to balance these values against others that may be served by unrestrained free speech. One can say that the court permitted emotionalism to predominate over any rational theories that might have developed. This is a grave danger, since guarantees are only meaningful if they are protected even in times of adversity. Free expression in general can be severely harmed when one particular form of expression is excluded from protection because of the negative emotionalism that it creates. This principle is applicable whenever an entire category of speech is excluded from protection.

The second distinction which the courts make appears rational on the surface. It is that there should be stricter scrutiny when the restriction is placed on the expression because of its content. The judiciary should be skeptical where the state's regulation is aimed at the content of the message because the state disagrees with the views expressed or for some other reason such as fear of violence.[25] One of the inherent difficulties with this approach has been the determination of what legislation is, in fact, content based.[26] Martin Redish argues that the courts even have difficulty determining whether many restrictions are content based or whether they relate to time, place or manner of expression.[27] He claims the courts often misinterpret the kind of regulation at issue in the particular case.

Whatever the difficulties of making distinctions, the courts in recent years have clearly taken the position that a stricter degree of scrutiny will be given to content-based regulations. This was not always the approach, however, since in the earlier decisions of the Supreme Court pertaining to freedom of speech, the Court gave no indication that it was specifically concerned about regulations which related to content.[28] Rather, the Court focussed on the effect of the regulation on the ability to freely communicate.

The development of strict scrutiny for content based regulation seems to be a fairly recent development which can be traced to the Supreme Court decision in *Cox* v. *Louisiana*[29] where Mr. Justice Goldberg declared that the Court need not "... consider the constitutionality of the uniform, consistent, and nondiscriminatory application of a statute forbidding all access

25. Redish, *supra*, n. 4.
26. See Ely, *supra*, n. 21, and Farber, *supra*, n. 21.
27. Redish, *supra*, n. 4.
28. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).
29. 379 U.S. 536 (1965).

to streets and other public facilities for parades and meetings".[30] In that case there was no emphasis on ascertaining whether nondiscriminatory legislation in itself was an infringement upon the values served by the First Amendment, instead the court focused primarily on the issue of whether it was content based.

This discussion contained the seeds of the "content" distinction which was to grow in future cases such as *Erznoznik* v. *City of Jacksonville*. There the Supreme Court struck down a Jacksonville ordinance which made it a public nuisance and a public offence for a drive-in movie theatre to exhibit films containing nudity when the screen was visible from a public place.[31] The Court held that the ordinance discriminated on the basis of content, and could not be justified under the rubric of the protection of the privacy of those who were in the public streets, since such persons could avert their eyes if offended.[32] On the other hand, in *Greer* v. *Spock*, the Supreme Court held that banning all speeches and demonstrations of a partisan political nature on a military base was not an infringement because it applied equally to all candidates. In addition, the Court declared that the purpose of a military base like Fort Dix was to train soldiers, not to provide a public forum for political candidates.[33] Since the ban did not discriminate, the Court did not closely scrutinize the danger to First Amendment interests nor the justification offered for prohibiting this activity. The result of this approach is that the court focuses on clearly undesirable situations where the government attempts to regulate a viewpoint. If this is found, strict justification is required before the regulations will be upheld.[34] But, if the regulation applies to all equally, then the courts do not require a state to have a compelling reason. In fact, they barely scrutinize legislation which applies to everyone.

There is grave danger in this approach for several reasons. One is that it is often difficult to ascertain when regulations are content based. The courts sometimes confuse these with time, manner and place restrictions.[35] Secondly, everyone agrees that regulations which distinguish on the basis of viewpoint are a serious infringement on the right of free speech since the government should not be permitted to suppress views with which it disagrees. However, even legislation which restricts speech on a basis other than content poses a threat to freedom of expression. For example, in *Greer* the Court did not really question the need for an absolute ban on political campaigning, nor assess the harm that is caused to free expres-

30. *Ibid.* at 555.

31. 422 U.S. 205 (1975).

32. See also, *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Schacht* v. *United States*, 398 U.S. 58 (1970).

33. 424 U.S. 828 (1975). For other decisions where the Supreme Court exercised minimal scrutiny, see *United States Civil Service Commission* v. *Association of Letter Carriers*, 413 U.S. 548 (1973); and *United States* v. *O'Brien*, 391 U.S. 367 (1968).

34. In *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970), a federal statute which provides that a person receiving a "pandering advertisement" which he believes to be "erotically arousing" or "sexually provocative" may instruct the Post Master General to inform the sender that such mail is not to be sent in the future, was upheld on the basis that the right to privacy outweighed the right of others to communicate to an individual's home.

