Liberty and Authority in Free Expression Law

The United States and Canada

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CHAPTER 1

Introduction

Freedom of expression is a hallmark of democracy. It is difficult to conceive of a working democracy that does not permit its citizens some right of free expression. In fact, as Robert Bork noted, "representative democracy would be meaningless without the freedom to discuss government and its policies."[1] Indeed, the history of the modern notion of freedom of expression is interwoven with the historical struggle for democracy and the rule of law.[2] Freedom of expression is, according to Thomas Emerson, "essentially a product of the development of the liberal constitutional state" that began with the Enlightenment.[3]

Prior to the Enlightenment, the attitude of the state toward expression was authoritarian. Freedom of expression was seen as both an instrument of and a threat to the state. Power was located in the state, and "command, obedience, and order [were] higher values than freedom, consent, and involvement."[4] Individuals were expected to obey the public law,[5] which was used by the state as an instrument to control expression and maintain order. With the Enlightenment came the rise of liberalism and liberal justifications for freedom of expression. Liberalism changed both the locus of power and the authoritarian instrumental notion of law. Since power was now located in individuals, free expression was seen as essential for the development of rational individuals and for the proper functioning of the democratic process. The legitimacy of state action or public law now depended upon the "rule of law." Instead of arbitrary and discretionary, the law had to be specific in its terms and universal in its application.

Despite these changes, the authoritarian tendencies of the state did not disappear completely but continue to linger. In a modern liberal democracy, they take their form in government restrictions on expression. Because freedom of expression is not absolute, the state is permitted to restrict expression in limited circumstances, such as when expression threatens public safety and welfare. This ability on the part of the state to restrict expression results in a tension between the liberal commitment to free expression on the one hand and the authoritarian tendencies of the state to curb expression in the name of public safety and welfare on the other. The tension is between liberty—the desire of individuals to freely express themselves without fear of government interference—and authority—the desire of the state to restrict expression to protect public safety and welfare. Implicit in the term liberty is a belief in the rationality of individuals and their ability to govern themselves. Correspondingly, implicit in the term authority is a belief in the need for individuals to be protected from themselves and each other.

Legal scholar Pnina Lahav has described "this dialectic between universal values under a liberal/constitutional order on the one hand, and the state with its instrumental conception of public law and speech on the other hand," as the key to understanding the law of freedom of expression in democratic societies.[6] Focusing on freedom of the press, Lahav has theorized that "the press law of a particular country is not so much determined by the existence of a particular type of constitutional commitment, or by the presence of a special press statute, as by the particular political philosophy which animates it."[7] In other words, how the tension between liberty and authority is resolved in a democracy depends on how the political thought of the country conceptualizes the individual, the state, and their relationship.

This study explores the tension existing in democracies between liberty and authority and how that tension affects the law of freedom of expression. This is accomplished through a comparative analysis of the political thought and the law of freedom of expression in the United States and Canada. Specifically, it examines how the political and legal

theorists and philosophers in the two countries have conceptualized the individual, the state, and their relationship over the course of the twentieth century. After determining the major trends in the political thought of both countries, freedom of expression cases are examined for evidence of reflection of those trends in the decisions. At the same time, the cases are examined to see whether the views of the judges concerning the nature of the individual, the state, and their relationship are reflected in the political thought. Such an examination allows for patterns and connections to emerge that help shed light on the tension between liberty and authority in democracies and how that determines the level of protection for freedom of expression.

The United States and Canada are appropriate countries to comparatively analyze the tension between liberty and authority because they are so similar, and as one researcher noted, "the more similar the units being compared, the more possible it should be to isolate the factors responsible for differences between them."[8] The two countries share a language, legal heritage, mass culture, integrated economy, and lifestyle.[9] They are both liberal democracies based on the rule of law with federal forms of government, although the structure of those governments is different, and are committed to the protection of freedom of expression. Despite these similarities, there are differences in the extent of protection given to freedom of expression[10] and in the relationship between the individual and the state in the two countries. The United States is traditionally associated with individualism and a lack of respect for authority, while Canada is traditionally considered more communitarian and more deferential to authority. These differences in political thought and the law of freedom of expression in light of the extensive similarities between the two countries suggest a need to explore the relationship between these two factors. For these reasons, the United States and Canada are appropriate choices for an exploration of the tension between liberty and authority through a comparative study of freedom of expression law and political thought.

The cases analyzed are in the area of political speech. Political speech is defined here as criticism of public officials and policies,

including speech advocating forcible overthrow of the government or incitement to violate democratically enacted laws.[11] The issue in political speech is at what point the state's duty to protect public safety and welfare takes precedence over the individual's right to criticize the government. Such speech brings into question the relationship of the individual to the state and directly involves the notion of self-governance, one of the primary liberal justifications for freedom of expression.[12] Therefore, it is an important type of expression in which to explore the tension between liberty and authority. At the same time, political speech allows for cases from many areas of the law to be examined, providing a better insight into the tension and its effect on freedom of expression.

