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Electronic version

URL: <http://journals.openedition.org/revdh/4109>

DOI: 10.4000/revdh.4109

ISSN: 2264-119X

Publisher

Centre de recherches et d'études sur les droits fondamentaux

Electronic reference

Pyeng Hwa Kang, « Constitutional Treatment of Hate Speech and Freedom of Expression: a Canada – U.S. perspective », *La Revue des droits de l'homme* [Online], 14 | 2018, Online since 14 June 2018, connection on 08 July 2020. URL : <http://journals.openedition.org/revdh/4109> ; DOI : <https://doi.org/10.4000/revdh.4109>

This text was automatically generated on 8 July 2020.

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- 1 Among Western nations sharing a frontier, no countries appear as congeneric as the Canadian-American pair. In broad terms, Canada and the U.S. today share a wide range of resemblances in culture, history, language, and to a great extent, political regimes of democratic governmental systems². That *bonhomie* is extended to the recognition of freedom of expression in the respective legal systems. The First Amendment's sophisticated elaboration of what are now *de facto* considered as the classic free speech paradigms³ – and its staunch defense of the freedom – has earned it a notorious reputation, effectively making it a kind of a mecca of any in-depth legal studies of freedom of expression.
- 2 Of course, America does not stand alone when it comes to the constitutional embrace of the free speech ideal. Canada too, has long established that freedom of expression “is the matrix, the indispensable condition of nearly every other freedom”⁴. Notwithstanding its enshrinement in s.2(b) of the *Canadian Charter of Rights and Freedoms*⁵, there is a widely accepted acknowledgement of the freedom being “one of the fundamental concepts that has formed the basis for the historical development of the political, social, and educational institutions of Western society”⁶.
- 3 In sum, there is an undeniable sense of general congeniality between the two nations in their positive *reconnaissance* of the freedom. This deep-rooted appreciation on both legal and socio-political grounds – along with other constitutional values such as right to due process, freedom of religion, of association, and of the press – has propelled the pair hand in hand as leading flag bearers of vibrant democracy. After all, the right to freely opine one's opinions – political ones in particular – and their unhindered circulation in any given social environment, constitutes the essence, the bloodline for a performing democracy; in case of that inability, the dawning of an authoritarian State is never too distant.

- 4 Notwithstanding this basic agreement, important distinctions remain⁷. One such area concerns the dilemma of hate speech. The legal conundrum surrounding the question of a legitimate suppression of hate speech by the State has become remarkably poignant following the American political *bouleversement* in 2016 and the burgeoning of mean-spiritedness in social atmosphere not only prevalent in the North American scenery⁸. In that process, hate speech that fundamentally vilifies the racial, ethnic or religious characteristics – *grosso modo*, the cultural identity⁹ – of the *Others* has re-emerged as a hairy quandary to Western societies that take pride in the liberal tradition of tolerance.
- 5 This article discusses the constitutional treatment of hate speech *vis-à-vis* freedom of expression from the Canadian and American perspective. Given the monumental amount of previous scholarly writings in the periphery of the subject, the natural challenge arising thereof is that of parroting or redundancy¹⁰. Thus, to narrowly tailor the aim and the scope of the article, I focus on two major points which I perceive as the most diverging aspects with regard to the legal handling of hate speech on constitutional level in respective legal orders: first, on the conceptual divergence to the freedom of expression as fundamental freedom and the extent of that recognition with respect to other constitutional rights; second, on the respective key jurisprudential evolutions and differing legal basis in evaluating the constitutional validity of legal restrictions of hate speech. The argument of the article is twofold: I argue that the American conception of free speech as a preferred freedom is necessarily built on strong originalist constitutional interpretation and shaped by socio-cultural context of its history. The Canadian approach to freedom of expression, on the other hand, rejects a hierarchical system of fundamental rights but rather applies an egalitarian conception of rights relationally and with respect to other conflicting rights (1°). It is my observation, based on landmark decisions specifically addressing group vilifying hate speech, that Canadian courts have not been hesitant to strike down such expressions. Their legal justifications lie on expansive, communitarian interpretations of harm in hateful words – harm that which is perceived as antithetical to group-oriented, multicultural values reflective of Canada's pluralistic vision. The American counterparts have been far more reluctant in this regard by applying strict First Amendment scrutiny (2°). My hope is that at the end of these demonstrations, the subtle yet disparate juridical identity of Canadian freedom of expression through its coping with hate speech will be established as compared to that of the American free speech.

1° - Absolutist or Egalitarian? Conceptual Divergence of Freedom of Expression

- 6 The American free speech enjoys a particular favoritism in the American constitutional life. It is a *juriscultural* product that was historically forged by a constant alertness against governmental intrusion on the fundamental freedom and its abidance to the originalist interpretation of the First Amendment (A). Canada, however, has declined to rank the same freedom above other equally fundamental rights, effectively creating an egalitarian-driven landscape of rights when rights are in collision course (B).

A/ - American Free Speech: a Preferred Freedom

- 7 If there is one word befitting to describe the place free speech occupies in the echelon of American constitutional life, it is that of exceptionalism. Indeed, speech as fundamental freedom enjoys an unmatched proclivity by American law.
- 8 Take for example the “online epidemic”¹¹ of fake news as (false) political speech and the associated legal conundrum reigning in such speech¹². Beyond the proximate concern that empowering the government to regulate political speech would be an open invitation to abuse¹³, courts have vehemently refused to impose constraint on expressions of political nature¹⁴. Assuredly, political speech, as “the essence of self-government”¹⁵, is beneficiary of the staunchest legal protection because the “discussion of political affairs lies at the heart of the First Amendment”¹⁶. It is in fact explicitly recognized and even encouraged by the U.S. Supreme Court that public debates on important issues take place as they are “integral to the operation of the system of government”¹⁷. To that end, the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people”¹⁸ is, as a prerequisite for any democratic system, that which must be constitutionally ensured. To guarantee the kind of “breathing room”¹⁹ for political debates, the argument continues, political speech, even false, must be protected.²⁰ In *United States v. Alvarez*²¹ for instance, the U.S. Supreme Court held that untruthful expression be given the same constitutional protection as truthful statement even if it was an intentional doing²². This extraordinary degree of protection granted to political speech²³ may appear almost outlandish to even America’s closest Western allies of democratic ideals. In fact, America remains to this day the sole country that has yet to adopt a comprehensive legal regime to suppress hateful speech (or fake news for that matter) in major Western nations²⁴.
- 9 One of the natural questions that arises from this peculiar stance is that of the absolute character of free speech. This question has, in its subtlety, contributed to an interpretation in strong favor of free speech. An attempt to answer that question is located in the structuration of the First Amendment itself. It reads in part, “the Congress shall pass no law ... abridging the freedom of speech”²⁵. The said Amendment does not offer any distinction nor elaborate on any possible legal circumstances that would trigger the passage of a law by the legislative body limiting the freedoms mentioned therein. The Amendment flatly forbids the congress from taking any actions placing a cap on the rudimentary freedoms. Some former Supreme Court Justices adhered to this originalist interpretation, taking that “no law” literally meant “no law” at all. In his dissenting opinion in *Beauharnais v. Illinois*²⁶, Justice Douglas found that the First Amendment rights are “couched in absolute terms”²⁷. Justice Black was another fervent believer of this absolutist position. In particular, he tenaciously defended free speech as a bedrock principle that cannot be compromised against any ostensible excuses for safeguarding government interests²⁸. In *Chaplinsky v. New Hampshire*²⁹, this absolutist view was somewhat refuted with the Court narrating a number of exceptional instances in which speech would not fall under the protective ambit of the First Amendment³⁰. Still, U.S. courts have been adamant if not extremely reticent to restrain speech activity, an attitude that was reinforced through a number of landmark jurisprudential developments that resulted in denouncements of overbroad laws countering individual expressions³¹. *Bref*, though the absolute character of free speech

may have eroded, it is unquestionable that free speech enjoys an unequivocal sentiment of predilection in American constitutional references. Free speech was, and continues to be, the first of the American freedoms.

