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Recommended Citation
Barbara Child, Trends in the United States Supreme Court's Use of the Ripeness Doctrine in Free Speech and Association Cases: A Comparison with Canadian Trends, 10 Case W. Res. J. Int'l L. 415 (1978)
Available at: https://scholarlycommons.law.case.edu/jil/vol10/iss2/6

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TRENDS IN THE UNITED STATES SUPREME COURT’S USE OF THE RIPENESS DOCTRINE IN FREE SPEECH AND ASSOCIATION CASES: A COMPARISON WITH CANADIAN TRENDS

by Barbara Child*

The author examines the changing approach of the United States Supreme Court to cases involving freedom of expression and association. Special attention is given to the doctrine of ripeness and to the ramifications of the doctrine in these areas. The American approach then is compared with that in Canada. She notes that the Canadian Bill of Rights was enacted only recently. The author questions, however, whether any constitution or bill of rights provides an effective safeguard against the abridgment of freedom of speech and association.

INTRODUCTION

TO AMERICAN POLITICAL dissidents, the First Amendment to the United States Constitution protects the most highly prized rights of all those protected by the Bill of Rights. During the turbulent 1960's, dissidents came to learn that protection of speech and association deserved special preference as fundamental rights, and that a chilling effect on those rights would not be tolerated. These lessons they learned from the United States Supreme Court, the Warren Court. Today, however, they are learning a new lesson: that those old truths are not immutable. Since the First Amendment in little more than a decade has undergone enormous changes in interpretation, if dissidents are to plan their political future knowledgeably, it is important for them to understand what has caused those changes. One cause worth investigating is the United States Supreme Court's uses of the doctrine of justiciability known as ripeness.

The ripeness doctrine is susceptible to quite contrary interpretations and thus to varying uses. Having explored the variations, one is in a position to question what view of ripeness prevailed in the Supreme Court during the 1960's that contributed to the Court's decisions favoring dissidents who had not been prosecuted for their speech or associations, in other words, those most vulnerable to a chilling effect. The United States Supreme Court's liberal period can be better understood by comparison with the liberal period of another Supreme

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Court in a country without a doctrine of ripeness and, at the time, without a bill of rights: Canada. One might presume that the existence of a bill of rights would make it easier to protect freedom of expression and that a doctrine of ripeness, which can serve as an impediment to hearing cases, would make it harder. However, to compare the American 1960's with the Canadian 1950's is to weaken that presumption. To trace Canadian freedom of expression cases after the passage of the Canadian Bill of Rights in 1960 is to weaken it even further. In the American retreat from the liberal 1960's there emerge trends that are reflected clearly in recent Canadian cases as well. In particular, a comparison of recent American and Canadian trespass cases shows the two Courts nearly merging in their response to political dissidents.

These cases, viewed in light of the trends that preceded them, suggest answers to the hard questions that the American dissident must meet head on: Is the ripeness doctrine, formerly a stumbling block, now being disregarded in favor of going directly to the merits of the cases, to the greater disadvantage of the dissident? Have First Amendment rights lost their preferred status in competition with property rights and the rising status of the concept popularly known as "law and order"? Finally, which is the more valuable guardian of free speech and association—a document called a bill of rights or a strong majority on the Supreme Court that regards those freedoms as fundamental?

I. THE PROBLEM OF DEFINITION

Article III of the United States Constitution limits the judicial power of the courts to "cases and controversies." That deceptively simple phrase has produced a whole history of attempts to define those limits; one of the several requirements for a case to be decided by the Supreme Court is that it must be "ripe" for adjudication. "Ripeness" in turn has needed definition.

"The basic principle of ripeness is easy to state: Judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." This easily stated principle has been responsible for many pages of discussion in Supreme Court opinions, including dissents, as the Court has explained why it has chosen to decide or not to decide

1 U.S. CONST. art. III, § 2, cl. 2.
given cases. One objective Supreme Court definition, given in reviewing an administrative regulation but cited by Professor Davis as worthy of general application, provides: "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to non-compliance, access to the courts . . . must be permitted, absent a statutory bar or some other unusual circumstance . . . ."\(^4\)

Such definitions are misleading, however, if they give the impression that there are a few simple tests that the Supreme Court can apply to a case to determine whether it is ripe—or that the Court can perform these tests free from any concern for other doctrines of justiciability and without any attention to the merits of the case. Professor Bickel writes bluntly on these problems:

[W]hen a case that is fully developed . . . is dismissed because the issue that it tenders is thought to lack ripeness . . . in such circumstances, the word "ripeness" is merely a conclusory label. . . . [T]he concept of ripeness of the case does not operate independently and is not alone decisive. . . . [I]t is in substantial part a function of a judge's estimate of the merits of the constitutional issue.\(^5\)

What Professor Bickel's comments acknowledge is that ripeness is actually a tool that the Supreme Court can manipulate, by changing the definition if need be, to refuse to decide cases that it does not want to decide, not necessarily because they are not ripe but possibly for very different reasons. Professor Bickel does not find such manipulation reprehensible. Indeed he approves of it: (1) When the issues in a case are volatile political ones upon which political institutions may yet take action which the Court can then review;\(^6\) (2) when it appears that numerous similar or related cases will yet be litigated, showing various ramifications of a vast problem and allowing the Court, if it waits, to speak to the whole problem at once rather than in pieces;\(^7\) (3) even when the individual plaintiff in the case before the Court may be harmed still more if the action against him is left free to continue fur-

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\(^6\) Id. at 146 (discussing the Court's dismissal of appeals in Poe v. Ullman, 367 U.S. 497 (1961)) (legality of contraceptives).

\(^7\) Id. at 176 (discussing Garner v. Lousiana, 368 U.S. 157 (1961)) (first sit-in case).
ther, thus allowing the Court to see fully what harm that action is capable of inflicting. Here ripeness is not the only manipulated tool; so also is the plaintiff. The end of the judicial process is not, according to such a view, the adjudication of the rights and duties of the parties to a case. It is the establishment of legal principles. Professor Bickel says virtually as much himself: "Finally . . . , the concept of ripeness ripens into the question . . . of the role that principle, called constitutional law, is capable of playing in a society such as ours."9

If there is any plaintiff who stands to suffer from the operation of Professor Bickel's views, it is the political dissident who would like to exercise his First Amendment rights to freedom of speech and association but is afraid to do so for fear of government reprisal. If he has not yet spoken or gathered with his fellows, no official action can possibly have been taken against him. Consequently, if he wishes to challenge the constitutionality of any of the myriad ordinances, statutes, regulations, rules, and other assorted sanctions that may apply to his contemplated speech or action, he is in real danger of having his challenge labeled "not ripe." In this way acts of the government and its agents can have a "chilling effect"10 on First Amendment rights.

Not all constitutional scholars share Professor Bickel's views of ripeness. Professor Davis argues that not only does the Court have the power to act even in contexts that are not purely adversarial,11 it can also legitimately function to resolve "deilitating legal uncertainty."12 Furthermore, it should bring to the problem of ripeness modern understanding of modern problems,13 not being bound by old interpretations of the "case and controversy" requirements in opinions written even before the existence of the Declaratory Judgment Act.14

In Professor Davis's view, "[W]hen the problem of constitutionality is a substantial one . . . , to require regulated parties to risk criminal penalties in order to obtain a clarification of the law that importantly affects them is procedurally unfair and may often result in substantial injustice."15 Obtaining such clarification, without having to show the

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8 Id. at 124.
9 Id.
11 Davis, supra note 2, at 1373.
12 Id. at 1123.
13 Id. at 1134.
15 Davis, supra note 2, at 1149. See also id. at 1368.
irreparable injury required for an injunction, is precisely the purpose of the Declaratory Judgment Act, according to the Senate Judiciary Committee: "The procedure has been especially useful in avoiding the necessity . . . of having to act at one's peril or to act on one's own interpretation of his rights, or to abandon one's right because of a fear of incurring damages." While the reference to damages suggests financial loss, "... the loss sustained by a plaintiff who foregoes exercising first amendment rights for fear of prosecution under an unconstitutional state statute is more truly irreparable than financial loss which, however great, can often be adequately compensated." In fact, the person contemplating action in violation of what he believes to be an unconstitutional statute can suffer whether he acts or does not. But if he cannot pursue his challenge before acting, he must choose.

If he violates the statute, and the statute is ultimately validated, he may suffer severe penalties. Had he been able to gain timely review of the statute's constitutionality, he could have avoided risking this punishment. On the other hand, if this person decides to "play safe" and not violate the statute, the statute may eventually be found to be unconstitutional. The unavailability of early review could then be viewed as having encouraged him to forfeit his constitutional right to engage in certain conduct. There is no way to compensate anyone for this kind of injury.

This is the potential plaintiff who has a pressing need to have his claim heard. His situation produces no comity problems such as might close the courtroom doors to many challengers who have state proceedings pending against them. Yet whether his need is great enough to be considered a right depends upon whether his claim can pass the ripeness tests. To trace representative Supreme Court decisions in First Amendment political speech and association cases from Dombrowski v. Pfister, a landmark Warren Court decision, to the present, is to observe the Court changing its use of the ripeness doctrine in ways that contribute to the chilling effect on those First Amendment rights.

18 Id. at 976.
19 See Note, I Used To Love You But It's All Over Now: Abstention and the Federal Courts' Retreat From Their Role as Primary Guardians of First Amendment Freedoms, 45 S. CAL. REV. 847, 869 (1972) (comity as a device to avoid first amendment decisions).
II. THE LIBERAL TRENDS: HOW THEY COME AND HOW THEY GO

A. The Dombrowski Period in the United States

The high-water mark in the Supreme Court's recognition and protection of First Amendment speech and association rights was *Dombrowski*. The case was important for two reasons. In granting standing to plaintiffs who wanted to challenge the breadth of statutes under which they were not at the time being prosecuted, the Court did not encumber justiciability with any strict ripeness test.\(^2\) Plaintiff in the case was the Southern Conference Educational Fund (SCEF), a civil rights organization that wanted to restrain prosecution or threat thereof by the Legislative Committee on Unamerican Activities of the Louisiana Legislature, acting under the authority of that state's Subversive Control Law. Members of SCEF had been indicted for violation of the statute requiring registration as members of a Communist front organization, but they wanted to challenge other statutes as well. A three-judge district court had dismissed the suit for failure to state a claim upon which relief could be granted and also upon abstention grounds.

The Supreme Court reversed in an opinion written by Justice Brennan in which Chief Justice Warren and Justices Goldberg, White, and Douglas joined. Since it is worthwhile to note how changes in the composition of the Court have accompanied changes in the decisions in this area, it should also be noted here that the only other Justice still on the Court, Justice Stewart, took no part in the case. Neither did Justice Black. The dissenters, who would not have heard the case on abstention grounds, were Justices Harlan and Clark.

The primary importance of the Brennan opinion in *Dombrowski* is its establishment of a fully elucidated doctrine of "chilling effect."\(^2\) An unconstitutional statute that threatens those who would speak out not only does harm to those who do speak and are eventually prosecuted for their speech (or more usually for some activity in conjunction with their speech), but it also does harm to those who never speak out at all, and who are deterred from so doing by the threat of reprisal.\(^2\) It is these people whose First Amendment rights are chilled.


\(^{22}\) Id. at 121 n.80.

\(^{23}\) 380 U.S. at 486.
Furthermore, they cannot vindicate those rights defensively precisely because, if they are chilled into silence, they will never be prosecuted.

Thus the rights vindicated by the members of SCEF in Dombrowski were not only their own but also those of unknown persons chilled into silence. Justice Brennan puts it this way: "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser."  

While the argument advanced against deciding the case was explicitly based on the abstention doctrine rather than the ripeness doctrine, the Brennan opinion implicitly answers a ripeness argument as well. It might be decided that a controversy is not ripe to let a vast statutory scheme have the opportunity to demonstrate just how much injustice it can cause, thereby enabling the Court to strike down the whole scheme at once.  