Decisions of the supreme courts of both countries are examined because these courts set out the legal meaning of freedom of expression in any given period. In Canada, the Canadian Supreme Court was not the highest court of the land until 1949. Prior to that year, cases could be, and regularly were, appealed to the Judicial Committee of the Privy Council in Great Britain. However, it is the relationship between Canadian political thought and freedom of expression with which this work is concerned. Presumably, the Privy Council did not take Canadian political thought into consideration in making its decisions, nor would its members have been influenced by such thought. In addition, it appears there were no cases concerning freedom of expression heard by the Privy Council in the period.[13]

Although history cannot be divided into neat packages with definitive starting and ending points, for purposes of organization, this book divided the twentieth century into five periods based on either major events affecting both countries, such as world wars, or on major shifts in the political thought. Each of the chapters analyzes the literature by the major twentieth century legal and political theorists and philosophers of the United States and Canada published during the particular period. The major theorists and philosophers were determined through an examination of studies on twentieth century political thought in the two countries. Specifically, the literature was examined

for trends in the conceptions of the individual, the state, and their relationship. The trends in both countries were examined for similarities and differences and cross-border influence. The chapters then analyze American political speech cases for explicit and implicit reflection of the American political thought, followed by an analysis of the Canadian political speech cases for reflection of Canadian political thought. Only those writers who published during the period and those cases decided by the courts in the specific years were examined together.

In today's increasingly international age, a greater understanding and appreciation for the dynamics at work in the law of freedom of expression in different democracies are needed. This study contributes to that understanding. The interdisciplinary nature of this study also strengthens the traditional legal research on freedom of expression and fits the law on freedom of expression into a larger context. The historical approach of the study adds to that process by examining the tension between liberty and authority across time.

REVIEW OF THE LITERATURE

Given the proximity of the two countries and their similar British roots, it is not surprising that scholars have spent considerable effort analyzing what accounts for the differences between the two. This section considers those studies as an introduction to the way scholars in the two countries view the individual, the state, and their relationship. Drawing on constitutional law, political science, and sociology, five topics are addressed: (1) the organizing principles of the two countries, (2) the protection of individual rights,[14] (3) Canada's Charter of Rights and Freedoms and the politicization of rights in both countries, (4) comparisons of freedom of expression law, and (5) theories of freedom of expression in a democracy.

Organizing Principles

American sociologist Seymour Martin Lipset, who has made a career out of comparing the United States and Canada, has argued that the differences between the two countries reflect differences in what he calls their basic organizing principles.[15] Those principles have affected how Americans and Canadians view sources of authority, their values, and their understanding of their societies.[16] The United States was founded on the principle of liberalism, which emphasized distrust of the state, egalitarianism, and populism.[17] Canada, on the other hand, was conservative in the British or European sense, accepting the need for a strong state, respect for authority, and deference. Although both countries have modified these principles over the years, they continue to be influenced by them.[18] It is these organizing principles that scholars have looked to for explanations of the differences in institutions and values.

These organizing principles determined in part how the two countries were founded and their notions of federalism. How the two countries were founded is important for an understanding of the development of their political thought because it established a difference from the beginning in the way these countries think about the individual and the state. Similarly, their notions of federalism are important to the later development of freedom of expression law because, as Ellis Katz and G. Alan Tarr stated, "federalism countenances particularism and encourages diversity, while the protection of rights seems to require universal standards and uniform treatments."[19] Those scholars advocating the "universality of rights" position argue that nationalization gives the greatest protection to individual rights, while regionalism promotes group rights at the expense of individual rights. Knowing whether the federalism of a country is oriented around the central government or regional governments is potentially important for understanding the law of freedom of expression and the tension between liberty and authority.

In explaining the political and cultural differences between the United States and Canada, most scholars emphasize that the United States was born of revolution, while Canada was created by evolution. Douglas Alderson, for example, noted that Canada has had forty-seven different constitutional acts from the first document in 1763 that created British North America until its most recent in 1982.[20] He described this process as a long evolution in which constitutional documents were changed to meet changing social, legal, and economic times without the need for revolution.[21] Alderson saw Canada's constitutional evolution as indicative of a particular historical and social understanding of the proper role and limits of government and a particular locus of sovereignty. In Canada, sovereignty resides in the Crown, while in the United States, it is with the people.[22]

Other scholars stress the importance of the American Revolution for the development of Canada's institutions and values. They claim that the Revolution in fact produced two nations. Richard Preston, for example, argued that although Canada gained its independence from England through the process of evolution, Canada's distinctive identity has been achieved, at least in part, by rejecting revolution rather than by experiencing it.[23] According to Lipset, Canadians had to justify their refusal to join the American Revolution, and the result was the nations' differing self-images in the nineteenth century. The Americans gloried in their tradition of revolution, while the Canadians defended a tradition of counterrevolution, embodied in the continued link with the mother country and elitist values, and cultivated the belief that the decision to refuse was morally superior to what the Americans had done.[24]

