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DEFAMATION OF PUBLIC FIGURES: NORTH AMERICAN CONTRASTS

ADRIENNE STONE*

I. INTRODUCTION

New York Times Co. v. Sullivan is an iconic First Amendment case. Its central finding — that a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”¹ — is a cornerstone of First Amendment law. That principle is generally accepted in the United States, even by those who are otherwise First Amendment critics.²

The fame of *Sullivan* has brought it the attention of common law courts around the world. Their response, however, has been critical. In most common law countries, *Sullivan* has either been rejected or considerably modified.³ The rejection of a case so central to the First Amendment indicates the depth of the divide between the American constitutional tradition of freedom of speech

* Fellow, Law Program, Research School of Social Sciences, Australian National University. This article benefited from discussion with participants in the Defamation Discussion Forum at New York Law School in December 2004 and from discussion at a Symposium at the Australian National University also in December 2004. Particularly detailed and helpful comments were gratefully received from Simon Evans, Graeme Hill, Grant Huscroft, Michael McIver, and James Stellios.

1. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). “Actual malice” requires knowledge of or reckless disregard as to falsity. *Id.* at 280.

2. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1323 (1992) (“Because the ability to attack the qualifications and performance of public policymakers goes to the core of the modern American conception of democracy, preserving the gains of *New York Times Co. v. Sullivan* is taken as virtually axiomatic even by those whose views on other First Amendment topics are less speech-protective.”) (citation omitted).

3. In a survey written in 2000, examining the effect of *Sullivan* in India, Australia, South Africa, Canada, the United Kingdom, and New Zealand, George Williams and I concluded that “most courts in the common-law world are not committed to the particular vision of freedom of speech that characterises the First Amendment to the United States Constitution.” Adrienne Stone & George Williams, *Freedom of Speech and Defamation in the Common Law World*, 26 MONASH U. L. REV. 362, 377 (2000). See generally, IAN D. LOVELAND, *POLITICAL LIBELS: A COMPARATIVE STUDY* (2001).

and those of the United States' nearest constitutional and cultural relations.⁴

In this article, I will focus on the divergence from *Sullivan* found in Canadian law. Despite the cultural and constitutional characteristics Canada shares with the United States,⁵ the Supreme Court of Canada has rejected *Sullivan* in its entirety in *Hill v Church of Scientology*.⁶ This article explores the differences in value that underscore the divergence between *Sullivan* and *Hill*. Those differences can be understood on two levels. First, there is a different understanding of the value of reputation. Reputation is given relatively short shrift in the *Sullivan* opinion, but is valued by the Canadian Supreme Court as a means of preserving dignity, the social bonds created by civility, and respect in social relations.

A second level of difference has an overtly political nature. *Sullivan* is an iconic case because, by resolving the long-standing uncertainty over the constitutionality of seditious libel,⁷ it defined, for American purposes, an essential element of a democratic government.⁸ As put by Professor Kalven, *Sullivan* propounds the idea that "[d]efamation of the government is an impossible notion in a democracy."⁹ In the minds of those committed to First Amend-

4. That divide no doubt reflects more pervasive cultural trends. See Frederick Schauer, *The Exceptional First Amendment*, July 18, 2004, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668543 (last visited Sept. 9, 2005) (exploring some of these cultural trends).

5. To state a few obvious facts: Both countries are modern, industrialized, multi-racial and multiethnic democracies. Both legal systems have inherited and adapted the English common law that now exists alongside, and subject to, extremely extensive legislative regimes. On the reception of the common law in Canada, see PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 27-29 (3d ed. 1992). Both constitutional systems are governed by written constitutions that provide for a federal division of power, and are enforced by judicial review. The Constitution of Canada is found in a series of Statutes including the Constitution Act, 1867, and the Constitution Act, 1982. *Id.* at 1-11. See generally *Constitution Act 1867*, 30 & 31 Vict. ch. 3 (U.K.), as reprinted in R.S.C., No.5 (Appendix 1985); *Constitution Act, 1982*, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). Judicial review was instituted following the enactment of the Constitution Act, 1867 (U.K.). HOGG, *supra* note 5, at 117. With respect to the *Canadian Charter of Rights and Freedoms*, judicial decisions are subject to parliamentary override. See *id.* at 802-03.

6. *Hill v. Church of Scientology of Toronto*, [1995] S.C.R. 1130.

7. See *Sullivan*, 376 U.S. at 273.

8. See Harry Kalven, Jr., *The New York Times Case: A Note on the "Central Meaning" of the First Amendment*, 1964 SUP. CT. REV. 191, 205.

9. *Id.*

ment ideals, the Canadian Supreme Court's rejection of *Sullivan* would therefore seem to indicate a misunderstanding of, if not disregard for, democratic government. Of course, the Canadian Supreme Court and other proponents of Canadian freedom of expression cases would not accede to that suggestion. On the contrary, the Canadian Supreme Court regards the protection of reputation and of truthfulness in public discourse as essential to the maintenance of a healthy public debate.

I conclude by considering how this comparative study relates to a debate in modern political theory between liberalism and its communitarian critics.¹⁰ Most obviously, the liberal concern with freedom and the communitarian concern with community explain disagreement as to the value of reputation. In addition, I suggest the differing conceptions of democracy are also illuminated by this debate. In this case, however, the relevance of the communitarian debate with liberalism is more complicated. A prominent response by liberals to the communitarian critique has been to accept the importance of "community" in human life but to deny the wisdom of allowing the State to take an active role in its protection.¹¹ That response, in turn, has led some to argue that the real point of distinction between liberals and communitarians lies in the comparative levels of suspicion with which they regard government and in their comparative levels of confidence that communal ends can be protected without state intervention.¹²

The division between the United States and Canadian free-speech law, I will argue, reflects just this point of distinction. It explains why both systems of law profess a commitment to democratic government yet have very different understandings of how it is to be achieved. This aspect of the division, however, is curiously

10. I am, of course, simplifying enormously. Communitarianism is a complex body of thought and communitarian thinkers hold a variety of positions. For an overview of various forms of communitarianism, see Will Kymlicka, *Community*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 366 (Robert E. Goodin & Philip Pettit eds., 1995). For a similarly helpful treatment of liberalism, see Alan Ryan, *Liberalism*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 291 (Robert E. Goodin & Philip Pettit eds., 1995).