- 10 If this originalist interpretation of the First Amendment has crowned free speech as the favorite son among other liberties consecrated in the American Constitution, this unique propensity is to a great extent owed to the historical cultivation of overzealous skepticism against government³² – a defining trait of American *jurisculture*³³. From the conception of the nation to post-colonial era to modern times (some periods naturally more intensely than others), there has been a simmering attitude of suspicion against governmental intrusion upon the fundamental liberties of its citizens³⁴. After all, the term means quite just that: *free* speech. It should come as no surprise then, as to why the particular formulation of the term ‘free speech’ has outlasted the tides of time when virtually all other legal references in Western constitutional systems have settled on the more general wording of ‘freedom of expression’. Free speech has thus not only stuck as a permanent fixture in American constitutional life, but saw its stature extend to the cultural domains transcending and undetachable to American nativist identity. This confrontational model has had a determinative touch in the projection of the cultural image of free speech. When considering the contentious, defiant roles free speech assumed in American history, it is graspable as to how and why it assumed a uniquely flavored conception of the freedom that was later suitably referred to as the “clash model”³⁵. The freedom is an unrestricted good *of* and *for* the people and its deprivation must be accompanied by pious compunction.
- 11 It is also no secret that this distinct American conception of speech freedom derives its sources from the First Amendment paradigms, most notably those of marketplace of ideas and personal autonomy³⁶ – both of which are chained to individualistic liberal customs: one should be allowed to freely choose whichever messages they wish to purchase from the marketplace, and this, independently from any government supervision on the definition of good life. It ensues that the government’s rightful role is thus that of respect of individuals’ autonomous agency. In other words, it is not up to the government to cherry-pick which speech passes or fails; it is rather the driving forces of a free market, the competitive spirit within the pool of ideas that will ultimately sort out the wheat from the chaff. No matter how controversial or upsetting a speech’s content may be, the potential imposition of government-sponsored speech regulation outweighs some inconvenience resulting from hate speech³⁷; for that encroachment – even in its seemingly harmless disguise of concerned paternalistic guidance – always presents a bigger threat to the freedom that will inevitably drag us toward democracy’s slippery descent³⁸.

B/ - Canadian Freedom of Expression: An Egalitarian Model

- 12 When compared side by side with the rich historical roots and the celebrated tradition of free speech in America, the image of Canadian freedom of expression can appear rather vapid. After all, there may be some truth into the assumption that the Canadian freedom of expression is not as aged as its counterpart in America³⁹. One commentator even noted that the Canadian legal treatment of freedom of expression is not as complex as that of the United States⁴⁰. I don’t think the remark necessarily implies that the Canadian constitutional tests of speech are a mere collection of haphazardry or lacking in substance than those of the United States. It is more in the sense of general

truism that the most ardent defense of free speech was conceived in the First Amendment jurisprudence's doctrinal sophistication. And over the course of the last decades, while not slavishly cloning the American path, Canada was attentive of the hard-earned lessons from America's experience with excessive predilection to unmitigated speech. The observation has helped Canada's legal minds to craft an egalitarian-oriented interpretation of the liberty.

- 13 The first sign of divergence emerges in the *Charter of rights and freedoms*, the (modern) Canadian equivalent of the American Constitution. In stark contrast to the First Amendment's seemingly unnegotiable tone in its articulation, the Canadian *Charter* debuts in a distinctively different way. Section 1 of the *Charter* in fact commences with the constitutional possibility to limit the fundamental rights even before they are proclaimed in the following section. The limit is not a mere decorum as the test is three-fold: that the limit be (a) lawful, that can be justified in a (b) free, and (c) democratic society⁴¹. This limitation clause indicates that the absolutist perception of rights has not succeeded to create a foothold on the Canadian constitutional soil. Freedom of expression is no exception. As one commentator has noted, "Canada has clearly rejected the idea of absolute principles"⁴². Freedom of expression is fundamental but that does not gift it with absolute immunity when there are legitimate "pressing and substantial concerns"⁴³ that may justify its inhibition. This denial of predisposition to speech freedom resonates with the purposive interpretation of judicial methodology that is undoubtedly Canadian. The relational alignment of rights invites that "the meaning of a right or freedom guaranteed by the *Charter* (...) be understood (...) in the light of the interests it was meant to protect"⁴⁴. When words are that are uttered with the express intent of inflicting harm to others – especially those belonging to minority groups – it is obvious that hate speech is incompatible to the purposive spirit of the *Charter*.
- 14 Further breaking point is clearly revealed when the freedom in question is balanced with other fundamental rights. In case of *Dagenais*⁴⁵, the Canadian Supreme Court came to grapple with the standing of freedom of expression *vis-à-vis* another *Charter* right. Although the case did not directly involve hate speech, it is very telling as to the horizontal attitude Canada has embraced in rights-reconciling operations. In considering whether the public airing and diffusion of materials that could inevitably cause prejudice to an ongoing trial, the Canadian Supreme Court declined from ranking one *Charter* right over the other. The Court explicitly noted that "a hierarchical approach to rights must be avoided, both when interpreting the *Charter* and when developing the common law"⁴⁶. This resolute departure from the American counterpart signaled the Court's demiurgical willingness to establish a unique Canadian free speech jurisprudence without turning the freedom itself into some 'Trump card' that should reign over other *Charter* rights. The Court rejected running into a methodological impasse of having to somehow grade the supposed status of constitutional rights. Instead, in a remarkable fashion, the Canadian approach generated a level-playing field for future cases where *Charter* rights will collide. Surely, free expression is a fundamental freedom but that does not mean it should enjoy a whole different categorization of its own. The Court thus distanced itself from the American narrative, noting that the "clash model is more suited to the American constitutional context"⁴⁷ but not the Canadian social conditions. Striking a conciliatory rather than a contradictory tone, the Court suggested that legal bans on publications – in this case

the public broadcasting of the series and the dissemination of related discussion on the platform of public discourse – “should not always be seen as a clash between freedom of expression for the media and the right to a fair trial for the accused”⁴⁸, as was the central issue raised in *Dagenais*.

2°/ - Hate Speech in Canada and the U.S.: a Constitutional Dilemma

- 15 Canada’s upholding of hate propaganda restrictions is strongly grounded on a communitarian understanding of the harms in hate speech. This expansive concept of harm is consonant with Canada’s striving for the pluralistic vision of society that seeks to protect collective interests and multicultural group rights⁴⁹ from fundamentally degrading speech (A). The American approach, however, has been for the most part characterized by a strong reluctance in limiting speech freedom and has fortified that abstentionist position through a narrowly developed set of criteria for justification of speech restriction. This has resulted in a reductionist interpretation of harm, a view that is wholly inadequate to cover the sensibility harms purported onto varied communities by hate speech (B).