Lipset argued that it was not just English-speaking Canadians who were counterrevolutionary. French-speaking Canadians also sought to preserve their values and cultures by reacting against a liberal revolution. While British and American Tories fought against the American Revolution and for the protection of the rule of law and traditional values, French-speaking Canadians sought to isolate themselves from the anti-clerical, democratic values of the French

Revolution. The elites of both groups consciously attempted to create a conservative, monarchical, and ecclesiastical society in Canada.[25]

Lipset concluded that the revolutionary and counterrevolutionary themes were echoed in the constitutional documents of the two countries. The revolutionary theme, celebrating individualism, was subsumed in the American objectives of "life, liberty, and the pursuit of happiness." The counterrevolutionary theme was reflected in the Canadian objectives of "peace, order, and good government," contained within the 1867 British North America Act (BNA Act), the document that united Canada as a country.[26]

Jennifer Reid, a Canadian political scientist, described the Americans of the Revolution as forwarding-looking. They had overthrown the old society and were constructing a new one in the New World. The Canadians of the same period were intent instead on preserving the traditional society.[27] These conflicting visions of society were codified, Reid argued, in two eighteenth century documents—the American Constitution and the Quebec Act.[28] The Quebec Act was an attempt on the part of English-speaking Canadians to avoid Americanization and to codify the notion that Canada was simply England transplanted to the New World.[29] The American Constitution, on the other hand, signaled a disruption with the past and, because it provided for amendment, posited a unity with the future, according to Reid.[30]

Scholars agree that the American Constitution and Bill of Rights are an embodiment of the American distrust of governments and authority. Guaranteeing individual rights and limiting the authority of the state were very much the goals of the Constitution and Bill of Rights.[31] Scholars also agree that in 1867 when Canada became a country, the American experience with federalism was very much on the colonials' minds.[32] Canadian political scientist Jennifer Smith noted that for the colonists in British North America, as Canada was known until Confederation, federalism meant American federalism, and it was not a popular identification. She and others have argued that many Canadians drew a connection between federalism and the Civil War.

Federalism was seen as an arrangement that encouraged dissension rather than unity.[33] Smith argued, for example, that for John A. Macdonald, one of the Fathers of Confederation and Canada's first prime minister, state sovereignty was the weak link in the American Constitution.[34]

Scholars have explained the British North Americans' movement toward Confederation as a pragmatic response to political, economic, military, and diplomatic conditions and considerations.[35] Lipset, for example, noted that Confederation reflected in part the fear of Canadians that they would be easy targets for takeover or absorption by the United States in the aftermath of the Civil War. Furthermore, Britain had sought for some decades to give up much of its responsibility for the territories and wanted colonists to take political responsibility for domestic governments.[36] According to other scholars, Confederation was a pragmatic accommodation of English and French desires. The English monarchists, such as Macdonald, favored a single government system, like that of Great Britain, rather than a federal system, while the French political elite in Lower Canada sought greater provincial autonomy. For Calvin Massey, the BNA Act reflected "both Macdonald's centralizing bias and the demands of French Canadians that security be provided for the autonomous development of a separate cultural and linguistic identity within a confederated union."[37] Faced with a choice between the Westminster political tradition based on parliamentary supremacy and American federalism, the Fathers of Confederation opted for a new system they called "parliamentary federalism."[38]

Essentially, the Canadians took the British unitary system of parliament and grafted it onto American federalism, or a dual system of government. The British system is based on the doctrine of parliamentary supremacy, which means that parliament's power is unlimited. American federalism, on the other hand, contains two levels of government, each sovereign in its own right with separate jurisdiction and each limited by constitutions. The BNA Act provides for both a national and a provincial level of government and distributes powers between the two, reserving general residual power to the central

government. Scholars agree that the BNA Act is a document by a government, for a government. It contains no bill of rights nor does it specifically guarantee individual rights.

The Canadian goal of creating a strong central government was frustrated by outside factors. The BNA Act made no provision for a national court, although the federal legislature did establish the Supreme Court of Canada in 1875.[39] Until 1949, appeals from Canadian courts, including the Supreme Court, were to the Judicial Committee of the Privy Council in England. The committee, established in 1833, was part of the legislative branch, not the judicial; yet its decisions had long-lasting ramifications for Canada's constitutionalism.[40] William Eaton noted that the first three Canadian cases that came before the Privy Council were used by the Council to restrict the broad general powers of the federal government. It was established at once that the BNA Act was to be considered not as a constitutional document, but as a general statute of the British Parliament, which it essentially was.[41] Despite the plain wording and the intent of the BNA Act that residual power be left in the hands of the federal government, the Privy Council interpreted the Act narrowly and used it to restrict federal powers.[42] The Council decided that the federal government could only legislate to preserve "peace, order, and good government" in times of emergency so as not to infringe on provincial autonomy, although there is no mention of provincial autonomy in the BNA Act.[43] The result of the decisions of the Privy Council was a shift in power from the federal government to provincial governments.