To this unspoken argument, Justice Brennan responds: "We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."  

The Court relied upon the principles established in Dombrowski in a number of subsequent cases. A year later Justice Brennan again wrote a concurring opinion in Lamont v. Postmaster General. Here under challenge was a federal statute authorizing the Postmaster General to deliver suspect foreign mail only upon the addressee's written request for delivery, which request would then cause a record to be kept on the addressee. Plaintiff was allowed to challenge the statute even though he was willing to receive such mail in compliance with the statutory requirements. The Court granted him standing, never even questioning the ripeness of the case. It held the statute in violation of the First Amendment because of the likelihood that an "addressee . . . [would] feel some inhibition in sending for literature which federal officials have condemned as 'Communist political propaganda.'"  

The rationale for the decision was again the chilling effect on those who,

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24 Id.
25 See text accompanying note 7 supra.
26 380 U.S. at 491.
27 381 U.S. 301 (1965).
28 Id. at 307.
because they would not exercise their rights, would never be able to test their rights during prosecution. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."\textsuperscript{29}

The Lamont case is worth noting because, it together with two 1950's cases that provided background, shows how inextricably joined the rights of speech, association, and privacy can be. It was the First Amendment that dictated that Mr. Lamont did not have to register as a recipient of "Communist political propaganda." Similarly, it was the First Amendment that dictated in 1958 that the NAACP did not have to reveal its membership lists. Justice Harlan's opinion in \textit{NAACP v. Alabama}\textsuperscript{30} makes the connection clear: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between freedoms of speech and assembly."

Even early in the 1950's the Court had struck down a scheme under which the Attorney General could put organizations on a subversive list with no prior hearing, publish the list in the \textit{Federal Register}, and have the list used by the Loyalty Review Board to determine which federal employees were to be discharged as disloyal.\textsuperscript{32} In \textit{Joint Anti-Fascist Refugee Committee v. McGrath}, the Court did expressly hold the case to be ripe, reversing the Court of Appeals, and producing five separate majority opinions. In view of his later dissents in First Amendment cases, it is not surprising that Justice Douglas' opinion most forcefully expresses the rationale for ripeness: "An organization branded as 'subversive' by the Attorney General is maimed and crippled. The injury is real, immediate, and incalculable."

To have one's name put on a subversive list is to be immediately injured. It is noteworthy that such government action, which is seriously injurious to both individuals and groups, is self-executing. No prosecution or administrative disciplinary proceedings need precede sanction and injury. Therefore, the usual arguments against finding a case ripe should have no application to cases of self-executing government

\textsuperscript{29} \textit{Id.} at 309.
\textsuperscript{30} 357 U.S. 449 (1958).
\textsuperscript{32} \textit{Joint Anti-Fascist Refugee Comm.} v. McGrath, 341 U.S. 123 (1951).
\textsuperscript{33} \textit{Id.} at 175 (Douglas, J., concurring).
interferences with First Amendment rights. This was understood in the *Lamont* and *NAACP v. Alabama* and *Joint Anti-Fascist Committee* cases. This is worth noting as background for later cases to be discussed in which a very different Supreme Court found other means to hold comparable cases not ripe.

The last case in which the *Dombrowski* principles were still fully in effect was *Keyishian v. Board of Regents*, involving a government scheme which was just as inimical to First Amendment rights as subversive lists: loyalty oaths for teachers. Plaintiffs here were faculty members at the State University of New York. They wanted to challenge the infamous Feinberg Law and related statutes that required that teachers certify that they were not Communists or that, if they ever had been, that they had so informed the President of the University. Some professors had been discharged, but others only regarded themselves as threatened with discharge for a wide variety of political acts and associations. They were forced to "guess what conduct or utterance" might violate New York's complicated scheme of regulations and laws, a scheme which was held constitutional by a three-judge district court.

The Supreme Court reversed in a 5-4 decision, with dissenters Clark, Harlan, Stewart, and White complaining both that the case should be moot because the Feinberg Law had already been changed, and that it should not be ripe because the plaintiffs had not exhausted their administrative remedies. By definition mootness and ripeness should be mutually exclusive grounds for holding a case not justiciable. When both are used to reject the same case, the combination suggests that neither is the real reason for the rejection. Two of the *Keyishian* dissenters, Justices Stewart and White, are, of course, still on the Court today, and Justice Stewart has written recent majority opinions that strongly curtail the right of free speech.

Justice Brennan, who wrote the majority opinion in *Keyishian*, is the only one of that majority still on the Court. With him in the opinion were Chief Justice Warren and Justices Black, Fortas, and Douglas. The only plaintiff to whom they denied standing was one who had

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34 385 U.S. 589 (1967).
35 Id. at 604.
36 For another comparably contradictory opinion, see *Golden v. Zwickler*, 394 U.S. 103 (1969) (case moot because prohibited anonymous election campaign leafleting concluded by election having already occurred, but case also not ripe because candidate now a judge with a 15-year term so that another campaign is remote in time).
37 See text accompanying notes 167-79 infra.
previously resigned. Otherwise they made no distinction between the teachers who had already been fired and those who only were fearful that they might be. Even in regard to the latter group, the majority saw no need to take up the question of ripeness. Instead, as in Dombrowski, it was concerned with the chilling effect on First Amendment freedoms, not only on the plaintiffs in the case but also in American society at large, particularly precious freedoms in an academic setting. The last resounding echo of Dombrowski was heard in Keyishian: "The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient in terrorem mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery."

To appreciate what was accomplished in Keyishian, one need only compare it with the Court's response to the first challenge to the same statutes fifteen years earlier in Adler v. Board of Education. At that time the Court held the entire New York Education Law, including the Feinberg Law, constitutional. Here, too, the majority found no need to mention ripeness. They simply allowed the challenge but found against the challengers on the merits.

Argument about ripeness dominated two strongly opposing dissents, however. In fact, Justice Frankfurter's dissent in Adler has become a classic statement of why a case should be held not to be ripe:

We are asked to adjudicate claims against its constitutionality before the scheme has been put into operation, before the limits that it imposes upon free inquiry and association, the scope of scrutiny that it sanctions, and the procedural safeguards that will be found to be implied for its enforcement have been authoritatively defined. I think we should adhere to the teaching of this Court's history to avoid constitutional adjudications on merely abstract or speculative issues and to base them on the concreteness afforded by an actual, present, defined controversy, appropriate for judicial judgment, between adversaries immediately affected by it.

Justice Frankfurter complained that the New York teachers did not allege that the Feinberg Law deterred them from doing anything—on-

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38 385 U.S. at 604.
39 Id. at 603.
40 Id. at 601.
42 Id. at 497-98.
ly that it affected teachers in general and that it made action against some teachers possible. As he understood the problem, any vagueness that existed was not in the statutes themselves but in the rules promulgated to administer the statutes and in the application of those rules. If under such an interpretation one could reach a conclusion that there was no statutory controversy ripe for adjudication, then administrative uncertainty could easily be used as a conscious device to keep the constitutionality of a statute from being challenged indefinitely.

The dissenting opinion strongly opposing Frankfurter was that of Justice Douglas, joined by Justice Black who also wrote a dissent of his own. Justice Douglas found the case ripe and discussed at length why the decision on the merits should be for the plaintiffs. In so arguing, he painted a vivid picture of the New York schools under the Feinberg Law. Professor Davis' commentary on that dissent makes the point more concisely: "If the specter of the censor over the teacher's shoulder appears as soon as the legislation is enacted, the statute is then ripe for constitutional challenge. At least, the substantive question whether the specter has appeared is ripe for consideration." In other words, such a law is another self-executing one that should be ripe for challenge before any prosecution under it.

Finally, the arguments of both the majority and the dissenters in Adler should make clear how completely unrealistic it is to assume that the Court makes its decision on ripeness without any attention to the merits of the case. The majority in Adler assumed it ripe in order to uphold the Feinberg Law; the majority in Keyishian, fifteen years later, assumed it ripe in order to strike down that same law. Attention to ripeness, not surprisingly then, comes not in the majority opinions but in the dissent, from justices who do not agree with the majority holding on the merits but who want to avoid saying so directly (or in the case of Justice Douglas, who feel constrained to establish ripeness when the majority has not done so), in order to fortify the ripeness decision for use in subsequent cases.

B. The 1950's in Canada

The United States Supreme Court upheld the Feinberg Law in Adler in 1952, although in 1951 it had struck down a subversive list

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43 Id. at 504.
44 Davis, supra note 2, at 1335.
45 Id. at 1336.
scheme in *McGrath*. In 1951 the Canadian Supreme Court decided the first of three cases that distinguish the 1950's as the decade in which that Court reached its peak in protecting the right of free expression, as it is called in Canada. That it did so then seems at first remarkable. First, the 1950's was the decade of McCarthyism in the United States. Also, at the time Canada had no written bill of rights and had to look to an implied guarantee of free expression in the British North America Act as its only constitutional protection. In contrast, the United States Supreme Court, which could cite the Bill of Rights as explicit and ultimate authority, did not produce the *Dombrowski* decision until four years into the 1960's.

The contrast then is worth exploring. Not only because of Canada's apparent foresightedness but also because during the Vietnam years Canada developed a reputation in the United States for hospitality to American dissenters, the contrast invites study to see whether the absence of any doctrine of justiciability including tests for ripeness, might lead to less obstructed protection of free speech.

When tracing the Canadian cases in comparison with the American chronology, building to *Dombrowski* and then retreating from it, it is crucial to keep in mind the differences between the two judicial systems. There was no First Amendment equivalent in Canada in the 1950's. Provincial legislation was tested not to find whether it was constitutional in the American sense but to find whether it was *ultra vires* the province by virtue of having "pith and substance" which was "in relation to" some "matter of significance" to the Dominion. This test still applies today. Implicit in it is that, while the provinces may not be free to legislate about non-local matters, Parliament is free to legislate virtually as it pleases, the only real checks being the presence of the parliamentary minority and the ballot box at the next election.46

While the American critic might be tempted to view as monumental the difference between applying Canadian constitutional tests and applying the American First Amendment, one must approach the cases with a warning in mind. "As a general principle it would appear wrong to seize upon the judicial institutions of any one nation, write them large and then insist that the institutions of other nations are truly judicial only to the extent that they correspond to the model thus

derived." It would be no more correct to judge the Canadian system by comparing it to the American one than to judge the American by the opposite comparison. It can be fruitful, however, to judge them both by how their trends have differed and have eventually come close to merging in their responses to free speech and association problems.

The Canadian commentators who have examined the differences between the two systems have not agreed with each other. At one end the spectrum is fairly open scorn for the United States for its rigidity and attention to the letter of the law rather than its spirit:

The word "Constitution" has a different connotation in American and in Canadian (i.e. British) usage. Speaking somewhat generally—in the United States, "the Constitution" is a written document, containing so many letters, words, and sentences, which authoritatively and without appeal dictates what shall and what shall not be done: in Canada "the Constitution" is "the totality of the principles, more or less vaguely and generally stated, upon which we think the people should be governed." In Canada anything unconstitutional is wrong, however legal it may be; in the United States anything unconstitutional is illegal, however right and even advisable it may be; in Canada to say that a measure is unconstitutional rather suggests that it is legal, but inadvisable.

An equally biased Canadian view sets up the United States system as a model and praises Canada for approximating it:

[A]lthough English and Canadian courts have not the power of the Supreme Court of the United States to check the activities of legislatures, the . . . use of . . . presumptions does go some distance to establishing a sort of fourteenth amendment to the British North America Act.