11. Allen E. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 *ETHICS* 852, 860 (1989).

12. See Kymlicka, *supra* note 10, at 373.

underemphasized, and my aim in this article is to bring this point of distinction to the fore.

To place this discussion in context, I begin in Part II with a review of some basic aspects of Canadian law of freedom of expression with particular reference to the Canadian Supreme Court's decision in *Hill*, the leading authority on defamation and public officials. In Part III, I will discuss the relevance of questions of constitutional text and structure to the rejection of the reasoning of *Sullivan* in *Hill* and consider how the Canadian Supreme Court has responded to some well-known criticisms of *Sullivan*. I conclude, in Part IV, by exploring deeper philosophical differences which, I argue, better explain the difference between Canadian and American free-speech law.

II. FREEDOM OF SPEECH IN CANADA: DEFAMATION OF PUBLIC OFFICIALS

A. *Section 2(b) and Section 1*

Freedom of expression is protected in Canada by section 2(b) of the *Canadian Charter of Rights and Freedoms*.¹³ Like all *Charter* rights, section 2(b) is governed by section 1 of the *Charter*, which provides that *Charter* rights are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹⁴ The *Charter* thus separates the question of the scope of protected rights from the question of limits on those rights.¹⁵

Determining the scope of the *Charter* right to freedom of expression requires asking whether an impugned law restricts "expression" within the meaning of the *Charter*. Answering that question is

13. "[F]reedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" is listed as a "Fundamental Freedom." See HOGG, *supra* note 5, at 960. For helpful accounts of the basic doctrines of Canadian law of freedom of expression see HOGG, *supra* note 5, at 955-88; RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 32-75 (2000); KENT GREENAWALT, FIGHTING WORDS 11-27 (1995); see generally Jamie Cameron, *The Past, Present, and Future of Expressive Freedom Under the Charter*, 35 OSGOODE HALL L. J. 1 (1997).

14. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

15. These questions are analytically distinct even if not separated by the text. See FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89-92 (1982).

usually comparatively straightforward. As interpreted by the Canadian Supreme Court, the concept of “expression” in section 2(b) covers almost any act that “conveys or attempts to convey meaning,” with the exception only of “violence as a form of expression.”¹⁶ The conception of protected expression is so broad that the Supreme Court has held that even solicitation for the purpose of prostitution counts as expression within the meaning of section 2(b).¹⁷ The rationales for the protection of freedom of expression, which are understood in terms familiar to any student of the First Amendment,¹⁸ are usually therefore irrelevant in determining the application of section 2(b) (though an exception arises when the government’s purpose was not to control or restrict attempts to convey a meaning).¹⁹

Because of the breadth of section 2(b), the result in most freedom of expression cases turns on the application of section 1 of the *Charter* and its subsidiary doctrines. The Supreme Court of Canada has given detailed treatment to each of the key phrases in section 1: “limit,”²⁰ “prescribed by law,”²¹ and most importantly, “demonstrably justified in a free and democratic society.” The Supreme Court elaborated upon this last phrase in *R. v. Oakes*,²² establishing a test

16. *Irwin Toy v. Quebec (Attorney-General)*, [1989] S.C.R. 927, 969-70.

17. See Reference Re §§ 193 and 195.1(1)(c) of the Criminal Code (Manitoba), [1990] S.C.R. 1123; *R. v. Stagnitta*, [1990] S.C.R. 1226; *R. v. Skinner*, [1990] S.C.R. 1235. See also *Irwin Toy*, [1989] S.C.R. at 969, in which the Supreme Court gives the following as an instance of expression protected by section 2(b): “For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource.” I am grateful to Grant Huscroft for this reference. By contrast, communication in the course of criminal activity is generally thought to be excluded from First Amendment conception of speech. See GREENAWALT, *supra* note 13, at 17-21.

18. The Canadian Supreme Court explains the justifications for freedom of expression in a manner that would be familiar to anyone who has studied the First Amendment — freedom of expression is seen as a means for promoting the search for truth, human autonomy, and democratic self-government. See *Edmonton Journal v. Alberta*, [1989] S.C.R. 1326, 1336.

19. In which case, section 2(b) is only violated if the law restricts expression relating to the underlying values. See *Irwin Toy*, [1989] S.C.R. at 976.

20. *Attorney-General (Quebec) v. Quebec Protestant School Boards*, [1984] S.C.R. 66 (distinguishing between a “limit” on rights and a “denial” of them). For a critique, see HOGG, *supra* note 5, at 798-99.

21. See *Little Sisters Book and Art Emporium v. Canada*, [2000] S.C.R. 1120, 1126.

22. *R. v. Oakes*, [1986] S.C.R. 103.

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that continues to form the basis for section 1 analysis: a law violating a *Charter* right must serve a “pressing and substantial objective” and use means that are “reasonably and demonstrably justified.” The second requirement, that the law be “reasonably and demonstrably justified,” in turn requires that the law be “rationally connected” to that objective; “minimally impair” the protected right;²³ and that there is “a proportionality” between the restrictions imposed and the objective pursued.²⁴

The *Oakes* test provides a flexible framework for the assessment of *Charter* claims.²⁵ The Canadian Supreme Court has resisted providing more precise guidelines as to its application, stressing instead that the test must be applied with sensitivity to the “context” of particular cases.²⁶

B. *The Constitution and the Common Law*

The opinions in most Canadian freedom of expression cases use the *Oakes* framework. Courts consider whether the right conferred by section 2(b) is violated by an impugned law (and frequently conclude that it is) before turning to consider the reasonableness of the limitation.²⁷ Cases challenging the common law tort of defamation, however, do not take this form. Where a rule of the common law, as opposed to legislation or executive ac-

23. The requirement of minimal impairment is not as restrictive as it sounds. Though in *R. v. Oakes* the Court required that a law must “impair as little as possible the right or freedom in question” [1986] S.C.R. 103, 138-39, the Court later made it clear that the requirement was only that a law impairing a protected right do so “as little as is reasonably possible.” See *R. v. Edwards Books and Art*, [1986] S.C.R. 713, 772.

24. See *Oakes*, [1986] S.C.R. at 138-39.

25. On the development of the *Oakes* test in the context of freedom of expression, see Cameron, *supra* note 13, at 7-22.

26. See *Edmonton Journal v. Alberta*, [1989] S.C.R. 1326, 1355-56; *R. v. Keegstra*, [1990] S.C.R. 697, 737; *Thompson Newspapers v. Canada*, [1987] S.C.R. 887, 939 (“[C]ontext is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right.”).