Kenneth Holland argued that the process begun by the Privy Council was substantially reversed by the Supreme Court of Canada after 1949 when appeals to the Privy Council were abolished. The Court moved both to restrict the provincial power and to expand federal jurisdiction. Holland has detailed the shifts in the concept of federalism on the part of the courts in both countries from its beginnings to the present.[44] The swings from protecting the central governments to strengthening state or provincial governments and back are responses to

particular historical periods and exist, Massey argued, without reference to the constitutional texts themselves.[45]

Despite the swings, the result overall is that federalism in the two countries has evolved in roughly opposite directions from that intended by their founders.[46] As Holland has observed, over the years, the U.S. federal government has gained greater policy and fiscal dominance over the states, and the Canadian federal government has conceded ever more powers to the provinces.[47] The judiciaries in both countries have played a leading role in that process.

It would appear, then, that the American Revolution produced two nations with different political structures and self-images. The American Constitution and Bill of Rights are reflections of a distrust of government and authority. The BNA Act, on the other hand, reflects an absence of such a distrust and promotes a link with the past. Changes wrought by the courts have frustrated the original intentions of the framers of these documents, leading to an emphasis on nationalism in the United States and regionalism in Canada.

Protection of Individual Rights

American and Canadian scholars agree on the importance of protecting individual rights in a democracy, but they disagree on the best means to protect them. The disagreement reveals the differing heritages of the scholars themselves and reflects the different way rights are discussed and protected in the United States and Canada.

As stated earlier, scholars see the American Bill of Rights as a natural outgrowth of a suspicion of authority.[48] The American colonials saw themselves as oppressed by an autocratic tyranny imposed from without that repressed all freedom of thought and discussion, enforced oppressive laws with unfair and arbitrary procedures, and sustained the whole effort by military force.[49] The new Americans produced a constitution and a bill of rights that expressed a strong commitment to freedom and the limited state.[50] At the same time,

distrust and hostility toward government were institutionalized in a system of checks and balances and a separation of powers.[51]

Scholars see the BNA Act, which makes no mention of individual rights, as a reflection of trust of government. Lewis Katz and Alan Westin both noted that because Canada had no violent break with Great Britain, there was no need to incorporate a bill of rights.[52] The Canadians' apparent trust of government is illustrated by their adoption of the British parliamentary structure, in which the legislature has the responsibility in law and in politics of balancing liberty and order, as opposed to the courts being responsible for the balancing as in the United States.[53] This difference in attitude toward government has led to a difference in the discourse concerning individual rights and in the institutions expected to protect those rights.

Massey, for example, argued that the formation of the United States occurred in an intellectual climate that accepted the legitimacy of natural rights as paramount to the authority of government.[54] For other scholars, the most important accomplishment of the Bill of Rights was psychological: It gave credence to the Jeffersonian view that individuals had "inalienable rights" that could not be taken away by any government.[55]

Some Canadian scholars, on the other hand, have rejected the notion of natural rights. Leonard Leigh, writing in 1958 in the wake of decisions of the Supreme Court of Canada suggesting the possibility of an implicit bill of rights in the BNA Act, argued there could be no implicit bill of rights because of the doctrine of parliamentary supremacy. The only limitations on Parliament were based on practical politics and recognized conventions.[56] The question for Leigh was not whether a legislature could legislate in the area of individual rights but which could legislate, the federal legislature or the provincial legislature.[57]

Lipset argued that nineteenth-century Canadians believed the monarchy to be a superior guarantor of liberty and freedom.[58] These Canadians, he stated, were not impressed by American advantages gained from democracy as distinct from the monarchy. Essentially they

believed that "freedom wears a crown."[59] Lipset said the Canadian attitudes toward liberty and order reflect the historical emphasis on the rights and obligations of the community over those of the individual.[60]

This difference in the early discourse on rights led Lipset to describe the two countries as operating under differing models of law and order. America is based on a due-process model, which involves various legal inhibitions on the power of the police and prosecutors. The crime-control model evident in Canada, on the other hand, emphasizes maintenance of law and order and is less protective of the rights of defendants and individuals generally.[61] Lipset went on to say that in the United States the common law and the courts have been perceived and used as a check on the power of the state. In Canada, the courts have been much more closely identified with the state and perceived as an arm of the state.[62]

Douglas Schmeiser argued, however, that in the 1950s, the Supreme Court of Canada was probably the most progressive court in the English-speaking world.[63] Armed only with the responsibility for dividing legislative power between Parliament and the provinces and with developing common law principles, it took individual rights to an unprecedented level in Canadian jurisprudence.[64] He concluded, however, that the Canadian Supreme Court no longer attaches primary importance to the role of the individual in conflict with the state.[65] In the 1970s, there was a sharp reversal of this trend begun in the 1950s.[66] Today, the Court is more concerned with the collective good of society, whether expressed in terms of needs of the state, administrative efficiency, or law and order. In cases of doubt, the common good usually wins out over the individual good. Thus, the main thrust for the protection of individual rights in Canada recently has come from the legislatures, which generally have been more liberal than the courts. According to Schmeiser, this recent trend is in accord with traditional Canadian legal theory that has looked to Parliament as the champion of individual liberty and as the final court of the land.[67] In the United States, on the other hand, it is the Supreme Court that is looked to for protection of individual rights.