According to this view, there is a presumption against interfering with the personal liberty of individuals, and this presumption is regarded as fundamental. At the other extreme is a Canadian critic's view that the Canadian freedom of expression cases "reveal confusion and conflicting statements. Some cases would appear to deny any constitutional protection for freedom of expression and even at times to deny

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49 Willis, *Statute Interpretation in a Nutshell*, 16 CAN. BAR 1, 23 (1938).

50 *Id.*
the existence of such a concept as freedom of expression in the law, while others reveal strong statements in the opposite direction."

The various theories can be fairly assessed, of course, only by studying carefully the cases themselves. The first of the three 1950's cases is Boucher v. The King. It came only a year after the Supreme Court became the final court of appeal in Canada, final appeal to the Privy Council having been abolished in 1949. Boucher involves a conviction for seditious libel for publishing a pamphlet in Quebec detailing instances of alleged persecution of Jehovah's Witnesses and charging the Roman Catholic Church with influencing the courts in their dealings with Jehovah's Witnesses.

The importance of the case is that it ultimately interprets the section of the Criminal Code providing a good faith defense to the crime of seditious libel so that subsequent to the case it is permissible to arouse people against the government so long as there is no intent to incite violence. Formerly it had been understood that advocating force was not a necessary element of seditious intention, and Chief Justice Rinfret maintained that position when Boucher first came before the Court. This view was based on Sir James Fitzjames Stephen's definition of seditious intention as one "to bring into hatred or contempt, or to excite disaffection against the . . . administration of justice." This definition, as codified, had served in the past as the basis for convictions of persons who distributed pamphlets critical of the clergy, business, and various branches of the government, and was also the basis for the conviction of other Jehovah's Witness pamphleteers. Sir Stephen's definition is put to rest in Boucher by Justice Rand and Justice Kerwin, however, at the same time as they breathe life into the good faith defense section of the Code. Here is Justice Rand's

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51 Bushnell, *supra* note 46, at 83.
54 C. 11, § 133A (1930).
56 Stephen's Digest of Criminal Law, §§ 114, 115, which became codified in the Draft Code and was incorporated in spirit in CAN. CRIM. CODE c. 29, § 133(4) (1936).
58 Duval v. The King, 64 Que. K.B. 270 (1938).
59 Sec. 133A reads, in pertinent part: "No one shall be deemed to have a seditious intention only because he intends in good faith . . . (b) to point out errors or defects in the government or constitution . . ., or in either House of Parliament . . ., or in any legislature, or in the administration of justice. . . ."
commentary on the defense section: "This . . . is a fundamental provi-
sion which, with its background of free criticism as a constituent of
modern democratic Government, protects the widest range of public
discussion and controversy, so long as it is done in good faith and for
the purposes mentioned. Its effect is to eviscerate the older concept of
its anachronistic elements."

Justice Rand, it should be noted, wanted the case to result in reversal and acquittal for the defendant. This was a minority view in 1950, however. The defendant was granted his reversal but was to be entitled only to a new trial, not acquittal. On rehearing in 1951 Justice Rand's view prevailed and the acquittal was granted on the grounds that there was no evidence upon which a pro-
perly instructed jury could convict.

In Boucher and in subsequent cases as well, Justice Rand's com-
ments about the importance of freedom of expression in general and
his approach to the controversies before him in particular mark him as
a leader, if not the leader, in the liberal movement of the Court.
However, even he is careful to point out the limits of freedom: "There
is no modern authority which holds that the mere effect of tending to
create discontent or disaffection among His Majesty's subjects or ill-will
or hostility between groups of them, but not tending to issue in illegal
conduct constitutes the crime [seditious libel]." In other words, one
may speak, but he must take his audience as he finds it. The key word
here is "tending." It appears to establish a test based not on what the
speaker intends to accomplish, that is, not on any concept of mens
rea, but on what he is likely to accomplish, according to an external
standard rather than an internal one. The speaker then appears to be
judged according to something like the reasonable man standard com-
mon in American tort law, a standard thought in the United States to
be more burdensome to defendants than is appropriate in the context
of criminal law. In the United States one may be prosecuted for in-
citing to riot whether there is a riot or not, so long as he intended
there to be one. In Canada, if one takes Justice Rand at his word, one
may be prosecuted for seditious libel if there is a riot following his
speech, and that riot, viewed objectively, was likely to result, whether
the speaker intended it or not. According to such a view, the left-wing
speaker truly is at the mercy of right-wing hecklers who come to cause
trouble. Justice Douglas would never have approved.


Id. at 682.

See text accompanying note 108 infra.
Justice Rand is not the only liberal Canadian Supreme Court justice to hold such a view. Here are the comments of Justice Kerwin on proper jury instructions based on the statutory good faith defense:

The jury should be charged that if they find good faith on the part of the accused, and if in their opinion there is nothing more in the case, the accused is entitled to an acquittal; but, if in addition to that good faith, there was an intention on the part of the accused to create public disorder or promote physical force, or that notwithstanding the motives of the accused the natural tendency of the words (and therefore the intention) was to create such disturbances, then they would be entitled to find a verdict of guilty.63

Again the objectively-assessed tendency is presumed to establish intention. Justice Kerwin, it should be noted, is a swing justice in this case. In 1950 he voted for retrial; in 1951 he was in the majority voting for acquittal.

Also among that majority was Justice Kellock, the one Justice who insisted upon viewing the Jehovah’s Witness pamphlet as a whole and thus was able to see the Witnesses as victims attempting to get justice, not as rabble-rousers attempting to defeat justice. His opinion in the case was the only one that did not impose upon the accused speaker the burden of responsibility for his audience’s response:

To say that the advocacy of any belief becomes a seditious libel, if the publisher has reason to believe that he will be set upon by those with whom his views are unpopular, bears, in my opinion, its own refutation upon its face and finds no support in principle or authority. Any such view would elevate mob violence to a place of supremacy.64

However lonely Justice Kellock was in this belief, the case became the first landmark in forging a Canadian doctrine of freedom of expression. It is thus not entirely fair to make too much of Justices Rand’s and Kerwin’s acceptance of tendency as definitive of intention, and it is not fair at all to ask that they in 1951 grant to dissenters the breadth of protection insisted upon by Justice Douglas in the United States twenty years later. At the time of the Boucher opinions, the Canadian praise was entirely justified:

[I]t is impossible to leave this case without saying that the judgments inspire pride and confidence in the court that is now in all matters

64 [1951] 4 D.L.R. at 390.
Canada's final court of appeal. The judgments reveal boldness in approach to authority, a scholarship in research and expression . . . and a sensitiveness to basic principles of law and democracy that represent the judicial process at its best. They will bear comparison with the products of any courts anywhere.65

Two years after Boucher came the second free expression landmark case, Saumur v. Quebec and Attorney General of Quebec.66 It, too, involves the conviction of a Jehovah's Witness, this time for distributing literature without a police permit, expressly required by a Quebec by-law (comparable to municipal ordinances in the United States). At issue this time is not the mere construction of the legislation but its validity, thus a question more nearly akin to those in typical American free speech cases.

In the United States the case would have raised an initial justiciability issue, for the defendant had distributed his pamphlet without even seeking the required license. In the United States, standing requirements would likely have barred his appeal to the Supreme Court if the ripeness doctrine had not. For the Canadian Court, however, that matter was a minor one, quickly disposed of by Justice Estey's brief comment that since only other Jehovah's Witnesses had been prosecuted under the by-law, it was pointless for the defendant to have sought a license.67 Apparently since the law does not require one to do a useless thing, the appeal would not be hindered by defendant's failure to seek a license.

The issue that set the Justices at odds, rather than one of justiciability, was whether the by-law was ultra vires. The disagreements among the Justices ring very familiar to the American ear, the conservatives construing the by-law by its meaning on its face only and reaching an expeditious conclusion of validity, the liberals looking beneath the words at their implications in their actual political context.

The conservative Chief Justice Rinfret in his dissent, fully accepted the city's characterization of By-law 184 as concerning "cleanliness, good order, peace and public security, the prevention of disorders and riots and [having] to do with the internal economy and the good local government of the town. . . ."68

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65 Case and Comment, 29 CAN. BAR REV. 193, 202 (1951).
67 Id. at 701.
68 Id. at 646-47.
Stripped of its extravagant build-up and reduced to its true dimensions, this case, in my opinion, is very simple. It surely does not have the scope and importance that Jehovah's Witnesses have tried to give it. . . .

It is a question of the validity of a municipal by-law and there have probably been hundreds and hundreds of cases of this kind since Confederation. If, on the other hand, this type of case had not been very frequently submitted to the Supreme Court of Canada, it is only because of its relative lack of importance. . . .

Justice Kellock, as he did in Boucher, takes a far broader view. He realizes that the unlimited discretion of a municipal officer, here exercised against a religious group, could as well be exercised against a political party or a newspaper of a particular editorial bias. He is appalled by the absence even of guidelines, much less express restrictions, applying to the official charged with granting or refusing permits. His conclusions are nothing short of blunt. "[A] more objectionable interference, short of complete suppression, with that dissemination which is the 'breath of life' of the political institutions of this country than that made possible by the by-law can scarcely be imagined." Ultimately, he concludes that "such a by-law was not enacted 'in relation to' streets but in relation to the minds of the users of the streets."

Justice Kellock, along with Justices Rand, Estey, and Locke, would have declared the by-law ultra vires, essentially the equivalent of being unconstitutional in the United States. However, the ultimate disposition of the case makes it far less a freedom of expression landmark than it might have been. The by-law was allowed to stand. The City of Quebec was simply enjoined from enforcing it against the Jehovah's Witnesses, which could amount to its being held unconstitutional as applied rather than on its face. The decision rested not on the right of freedom of expression but rather on "the full exercise and enjoyment of Religious Profession and Worship," a provincial statutory protection rather than a constitutional one, and on an additional statute, one that predated Confederation.

69 Id. at 644-45.
70 Id. at 672-73, 678.
71 Id. at 676.
72 Id. at 673.
73 Id. at 678.
75 Act of 1851, c. 175 of the old Province of Canada.
Section 93 of the British North America Act is invoked as well; however, even this suggestion of constitutional grounds carries with it the traditional Canadian limitation on even the most fundamental of personal freedoms. It is expressed by Justice Cartwright in his dissent in *Saumur*: "Under the B.N.A. Act . . . the whole range of legislative power is committed either to Parliament or the provincial Legislatures and competence to deal with any subject matter must exist in one or other of such bodies. There are thus no rights possessed by the citizens of Canada which cannot be modified by either Parliament or the Legislature . . . ."\(^76\) Lest Justice Cartwright's position be assumed to be antiquated and overruled by the majority in *Saumur*, his words must be juxtaposed with Justice Kellock's reference to the by-law not being actually enacted "in relation to" streets. "In relation to" is a key phrase in Canadian law. Since the by-law was not held *ultra vires* after all, it was found to be "in relation to" streets. If it had not been, the province would have lacked competence to legislate "in relation to" the minds of the users of the streets, but Parliament would still have had competence to do so. The distinction, with its serious limitation on free expression, is made clear by Justice Locke, one, it must be remembered, who would have held the by-law in question *ultra vires*:

If it be accepted for the purpose of argument that the distribution of such literature might induce some persons to commit acts of violence, it is for Parliament to decide whether this should be declared an offence in the Criminal Code. Parliament has not seen fit to pass such legislation and the Province is without any jurisdiction to do so.\(^77\)

The implication is clear that if Parliament had seen fit, there would be no reason to question the validity of the by-law.

In short, the result of *Saumur* is far greater protection of the free expression of Jehovah's Witnesses but no real grounds on which to extend that protection to non-religious dissenters. Seeing past the facial purpose of legislation to its repressive effect would be of little help so long as that effect was authorized by Parliament.

The Canadian Supreme Court had one further opportunity during the 1950's to go beyond the *ultra vires* analysis and to hold a piece of provincial legislation invalid expressly for interfering with free expression, in the case of *Switzman v. Elbing and Attorney General of*

\(^76\) [1953] 4 D.L.R. at 724.

