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Despite being next-door neighbors, sharing a common language (for the most part[1]), and being characterized as modern Western democracies, the High Courts of the United States and Canada have developed noticeably distinct lines of jurisprudence when it comes to the infringement of fundamental rights. Scholars have linked the divergence to numerous factors. One is the two countries' distinct cultural histories which have led to a different hierarchy of values.[2] Also noted, are the subtle differences in the constitutional texts that the courts must interpret.[3] But apart from simply noting the difference in approach and hypothesizing as to why it exists, scholars and law students alike seem to be in constant debate over which model achieves the best results. There

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1. On n'oublie pas les Québécois. ("Quebecers are not forgotten.")

2. *See* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1542 (2003) (noting that the U.S. has embraced an assimilationalist ideal of the "melting pot" whereas Canada has placed greater emphasis on diversity, symbolized as an "ethnic mosaic").

3. *See* Kent Greenawalt, *Free Speech in the United States and Canada,* 55 LAW & CONTEMP. PROBS. 5, 7 (1992) (noting, with regards to the First Amendment, that the 'the' preceding 'freedom of speech' might be argued to mean whatever 'freedom of speech' existed at common law when the amendment was drafted).

is also little consensus as to whether the Canadian Supreme Court is tending to become more like the United States Supreme Court or vice versa.[4]

Because the constitutions of the United States and Canada both include protections for freedom of speech[5] and freedom of religion,[6] the debate over which model is superior often centers on these two specific constitutional rights. As will be fully described below, the U.S. Supreme Court has historically applied what is perhaps best described as a categorical or an *all-or-nothing* analysis to First Amendment infringements. The Canadian Supreme Court, on the other hand, follows a case-by-case proportionality test whenever any Charter right has been trenched upon by a particular law.[7] Rather than suggesting that one model is better overall or arguing that one Court is beginning to follow the lead of the other, this article suggests that there are simply certain occasions where the U.S. Supreme Court must resort to proportionality and the Canadian Supreme Court must categorize to avoid absurd results. Continuing with the themes of free speech and free exercise of religion, this paper suggests that there are two realms where the High Courts must employ different standards than those typically adhered to. For the U.S., this occurs when dealing with hate speech regulations. For Canada, it is when the Court must grapple with generally applicable laws that incidentally affect the freedom of religion.

Section I of this article will introduce the United States Supreme Court's historically categorical approach with respect to free expression and contrast it with the Canadian Supreme Court's proportionality test. Section II will highlight how the U.S. Supreme Court has employed proportionality rather than categorization in two cases dealing with laws banning hate speech and explain why a categorical approach is not well-suited in this area.[8]

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4. *See e.g.*, Donald L. Beschle, *Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187 (2001); Matthew S. Melamed, *Towards an Explicit Balancing Inquiry? R.A.V. and Black through the Lens of Foreign Freedom of Expression Jurisprudence*, 59 HASTINGS L.J. 407 (2007).

5. U.S. CONST. amend. I.; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).[hereinafter Charter] at § 2(b).

6. U.S. CONST. amend. I.; Charter, § 2(a).

7. Canada's equivalent to the Bill of Rights is the Canadian Charter of Human Rights and Freedoms, enacted in 1982.

8. The two cases are R.A.V. v. St. Paul, 505 U.S. 377 (1992) and Virginia v. Black, 538 U.S. 343 (2003).

Section III will target an older Canadian case to highlight the early use of proportionality vis-à-vis generally applicable laws that incidentally affect the freedom of religion.[9] This will be contrasted, in Section IV, with the U.S. Supreme Court's use of categorization.[10] Finally, Section V will focus on a recent decision in which the Canadian Supreme Court seems to have adopted a categorical approach much more akin to that seen in the U.S.[11] This last section will also offer an explanation as to why proportionality does not lend itself well to dealing with generally applicable laws that incidentally burden religion.

I. THE TRADITIONAL APPROACHES TO FREE SPEECH IN THE U.S. AND IN CANADA

The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech."[12] As Professor Donald Beschle points out, this language suggests an absolute inability for Congress (or the states, by way of the Fourteenth Amendment) to enact a law that in any way restricts the freedom of speech.[13] Professor Erwin Chemerinsky notes that such a strict interpretation would disallow perjury laws or laws that prohibit spectators' yelling out in court, making it impossible for the judge to hear.[14] But the Supreme Court has never interpreted the First Amendment in this literal way.[15] In lieu of adhering to an absolutist view of the freedom of speech, the Supreme Court has instead carved out certain categories of speech that, according to the Court, simply do not enjoy First Amendment protection and may therefore be regulated.

It was the hand of Justice Oliver Wendell Holmes that carved out the earliest category of speech deemed to have no First

9. The case examined will be R. v. Videoflicks, Ltd., [1986] 2 S.C.R. 713 (Can.).

10. Categorization in this constitutional area will be exemplified by Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

11. The recent decision is Hutterian Brethren of Wilson Colony v. Alberta, [2009] 2 S.C.R. 567 (Can.).

12. U.S. CONST. amend. I.

13. Beschle, *supra* note 4, at 190.

14. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.1.2 (3d ed. 2006).

15. The Court explicitly stated in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) that it has "frequently denied that First Amendment rights are absolute. . ." *See also* Konigsberg v. State Bar of Cal., 366 U.S. 36, 49-50 (1961) ("[T]his Court has consistently recognized . . . [that the] freedom of speech is narrower than an unlimited license to talk.").

Amendment protection. In *Schenck v. United States*,[16] Holmes articulated his "clear and present danger" exception.[17] In *Schenk*, the Court was faced with what it classified as speech likely to bring about an imminent and significant harm to the efforts of a nation at war—speech that Congress had a right to limit and that no court could rationally view as being protected by any constitutional right.[18] Thus, Schenck's conviction under the Espionage Act of 1917 for circulating a leaflet analogizing the draft to involuntary servitude in violation of the Thirteenth Amendment was upheld.

The clear and present danger exception addressed speech advocating illegal acts or the overthrow of the government. The Court then carved out an additional exception for speech so inflammatory that it may drive an audience to take lawless action against its speaker.