Thus, there appears to have been a difference from the outset in the way rights were discussed in Canada and the United States and in what was seen as the best way to protect them. The questions raised but remaining unanswered by the comparative literature are how the political thought on rights has changed in the two countries, if at all, and to what extent that thought is reflected in judicial opinions in freedom of expression cases.

The Canadian Charter of Rights and Freedoms and the Politicization of Rights

In the 1950s, the Canadian Supreme Court found an implicit bill of rights within the BNA Act. Shortly thereafter the federal government enacted the Canadian Bill of Rights.[68] Despite its earlier protection of individual rights, the Supreme Court refused to grant the statute more than perfunctory powers. The debate on rights continued in Canada until passage of the Charter of Rights and Freedoms (the Charter) in 1982, which for the first time constitutionally entrenched individual rights.[69] The Charter has generated interest among Canadian and American commentators who have questioned the potential impact of U.S. civil rights jurisprudence on Charter adjudication.[70] As Christopher Manfredi noted, the attitude of Canadian commentators toward the U.S. experience has ranged from enthusiastic praise for judicial enforcement of constitutional rights in the United States to cautious warnings about misusing and misunderstanding American constitutional theories and experience.[71]

William McKercher, writing just after passage of the Charter, stated that the wording of the Charter reflects the clear influence of the American experience.[72] McKercher is repeatedly cited by scholars as support for their contention that the Charter is simply a modern version of the Bill of Rights; yet McKercher proceeded in his article to outline the extensive differences between the two documents. The Charter, he noted, contains no due process clause, no explicit protection of property, and no right to bear arms. But it does contain, unlike the Bill

of Rights, an affirmative action clause, a standard for judging the limits of rights, language and educational rights, mobility rights, aboriginal rights, and denominational school rights.[73] McKercher saw these differences as evidence of how the Charter embodies specific Canadian value choices.

Robert Sedler pointed out that the Charter and the Bill of Rights "are different documents in part because the Charter is a contemporary document written when Canada was at an advanced stage of its legal and political development."[74] The Bill of Rights, on the other hand, was promulgated when America was a new nation. There was no American experience on which to frame limitations; therefore, the limitations on government in the Bill of Rights were broad-based and open-ended.[75] In contrast, the drafters of the Charter could build on the Canadian experience. At the same time, they had the American experience with individual rights to guide them.[76] The result, argued Sedler, is that the Charter's clear language resolves some of the issues that required extensive interpretation by the U.S. Supreme Court or that have yet to be resolved by it.

The most notable difference between the Charter and the Bill of Rights is the inclusion in the Charter of sections 1 and 33. Section 1 provides that the rights and freedoms contained within the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In essence, section 1 prescribes the mode of analysis the Canadian courts are to use in evaluating governmental restrictions on rights.

According to Manfredi, the absence of such a "reasonable limits" clause in the Bill of Rights forces American courts to build limits into the substantive definition of rights. Section 1 of the Charter allows Canadian courts to balance the rights and freedoms guaranteed by the Charter against other considerations without necessarily restricting the substantive scope of the Charter's provisions.[77] Manfredi used the issue of secondary picketing to illustrate his point.[78] The Supreme Court of Canada held in *RWDSU, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, that picketing is a form of expression but that the

injunction against secondary picketing in the case before it constituted a reasonable limit under section 1. The Court was able to make the ruling without restricting the substantive definition of expression. The U.S. Supreme Court has been able to uphold similar state picketing regulations only by distinguishing between speech and conduct.[79]

But the most significant difference between the Charter and the Bill of Rights is section 33 of the Charter.[80] Section 33 provides that the legislatures of either the federal or provincial governments can declare that an act "shall operate notwithstanding a provision" of the Charter. The section permits the government to validly pass acts that would otherwise be unconstitutional under the Charter. American scholars see section 33 as evidence of Canada's reluctance to let go of tradition and the doctrine of parliamentary supremacy. As Steven Simpson asked, "how can a constitution describe and provide freedoms as 'fundamental' when they are subject to a simple legislative override?"[81] Canadian scholars are split on its significance. Some agree with the American view, arguing the naiveté of the clause's defenders.