A/ - Honoring Canada’s Communitarian commitment

- 16 If originalism remains a defining feature of American free speech and exceptionalism its’ norm, the Canadian version of freedom of expression has been somewhat palliated by an egalitarian-driven conceptualization of fundamental rights. In concrete terms, this means Canada has been far from reluctant in reining in hate speech from running rampant in civilized society no matter how paramount that freedom is. Canadian courts’ firm stance in castigation of hate speech and their intrepid interference through judicial pronouncements derive their rationale, among numerous basis, from the basic recognition of the harm the abuse of manipulated free expression can cause. Beyond the obvious immediate psychological injury or physical distress to even long-term impairment of social relationships individual victims suffer at the repetitive exposure to hate speech⁵⁰, Courts were steadfast to acknowledge that the corollary of such expression ultimately undermines the equal standing and human dignity of its intended audience. In particular, by perceiving extensively into the pervasive nature⁵¹ and mushrooming effect⁵² of this category of words, the Supreme Court of Canada has remained hypervigilant against the destructive power of hate speech to create and accumulate corrosive socio-political environment. This state of alertness against the permanent danger in hate speech - and more precisely of its capacity to fan the flames of incivility when left to flourish in the face of pusillanimity of the law - appears well warranted in today’s context. After all, the current phenomenon of hate speech operates largely in harmony with active seeding of disinformation and misinformation and propagation of ‘cheap’ speech⁵³ that together pollute the general stream of public discourse, not only political debacles.
- 17 To that end, Canada possesses in its penal inventory specific legal provisions that restrict and punish the propagation of hate speech. Section 319 of the Criminal code makes it an offence communicating expressions that publicly incite hatred (319-1)⁵⁴ or willfully promote hatred against an identifiable group of people (319-2)⁵⁵. Numerous

defense mechanisms⁵⁶ are put in place to keep the scope of the targeted category of speech narrow but nevertheless, it is an indictable offense punishable by imprisonment to up to two years. Section 318(1) of the Criminal Code makes advocacy or promotion of genocide an indictable offence that is punishable by imprisonment of up to five years⁵⁷. In addition, there are provincial human rights legislations that further keep a tight grip on hate speech activity through its broad targeting of fundamentally discriminatory behaviors⁵⁸.

- 18 The existence of such provisions that are specifically implemented to curtail hateful utterances alone places Canada at odds with the U.S. But what is even more remarkable – and that which further distinguishes from the American approach to impugned speech – has been the legal basis on which Canadian landmark hate speech jurisprudences relied upon to banish hate speech from Canadian soil. As Canada's criminal hate propaganda restrictions were subsequently put to the constitutional stands and their merit assessed against the inherent values of freedom of expression, one decision after another delivered by the Supreme Court have been strongly rooted in communitarian ground⁵⁹ that sought to protect the collective interests of Canadian society from the pugnaciousness of hate expression.
- 19 The communitarian concern about the harmful effects induced by hate message is well visible in *R. v. Keegstra*⁶⁰, a leading case in Canadian hate speech jurisprudence. Reaffirming the constitutional validity of a criminal provision⁶¹ that was called upon to prosecute an Albertan high school teacher's spreading of nefarious views regarding Jewish people to his own students, the ruling applied an expansive interpretation of the harm in hate dissemination onto the communal interests of society. While recognizing the direct result of harm on individual victims, the Court also saw the defendant's expression as constituting an assault to the very "sense of human dignity and belonging to the community"⁶². Writing for the majority, Dickson C.J. explicitly acknowledged that the accumulation of the continual "derision, hostility and abuse encouraged by hate propaganda ... has a severely negative impact on" the target who identifies with the associated group⁶³. The harm cuts that much deeper because "he experiences attacks on the groups to which he belongs personally and sometimes very deeply"⁶⁴.
- 20 This communitarian defense of hate speech prohibition is a partial reflection of a larger vision embedded in Canada's multicultural project. By natural implication then, the harm in hate speech is evaluated with the utmost seriousness because hate propaganda of fundamentally degrading ideals is perceived as an affront on Canada's ethnic mosaic and "antithetical to (our) very system of freedom"⁶⁵. The aspersion and the imputing insinuation contained in hate message may cause "serious discord" ⁶⁶ within the involved community if not outright acts of violence and discrimination that injures the multicultural character of Canadian society at large. In *Taylor v. Canadian Human Rights Commission* ⁶⁷ too, prohibiting anti-Semitic telephone calls was deemed as a wholly justified limitation in the eyes of the Court to which the suppression of hate speech presented an imperative in order to uphold "... the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality"⁶⁸. Although the more recent case of *Saskatchewan (Human Rights Commission) v. Whatcott*⁶⁹ did bring acute refinement to the definition of hatred so as to narrowly tailor the general overbreadth of the terminology's effective legal implication⁷⁰ (which was the main basis for the dissenting opinions raised in *Taylor*), nevertheless the ruling fell in

line with its predecessors. Noting that hateful expression “rises beyond causing distress to individual group members,”⁷¹ the Court wholeheartedly confirmed the necessity to regulate the sort of speech that “seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society”⁷². If free speech is an American exceptionalism, then multiculturalism is the Canadian equivalent to the former. It appears to be so much so to the extent that Canada’s devotion to multiculturalism “necessitate(s) a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression”⁷³. This is a direct suggestion by the Court that multiculturalism is a constitutional principle⁷⁴, synonymous with equality and standing tall next to speech freedom. Thus, Canada’s constitutional treatment of hate speech resulted in the elevation of what many discarded as a mere political ideology into an actual constitutional precept that can take precedent over free speech claim when that expression was judged to gnaw at the equal membership of fellow Canadians.

- 21 The Canadian commitment to communitarian perception of the harm in hate speech and the undeterred striving for preservation of multiculturalism illustrate the nation’s constitutional project’s inclination toward a group-based interpretation. The place for group rights – and inextricable to it “a recognition that pluralism is one of Canada’s animating values”⁷⁵ – in Canadian legal context is not a novelty; rather, it has been a distinctive Canadian juridical identity in the making. The indicative list of implicit *Charter* values provided in *Oakes*⁷⁶ was a harbinger fertilizing the Canadian legal terrain for fostering a constitutional atmosphere amicable to group rights. These entail the “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of groups in society”⁷⁷. In addition to section 27 of the *Charter*⁷⁸ that registers multiculturalism as a Canadian value, numerous sections are dedicated specifically in respect to and in recognition of other group rights such as minority language educational rights (s.23), denominational schools (s.29), and even extending the reconciliatory branch to the treaties with Aboriginal peoples (s.25).
- 22 Surely, individual freedoms are important. But so are group rights in Canada. When a freedom is distorted in such a way to disseminate and sow racially divisive messages, that liberty is perceived as a menace to the collective moral fabric of Canadian society. To protect the “cultural and group identity” through the prism of equality, there is no room of tolerance for expressions that bluntly malign entire blocks of social groups with one large brush without offering any sort of critical distinctions nor constructively elevating the political debate for the matter of public interest. Constitutional rights belong to individual agents as much as they do to groups. As long as the Supreme Court maintains the culturally pluralistic vision of Canadian society, legislations displaying preferment toward collective interests are likely to triumph over free expression even at the cost of abandoning piercing individual expressions⁷⁹.

B/ - Narrow Doors to Speech Restrictions

- 23 When it comes to the general acknowledgement of the harms in racist hate speech or other discriminatory expression, American courts seem to share Canada’s distaste. However, that common ground seems to shrink when the contested speech is subject to

suppression purely due to its content that may hurt sensibilities of particular communities. Staying true to the spirit embodied in the Holmesian tradition of marketplace and the utmost respect to individuals' autonomy to express and pursue whatever ideas they please, attempts to somehow frame or criminalize certain expressions were met with great backlash from U.S. courts. Over the course of the last century, the First Amendment jurisprudence has developed a series of elaborate rules that would satisfy the necessary constitutional bar when restraining speech. Given their aged rulings, there is valid criticism that their mode of applicability may be outdated to adequately address the rising challenges in the field. This concern pertains specifically with regard to the complexities resulting from technological advancement, ways of mass communication, and most problematically, the continuously self-evolving uses of the Internet's social networks. That being said, the principles excavated from these cases have retained much of their initial influence in addressing modern constitutional challenges related to the treatment of hate speech issue in American law.