Walter Chaplinsky was distributing religious pamphlets on a street corner when he accosted a passerby, yelling "[y]ou are a God damned racketeer and a damned Fascist . . . ."[19] After Chaplinsky was convicted for violating a state law that prohibited such offensive name-calling in a public place, the Supreme Court affirmed, explaining that "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,"[20] can be punished without raising any constitutional problems. Professor Chemerinsky points out that the Court has not overruled *Chaplinsky* but has never again upheld a fighting words conviction, usually by instead finding the statute involved unconstitutionally vague or overbroad.[21]

The Court has carved out exceptions for many other categories of speech that, in its judgment, should not receive First Amendment protection. Speech may be restricted as "obscene" when it portrays conduct in a patently offensive manner in order to appeal to a "prurient interest in sex."[22] Child pornography can be prohibited even if it does not meet the test for obscenity.[23] This article does not attempt to cover every type of speech that may be regulated, but rather to simply illustrate the Court's ability to cat-

16. 249 U.S. 47 (1919).
17. *Konisberg*, 366 U.S. 36, 52.
18. *Id.*
19. Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942) (citation omitted).
20. *Id.* at 572.
21. CHEMERINSKY, *supra* note 14, at § 11.3.3.2.
22. Roth v. United States, 354 U.S. 476, 487 (1957).
23. New York v. Ferber, 458 U.S. 747, 764 (1982).

egorically exempt certain types of speech from First Amendment protection, and thus, allow that speech to be restricted or entirely proscribed.

This categorical method contrasts sharply with the proportionality test employed by the Canadian Supreme Court. As mentioned above, this divergence relates, in part, to the text of Canada's Constitution. Unlike the seemingly absolute language of the First Amendment, the Canadian Charter of Rights and Freedoms begins with a disclaimer stating that all the rights and freedoms contained therein may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[24] As Professor Beschle argues, the language in Section 1 explicitly instructs Canadian courts to engage in a balancing test where the government's demonstrably justifiable interest is weighed against the particular Charter right.[25] This seems a fair reading of the Charter. But even if the constitutional language does not expressly call for the use of balancing, the Canadian Supreme Court has definitively interpreted Section 1 of the Charter as requiring it. As Justice Abella has aptly stated, "[p]roportionality is, after all, what [Section] 1 is about."[26]

The exact form of the proportionality test was explained in the 1986 decision of *R. v. Oakes*, [1986] 1 S.C.R. 103(Can). There, the Court held that in every case where Section 1 of the Charter is relied upon to validate a legislative infringement of a fundamental right, "courts will be required to balance the interests of society with those of individuals and groups."[27] The test is carried out by making the following determinations: (1) whether the impugned legislation has an objective of pressing and substantial concern; and (2) whether there is proportionality between the objective and the means chosen to fulfill it. The second prong requires the court to ask the following three questions: (1) Is measure is rationally connected to the objective?; (2) Does it impair the right or freedom in question as little as possible?; and (3) Is there is proportionality between the effects of the measure and its objective. Regarding this last inquiry, the Court emphasized that "[t]he more severe the deleterious effects of a measure, the more important the objective must be [to be justified by Section 1]."[28] Failure at any stage of

24. Charter § 1.

25. Beschle, *supra* note 4, at 188.

26. Hutterian Brethren of Wilson Colony v. Alberta, [2009] 2 S.C.R. 567,.630 (Can.) (Abella, J., dissenting).

27. R. v. Oakes, [1986] 1 S.C.R. 103, 139. (Can).

28. *Id.* at 141.

the test will mean that the legislation in question cannot be saved under Section 1, and accordingly will be found unconstitutional.

The *Oakes* proportionality test has since been applied every time a particular law is challenged as having infringed a fundamental right. Section 2(b) of the Charter protects the freedom of speech[29] and so an examination of how the proportionality test has been applied to infringements of this specific right—particularly regarding hate speech legislation—will now be addressed.

Section 319 of the Criminal Code of Canada makes it unlawful (and punishable by up to two years in prison) to make "statements, other than in private conversation, [that] willfully promote[ ] hatred against an identifiable group . . . ."[30] Identifiable group is defined as "any section of the public distinguished by colour, race, religion, or ethnic origin."[31] In 1984, a high school teacher named Jim Keegstra was convicted under Section 319 for teaching his social studies students that Jews were "treacherous, subversive, sadistic, money-loving, power-hungry, and child killers . . . [who] created the Holocaust to gain sympathy."[32]

In analyzing the constitutional challenge to the statute, the Canadian Supreme Court had to first decide whether Keegstra's free speech rights had been infringed, and then, whether that infringement could be justified by Section 1 of the Charter using the *Oakes* test. The Court dealt with the former inquiry, concluding that Keegstra's teachings fell within the Charter definition of "expression" because they conveyed a meaning and had expressive content. This, the Court held, "*prima facie* falls within the scope of the guarantee."[33] The Court also held that the clear purpose of Section 319 was to restrict certain types of expression. As such, the statute necessarily constituted an infringement of the freedom of expression as guaranteed by the Charter.[34] Having made these initial determinations, the Court moved on to the Section 1 analysis as delineated in *Oakes*.

First, the Court needed to decide whether the measure had a pressing and substantial objective. To answer this question, the Court asked "whether the amount of hate propaganda in Canada

29. Charter, § 2(b) ("Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion and expression. . .").

30. Criminal Code of Canada, R.S.C., ch. C-46, § 319(2) (1985).

31. Criminal Code of Canada, R.S.C., ch. C-46, § 318(4) (1985).

32. R. v. Keegstra, [1990] 3 S.C.R. 697, 714.

33. *Id.* at 729.

34. *Id.* at 730.

causes sufficient harm to justify legislative intervention . . . ."[35] After reviewing various domestic congressional reports and international human rights instruments, the Court concluded that hate propaganda was both pernicious and highly prevalent in Canada. Accordingly, the suppression of hate speech amounted to a pressing and substantial concern, worthy of legislative attention.

Moving to the second stage of the *Oakes* test—the proportionality stage—the Court dealt with the issue of rational connection, stating that "it would be difficult to deny that the suppression of hate propaganda reduces the harm such expression does to individuals who belong to identifiable groups . . . ."[36] But Keegstra had suggested, among other things, that criminalizing hate speech actually increases its prevalence due to heightened media attention and the potential of giving those convicted the status of martyrs.[37] The Court acknowledged the extensive media attention received when Section 319 was used, but concluded that "the message sent out is that hate propaganda is harmful to target group members and threatening to a harmonious society."[38] The Court added: "[t]he criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions."[39] The Court, therefore, found that Section 319 was rationally connected, in both theory and operation, to the legislative aim of suppressing hate.