McKercher, for example, criticized those who argue that it will be used only sparingly because no legislature would want to have to justify its use to the electorate. Such an argument is based on faith that certain events will not occur.[82] Such an assumption, agreed Clare Beckton, only works in peacetime, not in times of crisis.[83] Because of the inclusion of the "notwithstanding clause," Massey saw the Charter as a distinctly Canadian creation, combining the American model of judicial review and the British model of parliamentary supremacy.[84] The result has been not the nationalization of individual rights as was expected by many Canadians, but rather the regionalization of rights because provincial governments may override or legislate "notwithstanding" the fundamental rights constitutionally protected by the Charter.[85]

Others see the section as protecting Canadian democracy. Manfredi argued that section 33 is an attempt to refute "the paradox at the heart of liberal constitutionalism" that if the only limit on the courts' power is a constitution whose meaning courts alone define, then constitutional

supremacy ultimately becomes judicial supremacy.[86] "What is undesirable about this consequence and what provides the principal justification for the legislative override of section 33, is that judicial supremacy of the type reflected in American jurisprudence used by the post-Charter [Canadian] Court potentially denies Canadians their most basic freedom and right of self-governance," he wrote.[87] Canadian views on section 33 are symptomatic of a deeper division existing among Canadian scholars with respect to the whole notion of an entrenched bill of rights and the role of the courts in protecting rights.

Scholars on both sides of the border agree that the role of the Supreme Court of Canada changed with the passage of the Charter. Those who wrote immediately after the Charter came into effect in 1982 predicted either that the Court would turn increasingly toward American jurisprudence for guidance and Canada would become an increasingly rights-based society or that the Court would act conservatively, cautiously feeling its way. The change in the role of the Court is important because it suggests a change in political thought and a change in freedom of expression law that needs to be examined.

In 1983, Beckton, for example, argued that the Charter was a clear direction to courts to depart from their past history of treating infringements of rights, such as freedom of expression, as simply requiring a division of powers analysis and to focus on the right itself.[88] Similarly, McKercher, writing in the same year, argued that the Canadian courts would be forced to limit government under the Charter and would become the "ultimate guardians of the rights of the people."[89] The Charter put the whole of the judiciary and the legal profession into a position very much closer to that of their American counterparts and, most importantly for McKercher, forced the Supreme Court into the center of Canadian political life, which previously had been dominated almost exclusively by the executive branch of government.[90] He predicted that Canada would reject its traditional political model of "elite accommodation," which is characterized by compromise reached between the executives of the two levels of government, in favor of a more active citizen participation model on rights issues.[91]

Sedler, however, argued the opposite. Because the Charter defines the nature and extent of the protection afforded individual rights more specifically than does the U.S. Constitution and because the Charter's text and structure prescribe the mode of analysis for the Canadian Court to use, he saw the role of the Canadian courts in the development of constitutional protection for individual rights as comparatively less significant than the role played by the U.S. courts.[92] For example, Sedler argued, the U.S. Supreme Court had to be activist to an extent to perform its constitutional function of defining the meaning of the Constitution because of the way the Constitution was written.[93] This is not the case for the Canadian Supreme Court under the Charter.

Scholars who have examined the post-Charter decisions of the Canadian Supreme Court for use of U.S. citations and for the level of activism have found mixed results. In examining the use of U.S. cases by the Canadian Court, Manfredi found that after increasing steadily between 1984 and 1987, the number of U.S. citations dropped in 1988. He concluded that American jurisprudence enjoyed its greatest influence in early Charter cases when the Canadian Supreme Court was grappling for the first time with general questions of constitutional interpretation and specific questions of application. As the Court has decided an increasing number of Charter cases, it has built a foundation of domestic constitutional doctrine and precedents on which it can build.[94] This kind of cross-border influence in cases and in political thought was looked for in this study.

Holland examined the results of Charter cases and argued that since the Charter, the Supreme Court has exerted strong integrative and centralizing influences on the provinces in the area of individual rights. No longer in the position of being umpire between the two levels of government, it can now place constitutional constraints on both. The first fifteen Charter cases went against the government, whether federal or provincial. By the end of 1986, the Court had shifted toward more frequent support of the governments. And by 1990, it was hearing approximately twenty-five Charter cases per year, about one-quarter of its total load. Charter claimants won approximately a third of the

time.[95] Overall, Holland's research reveals that the Supreme Court is more likely to favor Charter claimants than the provincial courts of appeal.[96] Holland concluded that the Supreme Court of Canada is seeking to enhance national integration by shifting the balance of power toward the federal government and by developing a uniform national law on civil rights and liberties.

Scholars agree that the Charter has given the Court the potential to lead Canada in the direction of a more rights-based, citizen-participatory society. In Canada, that process has been described as the "judicialization of politics" because the Charter is seen as increasing judicial influence over public policy and it is expected that the courts will attract the attention of interest groups.[97] In the United States, the phrase "politics of rights" has been used to describe the same phenomenon. What the scholars do not agree on is whether this politicization of rights is a good thing and whether it is in fact happening.