- 24 The early years of free speech jurisprudence was marked by what many would criticize for failing to live up to today's democratic standards, and understandably so when considering the extraordinary circumstances of a nation engaged in wars abroad at the time. Nevertheless, the decisions provided clear directions to show legally sufficient basis when suppressing speech activity. *Schenck v. United States*⁸⁰ introduced one such 'test'. In a unanimous decision, the Supreme Court upheld the conviction of the defendant for violating the Espionage Act of 1917 by mailing thousands of pamphlets to drafted soldiers in which he essentially accused the government to have no right to send American citizens to fight war abroad. The Court embraced a contextual approach by evaluating whether the words in the leaflets were used in such circumstances and nature as to create a "clear and present danger"⁸¹. The reasoning in *Schenck* was later extended to *Abrams v. United States*⁸², in which defendants' distribution of pamphlets denouncing the government, capitalism and military intervention abroad in bellicose environment was judged as an expression that which the Congress has a right to forbid. The "clear and present danger" would eventually be somewhat discarded in *Gitlow v. New York*⁸³, in which the Supreme Court upheld a New York state statute that struck down the publication of utterances having the *tendency* to create danger to the public (in the case, manifesto encouraging to overthrow the government) even if the expression in question did not cause immediate clear and present danger. *Whitney v. California*⁸⁴ would expand on this 'bad or dangerous tendency' criteria, deeming it sufficient ground for denying the constitutional shield of the First Amendment. Although these cases occurred in unstable times in terms of America's involvement in major international conflicts and clashing political ideologies, it nevertheless illustrates that the courts were already abiding to a set of peremptory yet clearly framed rules to constitutionally justify infringing on dissenting speech.
- 25 This adherence to stringent requirement was greeted with renewed conditions that introduced further rigidity in cases concerning display of historically racist expression. In *Brandenburg v. Ohio*⁸⁵, it was held that regardless of how inflammatory a speech may be, it could not be justifiably subdued unless it is "directed at inciting or producing imminent lawless action"⁸⁶. Pronouncing in *per curiam*, the decision effectively reversed *Schenck* condensing the speech suppression test even more narrowly. *Cohen v. California*⁸⁷ further tightened access to speech restriction in a case that involved an individual wearing a jacket marked with "Fuck the draft", a conduct considered

offensive enough to earn the wearer a criminal conviction under a California statute for disturbing public peace. The Supreme Court quashed the conviction, judging the expression worn by the defendant as not inciting nor threatening to commit any acts of violence nor being part of the list of the “fighting words” enunciated in *Chaplinsky*⁸⁸. Operating a distinction between speech and conduct in the involved question, the Court emphasized on the ideal of marketplace of ideas: the presence of dissenting or often uncivil words is “not a sign of weakness but of strength”⁸⁹; and that “one man’s vulgarity is another man’s lyric”⁹⁰. Despite the concern raised with regard to the onlookers’ offended sensibilities as captive audience, that argument did not constitute a compelling enough basis to prohibit the protester’s freedom of expression in the eyes of the Court.

- 26 *R.A.V. v. City of St. Paul*⁹¹ elevated the bar for speech inhibition by reaffirming the two pillar principles of the First Amendment: content neutrality and view-point selectivity. In declaring unconstitutional a local ordinance prohibiting speech that “arouses anger, alarm or resentment in others ... on the basis of race, color, creed, religion or gender”⁹², Justice Scalia delivered a scathing rebuke for operating “special prohibitions on those speakers who express their views on disfavored subjects”⁹³. The ordinance had to pack a subsequent punch for exercising selectivity for having “proscribed fighting words of whatever manner”⁹⁴ (as opposed to the “particularly intolerable mode of expressing whatever idea the speaker wishes to convey) that can result in “handicap(ing) the expression of particular ideas”⁹⁵. One modern hate speech case involving quite similar circumstantial elements (cross burning) to *R.A.V.* was *Virginia v. Black*⁹⁶. In this case, the Supreme Court toned down the tenacity demonstrated in *R.A.V.* by upholding that a state could constitutionally enforce a content-based restriction on true threats if the expressive activity was tainted with intent to intimidate⁹⁷.
- 27 These key rulings have largely defined the American law’s dealing with improper speech ranging from political dissents to expressions of incivility to racially charged conducts. But when it comes to comparing the U.S.-Canada historical treatment of hate speech, none of these cases come as close to *Collin v. Smith*⁹⁸ which offers images simply inconceivable in Canadian freedom of expression constitutionalism. The judicial drama⁹⁹ that unfolded surrounding the Village of Skokie, in my opinion, offers the starkest contrast yet that stretched the very boundaries of free speech.
- 28 The incident in Skokie was, for the lack of better words, an ugly one: it involved the National Socialist party’s threat to publicly march wearing SS uniforms in a Chicago suburb that was predominantly inhabited by Jewish population - among whom many were survivors of the Nazi atrocities. Combined to this were other tactics of visual intimidation deployed by the organized protesters who swarmed the entire Northshore surrounding area of Chicago with thousands of leaflets that read in part “We Are Coming” with degrading pictures of Swastika chocking a stereotype Jew. Nobody would have predicted that a similar situation would recur in Charlottesville, Virginia, thirty-nine years later. But as Mark Twain understood it best, “history does not repeat itself, but it rhymes”¹⁰⁰. Filled with oleaginous chants of “Blood and Soil” and “Jews Will Not Replace Us” by tiki torches-wielding white nationalists, Kessler’s 2017 ‘Unite The Right’ rally¹⁰¹ had momentarily resurrected the ghastly remnants of Skokie¹⁰².
- 29 Setting aside all the circumstantial intricacy and upstaged political points to garner national outrage, the constitutional challenge brought forth in *Collins*, I’m inclined to think, would not have survived the s.1. *Charter* limitation test¹⁰³. If transposed onto

Canadian social context, the outcome of *Collins* would have yielded quite a different result because such expressive activity would have been a representation of ignominy to the equality-driven mentality of the *Charter* but also an outright betrayal of what ideal of freedom of expression embodies. Even when mirrored against their own free speech theories, the expression in *Collins* in question utterly fails¹⁰⁴. So here lies another Canadian fracture from the First Amendment jurisprudential management of hate speech: Canadian freedom of expression appears malleable in its scope¹⁰⁵, leaving an overture to adjusting its fundamental practicability to a reasonable degree. This implies that freedom of expression is conscious and considerate with respect to the sensibility harms posed by certain types of community-debasing expressions to the different multi-ethnic components of Canadian society. In contrast, free speech in America seems to hold its ground, unwilling to concede an inch of constitutional leverage. For those feeling left *uncomfortable*, they need only “avert their eyes”¹⁰⁶.

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Concluding remarks

- 30 It is unarguable that there is a lot to learn from the First Amendment’s historical evolution. But Canada and the United States are not, reckoning the long list of overlapping similarities in cultural and democratic values, same countries. Varying process of coming-to-be and Canada’s promotion of its culturally pluralistic-driven constitutional image necessarily imply different jurisprudential methodology and application of the very concept of the freedom itself. Defining the confines of a freedom inevitably places it in cross-paths of other freedoms. In this stage of reconfiguration of rights, Canada has confided in communitarian ideals to attenuate expressions that violate the acceptable demarcations of collective civility on one hand, and thereby sculpt an egalitarian conception of rights that is unmistakably Canadian on the other.