27. See, e.g., *Irwin Toy*, [1989] S.C.R. at 979 (finding that the Consumer Protection Act provisions constituted limitations on rights, and then turning to whether these limitations were reasonable limits on freedom of expression); *Keegstra*, [1990] S.C.R. 697, 734 (finding that a section of the Criminal Code constituted an infringement of the Charter right to freedom of expression, and then turning to examine whether such an infringement was justifiable as a reasonable limit).

tion, is challenged under the *Charter*, the Canadian Supreme Court takes a somewhat different approach.

The difference stems from the Canadian Supreme Court's understanding of the relationship between the common law and the Constitution. The Canadian Court has held that the common law, when invoked in a dispute between private parties,²⁸ is a species of private action not directly subject to constitutional requirements.²⁹ That conclusion may surprise American readers. It has long been accepted, in American case law, that the judicial enforcement of the common law is a form of state action.³⁰ Further, the application of this principle in a context like *Sullivan*, in which the First Amendment was applied to the Alabama common law of defamation, is an especially uncontroversial instance of the general rule.³¹

The Canadian Supreme Court's treatment of the relationship between the common law and the *Charter* has been criticized,³² but its position makes little practical difference. Though the Canadian Supreme Court refuses to apply the *Charter* "directly" to the common law, it held that the common law must conform to *Charter* val-

28. The Court in *Hill* provides an exception "in so far as the common law is the basis of some governmental action which . . . infringes a guaranteed right or freedom." The Court held that no such government action was present in this case. The Court rejected the argument that the plaintiff's action, as the action of an officer of the Crown, constituted government action. He brought the action, the Court held, in his own capacity in response to the impugning of his, rather than the government's, reputation. See *Hill*, [1995] S.C.R. at 1159.

29. The decision relies in part on the text of the *Charter* § 32 of which provides that "[t]his Charter applies . . . to the legislature and government of each province," but does not mention the judiciary. But the conclusion that the common law invoked between private parties is not directly subject to the *Charter* depends also on the Court's understanding of the nature of the judicial power to enforce the common law. See *RWDSU v. Dolphin Delivery*, [1986] S.C.R. 573, 600-01.

30. See *Shelley v. Kraemer*, 344 U.S. 1, 19 (1948).

31. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1711 (2d ed. 1988) ("[T]he general proposition that common law is state action — that is, that the state "acts" when its courts create and enforce common law rules — is hardly controversial.").

32. See Brian Slattery, *The Charter's Relevance to Private Litigation: Does Dolphin Deliver?*, 32 *MCGILL L. J.* 905 (1987). For a criticism of a similar approach adopted by the High Court of Australia, see Adrienne Stone, *The Common Law and the Constitution: A Reply*, 26 *MELB. U. L. REV.* 646 (2002). For a defense, see Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 *MICH. L. REV.* 387 (2003).

ues.³³ The Canadian Supreme Court has the power to develop the common law and so, where the common law is inconsistent with *Charter* values, it can alter common law rules to conform to the *Charter*. The result is that the *Charter* provides protection against the common law (where it is inconsistent with *Charter* rights) as well as against legislative and executive action.³⁴

C. Hill v. Church of Scientology³⁵

Hill dealt with a challenge to the common law of defamation by considering whether “*Charter* values” require the further development of the common law.³⁶ The case arose from the actions of a lawyer (Morris Manning) who, in the course of representing the Church of Scientology, made false allegations relating to the conduct of a prosecutor (Casey Hill). At a widely reported press conference, Manning accused Hill of misleading a court and of improperly obtaining access to sealed court documents.³⁷ Following the dismissal of contempt proceedings against him, Hill brought defamation proceedings against Manning and the Church of Scientology, who argued in response that the common law of defamation ought to be developed to include the “actual malice” rule.³⁸ Although it may not have been necessary to respond to that submission,³⁹ the Supreme Court of Canada took the opportunity

33. See *Dolphin Delivery*, [1986] S.C.R. at 603.

34. Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT’L J. CON. L. 79 (2003).

35. This discussion draws on Stone & Williams, *supra* note 3.

36. *Hill*, [1995] S.C.R. 1130.

37. See *id.* at 1147.

38. *Id.* at 1158.

39. The defendant appears to have known that the allegations were false, and thus may have been unable to rely upon the *Sullivan* defense in any event. See *id.* at 1147. In proceeding to consider an issue that could have been avoided, *Hill* is in fact a mirror image of *Sullivan*, which could have been resolved on the basis that the offending publication did not sufficiently identify the plaintiff. Kalven, *supra* note 8, at 204. In addition, at one point, Justice Cory seems to distinguish *Hill* from *Sullivan* on the facts: “None of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar. First, this appeal does not involve the media or political commentary about government policies.” *Hill* [1995] S.C.R. at 1188. That might seem to leave open the possibility of adopting a *Sullivan* style rule at some later point. However, given the depth of concern with *Sullivan* in other parts of the opinion (see *infra* Part III.C), it seems more likely that the Canadian Court would adopt a modified form of the rule that provides more protection to reputa-

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to reject the *Sullivan* rule. The Court decided that the existing Canadian common law provided sufficient protection for freedom of expression.⁴⁰

The Canadian common law, like the common law in a number of other countries, provides that a statement that tends to injure the reputation of the person to whom it refers is defamatory.⁴¹ Under Canadian common law, defamation is a tort of strict liability⁴² that is subject to the defenses of truth,⁴³ fair comment, and qualified privilege. These defenses, however, do not provide the protection of the *Sullivan* rule which, crucially, applies to false defamatory statements. The defense of fair comment is restricted to commentary on facts, which must be *true* (a key point of distinction from *Sullivan*) and identified with some clarity.⁴⁴ The defense of qualified privilege, which does apply to some false statements of facts, is limited by a requirement that the person making the statement have a duty to disclose it and the recipient an interest in its receipt. Critically, newsgathering and reporting have traditionally not been thought sufficient to establish this “reciprocity of duty and interest.”⁴⁵ Though the Canadian Supreme Court could extend the Canadian common law by exercising its general power over the common law or by reference to “*Charter* values,” it has declined to do so. Accordingly, Canadian media organizations ordinarily have to prove the truth of defamatory statements made in the course of reporting public affairs.⁴⁶

tion, like those found in Australia, the United Kingdom, and New Zealand. *See* Lange v. Australian Broadcasting Corporation, [1997] 189 C.L.R. 52 (Austl.); Lange v. Atkinson [2003] N.Z.L.R. 385 (N.Z.); Reynolds v. Times Newspapers, [1999] 4 All E.R. 609 (U.K).