Canadian constitutional historian F.L. Morton argued that a "politics of rights" was not possible in Canada prior to the passage of the Charter and that most attempts in Canadian history to use the judicial process to achieve political purposes have failed.[98] Roger Gibbons, however, claimed that rights have been becoming increasingly politicized in Canada since the end of World War II. Canada's political life after the War was marked by a much sharper regional and intergovernmental conflict than American political life.[99] The civil rights movement in the United States was centralist in character and an assault on the federal underpinnings of the American political system, but the Quebec nationalism movement that challenged Canada's constitutional order in the same time period was decentralized and federal in outlook.[100] The result of the Canadian conflict was a prolonged constitutional debate that began in the 1960s and has continued to the present.[101]

As Gibbons stressed, until 1982 the constitution was seen by Canadians as a document by and for governments. It had little relevance for the rights and responsibilities of citizens.[102] Passage of the

Canadian Bill of Rights in 1960, which reflected the rights-based political culture of the United States, had little effect because the Canadian political culture was still predominantly parliamentary and governmental in character.[103] But the Charter infused "rights" directly into the Canadian constitutional political discourse. It has shifted Canadian constitutional culture toward an acceptance of popular sovereignty as citizens have come to see the constitution as theirs rather than as the property of governments.[104] For Manfredi, the entrenchment of rights also promotes unity by shifting political discussion away from regional conflicts toward universal questions about rights and by enhancing the power of a national institution — the Supreme Court.[105]

For Morton, the politicization of rights is undemocratic because it allows unelected and unaccountable judges to overrule decisions of democratically-elected legislators. Defenders of the Charter, Morton argued, frequently respond to such allegations by drawing sharp distinctions between law and politics and between questions of rights and questions of policy.[106] But Canadians should have been more skeptical of what he called the myth of distinction between rights and policy because Canada had no written constitution for the majority of its existence as a country and yet its civil rights record is better than that of the United States. This shows, he argued, that just as a society can protect its individual rights without a Charter, so the existence of constitutional rights cannot guarantee protection in the face of hostile public opinion.[107]

American scholars, then, praise the Charter for what they consider as bringing about long-overdue changes in Canadian law. Their only concern is with section 33, the notwithstanding clause, which permits a legislative override of Charter rights. Canadian scholars either agree with the American response and applaud what they see as the positive shift toward a rights-based, citizen-participatory society, or they lament the passage of the Charter and decry what they perceive as a negative shift toward an anti-democratic state because of the increased reliance on the judiciary instead of the legislative branch. What all scholars agree on is that the Canadian constitutional landscape has changed and with it

Canadian society. To what degree and with what effect society will change remains to be seen. What is interesting about the Canadian intellectuals who view the change as negative is that they see the change as producing a less democratic society. Their vision of democracy and of the relationship of the individual to the state are clearly different from their American counterparts.

Comparisons of Freedom of Expression Law

For the most part, scholars see the Charter as an opportunity for the Canadian Supreme Court to follow the American Supreme Court's example and give strong constitutional protection to freedom of expression.[108] Scholars advocated the wholesale adoption of American principles and doctrines by the Canadian courts, especially in the areas of civil libel and access to the courts. Most favored increased protection in Canada for press rights. For example, scholars suggested that the Court ought to adopt the *New York Times v. Sullivan* actual malice standard in civil libel cases to give greater protection to the media.[109]

Other scholars attempted to explain differences in the law between the two countries by looking at judicial attitudes and the historical context of the cases.[110] For example, until recently Canadian courts had followed common law doctrines respecting an individual's right to a fair trial and preferred that right to the public's right of access to courts.[111] The reason given by the scholars for the Canadian courts' favoring of the right of a defendant to a fair trial over the right of a free press was that the Canadian legal culture gave greater deference to precedent and tradition than did the American legal culture. The Canadian judiciary was seen as timid and overly deferential to the legislature.[112] It would appear, however, that the Canadian situation is more complex than these articles suggest.

Interestingly, very few studies compare the treatment of political speech in Canada with that of the United States. Writing in 1959, for example, W.F. Bowker discussed the development of freedom of expression law in the two countries in the sedition cases of the World

War I period. Bowker noted that a provincial court of appeal decision in 1916, in a case involving charges of sedition against German sympathizers, anticipated to some degree the American "clear and present danger" test of 1919.[113]

After World War I, both countries clamped down on Socialists and Communists. While Communists were being rounded up in the Palmer raids in the United States, Socialists who had led a general strike in Winnipeg, Manitoba, were being convicted of uttering seditious words in Canada.[114] The Winnipeg general strike prompted Parliament to amend the Criminal Code to make illegal any association whose purpose was to bring about governmental, institutional, or economic change by force. Bowker noted that during the Depression a few convictions were made under the section but a strong opposition to it developed and Parliament repealed it in 1936.[115] Four years later, Congress passed a similar statute in the United States, according to Bowker, which is still in effect.[116]

The first time the Supreme Court of Canada dealt with the issue of seditious speech was in the case of *R. v. Boucher* in 1951. For Bowker, this decision, in which Mr. Justice Rand declared that there could be no sedition without an incitement to violence, deserves to be ranked with the great opinions of Justices Oliver Wendell Holmes, Jr., and Louis Brandeis.[117] Kent Greenawalt, on the other hand, treats the case matter-of-factly. He wrote, "The case is often cited as an application of free speech principles operating prior to the Charter. That decision supports narrow construction of provisions regulating dangerous speech, but sheds little light on the bounds of section 2," the Charter's freedom of expression section.[118] This is the only mention of seditious speech in Greenawalt's comparison of Canadian and American speech cases. What is missing from the work of both scholars is an analysis of the Canadian Court's reasoning in the case and its conception of the individual, the state, and their relationship.