The Court then moved on to the most difficult hurdle of the *Oakes* test,[40] asking whether the measure infringed as little as possible on the freedom of expression. Keegstra argued that Section 319 was overbroad, encompassing expression that was not in fact hate propaganda. To determine whether that was actually the case, the Court focused on the exact terms of the provision and the enumerated defenses that were available to those charged with violating it. First, the Court noted that Section 319, by its own terms, could not be used to prosecute statements made "in private conversation." The Court explained that this exemption effectively meant that even statements made in public places were not neces-

35. *Id.* at 745.

36. *Id.* at 767.

37. *Id.* at 768.

38. R. v. Keegstra, [1990] 3 S.C.R. 697, 769.

39. *Id.* (citing R. v. Morgentaler, [1988] 1 S.C.R. 30, 51 (Can.)).

40. BERNARD W. FUNSTON & EUGENE MEEHAN, CANADA'S CONSTITUTIONAL LAW IN A NUTSHELL 173 (Paperback, 3d ed. 2003).

sarily covered.[41] The Court also highlighted the statutory requirement that the promotion of hatred be willful. According to the Court, "[t]his mental element, requiring more than merely negligence or recklessness as to result, significantly restricts the reach of the provision, and thereby reduces the scope of the targeted expression." The Court completed a similar analysis for the statutory use of the words "promote"[42] and "hatred" and concluded that the statute, by using precise and specific language, did not reach an unnecessarily wide range of expression. Moreover, Section 319 laid out four affirmative defenses,[43] which, for the Court, meant even greater protection for expression that would otherwise be punishable as the willful, non-private, promotion of hatred. Accordingly, Section 319 passed the minimal impairment prong of the proportionality test.

In the third prong of the proportionality analysis, Canadian courts concern themselves with the possibility that "the deleterious effects of a limit [on a fundamental right] may be too great to permit the infringement of the right or guarantee in issue."[44] The *Keegstra* Court stated that "[f]ew concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure."[45] As such, the Court had "little trouble in finding that its effects, involving as they do the restriction of expression largely removed from the heart of free expression values, are not of such a deleterious nature as to outweigh any advantage gleaned from [Section 319]."[46] Because Section 319 passed all stages of the *Oakes* test, the Court held the

41. *Keegstra*, 3 S.C.R. 697 at 772.

42. Here, the Court compared the English verb "to promote" to the verb used in French version of the Code: *fomenter*, which translates as "to stir up." The Court determined that this was sufficiently more than simple encouragement or advancement. *Id.* at 776.

43. Section 319(3) provides that "No person shall be convicted . . . (*a*) if he establishes that the statements communicated were true; (*b*) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject; (*c*) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (*d*) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada." Criminal Code of Canada, R.S.C., ch. C-46, § 319(3) (1985).

44. *Keegstra*, 3 S.C.R. 697 at 786.

45. *Id.* at 787.

46. *Id.*

statute was saved under Section 1 of the Charter and was therefore constitutional.

But Jim Keegstra was not the only Canadian feeling hateful at the time. John Taylor, a prominent neo-Nazi leader, had set up a scheme in 1977 where callers could dial a particular number and listen to pre-recorded anti-Semitic messages.[47] He was found liable under Section 13 of the Canadian Human Rights Act, which forbids the use of the telephone to repeatedly communicate any matter that is likely to expose a person to hatred or contempt on account of enumerated grounds.[48] The provision is civil; at the time, upon finding a violation, the Human Rights Tribunal could only impose a cease and desist order.[49] This order, if not obeyed, could be enforced in federal court through a finding of contempt of court. The applicable punishment for contempt of court was a $5,000 fine or a one-year term of imprisonment.[50]

Taylor alleged that Section 13 violated his Charter-protected right to free expression. The Canadian Supreme Court was therefore forced to decide whether this civil provision could similarly be justified under Section 1 of the Charter. Unlike the legislation at issue in *Keegstra*, Section 13 did not provide for affirmative defenses or require the element of intent.

Applying the rationale used in *Keegstra*, the *Taylor* Court first found that Section 13 indeed infringed on the freedom of expression. It further held that the pressing and substantial objective of curbing the pernicious effects of hate propaganda allowed Parliament to place some limits on this freedom.[51] The Court then took up the remainder of the *Oakes* test.

In addressing whether there was a rational connection between the end and means, the Court took much of its reasoning from *Keegstra*. But it added that "the conciliatory nature of the human rights procedure and the absence of criminal sanctions

47. Canada (Human Rights Comm'n) v. Taylor, [1990] 3 S.C.R. 892, 903 (Can.).

48. The grounds are laid out in Section 2 of the Act and include (but are not restricted to) race, national or ethnic origin, color, and religion. *Id.* at 902.

49. Section 13 has since been amended to allow the Tribunal to order compensation to the victim up to $20,000 and penalties payable to the State up to $10,000. Section 13 was again challenged as unconstitutional and in 2009, the Tribunal held that the inclusion of penalties rendered the Act more penal in nature so that it can no longer be said to minimally impair the Charter right. *See* Warman v. Lemire, [2009] CHRT 26, ¶ 290. The Tribunal's ruling has no precedential value however and, as of this writing, the Supreme Court has not yet had occasion to revisit or overturn its decision in *Taylor*, where it upheld Section 13.

50. *Taylor*, 3 S.C.R. 892 at 902.

51. *Id.* at 917-21.

make [Section 13] especially well suited to encourage reform of the communicator of hate propaganda."[52] Accordingly, the Court found that Section 13 "promotes the ends sought by Parliament, and consequently evinces a rational connection towards those ends."[53] But of course, even legislation that rationally secures a pressing and substantial objective may "do so in a manner which limits a Charter right or freedom more than is necessary."[54] The Court then proceeded to the minimal impairment analysis.

Taylor argued that the Section 13 was overbroad because it did not require intent to discriminate and therefore could be used to punish speech that had only unintentional discriminatory effects on a listener. The Court agreed that by focusing only on the effect on the listener—and not the subjective intent of the speaker—Section 13 placed a greater restriction upon the freedom of expression than would otherwise be the case. But, the Court accepted this heightened intrusion, noting that the goal of the human rights statutes was the eradication of systemic discrimination, which was much more widespread than intentional discrimination.[55] Thus, "[t]o import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects,"[56] would run contrary to the fundamental aim of such statutes.

Moreover, while the Court stated that it would have difficulty defending a human rights provision that subjected a discriminator to imprisonment despite a lack of intent, the repercussion of a Section 13 violation was limited to a cease and desist order. While it was possible that imprisonment would follow in the event that the initial order was not complied with, at that stage, the discriminator was intentionally disobeying an order and communicating messages he or she knew had been found to cause the harm

52. *Id.* at 924. By "conciliatory," the Court means that the aim of human rights statutes is not to bring the full force of the state against a blameworthy individual for the purpose of imposing punishment. Rather, it allows conciliatory settlement, if possible, gearing remedial responses more toward compensating the victim. *See id.* at 917.