\(^77\) Id. at 718.
Quebec. However, only in the dictum of Justice Abbott is such a position taken:

I am . . . of [the] opinion that as our constitutional Act now stands, Parliament itself could not abrogate the right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good Government of the nation.

Although the majority was not willing to go so far, it did hold ultra vire the Quebec Communist Propaganda Act, commonly known as the Padlock Act. The legislation was found to be in relation to criminal law and thus a matter not within provincial competence.

The legislation in question made it illegal, among other things, to use or allow use of a house to propagate Communism or Bolshevism. It authorized the Attorney General to issue an order closing and padlocking the house. In this case, Switzman's landlady sued him to cancel his lease for prohibited use of the premises. Switzman pleaded that the Act was ultra vire, and the Attorney General intervened on the Constitutional question. After a judgment for the landlady, affirmed by the Quebec Court of Appeals, the Supreme Court held first that it was competent to hear the tenant's appeal even though the lease had long since expired and the landlady took no part in the appeal. While the United State Supreme Court would likely have regarded such a controversy as moot, there is no Canadian doctrine of justiciability that would provide a bar to considering the merits so long as the constitutional validity of the legislation was at issue. Furthermore, "once the conclusion is reached that the pith and substance of the impugned Act is in relation to criminal law, the conclusion is inevitable that the Act is unconstitutional." In this case, promptly addressing the merits turned out victoriously for freedom of expression, although not because the legislation interfered with that freedom but because it was in relation to criminal law.

That the whole scope of criminal law should be beyond provincial legislative competence, however, does not provide as broad a shield for dissenters against criminal prosecution as it might at first appear. Just as Quebec's "anti-litter" by-law survived as being in relation to streets,

78 [1957] 7 D.L.R.2d 337.
79 Id. at 371.
80 QUE. REV. STAT. c. 52 (1941).
81 [1957] 7 D.L.R.2d at 342 (per Kerwin).
so the Padlock Act would have survived if Justice Taschereau's dissenting analysis had been accepted by the majority. All that is required is to make a fine distinction between legislation creating a crime and that preventing one: "If the provincial legislature has no power to create criminal offences, it has the right to legislate to prevent crimes, disorders, [such] as treason, sedition, illegal public meetings, which are crimes under the Criminal Code, and to prevent conditions calculated to favour the development of crime." If the legislation can be characterized as preventative, either of crimes themselves or even of conditions favorable to their development, then it neatly follows that the legislation is *intra vires.*

In *Switzman,* Justice Taschereau replaces Justice Rinfret as the spokesman for the most conservative view. After paying lip service to the "fundamental liberties" of press and speech, he goes on to say that

> These liberties would cease to be a right and become a privilege, if it were permitted to certain individuals to misuse them in order to propagate dangerous doctrines that are necessarily conducive to violations of the established order. These liberties... do not constitute absolute rights. They... must be exercised within the bounds of legality. When these limits are overstepped, these liberties become abusive, and the law must then necessarily intervene to exercise a repressive control in order to protect the citizens and society.

Justice Taschereau wanted to view the Communist Propaganda Act as analogous to another statute authorizing padlocking of houses of prostitution as local nuisances, a statute held *intra vires* in 1923 in the case of *Bedard v. Dawson.* The instant case is, however, clearly distinguished from *Bedard v. Dawson* by Justice Nolan on the ground that the statute there considered was concerned with control or enjoyment of property and with safeguarding the community from the consequences of an illegal or injurious use being made of property, whereas that in the present case is aimed at the prevention of the propagation of Communism....
Moreover, in Bedard v. Dawson the offence was created under the Criminal Code [citation omitted] and not under the provincial legislation (the Disorderly House Act). The provincial legislation merely provided what would be the civil effect on the owner of a house in which such an offence had been committed.\textsuperscript{86}

Justice Rand's attack on the attempt to make this a nuisance case is scathing. He concludes in words that recall Justice Kellock's Saumur opinion: "The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities."\textsuperscript{87}

Switzman then, along with Boucher and Saumur before it, does contain opinions powerfully forged to protect the freedom of expression. If those opinions do not, as viewed subsequent to the United States cases of the 1960's, appear as protective as they might, it is not for lack of boldness on the part of the most liberal justices, most especially Justices Rand, Kellock, and Kerwin. Any stumbling block is to be found in the Canadian constitutional system itself, just as in the United States the doctrines of justiciability have at times been able to stand in dissenters' way. Furthermore, if it sometimes appears that the Canadian justices were happy to find a constitutional way to preserve legislation, that is not really different in effect from the United States justices choosing to find a case not ripe in order to avoid deciding its merits altogether, or at best deciding that a statute is unconstitutional not on its face but only as applied.

C. The Canadian Background

To see how far the Canadian Court has progressed by the 1950's, one need only review briefly the history of prior cases applying the \textit{ultra vires} concept. In its approach to provincial legislation, the Supreme Court responded in 1938 in much the same way as it did in the 1950's. When Alberta legislated an "Act to Ensure the Publication of Accurate Laws and Information," an Act that would, among other things, require newspapers to print government corrections of erroneous news reports and would require them to reveal their sources, the Court held the law \textit{ultra vires} as an attempt to amend the Criminal Code.\textsuperscript{88}

\textsuperscript{86} [1957] 7 D.L.R.2d at 375-76.
\textsuperscript{87} Id. at 357.
The opinions could have been written by the liberal justices of the 1950's. Here is Chief Justice Duff:

[I]t is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

We do not doubt that . . . the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from the B.N.A. Act as a whole; and since the subject matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.

Here is Justice Cannon: "[T]he Province cannot interfere with [the Alberta inhabitant's] status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about Government policies and discuss matters of public concern."

It remains, however, to be seen what broad infringements on speech and association were accepted so long as they were authorized by an Act of Parliament. 

Rex v. Buck was a case in which the Ontario Court of Appeals affirmed a conviction under a section of the Criminal Code making it a crime to become a member of an unlawful association, and defining an unlawful association as "one whose purpose is to bring about governmental, industrial or economic change within Canada by use of force and violence and physical injury to persons or property or by threats of such injury. . . ." The Buck opinion quotes at great length from the Theses and Statutes passed at the Second World Congress of The Communist International in July, 1920, and from the July 17, 1925 issue of The Worker, the official organ of the Communist Party of Canada, and concludes in 1932 that the Canadian Communist Party is an unlawful association because the quoted documents "are bristling with incitements to bring about a change in the governmental and industrial life of Canada by violence."

The extent to which Parliamentary legislation was permitted to interfere with freedom of expression is seen nowhere more clearly than in

90 Id. at 119.
92 CAN. CRIM. CODE § 98(1).
94 Id. at 116-17.
95 Id. at 118.
two 1940 cases decided under the War Measures Act,\textsuperscript{96} enacted in 1927, and particularly the Defense of Canada Regulations enacted in 1939 pursuant to the Act.

\textit{Yasny v. Lapointe}\textsuperscript{97} was an application by way of certiorari to quash the Acting Secretary of State's order prohibiting the publication of the applicant's allegedly pro-Nazi newspaper. The order had been made under Regulation 15, providing for such an “order for preventing or restricting the publication in Canada of matters as to which he [the Secretary of State] is satisfied that the publication, or, as the case may be, the unrestricted publication, thereof would or might be prejudicial to the safety of the State or the efficient prosecution of the war. . . .”

The publisher's application to quash the order was dismissed by the Manitoba Court of Appeal, over one eloquent dissenting voice:

It does not admit of question that the legality of the order is subject to investigation by the Court, and it also goes without saying that the Court cannot fail in the performance of its duty because of the anxiety and tension of the present time. The due and fearless administration of justice according to law is the paramount interest of the state which no consideration of the public mind can be permitted to thwart no matter how pressing or overriding the exigency in public opinion may be deemed to be.\textsuperscript{98}

The majority saw otherwise in its quite summary dismissal: “In time of peace civil rights of the people, the liberty of the subject, the rights of free speech and the freedom of the press, are entrusted to the Courts. In war time this may be changed. Parliament may take from the Courts their judicial discretion and substitute for it the autocracy of bureaucrats.”\textsuperscript{99}

The other 1940 case, \textit{Rex v. Coffin},\textsuperscript{100} involved another conviction under the Defense of Canada Regulations. Here the defendant was not alleged to be either Nazi or Communist, but was instead a pacifist, a Quaker school teacher who encouraged discussion among his rural pupils, one of whom took notes and turned them over to the police. The case devotes considerable space to purported quotations from the

\textsuperscript{97} [1940] 3 D.L.R. 204.
\textsuperscript{98} Id. at 206-07.
\textsuperscript{99} Id. at 205 (\textit{per} Dennistoun).
\textsuperscript{100} [1940] 2 W.W.R. 592 (Alta. Pol. Ct.).
teacher himself in his classroom. The magistrate deciding the case goes some distance to include his own patriotic ideas:

In determining whether statements are likely to be prejudicial to the safety of the State, Canada must be considered as itself a theatre of war. In other words, it is difficult to conceive that any statement made by a teacher in a country school-house is likely to affect the safety of Canada but that is not the test. The statement must be tested on the basis of many people making the same statement, any number of times to any number of persons. The possibility of the cumulative result of isolated statements by individuals must be considered. The circumstances under which the statement was uttered go to the question of punishment. The intention and effect of these regulations are most sweeping in their restrictions on free speech—the lid is on and tight. One may think what he pleases but he is not at liberty to express dissent and so influence others. . . .

The whole intention is to compel individuals to maintain silence or speak in the unconquerable spirit by which troops in action must be moved if they are to win.101

One inclined to scorn the Supreme Court in the 1950's for requiring a speaker to take his audience as he finds it, can look to the Coffin opinion if he ever doubts that progress was made. Here the speaker must not only take into consideration his own audience but every other possible audience and every other possible speaker. Such a test should have been intolerable even under the Canadian War Measures Act, even in 1940. One can only speculate as to why the conviction was not appealed. Perhaps the country school teacher was too poor; perhaps his very pacifism prevented his fighting back, even in a court of law. At any rate, the Coffin opinion could easily have served as the low point from which the Canadian judicial system rose to decide its liberal 1950's cases.

One very recent Canadian analysis of these cases included speculation that they may have been themselves in part a reaction to McCarthyism in the United States or a reflection purely of post-World War II sentiment.102 Another interpretation, written earlier, viewed the enactment of the Canadian Bill of Rights103 in 1960, just after those 1950's opinions, as a most hopeful sign. "[T]he Supreme Court was equipped . . . with the necessary tool to promote liberal decisions in those areas where more than one construction or solution was possible and thereby

101 Id. at 601-02 (per Fitch).
102 Bushnell, supra note 46, at 121.
That the hopeful predictions have not been borne out in the later cases may be explainable by the language of the Bill of Rights itself. While Section 1 of Part I expressly recognizes and declares among the fundamental freedoms those of speech, assembly and association, and the press, Section 2 includes a grave limitation to the guarantee of their protection. Section 2 reads as follows:

Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge, or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared.

In other words, Parliament is still competent to abrogate, abridge, or infringe those rights if it wishes to go to the trouble to do so expressly. The United States Constitution, in the First Amendment of the Bill of Rights or elsewhere, grants no such exception to Congress.

However, as the American Supreme Court cases following Keyishian demonstrate, the First Amendment freedoms can indeed be abrogated, abridged or infringed. The United States simply goes about it in different ways.