35. Redish argues that this error was made in *Police Department of Chicago* v. *Mosley*, *supra*, n. 32.

sion. It is too easy for a court to become complacent when faced with a non-content based regulation. Whenever regulations of this nature are enacted some forms of communication are restricted, and there is a potential for loss sustained from the non-dissemination of ideas.

As the Canadian courts interpret section 2 of the *Charter* it would be a grave mistake to follow the American courts, and the distinctions they have made between restrictions aimed at content and restrictions which are not discriminatory between views, particularly if free expression is to be fully protected. An approach similar to that adopted in the earlier *Hague* case, where the Supreme Court concentrated on the effect of regulation on a citizen's ability to freely communicate, would be more compatible with the structure of our *Charter*. Furthermore, it can be argued that section 1 does not permit such a distinction since it requires that all limits be scrutinized to ascertain if they are "reasonable", "prescribed by law" and "demonstrably justified in a free and democratic society". While regulations which are based on content may be more difficult to justify, this is merely an evidentiary problem and should not relate to the degree of scrutiny required whenever a purported limitation is challenged. No purpose can be served by making distinctions which are difficult to work with and difficult to justify if protection of free speech is significant. From the American cases it can be seen that the courts' concern with content based regulation has the potential to detrimentally affect the protection of free speech since legislation which infringes freedom of speech values may be overlooked if it is not content based.

In addition, there would be no benefits to adopting a subject matter exclusion, such as obscenity, because this could result in a serious restriction on freedom of expression without any requirement that the courts balance the values served by the restrictions against those served by free expression. There may be situations where other values, such as protection of children, override an adult's right to receive or communicate obscene speech, but this can only be assessed on a balancing of interests. The court must assess the degree of harm caused to the other value as compared to the harm that would result from imposing restrictions on freedom of expression. One can certainly argue that this approach is required by section 1. It is not enough for the courts to say there is a legitimate governmental interest served by the regulation — it can only be reasonable and justifiable if the harm from failure to regulate overrides the harm caused to freedom of expression by regulation.

An exhortation against developing a content distinction need not foreclose the development of any doctrines to aid the court's interpretation. One such doctrine which may be useful is a form of the overbreadth doctrine.[36] This doctrine recognizes that the objectives of the state are valid

36. In *Broadrick* v. *Oklahoma*, 413 U.S. 601 at 616 (1973), the Supreme Court established the substantial overbreadth doctrine, that is that statutes would be invalidated "when the flaw is a substantial concern in the context of the statute as a whole".

but the means used to achieve the objective are excessive. An example of a Canadian court's use of an approach similiar to this doctrine is *The Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors*[37] where the Court accepted that the objectives of the legislation were valid. However, the Court held that the provisions in the *Ontario Theatres Act* were not prescribed by law since there was no specific criteria to guide the Censorship Board in exercising its discretion. In other words, the means sought to achieve the valid objective were an excessive infringement upon freedom of expression. Of course Canadian courts need not resort to the use of the overbreadth terminology. They can achieve the same result by using "prescribed by law" and "reasonable" to require that legislation must be a reasonable means of achieving a demonstrably justifiable objective. What may be of assistance to Canadian judges as they seek to interpret section 1, is an examination of the situations where overbreadth has been used in the United States. They can then evaluate the relevance those cases may have in the Canadian context.

Another area of freedom of expression that has caused problems for the American courts is symbolic speech. Again, this is an issue that will arise in Canada, and thus it is useful to analyze the American experience briefly. Issues of symbolic speech arise, for example, when students refuse to salute the flag, wear black arm bands in school, burn their draft cards, or mutilate their own copies of their country's flag. In *West Virginia State Board of Education* v. *Barnette* the Supreme Court held that public school children cannot be compelled to salute the flag if that would violate their religious beliefs.[38] Although the students used action rather than words, the Court recognized that their acts were of a significant expressive nature. In fact, the Court made it clear that to compel the students to salute the flag would be forcing them to accept a particular view of nationalism. This, in essence, was almost a content distinction case since the statute arguably sanctioned one particular view to the detriment of any other points of view. The only state interest in the case related directly to freedom of expression, since, in effect the conduct required of the students would have forced them to express support for a particular ideology when they did not wish to do so.

Although the Supreme Court accepted the premise that some symbolic speech was entitled to protection, its early decisions did not create a test for defining what forms of symbolic speech would be favoured. A much-criticized 1968 decision of the Supreme Court attempted to set some guidelines.[39] O'Brien had been convicted of burning his selective service registration in violation of the *Universal Military Training and Service Act*, which made it an offence for any person to forge, alter, knowingly

37. (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.).