53. *Id.* at 926.

54. *Id.*

55. Canada (Human Rights Comm'n) v. Taylor, [1990] 3 S.C.R. 892, 931 (Can.). The Court does not specifically state what the difference between "systemic" and "intentional" discrimination is. Based on context and the eventual finding that Section 13 was proportionate even without an intent requirement, it seems that the Court believed the Canadian Human Rights statutes aim to combat the effects of discrimination on Canadian society as a whole, rather than target individual instances of discrimination or to punish those who discriminate.

56. *Id.*

described in Section 13.[57] The Court was therefore satisfied that an intent requirement was not necessary to find that Section 13 minimally impaired the Charter right. In fact, the Court concluded that requiring intent to discriminate would run contrary to the provision's goal by focusing on punishing the speaker rather than preventing the discriminatory effects.

Taylor's other major argument regarding minimal impairment was that by regulating telephonic communication, Section 13 suppressed expression in instances where the recipient of the information was likely to agree with its contents. The Court conceded that in upholding Section 319 in *Keegstra*, it relied heavily on the fact that private communications were not affected. But, the Court did not accept that these particular telephone conversations were "private" in the *Keegstra* sense. The Court explained that the telephone was "a medium which allows numerous organizations to present information and views to a sizable proportion of the public . . . ."[58] The Court focused on the aggregate effect of these racist phone campaigns and concluded that they were "undeniably public, and the reasonable assumption to make is that these campaigns can have an effect upon the public's beliefs and attitudes."[59] The Court held that "the telephonic medium . . . is . . . particularly insidious"[60] in publicly spreading messages of intolerance and inequality. Finally, because Section 13 requires "repeated" communications in order to be triggered, the Court found that the statute was directed only at "larger-scale schemes for the dissemination of hate propaganda"[61], and thus, minimally impaired free expression. The Court added one final paragraph discussing the "effects" prong of the *Oakes* test in which it basically reiterated its previous analysis and concluded that Section 13 was constitutional.

Having seen the Canadian proportionality test in action, we now explore two U.S. Supreme Court decisions involving the regulation of hate speech where the Court has employed Canadian-like proportionality in lieu of its expected categorical analysis.

57. *Id.* at 933-34.

58. *Id.* at 937.

59. *Id.*

60. Canada (Human Rights Comm'n) v. Taylor, [1990] 3 S.C.R. 892, 937 (Can.).

61. *Id.* at 939.

II. THE U.S. SUPREME COURT'S USE OF PROPORTIONALITY REGARDING HATE SPEECH LEGISLATION

In *R.A.V. v. City of St. Paul*,[62] the United States Supreme Court struck down a city ordinance that criminalized placing, on private or public property, symbols known to cause anger "on the basis of race, color, creed, religion or gender."[63] In this case, R.A.V. and his teenage friends had assembled and burned a wooden cross in the yard of a neighboring black family. The Supreme Court of Minnesota had determined that the ordinance only proscribed expression that constituted "fighting words" within the meaning of *Chaplinsky*[64] and upheld it due to the fact that fighting words were exempted from First Amendment Protection. The Supreme Court accepted that it was bound by the construction given to the St. Paul ordinance by the state's highest court.[65] Because fighting words are not protected by the First Amendment, the logical conclusion under a categorical analysis would be that the city could regulate such unprotected speech in any way it chose. Interestingly, however, the Supreme Court found the ordinance unconstitutional.

The Court acknowledged that the goal of eradicating hate speech was pressing and substantial. In fact, Justice Scalia, writing for the majority, had no doubt that St. Paul's goal of ensuring "the basic human rights of members of groups that have historically been subjected to discrimination"[66] was a compelling governmental interest that was clearly promoted by the ordinance. This line of questioning mirrors steps one and two of the *Oakes* test, where the Canadian Court asks whether the impugned legislation has an objective of pressing and substantial concern and whether the measure is rationally connected to that objective.

But rather than validate St. Paul's prohibition of specific types of fighting words, Justice Scalia took issue with the ordinance's qualifier—that the offensive symbol must cause anger on the basis of race, color, creed, religion, or gender. Scalia noted that "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the

62. 505 U.S. 377 (1992).

63. *Id.* at 380 (citing St. Paul, Minn. Legis. Code § 292.02 (1990)).

64. See supra, notes 18-20 and accompanying text.

65. *R.A.V.*, 505 U.S at 381 (citing Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 339 (1986)).

66. *R.A.V.*, 505 U.S. 377. at 395.

specified disfavored topics."[67] Accordingly, "[t]hose who wish to use 'fighting words' . . . to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality [ ] are not covered."[68] For Scalia, the City of St. Paul effectively went *too far* when it decided to regulate speech based on hostility or favoritism towards the underlying message: "[t]he dispositive question in this case . . . is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not."[69] Scalia concluded that "St. Paul ha[d] sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."[70] In Canadian parlance, the city ordinance failed the minimal impairment prong of the *Oakes* test. Even though the ordinance was rationally connected to a pressing and substantial objective, the government had not chosen the least restrictive means in pursuing that objective. As such, the St. Paul ordinance was struck down as unconstitutional.[71]

The Court once again strayed from its categorical roots eleven years later when it considered the constitutionality of yet another cross-burning statute. Virginia law made it a felony to burn a cross with the intent to intimidate. Justice O'Connor, writing for the majority in *Virginia v. Black*,[72] noted that the statute "does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate."[73] Unlike the statute at issue in *R.A.V.*, the Virginia statute did not single out only those threats based on the victim's race, gender, or religion, but instead prohibited cross burning for any reason, so long as the underlying intention was intimidation. The majority held that "[a] ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First

67. *Id.* at 391.

68. *Id.*

69. *Id.* at 395-96.

70. *Id.* at 396.

71. The departure from the standard, categorical analysis was fiercely criticized by Justice White in his concurring opinion, arguing that the Court had effectively created a new "underbreadth" doctrine, where the State must now regulate all fighting words or none at all. *Id.* at 402 (White, J., concurring). He, along with Justices Blackmun, O'Connor, and Stevens, concurred that the conviction should be reversed only on the basis that city ordinance was fatally overbroad. *Id.* at 397 (White, J., concurring).