D. The American Retreat from Dombrowski to Laird v. Tatum and Its Aftermath

The first signal of a retreat from Dombrowski occurred just a year after Keyishian, while membership on the Court was still the same except for Justice Marshall's replacing Justice Clark, not a change that would bode ill generally for the protection of First Amendment rights. Nonetheless, in 1968 the Court affirmed per curiam the district court's dismissal in Brooks v. Briley, a case in which some of the plaintiffs had been arrested and others had not under a disorderly conduct statute which was challenged for its overbreadth and vagueness. Even those who had been arrested were found to have no standing because they had not been harassed. Because the plaintiffs in Dombrowski had been harassed, a gloss was now placed on that case to the effect that Dombrowski would control only in cases of harassment. As to those

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104 Maloney, supra note 53, at 203.
105 See Bushnell, supra note 46, at 121, and Maloney, supra note 53, at 203.
plaintiffs in *Brooks* who had not yet been threatened with imminent prosecution, the district court dismissed because they had "sustained no injury." Their claim, in short, was not ripe.

The opinion in *Brooks*, although not developed with discussion because it was *per curiam*, foreshadowed the Court's finding against ripeness in the 1971 case of *Boyle v. Landry*. Here the plaintiffs were groups of black Chicago citizens who charged various Chicago officials with conspiracy to suppress their First Amendment rights by bringing unfounded charges under a whole collection of allegedly overly broad statutes, including one prohibiting intention to commit any criminal offense. As in *Brooks*, some plaintiffs had been arrested by the time the case got to the Supreme Court, but others had not. None had been arrested, however, when the three-judge district court held the statute invalid. The Supreme Court this time reversed in an opinion written by Justice Black, who was new on the Court. He was joined by Chief Justice Burger and Justices Harlan, Stewart, and Blackmun. Most strange is that Justice Brennan, the author of the majority opinions in *Dombrowski* and its follow-up cases, concurred along with Justices White and Marshall.

In *Boyle*, Justice Douglas was the lone dissenter. Even he accepted the harassment gloss on *Dombrowski*, although he had more to say:

Allegations of . . . harassment under facially unconstitutional statutes should be sufficient for the exercises of federal equity powers . . . .

The eternal temptation, of course, has been to arrest the speaker rather than to correct the conditions about which he complains. I see no reason why these appellees should be made to walk the treacherous ground of these statutes. They, like other citizens, need the umbrella of the First Amendment as they study, analyze, discuss, and debate the troubles of these days. When criminal prosecutions can be leveled against them because they express unpopular views, the society of the dialogue is in danger.\(^\text{108}\)

Justice Douglas' opinion was written to dissent not only in *Boyle* but also in *Younger v. Harris*,\(^\text{109}\) decided the same day. These cases are usually regarded as companions, although the distinction between them is crucial insofar as the plaintiff in *Younger* had already been indicted for violating California's Criminal Syndicalism Act. Consequently, the Court's holding in *Younger*, that it would be improper for

\(^{107}\) 401 U.S. 77 (1971).

\(^{108}\) Id. at 65.

federal courts to enjoin state proceedings except in extraordinary circumstances, should have no bearing on a First Amendment challenge in a case where no prosecution is pending.\textsuperscript{110}

Yet much can be made of the fact that the Court in \textit{Younger} reversed a three-judge district court whose grant of relief to plaintiffs relied on \textit{Dombrowski}. Thus \textit{Younger} adds to the harassment gloss on \textit{Dombrowski} another alternative: bad faith prosecution. After \textit{Younger}, if a plaintiff was not facing bad faith prosecution or harassment, \textit{Dombrowski} could not help him. Furthermore, the \textit{Younger} majority, in dismissing intervenors' claims, posed what can serve as a very strict ripeness test for plaintiffs not yet being prosecuted: "If these [intervenors] had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true—either on the admission of the State's district attorney or on any other evidence—then a genuine controversy might be said to exist."\textsuperscript{111} One should note how far the Court had moved, and how quickly, from recognition and appreciation of the chilling effect doctrine. According to the \textit{Younger} test, it would not be enough for a plaintiff to fear prosecution. Now he would have to come forward and prove that he would be prosecuted—an impossible test to pass, of course, for those chilled into silence.

By 1972, the Burger Court was sitting in full force. Justice Powell had replaced Justice Black the year before, and Justice Rehnquist had replaced Justice Harlan. Justice Blackmun was now in his second year, having replaced Justice Fortas. It was to the Burger Court that the case of \textit{Socialist Labor Party v. Gilligan} came.\textsuperscript{112} This was not a case involving prosecution or even threatened prosecution. It was another case involving a harmful self-executing statutory scheme: Ohio's election laws, including a loyalty oath provision, which the Socialist Labor Party wanted to challenge on First Amendment grounds among others. Other issues in the suit as originally filed had been made moot by an extensive revision of the laws which still left the loyalty oath provision intact.

The Court held the challenge not to be ripe. The opinion was written by Justice Rehnquist. The language in that opinion runs roughshod over prior tests of justiciability:

\textsuperscript{110} See Note, Implications of the \textit{Younger} Cases for the Availability of Federal Equitable Relief When No State Prosecution Is Pending, 72 COLUM. L. REV. 874, 892, 894 (1972).

\textsuperscript{111} 401 U.S. at 42.

\textsuperscript{112} 406 U.S. 583 (1972).
These plaintiffs may well meet the technical requirements of standing, and they may be parties to a case or controversy, but their case has not given any particularity to the effect on them of Ohio's affidavit requirement.

Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present.\(^{113}\)

Chief Justice Burger and Justices Stewart, White, Blackmun, and Powell agreed. Yet it is difficult to know what they agreed to. The opinion seems to say that a case or controversy may not be a case or controversy; what is justiciable may not be justiciable; after all, what is ripe may not be ripe at all.

The facts in the *Socialist Labor* case, however, suggest the nature of plaintiffs' difficulty. They acknowledged that they had taken the oath in the past without injury. They did not allege any effect on their speech or conduct.\(^{114}\) In other words, they showed no proof of their rights being chilled. It was of no consequence to the Court that they objected to filing the required affidavit on constitutional grounds and that if they did not do so they would not be able to function as a political party in Ohio.

Predictably, Justice Douglas dissented, joined by Justices Marshall and Brennan. For the dissenters, the issue was not speculative "for [plaintiffs] allege that they 'will continue to nominate candidates for political office in Ohio in the future.'"\(^{115}\) However, the majority's complaints in *Socialist Labor*, that harm was only speculative and that plaintiffs as active as these could scarcely have their rights chilled, are what mark the real demise of *Dombrowski*.

The case that marks the Court's greatest repudiation of *Dombrowski* is *Laird v. Tatum*.\(^{116}\) This was a class action challenging Army "surveillance of lawful and peaceful civilian activity."\(^{117}\) It arose after *The Washington Monthly* reported in January of 1970 that the Army was collecting information in a national computer bank that came from various sources,\(^{118}\) including the news media, Army intelligence agents who attended public meetings, and civilian law enforcement agencies.

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\(^{113}\) *Id.* at 588, *citing* *Rescue Army v. Municipal Court*, 331 U.S. 549, 574, 584 (1947).

\(^{114}\) 406 U.S. at 587.


\(^{116}\) 408 U.S. 1 (1972).

\(^{117}\) *Id.* at 2.

\(^{118}\) *Id.* n.1.
personnel.\footnote{Id. at 6.} The statute authorizing Army data gathering was not challenged, for its purpose was to provide for the use of federal troops in case of domestic disorder, which "suggests the importance of the need for information to guide the intelligent use of military forces. . . ."\footnote{Analysis by Attorney General Ramsey Clark, quoted id. at 35 n.2.} Rather, the attack went beyond the scope of that necessitated under the statute. Although the district court had dismissed the action, the Court of Appeals reversed and remanded, holding the challenge justiciable. The Supreme Court granted certiorari.

Chief Justice Burger wrote the opinion in this 5-4 landmark case holding the case not ripe because of the absence of a clear connection between the surveillance and any possible chill on plaintiffs' First Amendment rights. With the Chief Justice were Justices White, Blackmun, Powell, and Rehnquist. In their view, plaintiffs were asking for an advisory opinion. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm. . . ."\footnote{Id. at 11.}

The Court acknowledged that it was possible for there to be a constitutional violation where a government regulation could have a chilling effect without directly prohibiting the exercise of First Amendment rights. \emph{Laird v. Tatum} thus was to be distinguished from cases in which "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging."\footnote{Id. at 13-14.} Presumably then a statute regulating the receipt of foreign mail, a statute proscribing disorderly conduct, or a compulsory loyalty oath could still be found unconstitutional because of a chilling effect. Even thought the Court insisted that the "chilling effect" doctrine was still intact, the restriction of regulations, proscriptions, and compulsions would never have been accepted by the \emph{Lamont} Court: "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."\footnote{381 U.S. at 309.} The \emph{Laird v. Tatum} Court did, however, intimate that the Army surveillance operation might not be entirely proper but that its regulation should come from Congress rather than the courts.\footnote{408 U.S. at 15. For a response to this suggestion, see Christie, \emph{Government}}
There were two dissents to the majority in *Laird v. Tatum*, one by Justice Douglas and the other by Justice Brennan. Justice Stewart joined Justice Brennan; Justice Marshall joined both dissents. Douglas looked back with approval to the opinion of the Court of Appeals, arguing that Army surveillance "exercises a present inhibiting effect on [plaintiffs'] full expression and utilization of their First Amendment rights." For him the test of unconstitutionality should simply be a "deterrent effect" on those rights produced by the government. It should be noted here that in spite of their holding, the majority said essentially the same thing: "[G]overnmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." The major distinction between Justice Douglas' view and the majority's is that the latter qualifies "governmental action" to include only regulations, proscriptions, and compulsions.

Both Douglas and the majority, in assessing whether there was a nexus between the government action and the chilling effect, or whether there was a chilling effect at all, looked to the merits in deciding whether the case was ripe. In contrast, Justice Brennan's dissent, also quoting the Court of Appeals, found the case ripe by applying a test that focuses more directly on the timing of the challenge, strictly the proper focus of a ripeness test.

> Under justiciability standards it is the operation of the system itself which is the breach of the Army's duty toward [respondents] and other civilians. The case is therefore ripe for adjudication . . . Because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time.

The majority opinion, however, clearly implies throughout that the finding of the absence of ripeness is actually based on a refusal to

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125 408 U.S. at 25, quoting 444 F.2d 947, 954 (D.C. Cir. 1971).
126 Id.
127 Id. at 12-13.
128 Id. at 39, quoting 444 F.2d 947, 954-56 (D.C. Cir. 1971).
believe that there is a real chill and that the holding on justiciability is actually a holding on the merits as well.

If taken literally, the decision in *Tatum* does not deal with the surveillance's validity, but only with the litigants, ability procedurally to obtain an adjudication of the matter. But the decision cannot be literally read. Despite its disclaimer, the majority's opinion must be viewed as validating the surveillance. By finding no jurisdiction, the Court revealed its opinion that the challenged activity did not pose a sufficient danger to first amendment interests to warrant judicial intervention. It necessarily follows that if the impact on plaintiffs did not enable them to obtain adjudication, it did not impermissibly infringe their first amendment rights.

One who has never knowingly been the subject of government surveillance may read the *Laird v. Tatum* opinion and find it easy to agree with the majority that the gathering and retention of data hardly produces a recognizable chill, especially when the plaintiffs during the litigation themselves are anything but silent in their attempts to redress their grievances. Yet a close look at a case that will never go to court because of *Laird v. Tatum* suggests a contrary view. Shortly before that opinion came down, a complaint had been drafted in a case that was to be styled *Vietnam Veterans Against the War (VVAW) v. Fyke*. This case arose out of the discovery of an informant in the leadership of the VVAW chapter on the campus of Kent State University. The discovery came about when the informant was arrested by a city policeman (who did not know of the arrestee's government connections) for possession of an illegal firearm. When he was released the next day, the firearm having been confiscated by the Bureau of Alcohol, Tobacco, and Firearms, it was revealed that he was an employee of the Kent State University Police Department. Questions were raised about other government employees as well, but, because of *Laird v. Tatum*, they were never answered.