NOTES

1. I thank Professor Noura Karazivan in particular for her insightful comments at the drafting stage of the present article. My gratitude is extended to Robin Medard Inghilterra for his timely communications in the process leading up to the completion of the writing.
2. Evidently, I’m speaking in very general sense. Similar incipencies overarch the genesis of the two: from the first settlers’ struggles to disputes with the Aboriginal peoples, independence from the same foreign regency (the processes of which were of varying degrees of violence) and nation-building expansions. With the exception of the American Civil War, both have enjoyed relative domestic tranquility. After the two World Wars, they have emerged as powerful actors on economic, military, and diplomatic fronts on the global stage and as indispensable allies given the geo-political proximity.
3. The theories are known as the marketplace of ideas, democratic self-governance, and individual autonomy. For an introduction of these theories, see generally Thomas Emerson, “Toward a general theory of the First Amendment” (1962) 72 Yale LJ 877.

4. *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, at para 23 (S.C.C.), *per* McLachlin C.J.
5. s. 2(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [“s.2(b)” and the “Charter”].
6. *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, (1986) 2 S.C.R. at 583.
7. There are a number of differences when it comes to the overall legal attitude toward freedom of expression in Canada and the U.S. respectively and in particular with regard to the constitutional language, jurisprudential interpretation, methodology, balancing with other rights or interests, and the effects those different approaches have yielded. For a general overview on the subject, see especially Kent Greenwalt, “Free Speech in the United States and Canada” (1992) 55 *Law & Contemp Probs* 5 at 10 [“Greenwalt”].
8. In this past year alone: secessionist voices have grown louder; there is a significant rise of far-right groups that demand their portion of the political pie; the ongoing tendency of sectarianism unveil a slipping into self-abnegation from international dialogue and this inward-flinching of withdrawal into protectionist isolationism is often rooted in ethnic/nationalistic claims, underlining attempts to break away from universalizing international bindings that have largely defined the world order since the Cold War.
9. For the purpose of the article, I do not operate a strict distinction between racial or religious hate speech as that differentiation (and the significance of the outcome from that distinguishable legal treatment with regard to free speech) is subject for a separate discussion (and a worthy one too). It also is due to the fact that a great number of hate speech of this genre often base its blunt force in the amalgam of racial or religious prejudice.
10. There are quite a few relevant sources that have touched on the literature of freedom of expression in American and Canadian law. See generally Kent Greenwalt, “Free Speech”, *supra* note 6; Kathleen Mahoney, “Hate Speech, Equality, and the state of Canadian law” (2009) 44 *Wake Forest L Rev* 321; Richard Moon, “Hate Speech Regulation in Canada” (2009) 36 *Fla St U L Rev* 79. Kathleen Mahoney, “Hate Speech: Affirmation or Contradiction of Freedom of Expression” (1996) *U Ill L Rev* 789.
11. Lee K. Royster, “Fake News: Political Solutions to the Online Epidemic” (2017) 96 *N C L Rev* 270.
12. The majoritarian assumptions of First Amendment scholars have overwhelmingly tackled fake news treating it as political speech. Such qualification automatically rewards the speech in question the greatest of constitutional protection by the First Amendment. See e.g. Ann C. Hundley, “Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas” (2017) 92 *Tul L Rev* 497 (critically commenting the ways through which false news and false political expression undermine the marketplace of ideas); Anthony J. Gaughan, “Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration” (2017) 12 *Duke J. Const. L. & Pub. Pol’y* 57 (critiquing the state of approaching an illiberal form of democracy through illustration of fake news and hyper partisanship in major election terms); Michael C. Dorf & Sidney G. Tarrow, “Stings and Scams: Fake News, the First Amendment, and the New Activist Journalism” (2017) 20 *U Pa J Const L* 1 (raising problems in relation to fake news in the context of the First Amendment and the role of the news activist journalism); Royster, *supra* note 10; Nabiha Syed, “Real Talk about Fake News: Towards a Better Theory for Platform Governance” (2017) 127 *Yale LJ* F 337 (criticizing the marketplace as one that is increasingly outdated for better democratic governance). At least one author has proposed that fake news be legally perceived as commercial speech (considering that commercial speech receives significantly lesser protection than political speech). But considering the contextual factors (fake news usually reaching its peak during election seasons), the contents of targeted subjects (almost always exclusively on political candidates running for public office), and the very aim of purposefully spreading false news (besides financial motivations, to influence the

election by swaying popular votes), it is unlikely that fake news be treated as commercial speech at least from a legal point of view.

13. William P. Marshall, “False Campaign Speech and the First Amendment” (2004) 153 U PA L Rev 285 at 299.

14. See i.e., *Citizens United v. FEC*, 558 U.S. 310, 329 (2010) [“*Citizens*”](striking down certain campaign finance laws as impermissibly chilling to political speech “central to the meaning and purpose of the First Amendment.”); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) [*Buckley*](describing campaign finance laws as “operating in an area of the most fundamental First Amendment activities” and noting that “discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”), *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55 (1994) (noting that a city ordinance restricting yard signs especially impacts political campaigns, and that “residential signs have long been an important and distinct medium of expression”), *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)) (holding that a state law banning political primary endorsements “directly affects speech which ‘is at the core of our electoral process and of the First Amendment freedoms.’”), *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”).

15. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

16. Marshall, *supra* note 12 at 298.

17. *Buckley*, *supra* note 13 at 14-15.

18. *Ibid.*

19. “Because First Amendment freedoms need breathing space to survive, government may regulate

in the area only with narrow specificity.” *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964) (citing *NAACP*, 371 U.S. at 433 (1963)).

20. Historically, it has been the traditional position of the First Amendment not to take an active role intervening false speech. Frederick Schauer, “Facts and the First Amendment” (2010) 57 UCLA L Rev 897 at 919.

21. *United States v. Alvarez*, 567 U.S. 709, 728 (2012) [*Alvarez*].

22. While the court in *Alvarez* did admit to some “instances in which the falsity of speech bears upon whether it is protected” (*Ibid.* at 2546), it refused both the argument that false speech is not constitutionally protected as well as the general presumption of the unprotected status of false speech. Instead, the court returned to the classic American skepticism on governmental power and abuse that could result from gifting “the state to use its power for political ends.” (2564) (Alito, J., dissenting). It is interesting to note that the cover of the First Amendment protection was extended to false statement even as the Supreme Court did previously acknowledge that false statement lack “constitutional value,” (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)), an observation supported by scholars. See Chris Edelson, “Lies, Damned Lies, and Journalism: Why Journalists are Failing to Vindicate First Amendment Values and How a New Definition of the Press Can Help” (2012) 91 Or L Rev 52739 at 533 (noting Paul Horwitz’s observation “that scholars basically agree that false statements lack epistemic and/or social value”; Mark Tushnet’s conclusion that “there really is no social value in the dissemination of falsehood, particularly knowing falsehood”; and Robert Post’s comment asserting that “Entrenched First Amendment doctrine affirms that ‘there is no constitutional value in false statements of fact.’” (quoting *Gertz* cited above) (internal citations omitted)). The absence of constitutional value in falsehoods was not the detracting point in *Alvarez*, however. In fact, it was not so much as to the inherent value in factually incorrect expression that bothered the judges but rather the fear that such categorical exclusion could have unintended chilling effect on even truthful speech.