72. 538 U.S. 343 (2003).

73. *Id.* at 362. The Court suggests that this form of expression could be banned under either the "true threats" exception, carved out in Watts v. United States, 394 U.S. 705 (1969) or the "fighting words" exception of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Amendment."[74]

But the Virginia statute went a step further. It also provided that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate."[75] According to the *Black* majority, this rendered the statute unconstitutional. Justice O'Connor devoted over five pages of her opinion to discussing the history of cross burning—from its origins in 14th Century Scotland as a means of inter-tribal communication to its adoption by the Ku Klux Klan in the early Twentieth Century to celebrate shared ideology. The majority therefore opined that "a burning cross is not *always* intended to intimidate."[76] The prima facie evidence provision did not distinguish between different types of cross burning and allowed a jury to convict in cases "where the evidence of intent to intimidate is relatively weak."[77] The Court held that this was unacceptable. As one commentator has pointed out, the element of intimidation is highly dependent on context, which the statute completely ignores. "The statute conflates the meaning of cross burning done in private with that done in public; cross burning directed at like-minded believers with that directed at an individual who is the object of the group's scorn; cross burning done in a location where the property owner has given permission with cross burning done in the course of trespassing."[78] As a result, the statute had the potential to infringe too greatly on protected expression and was therefore not the least restrictive means of achieving the state's goal of curtailing hate speech.

Why is it that the typical, all-or-nothing approach—where the Court decides whether or not the particular type of speech being regulated is deserving of First Amendment protection—does not lend itself well to hate speech legislation? Unlike fighting words or obscenity, which both the United States and Canadian Supreme Courts have dubbed of "slight social value,"[79] "utterly without redeeming social importance,"[80] and "largely removed from the heart of free expression,"[81] hate speech is often entangled with

74. *Black*, 538 U.S. at 363.

75. VA. CODE ANN. § 18.2-423 (1996), *declared unconstitutional by* Elliot v. Com. 593 S.E.2d 263 (Va. 2004).

76. *Black*, 538 U.S. at 365 (emphasis supplied).

77. *Id.* at 385 (Souter, J., concurring).

78. Melamed, *supra* note 4, at 418-419 (suggesting a specific two-pronged test the Court should use for all future infringements of the freedom of expression (not just hate speech regulation), based on the disguised balancing used in *R.A.V.* and *Black*).

79. *Chaplinsky*, 315 U.S. at 572 (fighting words).

80. *Roth v. United States*, 354 U.S. 476 (1957) (obscenity).

81. R. v. Keegstra, [1990] 3 S.C.R. 697 at 786 (racist speech).

political ideology.[82] The Court has consistently defended the premise that this genre of speech is at the pinnacle of First Amendment protection.[83] According to the Court, a free marketplace of ideas is a key protector of the republican form of government.[84] A categorical, all-or-nothing approach is inappropriate when only a thin line separates speech of low social value with speech of the very highest. Rather than pigeonhole hate speech into a previously created categorical exemption, the U.S. Supreme Court is obliged to spend a bit more time weighing competing factors—as exemplified by Justice O'Connor's lengthy discussion of the historical, non-threatening roots of cross burning in *Black*—to determine whether the particular hate speech legislation in question has in fact limited speech more severely than was necessary to achieve the government's objective.

This case-by-case balancing resembles the proportionality test devised by the Canadian Supreme Court in *Oakes* but there is little indication that the U.S. Court will abandon its categorical approach in other areas of First Amendment jurisprudence.[85] In fact, in at least one particular area where proportionality doesn't lend itself particularly well to resolving the issue, a recent Canadian decision shows that the Canadian Court is inclined to adopt a categorical approach similar to that of the United States Supreme Court. But before examining this recent decision and its similarities to U.S. free exercise jurisprudence, it is best to see how the *Oakes* proportionality test has been applied to infringements of the freedom of religion in the past.

III. THE TRADITIONAL PROPORTIONALITY APPROACH TO THE FREEDOM OF RELIGION IN CANADA

In 1980, the Province of Ontario enacted the Retail Business Holiday Act which required mandatory Sunday store closings. Several retailers—particularly those who, for religious reasons,

82. *See* Rosenfeld, *supra* note 2, at 1525-1529 (describing how anti-Semitic groups sometimes attack Zionism, blurring the boundary between political ideology and simple racism, and how white supremacists sometimes harp on statistics indicating that blacks commit more crimes than whites, suggesting they are formulating political opinions based on scientific fact or theory). *Id.* at 1526.

83. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 377-78 (1984); Mills v. Alabama, 384 U.S. 214, 218 (1966); *Roth v. United States*, 354 *U.S.* 476, 484 (1957).

84. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976); Williams v. Rhodes, 393 U.S. 23, 32 (1968).

85. For example, the Court, in *Black*, reaffirms that fighting words still comprise an unprotected category of speech. *Black*, 538 U.S. at 359.

closed their businesses on Saturday—brought a constitutional challenge, alleging the law infringed their freedom of religion. The Court agreed that Act constituted an infringement of the freedom of religion because the Act placed a competitive disadvantage on Saturday-observing retailers—who were forced to close two days per week—compared to the favorable effect on Sunday-observing retailers.[86] Accordingly, the Retail Business Holiday Act had to survive the then newly-minted *Oakes* test in order to be saved.

In addressing the pressing and substantial legislative objective inquiry, the Court regarded as "self-evident the desirability of enabling parents to have regular days off from work in common with their [children]."[87] Further, the aim of protecting employees from being overworked and being alienated from their closest social bonds in light of the growing trend of wide-scale store openings and the erosion of statutory holidays was not one the Court was willing to deem "unimportant or trivial."[88] The Act was held to address a pressing and substantial concern.

The Court moved on to the rational connection inquiry where the Court asked whether it was acceptable for the legislature to focus exclusively on the retail industry.[89] The government had provided extensive evidence that the retail labor force was especially vulnerable to pressure from employers due to its "low level of unionization, its high proportion of women, and its generally heterogeneous composition."[90] Accordingly, the legislature had targeted a sector of business where there existed particularly urgent concerns seeking to aid constituencies that seemed especially needy. The Court found the Act to be rationally connected to its objective.