38. 319 U.S. 624 (1943).

39. *United States* v. *O'Brien*, *supra*, n. 33; see also, J.H. Ely, *supra*, n. 21; T.I. Emerson, *supra*, n. 6; D. Alfange, Jr., "Free Speech and Symbolic Conduct: The Draft-Card Burning Case", [1968] Sup. Ct. Rev. 1; Nowak, Rotundu & Young, *Constitutional Law*, (1978) 817-823.

destroy or knowingly mutilate or change such certificate in any manner.[40] The Supreme Court upheld the conviction dismissing his argument that it was an infringement on his freedom of expression. In doing so it set out a four part test for determining when a government may regulate expressive conduct:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the government interest is unrelated to the suppression of free expression; and [4] if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[41]

The Court recognized that O'Brien's action had some communicative element, although it was not willing to label all of his conduct as speech. In fact, the Court held that there was a sufficient government interest not related to expression. They did not appear to accept the premise that the legislation was designed to punish expressions of dissent concerning the war. The Court said the State interest was in protecting the system of selective service although they failed to show how O'Brien's draft burning affected speech. On the other hand, the impact on freedom of speech was small since O'Brien could protest the war in other ways.

Following *O'Brien*, in a decision entitled *Tinker* v. *Des Moines School District* the Court upheld the rights of school students to wear black arm bands to protest the war in Vietnam.[42] The Court characterized the regulation banning such arm bands as being directly related to free speech since other forms of political symbols were permitted in the schools. Furthermore, the court engaged in a balancing test, rather than the *O'Brien* test, to determine that this conduct did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school".[43] Also inherent in the Court's judgement was the concern that this regulation was content based and therefore required more scrutiny.

The courts have not been consistent in their analysis in this area. In some cases the courts have used the *O'Brien* test whereas in others, such as *Tinker*, they used an ordinary First Amendment analysis. In contrast to *O'Brien*, most of the cases involving desecration of flags owned by an individual have been decided in favour of First Amendment interests. For example, in *Smith* v. *Goguen* the defendant wore a flag sewn to the seat of his pants.[44] He was convicted under a Massachusetts statute which made it an offence to publicly treat the U.S. flag with contempt. The court struck down the statute as being too vague, but this was consistent with earlier cases suggesting there was no state interest, not related to expres-

40. *United States* v. *O'Brien*, *supra*, n. 33 at 370.
41. As quoted in *Nowak et al.*, *supra*, n. 39 at 818.
42. 393 U.S. 503 (1969).
43. *Ibid.*, at 509, quoting *Burnside* v. *Byars*, 363 F. (2d) 744 at 749 (1966).
44. 415 U.S. 566 (1974).

sion, which would override the message conveyed through the symbolic medium.[45]

Symbolic speech presents a problem because it is not always easy to identify and is usually intertwined with action. The general position of the American courts has been to recognize the communicative element and provide First Amendment protection although the methodology in the cases has not been consistent.

It can be argued that under section 2 of the *Charter* symbolic speech is clearly protected under the broad rubric of expression. Even in the American *Constitution*, which refers to speech, the courts were able to protect a form of expression that goes beyond mere speech, whether in oral or written form. Symbolic expression may have a much greater impact on an audience than words alone. It may be the most effective means for some to express a viewpoint. As such it is an important part of our free expression concerns.

In Canada, there should be no need to evolve a different test to deal with symbolic expression. The first step in the process should be a determination in any given case whether the communication is symbolic expression or merely conduct with no communicative element. Having determined this, the court must examine any governmental limitation for reasonableness, then ascertain if such a restriction is justifiable. Presumably a limit can only be justifiable if it serves some important interest other than the mere suppression of an unpopular idea or the enforcement of some administrative convenience. To adopt such a uniform approach would lessen the likelihood of inconsistent decisions. Inescapably, some inconsistencies will occur because the judges may differ in their opinions as to what restrictions are demonstrably justifiable and what constitutes symbolic speech. But far more inconsistencies are likely if the courts, instead of adopting a uniform approach, adopt a number of different tests, to justify upholding state restrictions in instances such as *O'Brien* where the Court obviously found the actions of the defendant distasteful to their sense of nationalism.