40. *See Hill*, [1995] S.C.R. at 1188-90. *See generally* ALLEN M. LINDEN, CANADIAN TORT LAW ch. 19 (7th ed. 2001).

41. *See* LINDEN, *supra* note 40, at 686-87; Colour Your World Corp. v. Canadian Broad. Corp., [1998] 156 D.L.R. (4th) 27, 36. R

42. *See* LINDEN, *supra* note 40, at 704. R

43. *Id.* at 706.

44. Fair comment also requires that the defamatory comments were made in the public interest, in good faith and without wrongful intent. *See* Prud'homme v. Prud'homme, [2002] S.C.R. 663, 698; LINDEN, *supra* note 40, at 723. R

45. LINDEN, *supra* note 40, at 714. R

46. *See also* R. v. Lucas, [1998] S.C.R. 439, 484-85, in which the Supreme Court upheld (in the face of challenge based on section 2 (b) of the *Charter*) a criminal libel statute that made it an offense for the publication by any person of a “defamatory libel that he knows is false” (though that statute would presumably be valid in the United States as well). Under American law, criminal libel statutes must comply with the rule

III. EXPLAINING THE DIFFERENCE

My principal concern in this article is with the differences of value that inform these decisions. Before turning to that matter, however, I should note that two more prosaic matters, namely criticism of *Sullivan* and textual and structural differences between the United States and Canadian constitutions, might also have had some influence. As I will argue, however, these explanations cannot fully account for the different resolution of the free-speech question in *Hill*.

A. *The "Failure" of New York Times v. Sullivan*

The decision in *Hill* was partly driven by a critical assessment of the *Sullivan* rule. The Supreme Court of Canada appears to have been persuaded by well-known arguments that the *Sullivan* rule, with its focus on the motives and practices of journalists and editors, tended to produce pressure on journalists to reveal sources, prolong litigation with an accompanying increase in expense, and encourage large awards against media defendants.⁴⁷ The result, according to these critics, is that the *Sullivan* rule has exacerbated the tendency to self-censorship that it attempts to address. The force of these arguments is somewhat disputed,⁴⁸ but their influence on the Canadian Supreme Court is clear.⁴⁹

The Canadian Supreme Court's reaction, however, reveals a deeper form of disagreement. If the Supreme Court of Canada had been principally concerned with those aspects of the *Sullivan* rule that are said to be self-defeating, it could have responded by adopting a rule that would better serve *Sullivan*'s original aims. It might, for example, have adopted a rule like that preferred by Justice Black in his *Sullivan* concurrence, which obviated the focus on jour-

in *Sullivan*, which requires a demonstration of "actual malice" (knowledge of falsity, or reckless disregard of, the truth). See *Garrison v. Louisiana*, 379 U.S. 64, 72-73 (1964).

47. See generally Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603 (1983); Nadine Strossen, *A Defence of the Aspirations — but not the Achievements of the U.S. Rules Limiting Defamation Actions By Public Officials or Public Figures*, 15 MELB. U. L. REV. 419 (1986).

48. See, e.g., Russell Weaver & Geoffrey Bennett, *Is The New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153, 1182-90 (1993).

49. See *Hill*, [1995] S.C.R. at 1182-83.

nalistic practice by conferring absolute protection on false defamatory statements about the public conduct of public officials.⁵⁰ The Supreme Court of Canada's real concerns, however, lay elsewhere. For the Court, the most significant defect with *Sullivan* lay in its disregard for the truth.⁵¹ Justice Cory, writing for the majority in *Hill*, concluded: "I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish."⁵² Far from adopting the concern, evident in *Sullivan*, that a requirement to demonstrate truth would "chill" public discussion, the Canadian Supreme Court was concerned with the deprecation of truth in public discourse.⁵³

B. Structural and Textual Differences

It has been suggested that the Canadian law of freedom of expression is affected by the separation of the right of freedom of expression in section 2(b) from the limits imposed by section 1. The explicit acknowledgement that *Charter* rights are subject to limitation contrasts sharply with the absolutist language of the First Amendment. Section 1 therefore seems to signal that the Canadian Court should be more sympathetic towards arguments for limitation on speech than its American counterpart, which is faced with the injunction "Congress shall make no law."⁵⁴

In *Hill*, of course, the influence of these factors is one step removed. Rather than applying section 1 directly, the Court applies

50. See Cameron, *supra* note 13, at 39.

51. See *Hill*, [1995] S.C.R. at 1182-83.

52. *Id.* at 1187.

53. *Id.* at 1183; see Cameron, *supra* note 13, at 39.

54. See Kathleen Mahoney, R. v. Keegstra: A Rationale for Regulating Pornography, 37 MCGILL L.J. 242, 251-52 (1992) ("The *Charter* is not constrained by the textual or political constitutional imperatives of the American *First Amendment*."). See also Jamie Cameron, *The Original Conception of Section 1 and its Demise*, 35 MCGILL L.J. 254, 261 (1989). The deferential stance is further encouraged by the flexible, context-sensitive *Oakes* test, which as history of the First Amendment would suggest, is likely to encourage the acceptance of limitations on rights. The U.S. Supreme Court's willingness to uphold prosecutions of leaders of the Communist Party in *Dennis v. United States*, 391 U.S. 494 (1951), is usually taken to demonstrate that in times of high intolerances, flexible standards of review may allow judges to accede to pressure to censor unpopular speech. See Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 940-41 (1968).

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“*Charter* values” to the development of the common law. Although, if section 1 is taken to indicate that the *Charter* requires a somewhat deferential approach toward rights, that principle may also be a “*Charter* value,” which in turn affects the Court’s attitude to the common law. Nevertheless, the very fact that the Court draws a distinction between the development of the common law to accord with *Charter* values and the direct application of the *Charter* may be significant. Where a court perceives its role as developing existing common law rules rather than developing an overtly constitutional rule (as the Supreme Court of the United States did in *Sullivan*), the court might proceed more cautiously.⁵⁵

But, even if this much is true,⁵⁶ these structural and textual features can only be seen as reinforcing choices made on other grounds. A principle of deference, on its own, is an insufficient basis on which to make the very precise choices required by particular free-speech controversies.⁵⁷ Deference might weigh the scales in favor of upholding existing law, but it does not provide guidance for distinguishing between permissible and impermissible limits.⁵⁸ The distinctive structural features of the *Charter* are better conceived as indicative of deeper differences. In this vein, section 1 is said to be the fundamental organizing principle of the *Charter*, and provides the foundation for a distinctively Canadian conception of

55. Graeme Hill & Adrienne Stone, *The Constitutionalisation of the Common Law*, 25 ADEL. L. REV. 67, 91-92 (2004).

56. A generally deferential stance cannot be seen to be a *necessary* consequence of the *Charter’s* text. The openness of the text of section 1 (“reasonably necessary in a free and democratic society”) could equally support an approach under which limitation on freedom of expression is quite narrowly circumscribed.