Whether the Act minimally impaired the religious rights of Saturday observers was the more difficult question. The Court emphasized that it was "incumbent on a legislature which enacts Sunday closing laws to attempt very seriously to alleviate the effects of those laws on Saturday observers."[91] Fortunately in this regard, the Act contained numerous exemptions. Generally exempted business included pharmacies, gas stations, flower stores, laundromats, boat and vehicle rental stores, and educa-

86. R. v. Videoflicks, Ltd., [1986] 2 S.C.R. 713, 765-66 (Can.).
87. *Id.* at 770.
88. *Id.*
89. *Id.* at 770-71.
90. *Id.* at 771.
91. R. v. Videoflicks, Ltd., [1986] 2 S.C.R. 713, 782 (Can.).

tional, recreational or amusement services.[92] Of greater importance was an explicit exemption for businesses of less than 5,000 square feet that had closed on Saturday, so long as on Sunday they employed fewer than seven workers who serve the public.[93] The Court decided that these exemptions were proof of the legislature's "serious effort . . . to accommodate the freedom of religion of Saturday observers, insofar as that is possible without undue damage to the scope and quality of the pause day objective."[94] It was the existence of these exemptions that saved the statute during the minimal impairment analysis. Focusing primarily on the efforts of the legislature to accommodate, the Court found that the effects of the Act were not disproportionate to the legislative objective (the third prong of the proportionality inquiry under *Oakes*), and the Act was held to be justified under Section 1 of the Charter.

Under the *Oakes* test—as it has been applied to Canada's generally applicable laws that incidentally burden religion—the legislature must make serious attempts to accommodate the religious rights of those who are negatively affected by its laws. This is deeply contrasted by the United States Supreme Court's categorical model, which affords great leeway to the legislature. As will be described below, under the United States Supreme Court's current free exercise jurisprudence, so long as the government has not purposefully enacted legislation aimed at suppressing religious practice, a generally applicable law that incidentally affects religion will nearly always be upheld.

IV. CATEGORIZATION IN UNITED STATES FREE EXERCISE JURISPRUDENCE

Long ago, the U.S. Supreme Court stated that when it came to legislation that negatively affects the ability to freely exercise one's religion, "[i]t is basic that no showing merely of rational relationship to some colorable state interest [will] suffice."[95] Thus, the Court held that strict scrutiny would apply "in this highly sensitive constitutional area."[96] But, in what Professor Chemerinsky calls a "radical change"[97] in free exercise jurisprudence, the Court expressly changed course in *Employment Div., Dep't of Human*

92. *Id.* at 727.
93. *Id.*
94. *Id.* at 783.
95. Sherbert v. Verner, 374 U.S. 398, 406 (1963).
96. *Id.*
97. CHEMERINSKY, *supra* note 14, at §12.3.2.3.

Res. of Oregon v. Smith.[98]

Smith involved an Oregon law that prohibited the use of peyote, a potent hallucinogen. Respondents were Native Americans who had been fired from a private drug rehabilitation center due to their religiously inspired, sacramental use of the drug. Because they were technically discharged for work-related *misconduct*, they were subsequently denied unemployment benefits. Relying on *Sherbert*, the Respondents invited the Court to apply strict scrutiny and overturn the denial of their unemployment benefits based on Oregon's ban on peyote because this result unmistakably conflicted with the Native Americans' religious practice. The Court did not accept the invitation.

The *Smith* Court began its analysis by quoting the First Amendment, which prohibits Congress from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof . . . "[99] As with the freedom of speech cases, the Court has rejected a literal reading of this text, which suggests an absolute bar against laws that somehow restrict the free exercise of religion.[100] In *Smith*, the Court expanded on its rejection of this absolutist view, stating that the United States is "a cosmopolitan nation made up of people of almost every conceivable religious preference."[101] Accordingly, to permit religious exemptions from neutral laws of general applicability would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself."[102] Instead of allowing for this chaotic result, the *Smith* Court took a highly deferential approach—applying only rational basis scrutiny—and held that the First Amendment is not violated when an otherwise valid law of general applicability incidentally affects the free exercise of religion.[103]

Congress was unimpressed with the *Smith* decision and, in an attempt to restore strict scrutiny as the applicable standard to all free exercise claims, passed The Religious Freedom Restoration Act ("RFRA"). RFRA decreed that the government may only sub-

98. 494 U.S. 872 (1990).

99. U.S. CONST. amend. I.

100. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (differentiating between the freedom to believe, which cannot be regulated, and the freedom to act, which can be regulated out of a concern for the protection of society).

101. *Smith*, 494 U.S. at 888 (citing Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

102. *Smith*, 494 U.S. at 879 (citing Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (internal quotation marks omitted)).

103. *Smith*, 494 U.S. at 890.

stantially burden a person's exercise of religion "in furtherance of a compelling governmental interest" where the means chosen are "the least restrictive" possible.[104] This statutory language evokes elements of an *Oakes*-style proportionality test—namely, "pressing and substantial concern" and "minimal impairment."[105] But soon after its passing, the Supreme Court found RFRA itself to be unconstitutional as applied to state and local governments.[106] The High Court has not yet definitively ruled on the issue but several circuits hold that the Act remains in force as applied to the federal government.[107]

The Supreme Court applied *Smith* in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*[108] to invalidate a city ordinance that prohibited the ritual sacrifice of animals. Although at first glance it would seem that such a law was neutral and of general applicability, the Court found otherwise. By examining the record, which included the minutes of the city council meetings, and observing that the law permitted other religious killings—like kosher slaughtering—and exempted every form of secular animal slaughter, the Court determined that this particular law had as its sole aim the suppression of the Santeria religion.[109] In fact, the Court explained that the ordinance was "gerrymandered" with care to proscribe only religious conduct.[110] It was therefore neither neutral nor generally applicable, as would be required in order to fit into the category of laws described in *Smith* and could not be upheld under the relaxed, rational basis threshold.

Thus, the current state of U.S. law is that when state and local governments pass a neutral, generally applicable law that incidentally burdens religious practice, the law falls into a category where it need only be rationally related to a legitimate government interest to pass constitutional muster. On July 24, 2009, the Canadian Supreme Court handed down its decision in *Hutterian Brethren of Wilson Colony v. Alberta*[111] indicating that the current state of Canadian law in this area may now be the same.

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104. 42 U.S.C. § 2000bb.

105. *See* R. v. Oakes. [1986] 1 S.C.R. 103 at 139.

106. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Congress had exceeded its powers under §5 of the 14th Amendment in enacting the statute.)

107. *See, e.g.,* Kikumura v. Gallegos, 242 F.3d 950 (10th Cir. 2001); *In re* Bruce Young, 141 F.3d 854 (8th Cir. 1998).

108. 508 U.S. 520 (1993).

109. *Id.* at 542.

110. *Id.*

111. [2009] 2 S.C.R. 567 (Can.).