During the course of his association with VVAW, Reinhold Mohr had become a close friend and confidant of his fellow leaders, some of
whom were studying Marxist philosophy. He joined their study group. During this period the home of one of the members was broken into and many VVAW records and Marxist documents were taken, although money and other valuables in plain sight were not taken. According to plaintiffs, this same young man, Mohr, began to intimate that his weapons, one Chinese and the other Vietnamese, both illegally possessed, might be useful to VVAW. They might be used in photographs for posters (which, though he did not tell them, could have led to the arrest of anyone pictured with the weapons); easily made operable, they could also be used for their original destructive purposes. It was when he began to talk of not only illegal but violent activity that his fellow VVAW leaders began to grow suspicious of Mohr. Shortly afterwards he was arrested and his identity revealed, at least partially.

However, the point is that having him identified and removed from the group did not solve the problem. If the government had found their organization sufficiently suspicious to warrant paying an informant to become an active part of it, it was reasoned, surely the government would not let them go unwatched from that point forward. Who then, they wondered was Reinhold Mohr's replacement? Or had he had a partner all along? From that moment on, virtually every member of the group was suspected at one time or another. Old friends began to mistrust each other. In two's they would concoct loyalty tests for a third person. The next week that person, together with another, was testing someone else. Shortly thereafter the organization began to disintegrate. The chilling effect had taken its toll. 152

152 For a discussion of how informants' violation of the right to privacy leads to violation of First Amendment rights as well, see Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUNDATION RESEARCH J. 1195, especially at 1234:

[If the individual is to participate meaningfully in the democratic process, he must at least be able to discuss frankly and openly his half-formed and tentative ideas with friends and associates before deciding whether to express them publicly. A loss of confidence in our ability to keep such conversations private could, because of a fear of public or official disapproval or perhaps even more tangible retaliation, have a serious inhibiting effect upon our willingness to express such views, even "privately." And when such an inhibition exists "dissent from the popular view is discouraged, intellectual controversy is smothered, the process for testing new concepts and ideas is hindered and desirable change is slowed." (footnotes ommitted), quoting in part, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 18 (1967).]
Some, of course, would say that those VVAW members were paranoid, that they had nothing to fear if indeed they were engaging in or planning no illegal activity. But related events during the same period suggest otherwise. It was a period of many rallies on the Kent State University Commons. Not only did the VVAW sponsor several antiwar demonstrations, but other groups protesting various University actions called rallies, and on May 4, there was a memorial for the students slain there in 1970. A professor attending that gathering had occasion to speak to a man wearing headphones and carrying a camera. He identified himself to her as a member of a local TV news team. Shortly thereafter, she met him again. It turned out that he was a plain clothes detective for the Kent State University Police. When the students became suspicious of the extent of surveillance at rallies, many would not attend for fear of the consequences. Some professors warned their students that they might not be able to get jobs later if their names or pictures turned up in the wrong file. When the American Civil Liberties Union (ACLU) began preparing to draft the complaint in *Fyke*, they had no trouble securing a long list of potential plaintiffs who would claim that they had not engaged in a variety of constitutionally protected activities because of surveillance on the campus.

The extent of harm done by that surveillance was not known, however, until discovery began in *Scheuer v. Rhodes*, the Civil Rights action that followed the Kent killings. The ACLU office was then piled high with documents from the FBI, the Ohio Highway Patrol, the Bureau of Criminal Investigation, and a host of other surveillance organizations. The records on students, faculty, and other members of the University community were all there. They reported everything from which meetings people attended and with whom, to what some professors said in their classes. Because one of the professors happened to be working on the *Scheuer* case and thus had access to

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133 *See* Dix, *supra* note 130, at 241: Even if the surveillance does not involve direct or indirect pressure not to engage in protected activities and does not result in the use of the information in that way, it is arguable that those subjected to the surveillance may nevertheless fear such abuse and refrain from engaging in the protected activity on this basis. In addition . . . subjecting behavior such as the exercise of the right of assembly and petition to surveillance has the effect of labeling it undesirable and thus discouraging persons from engaging in it because it is recognized by others as undesirable. In either case the result is a reduction in the behavior involved.

the records, it quickly emerged that much of what they reported was not true.

Yet in spite of the very real injuries to the First Amendment rights of many people inflicted by the informant in the VVAW and the rest of the surveillance activities on the Kent State University campus, Fyke will never go to trial. After Laird v. Tatum, the class action, seeking a declaratory judgment and an injunction, was amended to make it strictly a damage action with named members of VVAW as the only plaintiffs. The case is now being settled out of court. The plaintiffs will receive a few dollars for their trouble. Reinhold Mohr has recently been seen riding around the Kent campus in a police car. Most of the current students do not recognize him although large posters showing his picture once covered the campus. VVAW has been defunct for a long time on the Kent campus.

Another 1974 surveillance case demonstrates a different kind of response to Laird v. Tatum. Although Socialist Workers Party v. Attorney General$^{135}$ did not reach the Supreme Court, Justice Marshall's Opinion in Chambers as Circuit Justice on an application to stay an order is instructive for his analysis of the ripeness doctrine. The plaintiffs in this case apparently studied Laird v. Tatum well so as to pass the ripeness test. Consequently, the district court granted an injunction barring the FBI from attending the Young Socialist Alliance (YSA) national convention after plaintiffs alleged that surveillance would dissuade some delegates from active participation and others from attending at all, and would cause some in attendance to lose their jobs if they were identified as having attended. The Court of Appeals vacated the injunction except for the provision barring the FBI from forwarding the names of those in attendance to the Civil Service Commission.

Justice Marshall responded to plaintiffs' careful pleading by finding the case ripe, distinguishing it from Laird v. Tatum:

In this case the allegations are much more specific . . . . Whether the claimed "chill" is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under Laird, to satisfy the requirements of Art. III.$^{136}$

On the merits, Justice Marshall decided that informants, themselves members of YSA (just as Mohr was a member of VVAW), had as

$^{135}$ 419 U.S. 1314 (Marshall, Circuit Justice, 1974).

$^{136}$ Id. at 1319.
much right to attend the convention as anyone else.\textsuperscript{137} Not only that, but "[t]o require informants who may be active members of the organization to remain silent throughout the convention would render them as readily identifiable in some cases as an order excluding them."\textsuperscript{138} Since the FBI had no plans to disrupt the meeting and since it promised not to transmit information to non-government entities, the FBI informants could attend. The application to stay the Court of Appeals order was denied.

In spite of his finding against the plaintiffs on the merits, what is particularly to be noted about Justice Marshall's opinion is that he did not use the ripeness doctrine as a tool for avoiding the merits. His willingness to approach both ripeness and the merits of the case directly and to discuss both explicitly should be kept in mind if one is tempted to interpret his vote against ripeness in some other case as unwillingness to deal with the merits.

In view of \textit{Laird v. Tatum}, however, the Court's holding also in 1974 that \textit{O'Shea v. Littleton}\textsuperscript{139} was not ripe seems to follow a fortiori. In fact, in that time of national concern about surveillance, this civil rights case seemed almost a throwback to the 1960's. The plaintiffs were blacks conducting an economic boycott in Cairo, Illinois. They alleged that the local magistrate and circuit court judge were conducting a pattern and practice of illegal bond-setting and sentencing. Although the court of appeals reversed the district court's dismissal of the action, it was fatal to the plaintiffs' claim in the Supreme Court both that none of the named plaintiffs had been arrested and that they were not challenging the constitutionality of any statute but only the procedure followed in administering admittedly constitutional statutes. Calling the claims "speculation and conjecture," Justice White, joined in the majority by Chief Justice Burger and Justices Stewart, Powell, and Rehnquist, with Justice Blackmun concurring, declared: "Apparently, the proposition is that if respondents proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed."\textsuperscript{140}

Yet Justice Douglas' dissent in which Justices Brennan and Marshall joined, is as bitter as the majority is scornful:

\textsuperscript{137} \textit{Id.} at 1316.
\textsuperscript{138} \textit{Id.} n.2.
\textsuperscript{139} 414 U.S. 488 (1974).
\textsuperscript{140} \textit{Id.} at 497.
What has been alleged here is not only wrongs done to the named plaintiffs, but a recurring pattern of wrongs which establishes, if proved, that the legal regime under control of the whites in Cairo, Illinois, is used over and over again to keep the blacks from exercising First Amendment rights, to discriminate against them . . . . This is a more pervasive scheme for suppressing blacks and their civil rights than I have ever seen . . . . [I]f this case does not present a "case or controversy" involving the named plaintiffs, then that concept has been so watered down as to be no longer recognizable.141

Another case from that same year, however, one in which Justice Douglas did not participate, suggests that his worst fears were not entirely well-founded. In Steffel v. Thompson142 the Burger Court unanimously held a challenge to a trespass statute ripe and included no implications of opposition to plaintiffs' claim on the merits. The subject matter in this case also harkens back to earlier times. Plaintiff here was distributing handbills against the Vietnam War. He was asked to leave the exterior sidewalk of a Georgia shopping center; he left but his companion stayed and was arrested. Threatened with arrest if he returned, the plaintiff filed suit, which was dismissed by the district court and affirmed by the court of appeals.

According to Justice Brennan, writing for the Supreme Court in its reversal, when one has actually been threatened with arrest and his companion has already been arrested, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."143

III. A COLLECTION OF AMERICAN AND CANADIAN TRESPASS CASES: THE EMERGENCE OF CONVERGING TRENDS

A. The American Cases: The Retreat from Logan Valley to Hudgens and Spock

Steffel v. Thompson might be read as encouraging for the future of American dissent. It is misleading, however, to view it simply as representing a shift in the Court's theory of ripeness from that reflected in Laird v. Tatum and O'Shea v. Littleton. As a trespass case, Steffel deserves particular attention for more than its treatment of ripeness. Trespass is one of the typical charges to which groups of

141 Id. at 509.
143 Id. at 459.
political dissenters are subject. Steffel comes in the midst of a series of trespass cases that show the emergence of a whole new approach to political speech by the United States Supreme Court and the Canadian Supreme Court as well. Discussion of ripeness is absent in the American cases almost as completely as in the Canadian ones. The Justice whose words bear noting in the American cases is Justice Stewart.

Justice Stewart's concurring opinion in Steffel puts an important gloss on that case. He stresses that feeling one's rights chilled is not enough to give plaintiff a justiciable case. The plaintiff in Steffel succeeded only because of "a genuine threat of enforcement of a disputed state statute." Justice Stewart comments that he expects such "genuine threats" to be "exceedingly rare," suggesting that "genuine threat" should be very narrowly defined. Is it enough for one's companion to have been arrested though one has not been expressly threatened with arrest by someone capable of either making the arrest or seeing that it is made? Quite possibly not. Such a requirement of an articulated threat made personally from someone capable of executing it may seem a reasonable enough requirement in a context involving only two or three people distributing leaflets. Such a requirement becomes at least less practical if not less reasonable in a different context involving a large group of people, perhaps not even all gathered in the same place. It is easy to see how "genuine threats" can be exceedingly rare.

Only two years before Steffel, Justice Stewart had joined Justice Marshall's dissent in Lloyd Corporation v. Tanner, another trespass case with facts resembling those in Steffel but with an opposite result. Here five Vietnam War protesters were distributing leaflets in a Portland, Oregon shopping mall. None was arrested. However, when security guards told them to leave, they did so to avoid arrest. Here then is a prior case involving one of Justice Stewart's "genuine threats." The Oregon protesters were granted both declarative and injunctive relief by the district court, and the decision was affirmed by the court of appeals. The Supreme Court reversed, in an opinion written by Justice Powell.