23. Political speech and its relation to the First Amendment interpretation is a whole different subject that merits its own categorization. But as Justice Black stated, “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect free discussion of governmental affairs.” *Mills v. State of Alabama*, 384 U.S. 214 (1966). See also, *Brown v. Hartlage*, 456 U.S.45 (1982). Financial contribution as a form of political speech has always been a thorny issue with the lingering of corruption or exchange of favors by money that would essentially create quid pro quo type of election-deciding practices. These particular challenges tied to political contributions and campaign finances prompted a number of cases, including *Buckley*, *supra* note 13. See also, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell v. Federal Elections Commission*, 540 U.S. 93 (2003). But recently the rationales in previous rulings have been undermined by more modern cases, notably with *Citizens*, *supra* note 13), and *McCutcheon v. FEC*, 572 U.S. _ (2014). In contrast, Canada broke sharply from the libertarian approach of the United States (with the *Citizens* case in particular) in *Harper v. Canada (Attorney General)* [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.) in which the Court emphasized on conducting a fair election based on equal political expression.

24. This portrays a stark contrast to not only its neighbor next door, Canada (which will be the point of comparison here) but also with regard to some of the European countries. This rift has even more widened as Germany began implementing ‘Netzwerkdurchsetzungsgesetz’ (NetzDG), a new hate speech law that requires social media sites to remove hate speech, fake news, and illegal materials. The law, passed in June 2017, came into force in October 2017, and internet sites were given until the end of last year to adjust themselves to the law. Social networking sites would have 24 hours to take action to remove illegal materials and up to a week for more sensitive, complex cases. The failure to do so could result in a fine of up to 50 million euros. In France too, there is talk by the French President E. Macron, of proposition of a new law before the end of 2018 against the spreading of fake news during election seasons. Although now in its conceptual stage, one of the legal course of actions opened to interested party would be: “En cas de propagation d’une fausse nouvelle, il sera possible de saisir le juge à travers une nouvelle action en référé permettant le cas échéant de supprimer le contenu mis en cause, de déréférencer le site, de fermer le compte utilisateur concerné, voire de bloquer l’accès au site Internet. » *Le Monde*, AFP & Reuters, «Macron veut une loi contre les fausses informations en période électorale », *Le Monde* (3 January 2018), online: http://www.lemonde.fr/actualite-medias/article/2018/01/03/emmanuel-macron-souhaite-une-loi-pour-lutter-contre-la-diffusion-de-fausse-informations-pendant-les-campagnes-electorales_5237279_3236.html

25. The First Amendment of the U.S. Constitution (constitutional protection of free speech and freedom of religion): “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

26. *Beauharnais v. Illinois*, 343 U.S. 250 (1952) [*Beauharnais*].

27. *Ibid.* at 285. (Douglas J. dissenting).

28. Writing for the dissent in *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), he explicitly relayed this position, admitting that, “I believe that the First Amendment’s unequivocal command that there shall be no abridgment of free speech and assembly knows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done.”

29. *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942).

30. “These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words. ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Ibid.* at 571-72.

31. This will be elaborated in fuller detail in the later part of the article. See part 2° B.
32. In the words of Professor Krotoszynsky, “our tradition of pervasive distrust of government.” Ronald J. Krotoszynsky, Jr., “Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment” (2015) 76 Ohio St LJ 659 at 670.
33. It helps to think that it is rather futile to disjoint the legal scholarship from its intermingled sources garnered from fields of history, anthropology, philosophy, and social science. Abiding to a line of pure understanding of law may result in the blatant disregard of the cultural context in which a legal system may reside. See Pierre Legrand, *Fragments on Law-as-Culture*, (Tjeenk Willink, 1999) at 1-13 [Legrand, “Fragments”]. Thereby it is always wiser to reach for the “deep or thick understanding of a legal order” (*Ibid*, at 5). This involves seeing law as a “fragment of culture,” an “outrageous and heterogenous collage” *Ibid*. J. Law, *A Sociology of Monsters: Essays on Power, Technology and Domination*, (London: Routledge, 1991) at 18, cited in Legrand, “Fragments”; R. Sacco referred to it as the “dimension muette.” R. Sacco, *La comparaison juridique au service de la connaissance du droit*, (Economica, 1991) at 106, cited in Legrand, “Fragments”.
34. Professor Michel Rosenfeld introduces four distinct timeframes in American history to mark the varying functions and dominant character of free speech in America: the early period leading up to the War of Independence in 1776; the fight against the “wrath of the majority” opinions; the 1950’s – 80’s that is marked with conformity and consensus on social and ideological values; and the modern era, which is characterized by the rights talk and diversification of discourses. See Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis” (2003) 24 Cardozo L Rev 1523 at 1529-1532. Although the current free speech is so much associated to and ‘claimed’ by far-right movements or discourses, the impact of the rights talk is still very much alive. The rights discourse continues to channel a voice sharp enough to pierce through the political wall of indifference, historical ignorance, and bitter cynicism to pave way forward in the name of progress and rectification. On this very day, the rights talk keeps on marching to emancipate the voices of victims of sexual harassment.
35. *Dagenais et al. v. CBC et al.* [1994]. 3 S.C.R. 835 at 839 [“Dagenais”].
36. See footnote 2.
37. Ronald J. Krotoszynski Jr., “Questioning the Value of Dissent and Free Speech more generally: American Skepticism of Government and the Protection of Low-Value Speech” in Austin Sarat, ed, *DISSENTING VOICES IN AMERICAN SOCIETY: THE ROLE OF JUDGES, LAWYERS, AND CITIZENS*, (Cambridge University Press, 2012) at 209, 213-19. See also, Michel Rosenfeld, *supra* note 33 at 1530.
38. Also known as the ‘slippery slope’ argument. It’s the classic theory put forward by the opponents of speech regulation.
39. This is of course open to further debate but if free speech occupied a firm place in American historical and constitutional context, the Canadian freedom of expression was not efficiently endorsed in the most explicit terms by previous constitutional documents that did not refer fundamental individual freedoms until the *Canadian Bill of Rights*, S.C. [1960], c. 44., (s.1.D) The *Canadian Bill of Rights* in turn, even in its express recognition of freedom of expression, proved to be ineffective in actually protecting the freedom because it was not constitutionally entrenched. And while a number of important legal doctrinal and jurisprudential elements do point to the pre-*Charter* existence of constitutional protection of freedom of expression in Canada by the Implied Bill of Rights theory, (see e.g. *Reference re Alberta Legislation*, S.C.J. No. 2, [1938] S.C.R. 100.; *Saumur v. The City of Quebec*, [1953] 2 SCR 299; *Switzman v. Ebling and A.G. of Québec* ([1957] SCR 285), the focus of this paper is on the post-*Charter* image of freedom of expression and its particular treatment of balancing hate speech.
40. Greenwalt, *supra* note 9 at 10.
41. s.1. of the *Charter*.