V. THE CANADIAN SUPREME COURT'S USE OF CATEGORIZATION REGARDING INFRINGEMENTS OF THE FREEDOM OF RELIGION

The Hutterian Brethren of Wilson Colony ("Hutterites") believe that the Second Commandment prohibits them from having their photographs taken.[112] Until 2003, the Province of Alberta had issued photoless driver's licenses to those who objected to having their picture taken on religious grounds.[113] However, in an effort to minimize identity theft, Alberta decided to do away with the photoless licenses and required all license holders to be photographed so that their pictures could be placed in a digital facial recognition data bank.[114] In an attempt to accommodate the Hutterites' sincerely held religious beliefs, the Province offered to issue sealed licenses to the Hutterites so that they would never have to see the photo, or alternatively, to offer them photoless licenses so long as they had their pictures taken for placement in the digital photo bank. Because it is the act of having their photo taken that is repugnant to their religious beliefs, the only compromise the Hutterites were willing to accept was that they not have their photo taken and be issued photoless licenses marked "Not to be used for identification purposes."[115] Due to this impasse, the Hutterites brought a constitutional challenge against Alberta's new photo requirement, alleging it infringed their freedom of religion, guaranteed under the Charter.[116]

The Province of Alberta conceded that the photo requirement infringed upon the Hutterites' Charter right and so the Court was only asked to determine whether this infringement could be upheld under Section 1 as a reasonable limit, demonstrably justifiable in a free and democratic society.[117] Before delving into step

112. *Hutterian Brethren,* [2009] 2 S.C.R. 567, 2009 SCC 37 (Can.) at ¶ 7. The Second Commandment states: "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under earth." *Exodus* 20:4. The Colony members believe that a photograph is a "likeness" within the meaning of this text.

113. *Hutterian Brethren,* [2009] 2 S.C.R. 567 (Can.) at ¶ 5.

114. *Id.* at ¶ 10. The digital photo bank was connected to facial recognition software that analyzed the photographs of those who applied for licenses. The system allowed the government to ensure that the person trying to renew or replace a license was the same person represented by the existing photo in the data bank. *Id.*

115. *Id.* at ¶ 13.

116. Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982, ch. 11 (U.K.) (Charter) § 2(a) ("Everyone has the following fundamental freedoms . . . (a) freedom of conscience and religion.").

117. *Hutterian Brethren,* [2009] 2 S.C.R. 567at ¶ 34.

one of the *Oakes* test, however, the Court stated that "[w]here a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the [Section] 1 analysis."[118] With this deferential standard in mind, the Court applied the *Oakes* test. The Court had no difficulty in determining that maintaining the integrity of the driver's license system to minimize identity theft was a pressing and substantial goal. But asking whether the universal photo requirement was rationally connected to that goal, was where Court's deferential posture led it to stray from the expected *Oakes* proportionality requirements.

The lower court, citing both *Oakes* and *Videoflicks,*[119] stated that the rational connection inquiry requires "an assessment of whether the impugned law has been carefully designed to achieve the indentified objective."[120] "If the law is not appropriately tailored to suit its purpose, it will fail this inquiry . . . ."[121] Noting that there are over 700,000 Albertans who do not hold driver's licenses and whose photos are therefore not in the digital bank, the lower court held that the mandatory photo requirement did "not seem to be well-tailored to address the problem of seeking licenses in the name of another."[122] Interestingly however, the Supreme Court held that the government must only show "that it is reasonable to suppose that the limit may further the goal, not that it will do so."[123] Under this relaxed standard, the Court was able to find a rational connection based on the government's somewhat tautological argument that "a universal system of photo identification for drivers will be more effective in preventing identity theft than a system that grants exemptions . . . ."[124]

Of perhaps greater concern in the rational connection analysis was the lack of evidence suggesting that the photo exemptions were in any way problematic. As mentioned above in the discussion of *Videoflicks*, the Ontario government had completed considerable research regarding exploitation of retail workers.[125]

118. *Id.* at ¶ 37.

119. R v. Oakes, [1986] 1 S.C.R. 103 (Can.); R. v. Videoflicks, Ltd., [1986] 2 S.C.R. 713 (Can.).

120. Hutterian Brethren of Wilson Colony v. Alberta, [2007] 77 Alta. L.R. (4th) 281, 297 (finding the photo requirement to be disproportionate under *Oakes* and striking it down).

121. *Id.*

122. *Id.* at 298.

123. *Hutterian Brethren*, [2009] 2 S.C.R. 567at ¶ 45.

124. *Id.* at ¶ 49.

125. R. v. Videoflicks, Ltd., [1986] 2 S.C.R. 713, ¶ 123 (Can.)

Although the *Hutterian Brethren* Court relied heavily on *Videoflicks*, it was not troubled by the fact that there was "*no evidence* from the government to suggest that [photoless] licenses . . . caused any harm at all to the integrity of the licensing system."[126] Despite this evidentiary deficiency, the Court still concluded that Alberta had established that the photo requirement was rationally connected to its stated goal, and therefore, moved on to the minimal impairment analysis.

Before embarking on this section of the *Oakes* test, the Court stated—without citing precedent—that in making the minimal impairment assessment, "the courts accord the legislature a measure of deference, particularly on complex social issues . . . ."[127] As in *Videoflicks*, the *Hutterian Brethren* Court focused on potentially less-restrictive alternatives and the legislative exemptions offered as a compromise. In *Videoflicks*, Ontario had offered general exemptions to the mandatory Sunday closings to many business sectors, and specifically, exempted certain Saturday-observing retailers. The *Videoflicks* Court found that by offering these exemptions, the legislature had struck a fair balance between freedom of religion and the Province's goal of making sure that retail employees were not over-worked. In contrast, Alberta offered to issue the Hutterites sealed photo licenses or photoless licenses so long as a photo was taken to be stored in the digital database. Both of these options involve "the very act that offends the religious beliefs of the Wilson Colony members,"[128] and were thus no compromise at all.

Rather than focusing on the minimal impairment of the Hutterites' religious rights, the Court dwelled on the minimal impairment of the government's objective. Although the Court conceded that "it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions,"[129]it somehow agreed with the Province that allowing photoless licenses would *significantly* compromise the objective and greatly increase the risk of identity theft.[130] This conclusion is problematic in light of the absence of any evidence that the photo exemptions had any negative effect on the integrity of the driver's license system.