57. So, for example, a general principle of deference does not explain why the Canadian court has been so much less deferential with respect to limitations on some forms of speech, notably commercial speech. *See, e.g., RJR-MacDonald v. Canada (Attorney-General)* [1995] S.C.R. 199, 327 (protecting commercial expression). *But cf. Irwin Toy*, [1989] S.C.R. at 945 (allowing the regulation of commercial expression). The apparent inconsistency between *RJR-MacDonald* and *Irwin Toy* might be taken as indicative of the unpredictability of the section 1 test.

58. Similarly, the flexibility of the section 1 test (which First Amendment history would suggest is likely to encourage) is also not a *necessary* consequence of the *Charter’s* text. Section 1 does seem to require balancing in some form. But balancing is also a feature of more defined (and restrictive) tests. *Sullivan’s* “actual malice” test itself is usually given as an example of this “definitional balancing.” Nimmer, *supra* note 54, at 944.

rights.⁵⁹ The remainder of this essay will be devoted to identifying the values that inform this distinctively Canadian conception of rights.

C. *Motivating Values*

1. Reputation: Self-Esteem, Civility, Public Deliberation and Participation

A starting point in analyzing the *Hill* opinion lies in its treatment of reputation. Reputation receives little attention in *Sullivan*,⁶⁰ but is the subject of a long and rather reverential analysis in *Hill*.⁶¹ In *Hill*, reputation is described in rather lofty and intangible terms. Reputation is extolled as “an integral and fundamentally important aspect of every individual.”⁶² It is linked to the “innate worthiness and dignity of the individual”⁶³ and the right to privacy,⁶⁴ values that are themselves aspects of the free and democratic society protected by section 1 of the *Charter*.

When the Supreme Court of Canada describes reputation in these terms, it aligns itself closely with a conception of reputation described as “reputation as dignity.”⁶⁵ Under this conception, reputation has a double function. In part, it protects the individual’s

59. See Cameron, *supra* note 54, at 258.

60. The Court’s references to reputation occur mainly as it describes the common law of defamation in the state of Alabama; there is no sustained reflection on the nature of the reputation or its social importance. See *Sullivan*, 376 U.S. at 265, 267 (“It matters not that that law has been applied in a civil action and that it is common law only . . . Under Alabama law as applied in this case, a publication is ‘libelous per se’ if the words ‘tend to injure a person . . . in his reputation’ or to ‘bring [him] into public contempt.’”).

61. See *Hill*, [1995] S.C.R. at 1175-79. The Supreme Court, however, does acknowledge that reputation serves the relatively prosaic purpose of protecting a lawyer’s practice. See *id.* at 1178 (“[A] lawyer’s practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness.”). See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* 74 CALIF. L. REV. 691, 693 (1986) (stating that reputation resembles a form of property, “akin to good will”).

62. *Hill*, [1995] S.C.R. at 1161, 1175.

63. See *id.* at 1179 (“[T]he good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights.”).

64. This was accorded constitutional protection in *R. v. Dymnt*, [1988] S.C.R. 417, 427. See *Hill*, [1995] S.C.R. at 1179.

65. Post, *supra* note 61, at 707-08.

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interest in the preservation of self-esteem, protecting against the humiliation involved in the dissemination of defamatory statements. But, in addition, the preservation of reputation serves a public purpose by providing a mechanism for the ordering of social relations. This latter element is reflected in the Canadian Supreme Court's description of reputation as "at the base of any system of ordered liberty," and as the "fundamental foundation on which people are able to interact with each other in social environments."⁶⁶ The idea is that reputation is a means by which a community determines those who are to be accorded the respect due to full members and those who will be denied that respect. As explained by Professor Robert Post:

[T]he dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society. Rules of civility are the means by which society defines and maintains this dignity. Conversely, rules of civility are also the means by which society defines and distinguishes members from non-members.⁶⁷

In addition to its role in promoting dignity, the Court in *Hill* also seems to accord the protection of reputation an overtly political role. The protection of reputation is said to improve the quality of, and participation in, public discourse in a manner that promotes democratic government. At this point, the significance of the Canadian Supreme Court's emphasis on truth is evident. Insisting on truth is a means by which the Canadian Supreme Court protects the quality of public discourse. In its view, the *Sullivan* actual malice rule risks leaving a false statement uncorrected. If a public official cannot show that a false statement was motivated by actual malice, the statement may never be legally challenged and, even when it is, the focus of proceeding will be on the conduct of the defendant and not the truth of the challenged statement. The result, in the eyes of the Canadian Supreme Court, is to endanger

66. *Hill*, [1995] S.C.R. at 1175 (quoting David Lepofsky, *Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of Expression?*, 4 N.J.C.L. 169, 197 (1994)).

67. Post, *supra* note 61, at 711.

public discourse: “the stream of information about public affairs is polluted.”⁶⁸

This concern for the quality of public debate is complemented by a concern with participation. The *Hill* Court reiterated the traditional common-law concern that reducing the protection of defamation law might deter “sensitive and honourable men from seeking public positions of trust and responsibility.”⁶⁹

2. Dignity, Civility, and Public Deliberation and Participation in Two Free Speech Traditions

None of these ideas are unique to Canadian free speech jurisprudence. They even find some resonance in strands of First Amendment law.⁷⁰ What emerges from a comparison of *Sullivan* and *Hill*, however, is that each of these ideas — that the protection of reputation can promote self-esteem, social order, and democratic deliberation — is more easily accommodated by the Canadian Court.