What makes Lloyd different from Steffel but similar to the others in this series of trespass cases is that the focus of the challenge is not the trespass statute but the shopping center's own regulation against handbills. For the Lloyd Court this is a crucial difference. "[T]he First

144 Id. at 476.
and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on State action, not on action by the owner of private property used non-discriminatory for private purposes only..."146

There are two thorny issues buried in Justice Powell's truism, neither of which the Lloyd majority faces at all in its eagerness to resolve the case by extolling the rights of the private property owner. The first comes in a reference to state action. In the 1960's, faced with a number of cases involving racially discriminatory private businesses, the Court had relatively little difficulty finding state action or its equivalent as required by Title II of the Civil Rights Act of 1964147 to prohibit racial discrimination by private businesses accommodating the public. The Act brought some in the business of public accommodation under its control by virtue of the Commerce Clause.148 The Heart of Atlanta Motel was not permitted to exclude blacks because it solicited patronage from non-Georgia customers and so was involved in interstate commerce.149 Even Ollie's Barbecue, a family-owned restaurant in Birmingham, Alabama, not catering to interstate travelers, was covered by Title II because it received some of the food it served through interstate commerce.150 Thus developed what some have called the "catsup bottle rule" that works in the employment discrimination cases under Title VII151 as well. If a business uses as much as one bottle of catsup that has traveled in interstate commerce, according to this rule the business can be covered by the Civil Rights Act of 1964.

Earlier sit-in cases had favored protesters if there was even remote complicity by the state (or city) in private discrimination.152 Once Katzenbach v. McClung sustained the constitutionality of Title II's prohibition of racial discrimination in places of public accommodation, protesters could look forward to the statutory remedies provided by the Act as well as the protection of the Equal Protection Clause. A

146 Id. at 567.
148 U.S. CONST. art. I, § 8, cl. 3.
further advantage came in 1966 when United States v. Price\textsuperscript{153} established that for purposes of § 1983 civil rights actions,\textsuperscript{154} "[acting] 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. . . ."\textsuperscript{155} Finally, in 1970 a white school teacher was able to succeed in her § 1983 action\textsuperscript{156} based on a refusal to serve her while she was in the company of black pupils at a lunch counter in Hattiesburg, Mississippi. For violation of her Fourteenth Amendment right to equal protection, it was enough for her to show that the refusal of service was a state-enforced custom. This alone was sufficient for the private business to be acting "under color of law."

Such is the recent history of private property rights in the realm of equal protection law. One should note how methodically private action became the equivalent of state action when the property owner wanted the unwelcome to be considered trespassers; how different is the recent history when the unwelcome are not blacks and their supporters protesting against racial discrimination but people of either race protesting against war or unfair labor practices or the sale of California grapes.

Justice Powell in his Lloyd opinion raises an additional issue which gets short shrift there when he refers to "private property used non-discriminatorily for private purposes only." The reference to lack of discrimination, of course, suggests a distinction between this case and the sit-in cases. The Lloyd Center's policy against handbills was a strict one that admitted no exceptions. Where then is the discrimination?

It becomes evident when one gets a complete picture of the facts in the case. The shopping mall here is in downtown Portland. It covers fifty acres of land and includes within its confines not only the stores and other businesses typical of contemporary shopping malls but also an auditorium so large that when the Presidential candidates visited Portland in 1972, it was there that they spoke, having been invited to do so by Lloyd Center. The complete picture of the use to which this mall is put does not emerge until one reads Justice Marshall's dissent.\textsuperscript{157} It turns out that the Salvation Army, the Volunteers of America, and the American Legion are allowed to solicit there. On

\textsuperscript{153} 383 U.S. 787 (1966).
\textsuperscript{155} 383 U.S. at 794.
\textsuperscript{157} 407 U.S. especially at 578-79.
Veterans' Day there is a parade within the mall and patriotic speeches are given in a commemorative celebration. Plaintiff Lloyd Corporation contended that such activities, particularly the visits from Presidential candidates, draw business to the mall. This is likely so. On the other hand, it appears that certain speakers there are enjoying a full range of First Amendment rights even though some of them, paraders in particular, very likely also cause some annoyance to shoppers at the mall. Yet five Vietnam War protesters, who had just as much to do with the private use of the mall as do solicitors for the American Legion, had to leave to keep from being arrested. One must wonder if the charity solicitors do not hand out any literature at all to those who approach them—or whom they approach. If there is literature, how does it escape the anti-handbill regulation?

For the Lloyd majority, however,

[the handbilling by respondents . . . had no relation to any purpose for which the center was built and being used. . . . The message sought to be conveyed . . . was directed to all members of the public, not solely to patrons of Lloyd Center or any of its operations. Respondents could have distributed these handbills on any public sidewalk, in any public park, or in any public building in the city of Portland.]

One could surely say the same of the solicitors for the American Legion. However, what they no doubt recognize is what the Vietnam protesters recognized as well: the contemporary giant shopping malls have become the places where one must go to reach urban American people. They will no longer be found in great numbers on downtown sidewalks or in public parks. Justice Marshall understood the problem very well.

The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.\footnote{159 Marsh v. Ala., 326 U.S. 501, 506 (1946).}

When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality.\footnote{160 407 U.S. at 586 (Marshall, J., dissenting).}
Justice Stewart agreed, as did Justices Douglas and Brennan. The majority preferred to devote its attention to distinguishing Lloyd from Amalgamated Food Employees Union v. Logan Valley Plaza\textsuperscript{161} so as to avoid overruling it. Logan Valley was grounded on the Marsh case quoted by Justice Marshall. Marsh had reversed the trespass conviction of a Jehovah's Witness who distributed literature without a license in Chickasaw, Alabama. What mattered was that Chickasaw was a company town and so the company regulations were treated by the Court as though they were municipal ordinances. In Logan Valley, a shopping center was held to be "clearly the functional equivalent of the business district of Chickasaw. . . ."\textsuperscript{162} It was further held that "the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."\textsuperscript{163}

This holding was narrowed somewhat, however, by express reference to certain facts in the case but not to others. The facts that mattered were that the union picketers here were picketing the non-union Weiss Market and doing so in front of that store. In other words, the holding was to leave entirely open the Court's view as to picketing "not thus directly related in its purpose to the use to which the shopping center property was being put."\textsuperscript{164} It apparently did not matter at all that, at the time of the picketing, there were only two businesses in the Logan Valley Plaza, making it very different from Chickasaw and providing a very real basis on which to distinguish Logan Valley Plaza from Lloyd Center, although the Lloyd Court did not seize upon that distinction.

It should be noted also that among the dissenters in Logan Valley was Justice Black, who had written the Marsh opinion. For him, the property would have to take on "all the attributes of a town"\textsuperscript{165} for Marsh to govern. But the Lloyd majority was not interested in pursuing whether Lloyd Center was the functional equivalent of a town. If it had done so, it is difficult to imagine how the Court could have escaped concluding that the fifty-acre Lloyd Center was, indeed,\footnotesize{
\begin{itemize}
\item\textsuperscript{161} 391 U.S. 308 (1968).
\item\textsuperscript{162} Id. at 318.
\item\textsuperscript{163} Id. at 319-20.
\item\textsuperscript{164} Id. at n.9.
\item\textsuperscript{165} Id. at 332.
\end{itemize}}
equivalent if the two-store Logan Valley Plaza was. What mattered to Justice Powell in his 5-4 opinion was that "Logan Valley extended Marsh to a shopping center situation... in a context where the First Amendment activity was related to the shopping center's operation." If such a restriction can be placed upon expression in a shopping center setting and if the shopping center becomes the best forum, or perhaps the only real one, for political minorities who cannot pay the mass media to spread their word, then it is easy to see how freedom of speech must become a second-rate freedom in spite of its historically fundamental importance.

There are two remaining trespass cases in the American series. The opinions in both were written by Justice Stewart, who, it should be remembered, joined Justice Marshall's dissent in Lloyd. In Hudgens v. NLRB, however, he does what Justice Powell refused to do in Lloyd, that is, to declare Logan Valley overruled. Here members of a striking union picketed in front of one of their employer's retail stores, the Butler Shoe Company, in a Georgia mall. They left when threatened by the general manager of the shopping center with trespass arrest, and none was arrested. Their union filed unfair labor practice charges with the NLRB, which issued a cease-and-desist order against the shopping center. The court of appeals enforced the order. In vacating the order and remanding the case, the Supreme Court made much of the fact that the picketers here were warehouse employees, that they did not themselves work in the retail store in front of which they were picketing. This is a more strict requirement even than that imposed in Lloyd.

However, the major significance of the Stewart opinion is its decision that "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." [Instead] the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act [NLRA]. Under the Act the task of the Board... is to resolve conflicts between §7 rights and private property rights... The task of
the Board and the reviewing courts under the Act, therefore, stands in conspicuous contrast to the duty of a court in applying the standards of the First Amendment. . . .

According to Justice Stewart then, if the NLRA controls, the First Amendment does not. If speech can be characterized as a labor practice, it can be subject to regulation *vis-à-vis* property rights of the employer without reference to the Constitution, at least as long as the speaker does not himself work in the same place at which he pickets.

Justice Marshall in his dissent completely scorns the majority's leaping to overrule *Logan Valley* when, in his view, it is reconcilable with *Lloyd* and when *Hudgens* could have been decided on entirely statutory grounds. It remains to be considered why Justice Stewart, who joined Marshall's dissent in *Lloyd*, should in *Hudgens* appear to go so far to reverse the position expressed there. The answer may be simply that he felt compelled to do so. He disagreed with *Lloyd*'s holding, but he believed that the holding did indeed overrule *Logan Valley*. Without *Logan Valley* for support and without a company town in *Hudgens* to justify invoking *Marsh*, for him there was only one result possible: to follow *Lloyd*. Not wanting to be responsible himself for not allowing the picketing, he found the NLRA an acceptable way out.

Justice Stewart in this case is not an eager opponent of dissenting speech; rather he is a careful, safe proponent of *stare decisis*.

However, there is yet another Stewart opinion to consider, that in *Greer v. Spock*. This time the setting is not a shopping center but a United States military installation, Fort Dix; therefore, there is no difficulty establishing state action in the prohibition of the speech in question. Benjamin Spock and other candidates from the People's Party and the Socialist Workers' Party sought to distribute leaflets and to speak at Fort Dix as part of their campaign before the 1972 Presidential election. Although Dr. Spock did not attempt to campaign there before seeking permission, some others did. They were evicted and barred from re-entry. When they all then sought official permission, it was denied pursuant to regulations at the post banning partisan political speeches and demonstrations and prohibiting distribution of literature without approval of its contents. After the denial, the candidates sought to enjoin enforcement of the regulations. The district

172 424 U.S. at 521.
173 *Id.* at 531-32, 535.
174 *See id.* at 520-21.
court at first denied the injunction; however, after the court of appeals reversed, the district court issued a permanent injunction, which was then affirmed by the court of appeals. The Supreme Court reversed.

Even though the regulations unquestionably constituted state action, so that there was no need whatsoever to go through anything like the shopping center analysis, that is exactly what Justice Stewart did. Just as in *Lloyd* and *Hudgens* there was attention to whether the First Amendment activity was compatible with the purpose of the owner's use of his property. Here, according to Justice Stewart, "it is . . . the business of a military installation like Fort Dix to train soldiers, not to provide a public forum."\(^{176}\) Yet the area where Spock and his associates wished to speak and distribute literature was an unrestricted one, completely open to public traffic. One could also have said that the business of city streets and sidewalks is to move vehicular and pedestrian traffic and thus conclude that a hypothetical municipal ordinance would be valid even if it prohibited speeches and distribution of literature on the city streets and sidewalks.