The majority of the comparisons of freedom of expression are largely descriptive studies. Although some of the scholars attempted to

explain their findings as the result of historical differences or judicial attitudes, none provided a theoretical framework for their conclusions.

Theories of Freedom of Expression in a Democracy

Because this study explores the law of freedom of expression as it has developed in two different democracies, the abundant studies on First Amendment theory have not been discussed. Instead, theories that attempted to explain freedom of expression cross-nationally were sought out. Unfortunately, there is a shortage of studies in this area. Several scholars have listed the kinds of factors that should be examined when looking at individual rights in different countries, but these factors are not theories in themselves.

Alan Westin, for example, argued that the treatment of rights and freedoms in any democratic society is best understood as part of its politics.[119] According to Westin, liberal societies start with ideals embodied in a bill of rights. Then historians and political scientists look at the process by which each liberal society tries to apply its ideal goals to the realities of governance in a complex society.[120] He identified six factors that are primary in shaping the civil liberties politics of any democracy:[121]

- the act of founding
- the ideology or political culture of the society
- the structures of government that were created by the written constitution
- the political processes
- sociological make-up of the population
- the legal culture

These factors are not unlike those set out by Lawrence Beer in his comparative study of freedom of expression in Japan.[122] Beer's six factors were part of what Beer called a "transcultural approach" to comparative study. Such factors should be taken into account when

making comparisons, but they do not in themselves constitute a theory of freedom of expression.

In his article, Westin did set out his own theory of American civil liberties politics. He saw the history of rights in America as a Hegelian dialectical process between the desire of public officials to maintain the status quo in terms of rights on the one hand and the creation of interest groups who push for new rights on the other.[123] According to Westin, the history of the expansion of rights and liberties in the United States is a history of demanding change from those who are reluctant to change.[124] Westin did not apply his theory of American rights development to Canada, but he did acknowledge that there is a sense in Canada that liberty versus authority issues should be settled by the legislatures and not by the courts. Thus, the parliamentary structure has produced a different relationship between liberal issues and the political process in Canada than in the United States.[125]

Sedler, after finding considerable similarity between freedom of expression cases in Canada and the United States, theorized that any free and democratic societies sharing the same legal tradition are likely to be in substantial agreement with respect to constitutional limits on freedom of expression. He concluded, "To this extent, the constitutional protection of individual rights will be 'universal' in free and democratic societies."[126] He hypothesized that if England, Australia, and New Zealand were to adopt constitutional protections for individual rights the results would be substantially the same.

But Lahav has noted that constitutional commitments are not determinative of the level of protection for freedom of expression. Rather, the key to understanding the law of freedom of expression is the political thought of a country. Lahav argued that prior to the Enlightenment, the state considered the press both as a tool to advance the public good and as a threat to public order. At the same time, public law was conceived of as an instrument of the state to be used at the discretion of the ruler. The result was what Lahav referred to as an authoritarian/instrumental conception of press law.[127] With the Enlightenment came the development of liberal justifications for free

expression and a different conception of public law. Under the new "rule of law," the legitimacy of governmental action depended on the uniformity of the law's application and a lack of the arbitrariness associated with the instrumental conception of public law.[128]

Despite the shift to this liberal/constitutional conception of press law, as Lahav called it, states continue to hold onto the authoritarian/instrumental concept.[129] An example is when the state seeks to restrict the press on the grounds of protecting national security.[130] The result is a tension in modern democracies between the liberal commitment to free expression and the authoritarian tendencies of the state to curb expression in the name of national or collective interests.[131] She concluded that:

> It is the form this tension takes in the various societies that distinguishes them. Each has its own unique combination, peculiar to its history, philosophy, and political culture. The manifestations of the particular combination, the causes which contributed to its formation, and the results, in terms of the degree of freedom enjoyed by the particular national press, have not yet been adequately explored, and herein lies the challenge to scholars of comparative press laws.[132]

Lahav's work is clearly the most theoretical of the studies discussed here, but not the most original. Other scholars have mentioned this tension between liberalism and order or between liberty and authority. Alderson, for example, talked about the tensions that exist in a liberal democracy between public and private and the individual and the state.[133] James Buchanan, a political economist, described the same phenomenon as society's need to find a workable solution between anarchy and the leviathan.[134] What sets Lahav apart is her attempt to conceptualize the tension into a framework within which to compare different countries. In the following chapters, this study explores Lahav's notion that the political philosophy of a democratic country is the key to understanding the level of tolerance granted freedom of expression by examining the

twentieth century political thought and political speech cases of the United States and Canada.