Before moving on to the final stage of the *Oakes* test, the

126. *Hutterian Brethren*, [2009] 2 S.C.R. 567at ¶ 156 (Abella, J., dissenting) (emphasis supplied).

127. *Id.* at ¶ 53.

128. *Id.* at ¶ 148 (Abella, J., dissenting).

129. *Id.* at ¶ 81.

130. *Id.* at ¶ 60.

Court reiterated that "laws of general application are not tailored to the unique needs of individual claimants"[131]and that the legislature "cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief."[132] This language is highly reminiscent of that used by the U.S. Supreme Court in *Smith*.[133]

As is noticeable in the Canadian cases analyzed above, the "effects" section of the proportionality test has been somewhat of a throwaway. As Professor Peter Hogg points out, there is no case where this section has been decisive to the outcome.[134] If a law has a pressing and substantial objective, is rationally connected to that objective, and minimally impairs the Charter right, Hogg asks how it is possible that the law's effects will somehow be disproportionate to its objective.[135] Cognizant of this criticism, the *Hutterian Brethren* Court devoted a substantial amount of time to weighing the salutary effects of the universal photo requirement against the deleterious effects on the Hutterites. Here, the Court decided that the Hutterites were not left with the choice of disobeying the Second Commandment or giving up their self-sufficient, rural way of life. "The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver's license must permit a photo to be taken for the photo identification bank."[136] According to the Court, the Hutterites could simply hire people with licenses to accomplish the tasks that require driving.[137] The dissent pointed out that this suggestion "fails to appreciate the significance of [the Hutterites'] self-sufficiency to the autonomous integrity of their religious community"[138] and invoked the *Videoflicks* pronouncement that "indirect but non-trivial burdens on religious practice are prohibited by the [Charter]."[139] But the majority, while recognizing the significant financial costs to the Colony, and the interference with the Hutterian tradition of being self-sufficient, still concluded that the

131. *Hutterian Brethren,* [2009] 2 S.C.R. 567, 2009 SCC 37 (Can.) at ¶ 69.

132. *Id.*

133. "Any society adopting [a system that tailors laws to accommodate religious beliefs] would be courting anarchy, [a] danger [that] increases in direct proportion to the society's diversity of religious beliefs . . . ." Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990).

134. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 38.12 (5th ed. Supp. 2007).

135. *Id.*

136. *Hutterian Brethren,* [2009] 2 S.C.R. 567at ¶ 98.

137. *Id.* at ¶ 97.

138. *Id.* at ¶ 167 (Abella, J., dissenting).

139. *Id.* at ¶ 168 (Abella, J., dissenting).

deleterious effects imposed upon the Hutterites' freedom of religion did not outweigh the salutary effects of the law.[140]

It thus appears that the Canadian Supreme Court has forgotten (or chosen to part with) its roots in both *Videoflicks* and *Oakes* and is instead deferring to the legislature when it comes to laws of general applicability that incidentally affect the freedom of religion. Although the Court went through the motions of the *Oakes* test, the end result appears to be that generally applicable laws—meaning those not drafted for the sole purpose of hindering religious practice—fall into a category of legislation that is virtually immune from constitutional challenge.

The *Hutterian Brethren* Court—although it nowhere explicitly states that it is applying a categorical analysis—sheds light on why proportionality may not be the best tool for addressing generally applicable laws that incidentally burden religion. Because the *Oakes* test requires the Court to weigh the salutary effects of a measure against the deleterious effects upon the claimant's religious beliefs, the test implicitly asks the Court to determine how important the particular religious tenet being interfered with is to that claimant. The *Hutterian Brethren* Court acknowledges the difficulty of this task when it states that "[t]here is no magic barometer to measure the seriousness of a particular limit on a religious practice."[141] The Court explains that "[s]ome aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice."[142] More problematic in performing a balancing test is that "[b]etween these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others."[143]

Rather than attempt to determine just how important the Second Commandment is to the Hutterites, or how important the ingestion of peyote is to the members of a Native American faith, the High Courts seem to have recognized that the safest alternative is to essentially exempt generally applicable laws from constitutional challenge on religious grounds.[144] A categorical

140. *Id.* at ¶ 103.

141. *Hutterian Brethren,* [2009] 2 S.C.R. 567, 2009 SCC 37 (Can.) at ¶ 89.

142. *Id.*

143. *Id.*

144. As exemplified in *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), the U.S. Supreme Court is willing to find that some laws that seem neutral and generally applicable are, in fact, not. The Canadian Court also alludes in *Hutterian Brethren,* [2009] 2 S.C.R. 567, to the fact that a generally applicable law

approach—where so long as the particular law is neutral and of general applicability, it will be immune from a constitutional challenge—allows the Courts to avoid making the controversial and perhaps impossible determinations required under a proportionality analysis. Categorical immunization also assures that generally applicable laws are not consistently under constitutional attack by the diverse array of religious adherents who inhabit the United States and Canada.

VI. CONCLUSION

While the categorical approach may have been a suitable compromise when dealing with a constitution that seems to call for an absolute ban against laws that infringe the freedom of speech, categorization does not lend itself well to recent advent of hate speech regulation. This is because it is difficult to precisely classify hate speech, which is often politically charged and therefore highly deserving of First Amendment protection. As a result, the U.S. Supreme Court, in *R.A.V.* and *Black* applied a more Canadian-style balancing test, whereby it weighed the value of the speech being regulated against the government's legitimate goal in regulating it, and asking whether the legislature had gone too far in attaining that goal.

Conversely, the *Oakes* test is an efficient tool with respect to the language of Section 1 of the Canadian Charter, which appears to instruct the Canadian courts to weigh the affected right against a demonstrably justifiable government interest. But when it comes to neutral laws of general applicability that incidentally burden religious practice, a proportionality test unacceptably forces the Court to determine just how important a certain religious practice is to the particular claimants before it. Proportionality also opens the flood gates to endless litigation due to the diversity in religious preference in both the United States and Canada. To avoid this, the *Hutterian Brethren* Court departed from the typically high standards of the *Oakes* test, and instead insulated neutral, generally applicable laws from constitutional challenge.

But these decisions do not indicate that the High Courts are wholly choosing to part with their normal mode of operation. On the contrary, these two areas have simply created constitutional

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that limited prayer or some other fundamental sacrament may undoubtedly fail a Section 1 analysis, regardless of how much deference is afforded to the legislature.

anomalies where the preferred or expected method of analysis is unsuitable. *R.A.V.*, *Black*, and *Hutterian Brethren* can be best described as necessary constitutional eruptions on an otherwise unsullied analytical landscape.