Take first the private concern with self-esteem and dignity. Although courts in both systems emphasize these values, they adhere to different conceptions of them.⁷¹ The conception of dignity reflected in the Canadian common law relies on reputation to protect dignity, whereas a strong theme of First Amendment law is that dignity lies in freedom of speech itself.⁷² One image that emerges

68. *Hill*, [1995] S.C.R. at 1185 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 473 U.S. 749, 769 (1985) (White J., concurring)).

69. *Hill*, [1995] S.C.R. at 1174 (quoting RICHARD O’SULLIVAN, *GATLEY ON LIBEL AND SLANDER IN A CIVIL ACTION: WITH PRECEDENTS OF PLEADINGS* (4th ed. 1953)).

70. In support of its conception of reputation as preserving dignity, the Supreme Court of Canada cites Justice Stewart’s concurrence in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966): “The right of a man to protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.” In support of its argument regarding the deprecation of truth in public discourse, the Supreme Court of Canada quotes at length from the concurrence of Justice White in *Dun & Bradstreet*, 473 U.S. at 769.

71. The Canadian treatment of reputation seems to bear some resemblance to the European tradition described by James Q. Whitman as a tradition of “leveling up” — of extending to all levels of respect formerly reserved to those on the highest rung of the social hierarchy. See James Q. Whitman, *Enforcing Civility and Respect*, 109 *YALE L. J.* 1279, 1385 (2000).

72. See *Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression is . . . designed and intended to remove governmental restraints from

from First Amendment law is of a capable, brave citizenry able to withstand the unpleasantness of unregulated public discourse and able to assess for itself the worth of ideas.⁷³ That image is strong in Justice Brandeis's famous opinion in *Whitney v. California*⁷⁴ which invokes the character of the founders of the United States Constitution — “courageous self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government”⁷⁵ — to describe the ideals of the First Amendment.⁷⁶ A key virtue of the First Amendment is that it eschews the paternalism inherent in the governmental intervention in public debate and recognizes its citizens' full capacities. “Dignity” thus lies at the core of First Amendment justifications for freedom of speech, which emphasize the importance of free speech to the expression of individuality and the development of independent personality.⁷⁷

That First Amendment conception of “freedom of speech as dignity” also contains the counterpart to the Canadian idea that reputation performs a public role. According to some analyses of the First Amendment, the dignified treatment of the citizenry through freedom of speech has public benefits, albeit of a different kind. Thus, the U.S. Supreme Court wrote in *Cohen v. California* of “the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.”⁷⁸ The nature of the public benefits that flow from the First Amendment's protection of speech is, of course, somewhat disputed. One suggestion is that recognizing the moral independence of the people encourages the development of the independence and courage idealized in the

the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”).

73. See Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1572-74 (1999).

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

75. *Id.* at 377 (Brandeis, J., concurring).

76. See generally Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney*, 29 WM. & MARY L. REV. 653 (1988).

77. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 9-10 (1992).

78. *Cohen*, 403 U.S. at 24.

Brandeis opinion in *Whitney*,⁷⁹ another is that a principle of freedom of speech that extends even to highly unpleasant and unpopular forms of speech encourages the development of tolerance.⁸⁰ Another suggestion still is that, by allowing the people to pursue many “forms of life,” the First Amendment protects and promotes cultural diversity.⁸¹

When we turn to the second of the public goods identified in the *Hill* opinion — the promotion of public participation — the tension with the First Amendment is, if anything, more obvious. The notion that government can intervene to enhance public debate for the purposes of improving democratic government, though propounded by prominent First Amendment scholars,⁸² has met with strong resistance in the U.S. Supreme Court. The American free-speech tradition is replete with images that draw on, or resonate with, a more free-market approach to public participation. Though the *Sullivan* opinion does not cite Justice Holmes’s famous statement,⁸³ it reveals affinity with these ideas in citing, among others, Judge Learned Hand: “right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.”⁸⁴ The “marketplace” idea, as Frederick Schauer has shown, is best understood as an idea about democratic government. Democratic government is best secured by an absence of state control of expression because of the risk that government will use its power to regulate speech self-interestedly or incompetently.⁸⁵

IV. PHILOSOPHICAL FOUNDATIONS: LIBERAL AND COMMUNITARIAN

The contrast between these cases reveals deeper philosophical trends. First Amendment law is often taken to provide a vivid illus-

79. See Blasi, *supra* note 73, at 1577; Blasi, *supra* note 76, at 670.

80. See LEE BOLLINGER, *THE TOLERANT SOCIETY* 233 (1986).

81. See generally Robert C. Post, *Cultural Heterogeneity and the Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297 (1988).

82. See, e.g., OWEN M. FISS, *THE IRONY OF FREE SPEECH* 28-33 (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 34 (1993).

83. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (“The best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

84. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1949) (cited in *Sullivan*, 376 U.S. at 270).

85. See SCHAUER, *supra* note 15, at 33-34.

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tration of essential commitments of liberalism, whereas the Canadian law of freedom of expression is widely accepted as having an affinity with “communitarian” challenges to liberalism.⁸⁶ The comparative study of Canadian and American free-speech law thus provides a case study in an important debate in modern political philosophy.

Of course, one must be careful to avoid a simple equation of either body of case law with either body of political thought. Judging is a practical task performed under time constraints by lawyers who may have little expertise in political theory and who have considerable incentive to leave at least some of their more fundamental justifying reasons unarticulated.⁸⁷ Case law is therefore likely to reflect only elements of any particular philosophical position and may contain multiple contradictory strands of thought.⁸⁸ A perhaps even more fundamental obstacle to the simple equation of any body of case law with either “liberalism” or “communitarianism” is the considerable complexity within these bodies of thought.⁸⁹ Nonetheless, considering this comparative study through the lens of the liberal-communitarian debate is helpful.

A. *The Social Character of Human Beings*

Various lines of thought associated with liberalism on the one hand and communitarianism on the other are identifiable in these cases on defamation of public figures. A key tenet of communitari-

86. See GREENAWALT, *supra* note 13, at 149; Roy Leeper, Keegstra and R.A.V.: A Comparative Analysis of the Canadian and U.S. Approaches to Hate Speech Legislation, 5 COMM. L & POL'Y 295 (2000).

87. Judges make their decisions by reference to an existing body of law, which can make it difficult to adopt theoretical positions that call into question decided cases. In addition, in multi-member courts, judges seek agreement with others, which creates an incentive to compromise by avoiding statements of high-level propositions. Further, as a matter of strategy, judges may wish to avoid limiting their options in future case that follows from articulating the high-level propositions that justify their positions in particular cases. See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 41 (1999).