42. Donald L. Beschle, “Clearly Canadian ? Hill v. Colorado and Free Speech Balancing in the United States and Canada,” (2001) 28 Hastings Const L Q at 188.
43. *R. v. Oakes*, [1986] 1 S.C.R. 103. [“Oakes”].
44. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17. (QL) at para 116. Also known as “interpretation fonctionnelle” or “finalist,” the purposive interpretation of a Charter right, according to Professor Luc Tremblay, should be considered both an approach and a method that is an “ensemble des règles méthodologiques constitutives du processus d’interprétation constitutionnelle au Canada.” On the purposive interpretation of Charter rights and freedoms, see in general Luc Tremblay, “L’interprétation téléologique des droits constitutionnels” (1995) 29:2 *Revue juridique Thémis*, 464-472; Bernatchez, Stéphane. “Les fondements philosophiques et théoriques de la Charte canadienne es droits et libertés” in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (LexisNexis, 2013) at 47-82.
45. *Dagenais*, *supra* note 34.
46. *Ibid* at 839.
47. *Ibid.* at 839.
48. *Ibid.*
49. This will further be elaborated on in the later portion of the article but the *Charter* itself is very telling of this vision as it includes Canada’s commitment to preserve and respect multiculturalism (s.27), denominational schools (s.29), minority language rights (s. 23), and treaty with the aboriginal peoples (s. 25).
50. There is a whole category of detailed legal scholarship devoted on this very issue. See in general, Richard Delgado, “Words that would: A Tort Action for racial insults, epithets, and name-calling” (1982) 17 *Harv C R-C L L Rev*; Charles R. Lawrence III, “If he hollers let him go: Regulating Racist Speech on Campus” (1990) *Duke L J* 436; Diana T. Meyers, “Rights in Collision: A Non-Punitive, Compensatory Remedy for Abusive Speech” (1995) 14:2 *Law and Philosophy* 203-243; Mari Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story” (1988) 87:8 *Michigan L Rev* 2320-2381.
51. By pervasive nature of hate speech, I mean that there is a significant post-impact of hate speech in its’ ability to disfigure its targets and discolor innocent bystanders point of view about the subjects intended in hate speech. This is a real danger, I’m firmly convinced, because it can negatively affect the presently vilified victims and the to-be-victims for the sake of belonging to or be tied to the same groups of people.
52. The “mushroom” effect was originally mentioned in the Cohen Commission report: For, in time of social stress, such ‘hate’ could mushroom into a real and monstrous threat to our way of life... In the Committee’s view, the ‘hate’ situation in Canada, although not alarming, clearly is serious enough to require action. It is far better for Canadians to come to grips with the problem now, before it attains unmanageable proportions, rather than deal with it at some future date in an atmosphere of urgency, of fear and perhaps even of crisis”. Canada, Special Committee on Hate Propaganda (chaired by M. Cohen), *Report* (Ottawa: Queen’s Printer, 1966).
53. Tim Wu, “How Twitter Killed the First Amendment” *New York Times*, (27 October 2017), online: <https://www.nytimes.com/2017/10/27/opinion/twitter-first-amendment.html>
54. Section 319 (1) of the Criminal Code states: Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) An indictable offense and is liable to imprisonment for a term not exceeding two years; or (b) An offense punishable by summary conviction.
55. Section 319 (2) of the Criminal Code states: Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of (a) An indictable offense and is liable to imprisonment for a term not exceeding two years; or (b) An offense punishable by summary conviction.

56. Section 319 (3) of the Criminal Code provides: No person shall be convicted of an offence under subsection (2) (a) If he establishes that the statements communicated were true; (b) If, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (c) If the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (d) If, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

57. Section 319 (1) of the Criminal Code reads: Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

58. For instance, Section 13(1) of the *Canadian Human Rights Act* makes it a discriminatory practice to repeatedly communicate by telephone “any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.” s.13(1) of R.S.C. 1985, c. H-6. Section 3(1) of the same *Act* narrates the possible basis of discrimination, including “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted”. For provincial human rights legislations, see Quebec: Charter of Rights and Freedoms, R.S.Q. c. C-12; Ontario: Human Rights Code, R.S.O. 1990 c. H-19; Alberta: Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14; P.E.I.: Human Rights Act, R.S.P.E.I. 1988, c. H-12; Nova Scotia: Human Rights Act, S.N.S. 1991, c. 12; New Brunswick: Human Rights Act, R.S.N.B. 1973, c. H-11.

59. Communitarianism in legal/political philosophy is of course a vast section of study itself. But for the purpose of the article, by ‘communitarian,’ I seek to emphasize on the enriched, interconnected, and relational vision of the self that is mainly characterized by the shared conception of the good that which attributes meaning, as opposed to the detached, self-sufficient, wholly autonomous and independent individual conception of the self whose priority is self-aggrandization and self-contentment, an image prevalent in the liberal theory. In the words of Richard W. Bauman, the former is based on the belief that “members of the community have an ingrained sense of what is the proper relationship between themselves and others as well as a socially-conditioned sense of self.” Richard W. Bauman, “The Communitarian Vision of Critical Legal Studies” (1987) 33 McGill LJ 295 at 330.

60. *R. v. Keegstra*, [1990] 3 S.C.R. 697. [“Keegstra”].

61. Section 319 (2) of the Criminal Code, *supra* note 54.

62. *Keegstra*, *supra* note 59 at 746.

63. *Ibid.*

64. *Ibid.* at 746-47.

65. *R. v. Andrews*, (1988), 28 O.A.C. 161 at 182, 43 C.C.C. (3d) 193, [1998] O.J. No. 1222 (QL) (C.A.).

66. *Keegstra*, *supra* note 59 at 747-78.

67. *Taylor v. Canadian Human Rights Commission* [1990] 3 S.C.R. 892.

68. *Ibid.* at 919.

69. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467.

70. It did so in three aspects. For one, “a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred; Secondly, that the “legislative term “hatred ... must be interpreted as being restricted to those extreme manifestations of emotion described by the words “detestation” and “vilification””; and thirdly, on the actual effect of the expression may cause. *Ibid.*

71. *Ibid.*

72. *Ibid.*

73. *Keegstra*, *supra* note 59 at 743.

74. Multiculturalism is granted its own place in the *Charter*. s.27. of the *Charter* states that: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” Also, Canada has passed and enacted the Canadian Multiculturalism Act (R.S.C., 1985, c. 24 (4th Supp.)) which affirms multiculturalism as an official policy of the Canadian Government in recognizing a number of important fundamental group rights and promoting it as “a fundamental characteristic of the Canadian heritage and identity” (s.3(1)) of the Act. Multiculturalism appears on numerous passages in the ruling of *Keegstra*, providing a legal basis for which the criminal suppression of hate speech is justified. There is an abundant scholarly discussion on multiculturalism in Canadian legal context by legal/philosophical theorists like Will Kymlicka, Charles Taylor, and Michael McDonald.

75. The Hon. McLachlin, Beverly. “The Canadian Charter of Rights and Freedoms’ First 30 Years: A Good Beginning” in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (LexisNexis, 2013) at 31.

76. *Oakes*, *supra* note 42.

77. *Ibid* at 64.

78. s. 27 of the *Charter*.

79. Perhaps one recent decision that contravened this was *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214. The Supreme Court of Canada a class action of racial group defamation that involved a provocative public statement made by a radio host in Québec alleging that Montréal Arabic-speaking taxi drivers are ill-mannered and incompetent. In application of a number of contextual factors surrounding the utterance, the Court eventually conceded to the safeguarding of freedom of expression largely by relying on the group size in the case and the ordinary person test.

80. *Schenck v. United States*, 249 U.S. 47 (1919) [“*Schenck*”]. In upholding the conviction of the defendant for violating the *Espionage Act* of 1917 which forbade obstructing the draft or attempts to make soldiers disloyal or disobedient. The defendant had mailed thousands of pamphlets to drafted soldiers in which he essentially accused the government in having no right whatsoever to send American citizens to fight war abroad. Comparing the situational elements in the case to falsely shouting fire in a movie theatre, expressions that would in times of peace be allowed were evaluated according to the necessities of a nation at war.

81. *Ibid*, at 52.

82. *Abrams v. United States*, 250 U.S. 616 (1919). Interestingly, the original mastermind of the “clear and present danger,” Justice Oliver W. Holmes dissented from the majority opinion’s upholding of the defendants’ conviction.

83. *Gitlow v. New York*, 268 U.S. 652 (1925).

84. *Whitney v. California*, 274 U.S. 357 (1927).

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

86. *Ibid*.

87. *Cohen v. California*, 403 U.S. 15 (1971) [“*Cohen*”].

88. See footnote 29.

89. *Cohen*, *supra* note 86 at 25

90. *Ibid*.

91. *R.A.V. v. city of St. Paul*, 505 U.S. 377 (1992) [“*RAV*”].