Conclusions

What I have attempted to present is a kaleidoscope of the interpretations given to freedom of speech guarantees in the United States, and their significance for a similar exercise of interpretation in Canada. Of particular significance are the differences in judicial traditions between the two nations. The United States Supreme Court is firmly entrenched in the *Constitution* as a third arm of the checks and balances of the American system. The courts, since the time of John Marshall, have taken the posi-

45. See *Spence* v. *Washington*, 418 U.S. 405 (1974); and *Wooley* v. *Maynard*, 430 U.S. 705 (1977). In the latter case the Court held that a motorist has a free speech right not to be prosecuted for obscuring on his licence plates the state's motto: "Live Free or Die", since this was an attempt to enforce a particular viewpoint without any justification. This case demonstrates that scrutiny of content-based restrictions also permeates speech labelled as symbolic.

tion that they have the power to exercise judicial review, even to the point of ascertaining the content of Presidential privilege.[46] While the courts have always recognized government interests, they have never simply deferred to them when, in the courts' opinion, these interests are in conflict with fundamental interests. In addition, the United States Supreme Court has experienced periods of intense activism in some areas, such as civil liberties.[47]

In contrast, the Supreme Court of Canada is not entrenched although it would be extremely difficult to abolish it. In the past, Canadian courts have only invalidated legislation when it was not within the legislative power of the enactor pursuant to sections 91 or 92 of the *Constitution Act, 1867*. In addition, Canadian courts have long adhered to the British tradition of parliamentary supremacy deferring to Parliament when choices of policy were at issue. The Supreme Court of Canada has not been viewed as activist in the same manner as the United States Supreme Court. Adherence to parliamentary supremacy has not been totally removed from the *Charter* because of the retention of the section 33 override clause. It is in this context that our courts must meet the challenges presented by section 2. They have no long Canadian history of open protection of freedom of expression to rely upon although there has long been a commitment in Canada to these values. This lack of a history has its merits and demerits. One merit is that the courts can begin anew to develop a theory of freedom of expression. There is time to assess the values served by the free expression guarantees with the benefit of the plethora of jurisprudence available from the United States and some available from the developing jurisprudence of the European Court of Human Rights. Also, there is the opportunity to examine the successes and failures of each system so as to avoid falling into the same pitfalls or struggling with issues that have been resolved in other jurisdictions (so long as those resolutions are satisfactory within the context of Canadian society). It cannot be denied that the United States Supreme Court has been asked to resolve many of the issues that will confront the Canadian courts. This is not to say that the Canadian courts should simply adopt the American jurisprudence for their own. Canada is a different society with distinctive values that would render many American or European solutions unpalatable. The Canadian courts must and will develop a uniquely Canadian jurisprudence.

The demerits stem from the courts' long tradition of deference to legislative supremacy. There will undoubtedly be a temptation to say that legislation which protected specific interests in the past is valid because those interests have been traditionally accepted as valid. In the *Ontario Censorship Board* decision, the Divisional Court, at least, accepted without much analysis that censorship of obscene material was valid. While it

46. For a declaration of the power to declare Acts of the Federal Government to be in violation of the *Constitution*, see *Marbury* v. *Madison*, 5 U.S. 1; 1 Cranch 137 (1803). For an example of the exercise of the power to set the limits of Presidential privilege see *United States* v. *Nixon*, 418 U.S. 683 (1974).

47. For example, during the tenure of Chief Justice Warren the Court was very activist with respect to civil liberties issues.

is true that they did not have to make this decision, since the statute was lacking in criteria, it is indicative of the pitfalls that our courts should try to avoid. Our ultimate conclusions may be that many of the pre-existing limitations are valid but this conclusion is only legitimate if it is determined after a critical analysis of the justifications. An example is the whole realm of obscenity where the *Criminal Code* makes selling or distributing obscene materials an offence. This provision has never been tested against a freedom of expression guarantee, because Parliament has the power to enact it under section 91. I have previously argued that such a provision is likely an unjustifiable infringement on freedom of expression because it cannot be demonstrated that the values served by free expression should be subsumed to interests engaged in the protection of morality.[48] In order to assess the forces of competing values the court must decide the value served by free expression and must not permit the emotional appeal of censorship to cloud their vision. This apportionment of values is significant in other areas. Undoubtedly, free expression collides with other rights such as the right to privacy, and the right not to be discriminated against. An assessment of the appropriate balance can only be made where values underlying these rights have been determined.

In essence, the interpretation of section 2 poses many problems. These can only be resolved by clear goals established in early decisions which recognize the vital importance of freedom of expression but which also ensure an appropriate mechanism for balancing of vital interests. It requires a willingness to be creative, to depart from complete deference to legislative supremacy without usurping the function of the legislatures, and to examine other legal systems for precedents that offer guidance.

48. Clare F. Beckton, "Obscenity and Censorship Re-Examined Under the Charter of Rights", (1983) 13 *Man. L.J.* 351.