88. In addition, because of the relatively undertheorized nature of judicial decisionmaking, judicial reasoning may be compatible with several more highly theorized positions. Modern civic republicanism, with its emphasis on political participation, is another obvious candidate as an explanation for at least some aspects of Canadian free speech law. On the relationship between republicanism and communitarianism, see PHILIP PETTIT, REPUBLICANISM 120-26 (1997).

89. See Kymlicka, *supra* note 10, at 366.

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anism is the importance to the individual of membership in groups and, more generally, of communal life.⁹⁰ Communitarianism seeks to correct liberalism's excessive individualism by elevating the importance of relations within and among groups in constructing just social and political arrangements.⁹¹ A communitarian conception of rights⁹² would give more weight to communal life in determining the nature and limits of rights.⁹³

The Canadian response to the conflict between freedom of speech and reputation reflects the communitarian emphasis on the social character of human beings. The Canadian Court protects reputation because it understands reputation as an important means by which individuals obtain membership in society and by which communities order social relations. By contrast, the American position, represented by *Sullivan*, values the development of the individual through expressive freedom. This argument is an aspect of the more general understanding of liberalism that freedom of choice serves the person's dignity on whom that freedom is conferred.⁹⁴ The American and Canadian cases thus reveal a different understanding of the principal elements of a dignified, fulfilling life; the Canadian cases show a communitarian appreciation for communal ties, while the American cases show a liberal appreciation of freedom.

B. *Suspicion of the State*

The debate between liberals and communitarians, by focusing on the relationship between the two sets of ideas, is also helpful in understanding the difference between American and Canadian defamation cases. In response to the communitarian critique, some liberals have argued that far from neglecting the importance of

90. One of the challenges for communitarianism is to identify the nature of the "communities" that it values. See Kymlicka, *supra* note 10, at 376-77.

91. The major communitarian theorists are usually thought to include Michael Sandel, Charles Taylor, and Alasdair MacIntyre. See generally MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); ALASDAIR MCINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981); CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES (1985).

92. Though a strong communitarian theory might abandon the idea of rights altogether in favor of a conception of the common good.

93. See SANDEL, *supra* note 91, at x-xi; MCINTYRE, *supra* note 91; TAYLOR, *supra* note 91.

94. See SCHAUER, *supra* note 15, at 62.

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“community” in human life, liberal ideals best protect that goal. In particular, it is said that the communitarian readiness to allow state intervention risks abuse of state power, even to the point of totalitarianism.⁹⁵ Thus, an element of the liberal-communitarian debate, though not one always emphasized by the primary participants, is a debate over the proper role of the state in the protection of communal practices. A commitment to limited government, founded on a distrust of state power, is a key element of liberal theory in all its various forms. Communitarianism, by contrast, seems to be premised on the belief that communal ends can be properly secured by the state with the consequence that the state is entitled to intervene to protect valuable communal practices.⁹⁶

Some critical accounts of Canadian law of freedom of expression mirror this aspect of the liberal response to communitarianism. Suspicion of state intervention is a general theme in American political culture,⁹⁷ but it finds especially clear expression in the First Amendment.⁹⁸ By contrast, the Canadian vision of freedom of expression is more sympathetic toward the state, allowing intervention in order to protect the institutions and practices — such as the possession and acknowledgement of good reputation — which protect communal life and promote a healthy public debate.⁹⁹ Conse-

95. For criticisms of the communitarian tendency to overlook the dangers posed by the state, see BUCHANAN, *supra* note 11, at 860; Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 318-20 (1985).

96. Indeed, on some accounts this is all there is to the debate since, it is argued, liberalism does not neglect the value of the shared practices and communal life that are the central concern of communitarians. See Kymlicka, *supra* note 10, at 373; Buchanan, *supra* note 11, at 860.

97. See Schauer, *supra* note 4, at 23-24 (“[I]t is well-documented that for many years the degree of citizen distrust of government in the United States has been greater than that in a vast number of other developed and developing nations, including some number of countries whose citizens have considerably more reason to distrust their governments than Americans have to distrust theirs . . . American distrust of government is a contributing factor to a strongly libertarian approach to constitutional rights.”) (citations omitted).

98. See Schauer, *supra* note 4.

99. This is a theme in Canadian approaches to other *Charter* rights. In a freedom of religion case, Chief Justice Dickson wrote in an early *Charter* case, *R. v. Edwards Books*, [1986] S.C.R. 713, 779: “In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.” I am grateful to Grant Huscroft for this reference.

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quently, the Canadian position is seen as potentially totalitarian. The dangerous naïvety of the Canadian law of freedom of expression is an occasional element of scholarly commentary on Canadian free-speech law¹⁰⁰ and a strong theme among commentators in other contexts.¹⁰¹

This criticism of Canadian free-speech law is assisted by the relative inattention of Canadian constitutionalists to this question. Proponents of Canadian law of freedom of expression have directed their attention to exploring the relevant countervailing values — reputation in the cases considered here¹⁰² — that justify limits to freedom of expression. The focus on these questions, however, has come at the expense of noting, or critically analyzing, the faith that Canadian constitutionalists exhibit in the capacity of the state to act as a constructive agent in the pursuit of communal goods.

Greater attention to this question will undoubtedly improve the comparative study of free-speech law in these countries. In particular, more sustained attention by proponents of Canadian constitutionalism to the question of trusting the state will assist in providing a fuller response to its critics. That is a large project, and here I will offer only a few preliminary observations.

The first point to note is that any challenge premised on the First Amendment's distrust of the state, inherent in Canadian free-speech law, is only a moderate one. There are aspects of Canadian constitutionalism that bear an obvious debt to the liberal project of limited government, not least of which is the adoption of the *Charter* in 1982 that modified Canada's traditional preference for parlia-

100. James Weinstein, *Canadian Hate Speech Cases*, in *FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY* 175 (W.J. Waluchow ed., 1994). Though, a number of important comparativists avoid normative evaluation. See, e.g., GREENAWALT, *supra* note 13; Schauer, *supra* note 4.

101. See, e.g., John Leo, *Stomping on Free Speech*, U.S. NEWS & WORLD REPORT, Apr. 14, 2004, available at <http://www.usnews.com/usnews/opinion/articles/040419/19john.htm> (last visited Sept. 16, 2005); David E. Bernstein, *Canadian Thought Police on the March*, NATIONAL REVIEW ONLINE, Dec. 2, 2003, <http://www.nationalreview.com/comment/bernstein200312020910.asp> (last visited Sept. 16, 2005).