92. St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990).

93. *RAV*, *supra* note 82 at 391.

94. *Ibid*. at 393-94.

95. *Ibid*. at 394.

96. *Virginia v. Black* 538 U.S. 343 (2003).

97. However, the Supreme Court did strike down the part of the Virginia statute’s *prima facie* evidence provision of intent to intimidate because the Court saw it as a violation of the First

Amendment which protects symbolic speech – such as a statement of ideology or symbol of group solidarity (*Ibid.* at 366-367).

98. *Collin v. Smith*, 439 U.S. 916 (1978) [*“Collin”*], 578 F. 2d 1192 (7th Cir.), *cert. denied*.

99. I employ the term legal ‘drama’ because it really was one. When Frank Collin applied for permit to hold his political party’s (NSPA) demonstrations and when the village of Skokie responded in the affirmative if a bond of 350,000 US dollars was posted (and thereby indirectly refusing Collin’s application). Displeased, Collin notified the community of Skokie that his party will hold a march to demonstrate their grievances in front of the Skokie city hall. An Illinois court, upon receiving a suit filed by Skokie, issued an injunction that forbid the demonstrators from marching 51 Ill. App. 3d 279, 366 N.E. 2d 347 (1977). At this point, the American Civil Liberties Union, representing the Nazis, appealed to the United States Supreme Court which ruled that the previous prohibition order of the march would be acceptable only if there was an expedited appellate review, among other strict procedural safeguards. *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977). The injunction was later altered by the appellate court, allowing the NSPA to march provided that their members would not display swastika. *Village of Skokie v. National Socialist Party of America*, 51 Ill.App.3d 279 (1977), *rev’d. in part*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978). But the NSPA was not satisfied. They argued that their march, no matter how repugnant the underlying ideals may be, must be protected by the First amendment. The Illinois Supreme Court agreed and ordered the injunction to be cancelled in its entirety. *Village of Skokie v. National Socialist Party of Am.*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978). During this time, Skokie had adopted new ordinances that prohibited any dissemination of material inciting racial or religious hatred as well as the display of Nazi military uniforms. *Skokie Mun. Ord.* 994-96 (1977). ACLU once again filed suit on behalf of Collin’s Nazi group against the newly passed ordinances which were judged to be unconstitutional by a federal district court. *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), *aff’d*.

100. Mark Twain is reputed to have said this quote.

101. The organizer of the right wing rally had sued on First Amendment grounds the City of Charlottesville and the city council manager for unilaterally trying to relocate the originally requested rally site. The U.S. District Court for the Western District of Virginia granted an injunction that authorized the organized rally to proceed. The Court ruled so on several reasons and among cited reasons was that rather than the original argument provided by the City of Charlottesville citing concerns of public safety for attempting to relocate organized rallies, it was their viewpoint that discriminated against the political speech of the far right. The march would go on to take place on August 11th and 12th, 2017. See *Kessler v. City of Charlottesville, et al.*, No. 3:2017cv00056 – Doc. 21 (W.D. Va. 2017). (memorandum opinion signed by District Judge Glen E. Conrad on 08/11/2017).

102. When historically contextualized, the two incidents are obviously different. The former was a march that was purposefully tailored to hit a specific area of high Jewish inhabitants with incurable memories of the Holocaust; the latter was initially triggered by a series of nation-wide operation of confederate statutes removal operations. The disparity in terms of basic rights’ evolution and the general perspective of public opinion on racial issues in America is to be noted as well. However, the First Amendment grounds that were invoked both by *Collin* of NSPA in 1978 and *Kessler* of ‘Unite The Right’ rally in 2017, and the subsequent court authorizations protecting Nazi’s freedom to political speech had hardly changed.

103. s.1. of the *Charter*.

104. It is difficult to presume whether racist speech brings anything substantive of value to any constructive discussion. The obvious counter-argument would be that it only greatly muddies the pool of marketplace of ideas. Even if racially charged expression could be said to contribute in any manner to the process of democratic self-governance, that contribution would appear to be minimal. In fact, such expression has been proven to incite hostile attitudes in today’s diverse,

polyglot societies. It would be benign, to put it politely, to assume whether racist hate message elevates the speaker's individual sense of autonomy; perhaps it does in the sense that it allows the speaker to achieve it through self-expression. But contradictory argument would be that, again, that ascension would be quite limited because such expression is based on the lowest of human aspirations.

105. Mark Crawford hints at this very briefly when he notes that, "Communitarian philosophers, as part of their general critique of liberalism's abstractness, universalism and individualism, have argued that the scope of the freedom ought to vary between societies (or between communities within federal societies)" Mark Crawford, "Regimes of Tolerance: A Communitarian Approach to Freedom of Expression and its Limits" (1990) 48 U Toronto Fac L Rev 1 at 4.

106. *Cohen*, *supra* note 86 at 21.

ABSTRACTS

The present article explores the constitutional treatment of hate speech in Canadian and American law vis-à-vis the paramount place freedom of expression occupies in both legal systems¹. The author first pronounces on the conceptional divergence of the freedom, opining that American free speech has retained much of its status as a preferred freedom given its unique historical fomenting process and predilection toward a quasi-absolutist interpretation of the First Amendment. Canada, however, has explicitly declined to institute a hierarchical approach of rights, thus effectively creating a level-playing field through an egalitarian-driven perception of rights when they are in collision. The argument continues by looking into major jurisprudential developments of hate speech in the two respective constitutional orders. Identifying one of the principal legal basis for Canadian courts to strike down constitutional challenges raised in hate speech cases to be strongly grounded in the communitarian understanding of the harm inflicted by hate speech, the observation hints at the distinctively Canadian legal attitude's overture toward special group rights, multiculturalism, or *grosso modo* – the promotion of pluralism. The American courts, however, have been reluctant in suppressing speech activity by confiding in a set of extremely narrowly tailored tests to justify constitutional infringements of free speech.

Le présent article analyse le traitement constitutionnel des discours de haine en droit canadien et étatsunien, notamment au regard de la place prépondérante qu'occupe la liberté d'expression dans les deux systèmes juridiques. L'auteur se prononce d'abord sur les divergences conceptuelles, estimant que la liberté d'expression aux États-Unis demeure largement conçue comme une liberté privilégiée, compte tenu de son rôle historique unique et de la tendance à une interprétation quasi absolutiste du Premier Amendement. Le Canada a quant à lui explicitement refusé d'instituer une approche hiérarchique des droits, permettant aux prétoires d'être des terrains neutres où s'exerce une perception égalitaire des droits en cas de conflit de normes. La démonstration de l'auteur se poursuit en examinant les développements jurisprudentiels majeurs relatifs aux discours de haine dans les deux systèmes juridiques respectifs. Une telle analyse conduit à identifier l'appréhension communautaire des préjudices causés par le discours de haine comme étant l'un des principaux arguments permettant aux tribunaux canadiens de faire obstacle aux éléments de défense soulevés dans les cas de discours haineux. Ce constat fait écho à l'ouverture typiquement canadienne aux droits spécifiques des groupes ainsi qu'au

multiculturalisme ou, *grosso modo*, à la promotion du pluralisme. De manière plus nuancée, les tribunaux étatsuniens hésitent à restreindre la liberté de parole et se fondent par conséquent sur un ensemble de tests d'interprétation stricte pour justifier d'éventuelles atteintes à la liberté d'expression constitutionnellement garantie.

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Mots-clés: Liberté d'expression, discours de haine, Canada, États-Unis, préjudice, restriction, multiculturalisme

Keywords: Freedom of expression, hate speech, Canada, United States, harm, restriction, multiculturalism

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