102. Similarly, in comparing American and Canadian attitudes to hate speech and pornography, emphasis is given to equality and multiculturalism. See Mahoney, *supra* note 54, 251-52; Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fissian Freedoms*, 58 U. MIAMI L. REV. 265, 284-88 (2003).

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mentary sovereignty on questions of rights.¹⁰³ The Canadian Constitution — including its free-speech law — is therefore not premised on an abandonment of the liberal insight that government poses a threat to the individual. Rather, as interpreted by the Supreme Court, the *Charter* gives traditional liberal rights¹⁰⁴ some special status, while at the same time remaining comparatively receptive to communitarian-inspired arguments for limitations on those rights.

Secondly, to some extent, suspicion of government is a First Amendment article of faith. When Justice Holmes wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market,” he immediately qualified the statement: “That, at any rate, is the theory of our Constitution.”¹⁰⁵ It is open, then, for Canadians to argue that this degree of suspicion of government is not the “theory” of *their* Constitution. There is ample basis for such an argument. After all, far from the revolutionary spirit of the founding period in the United States, the Canadian Constitution grew out of the more prosaic desire on the part of the Canadian colonies to resolve tensions between the English and French speaking parts of Canada.¹⁰⁶ Canada, moreover, has achieved its independence from the United Kingdom only gradually, maintaining to this day symbolic ties to the monarchy.¹⁰⁷

103. In this respect Australia provides a useful comparison. The Australian Constitution contains no comprehensive charter of rights (and contains only a limited kind of free speech right), leaving the legislature in control of most rights issues. See generally HILARY CHARLESWORTH, *WRITING IN RIGHTS* ch. 1 (2002) (stating that when the Australian Constitution is silent about a set of rights, it is up to the legislature to write legislation to protect these rights); see Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29-48 (2005).

104. The *Charter* also protects some rights that are not always considered “liberal rights” such as group language and education rights. See, e.g., Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 23 (U.K.). See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995); Jeremy Waldron, *Taking Group Rights Carefully*, in *LITIGATING RIGHTS* 203 (Grant Huscroft & Paul Rishworth eds., 2002).

105. *Abrams*, 250 U.S. at 630.

106. See HOGG, *supra* note 5, at 33-38.

107. On the gradual achievement of Canadian independence, see generally HOGG, *supra* note 5, at 45-59. It is tempting also to place some weight on section 33 of the *Charter*, which gives to the Canadian and provincial parliament the power to override judicial determinations with respect to rights. In theory, then, the Canadian parliaments have the last word on rights issues, which is consistent with a comparatively relaxed attitude toward the dangers posed by state power. However, it is difficult to

There is, however, a final matter that is more difficult to resolve. First Amendment theory is also driven by an empirically based assessment of how governments will act. The tendency towards intolerance is regarded as natural and human,¹⁰⁸ and thus is a temptation to which all governments will eventually accede. Moreover, American history is usually understood as demonstrating that in periods of political turmoil and wide-spread fear, government will give in to the temptations toward oppressive censorship.¹⁰⁹ In light of this experience, adherents to the First Amendment predict that, without the restraint of a judicially enforced freedom of speech, government will engage in oppressive censorship.

Testing such a claim is a difficult and complex process that will not be attempted here. But, recognizing its empirical basis is important. It means that any claim that the First Amendment represents the only understanding of freedom of expression compatible with democracy is open to argument on the basis of the evidence. It also counsels caution in too readily transferring the “lessons” of the First Amendment history to a different cultural and political context. It may be that in Canada, which had a long history of stable democratic government *before* the adoption of the *Charter*, there

accord it much significance in understanding Canada’s fundamental constitutional commitments. Section 33 is now rarely used and is subject to a strong political culture opposed to its use. See Jamie Cameron, *The Charter’s Legislative Override: Fear or Figment of the Constitutional Imagination?* in CONSTITUTIONALISM IN THE CHARTER ERA (Grant Huscroft & Ian Brodie eds., 2004).

108. See *Abrams* 250 U.S. at 630 (“Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”).

109. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 463-65 (1985). In particular, the period of anti-communist intolerance following the Second World War is regarded as a “cautionary tale” of the First Amendment, and key features of modern First Amendment law — especially the development of rigorous standards of review — are seen as a response to this experience. The conviction of leaders of the Communist Party of the United States for advocating the overthrow of the United States was upheld in *Dennis*, 341 U.S. 494. *Dennis* stands alongside *Lochner v. New York*, 198 U.S. 45 (1905), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), as an “anti-canonical” case, a case universally disapproved of but widely cited and taught because of its power to illuminate the danger of approaches to constitutional law. See Richard A. Primus, *Canon, Anti-Canon and Judicial Dissent*, 48 DUKE L. J. 243, 245, 251 n.33 (1998).

is reason to relax, though not to abandon, the level of suspicion of government.

CONCLUSION

A remaining challenge for proponents of Canadian free-speech law, then, is to consider more closely, and to justify, the attitude to state power revealed in its case law. That is an especially important task. First Amendment law, for all its richness and rhetorical power, is not the dominant model for the rest of the world.¹¹⁰ On the contrary, Canadian free-speech law seems to be much closer to the mainstream positions developed in Europe and in the British Commonwealth. The rough consensus on free-speech issues in these countries¹¹¹ is no doubt facilitated by the comparatively internationalist outlook of these courts.¹¹² Attention to the key underlying assumptions of Canadian constitutional law is likely, therefore, to be important to the understanding of widespread constitutional commitments.

110. See Schauer, *supra* note 4, at 3 (“[T]he American First Amendment, as authoritatively interpreted, remains a recalcitrant outlier to a growing international understanding of what the freedom of expression entails.”).

111. Though there are of course a variety of positions held within these countries as well. Indeed, the question of defamation of public figures in Canada is somewhat less protective of speech than other countries. For example, though the countries of the Commonwealth have usually rejected *Sullivan*, most have also extended the common law to provide more protection to criticism of public officials than is accorded in *Hill*. See generally, Stone & Williams, *supra* note 3; see *supra* text accompanying note 39.

112. Consider the references in *Hill* to *Sullivan*, cases from Australia and the United Kingdom, and to International Law Reform Commission reports from various Commonwealth countries. See *Hill*, [1995] S.C.R. at 1185-87.

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