To understand fully the import of the *Spock* decision, however, it is important to consider the rationale used to justify the challenged regulations. There were two different kinds of regulations with a different rationale for each. The regulation against partisan political speeches was claimed to be justified by the need to maintain "the reality and appearance of the political neutrality of the Armed Services. . . ."\(^{177}\) Yet, assuming this need to be legitimate, post practices do not operate consistently to meet it because the Fort Dix recruits do have access to radio and television; consequently, certain political ideologies do indeed find expression at Fort Dix. However, Dr. Spock's brand of antimilitarism does not get the same coverage in the mass media that the pro-military establishment does. One cannot escape recalling Justice Marshall's assessment in *Lloyd* of the plight of the five war protesters with their leaflets being evicted from the mall where Richard Nixon was invited to speak. So much for the "reality and appearance of neutrality" with respect to partisan speakers.

With respect to the partisan written word, it should first be noted that the Fort Dix recruits also have access to certain newspapers: the popular press more likely than the underground or other alternative papers. Justice Stewart on the Fort Dix regulation against distribution of campaign literature declared:

\(^{176}\) *Id.* at 838.

\(^{177}\) *Id.* at 845 (Powell, J., concurring).
[I]t is to be emphasized that it does not authorize the Fort Dix authorities to prohibit the distribution of conventional political campaign literature. The only publications that a military commander may disapprove are those that he finds constitute "a clear danger to [military] loyalty, discipline, or morale," and he "may not prevent distribution of a publication simply because he does not like its contents," or because it "is critical—even unfairly critical—of government policies or officials. . . ."\textsuperscript{178}

The attention to that which the commander may not do sounds impressive. It sounds indeed like careful protection of First Amendment rights, but is it really? The first part of the statement setting forth what he may do appears to cancel out the protection of the second part. What is to prevent the commander from prohibiting anything he wishes? All he need do, it appears, is to recite that the publications in question "constitute a clear danger to loyalty, discipline, or morale." Such a discretionary system calls to mind the Quebec by-law, challenged in \textit{Saumur} allowing the police official to suppress any publication he was satisfied was a danger to "cleanliness, good order, peace and public security."\textsuperscript{179} In his easy acceptance of the Fort Dix regulation, Justice Stewart sounds very much like Chief Justice Rinfret in \textit{Saumur}.

Of the two strong dissents in \textit{Spock}, it is Justice Brennan's that most directly takes Justice Stewart to task for that acceptance:

Requiring prior approval of expressive material before it may be distributed on base constitutes a system of prior restraint; a system "bearing a heavy presumption against its constitutional validity. . . ." The Court's tacit approval of the prior restraint imposed under Fort Dix Reg. 210-27 is therefore deeply disturbing. Not only does the Court approve a procedure whose validity need not even be considered in this case, but also it requires no rebuttal of the heavy presumption against that validity.\textsuperscript{180}

What has happened here is that the military commander has been treated as though he were the owner of a shopping mall, and Fort Dix as though it were Lloyd Center or the North DeKalb Shopping Center in \textit{Hudgens}. The business of a shopping center is to sell merchandise and services. The business of a military base is to train soldiers. Never mind that the shopping center is allowed also to serve as a forum for expression by the American Legion, say, or by Richard Nixon. Never

\textsuperscript{178} \textit{Id.} at 840.
\textsuperscript{179} [1953] 4 D.L.R. at 647.
\textsuperscript{180} 424 U.S. at 865-66.
mind that the military base is allowed to serve as a forum for "conventional," that is, pro-military publications. If the property owner thinks certain speakers will be advantageous to his purpose of making money by selling goods and services and others will not, that is his business. And if the military commander can be turned into a property owner by some amazing sleight of hand, then he, too, can restrict the use of "his" property to suit his purposes, even when "his" property is a public thoroughfare with unrestricted public access.

Agreeing with Justice Brennan that the Spock decision is comparable to the one in Hudgens in "narrow[ing] the opportunities for free expression in our society," Justice Marshall goes farther in his dissent to provide a complete assessment of the state of First Amendment rights in this country in the wake of Spock:

The First Amendment infringement that the Court here condones is fundamentally inconsistent with the commitment of the Nation and the Constitution to an open society. That commitment surely calls for a far more reasoned articulation of the governmental interests assertedly served by the challenged regulations than is reflected in the Court's opinion. The Court, by its unblinking deference to the military's claim that the regulations are appropriate, has sharply limited one of the guarantees that makes this Nation so worthy of being defended. I dissent.

What emerges unmistakably in this recent series of American trespass cases is a combination of two related trends. One is that the First Amendment right of freedom of speech and assembly, which traditionally has been regarded in this country as fundamental, "a freedom that is given a preferred place in our hierarchy of values," has come to lose its preferred status except insofar as perfunctory lip service is paid to it. Instead it is weighed at best equally in the balance against property rights, statutory rights of employers, and the self-proclaimed rights of military commanders. The related trend, the one, in fact, that has enabled the first to occur, is the tendency to bypass questions of justiciability altogether to go directly to the merits of the cases where the equally balanced rights compete, to the decided detriment of the First Amendment.

It may even seem that these recent trespass cases are out of place in a discussion of the Court's use of the ripeness doctrine. There is no

181 Id. at 869.
182 Id. at 873.
attention to the ripeness issue in them. However, that is precisely the point. While such attention is not there, it almost certainly would have been, had the cases been decided earlier. Yet here in a series of cases in which political protesters have left their chosen fora, or in the case of Spock not gone to them at all, because of the fear of arrest, but have not themselves been arrested or been in the company of someone who was, there was no concern as to whether their challenges were ripe.

Perhaps the former interpretation of ripeness was a blessing in disguise. By not acknowledging ripeness until the harm to potential plaintiffs was substantial, the remedy available to such plaintiffs was also more significant. The current climate is considerably less healthy, for the recent decisions, which say not a word about a chilling effect, themselves impose a terrible chill. The dissident who is brave enough to challenge a repressive regulation, proscription, or compulsion risks far more than having his challenge deemed unripe. He risks a decision on the merits which is likely to fence off still another forum for free speech and assembly and fence it off not only for him but also for all those who follow him until some future Supreme Court, its justices not even yet identifiable, goes to the laborious trouble to overrule the Burger Court’s decisions.

B. The Canadian Trespass Cases Revealing Comparable Trends

The trends in the American cases show up in sharper relief when viewed in light of trends in a series of Canadian trespass cases from the same period. The Canadian Bill of Rights, with its qualified guarantee of protection of free expression, had been in force for a full nine years before consideration of the first of these cases, Regina v. Burko and Five Others. This is not a Supreme Court case; the trespass conviction here was not even appealed. This case is useful, however, as a starting place for the series because of some of the assumptions implicit in the magistrate’s opinion.

The case arose when six university students, without seeking permission, attempted to sell a newspaper in the halls of a high school. They were convicted for violating the Ontario Petty Trespass Act, and were assumed by the court to have been wanting to test the validity of that Act. In fact, that assumed motive appears to have been...

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185 ONT. REV. STAT. c. 294 (1960).
186 3 D.L.R.3d at 392.
been instrumental in their conviction. The court paid particular attention to their “not acting under a fair and reasonable supposition that they had a right to do what they did.”

Although the court does not describe the exact contents of the defendants' newspaper, the opinion is particularly remarkable to the American reader for its open acknowledgement that objectionable content is reason enough for its suppression, at least in the setting of a school: “[I]t is contrary to the public good to permit individuals on public or secondary school property without the permission of the proper authorities for the purpose of disseminating information or ideas, particularly when such information or ideas may not be in accordance with the curriculum established by the state for the public good.”

Although the high school in question here was not a private one, the court made much of the point that it was owned by the School Board. Wanting to suppress the flow of ideas in the very place where ideas should flourish, that is, a school, seems particularly inappropriate. But it is difficult to read the magistrate's opinion without thinking of the Fort Dix commander wanting to control the dissemination of ideas that he finds not in accord with the public good. The magistrate proceeded however, to a truly astounding conclusion: “[O]urs is a democratic society and can be changed, albeit slowly, in a democratic way. Therefore, no minority has the right to try to impose its will on the majority no matter how well-meaning or sincere their thinking may be.”

Freedom of expression is never mentioned in the opinion, and indeed appears to be a nonexistent concept in the mind of the magistrate who wrote it. Even the magistrate who took it upon himself to lecture the pacifist teacher, Mr. Coffin, about the patriotic duties of a Canadian citizen in time of war, did so with the understanding that only in time of war need schools abridge free discussion. Canada was not at war in 1969.

Two years later the Supreme Court had occasion to review another conviction under the Ontario Petty Trespass Act, in the case of Regina v. Peters. Mr. Peters was arrested while picketing a Safeway

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187 Id. at 330 (syllabus).
188 Id. at 336.
189 Id. at 337 (emphasis added).
190 See text accompanying note 101 supra.
store that was selling California grapes during the union dispute in the United States over the rights of the grape pickers. There was at the time no dispute between Safeway and its employees and no strike in progress. Mr. Peters had no connection with the store. His purpose was to support the grape boycott. His arrest, however, led to a challenge of the Ontario Petty Trespass Act, which the Ontario Court of Appeals held *intra vires*. The Supreme Court unanimously dismissed his appeal, affirming that a store owner's possessory interest in his property entitles him to expel picketers. It should be noted that the *Peters* case antedated *Lloyd* in the United States by one year.

In 1974, the same year as *Steffel*, in the case of *Regina v. Carswell*, the Manitoba Court of Appeals dismissed a conviction under that Province's Petty Trespass Act. Here the picketer was an employee engaged in a lawful strike. The Court's reasoning deserves special attention. First, after a long history of Canadian courts refusing to draw any analogies with American free speech cases because of the major differences in constitutional law in the two countries, the court here specifically relied on American First Amendment cases, *Logan Valley* and *Marsh* in particular, making very little of the distinction between the two judicial systems, and noting only that in Canada freedom of expression is a "common law right." Although the free speech advocate might prefer to read about free speech called by that name, it matters little that it should be labeled as a policy right or even a matter of common sense as long as it prevails. The Court of Appeals opinion in *Carswell* is in many respects an echo of Justice Marshall's opinion in *Logan Valley*. Just as the area in front of the Weiss Market was the only appropriate place for the union picketers effectively to protest the nonunion shop in the Logan Valley Plaza, so here:

195 48 D.L.R.3d at 141.
196 Id. at 142-43.
To deny a striking employee access to the sidewalk in question for the purpose of peaceful picketing is to prevent the exercise of picketing at the one point where it can really be effective. If the picketing cannot be maintained in the immediate vicinity of Dominion Stores but has to be conducted no nearer than the public thoroughfare surrounding the perimeter of the shopping centre, a number of practical difficulties are at once encountered. The information which the picketer wishes to convey becomes much more difficult to communicate effectively, if only on account of distance. The whole purpose of peaceful picketing—the communicating of information to the public—is thus to a great degree defeated.197

If the American reader finds pleasure in seeing evidence of American cases serving as a basis for expanding the right of free expression in Canada, that pleasure is short-lived. The Carswell Appeals Court opinion having opened the door to the citation of American cases, the Canadian Supreme Court on appeal also looked to the United States Supreme Court, but this time to Lloyd. Harrison v. Carswell198 reversed the Court of Appeals and restored Carswell's conviction. Dissenting Chief Justice Laskin looked with approval to Logan Valley, but Justice Dickson in the majority opinion found no distinction between this case and Peters. Citing a number of cases on the importance of stare decisis, he wrote a careful, safe opinion that steered so completely clear of any express attention to the right of free speech that, if its author were unidentified, one might suppose Justice Stewart had written it:

The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socioeconomic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this Court under the Canadian Constitution. The duty of the Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the Court to act creatively—it has done so on countless occasions; but manifestly one must ask—what are the limits of the judicial function?199

197 Id. at 140.
199 Id. at 82.
As if Justice Dickson's answer to his own question were not foreordained by his laborious preface, he then gathered his collection of citations on *stare decisis*, from which he concluded that there was only one thing to do—follow *Peters*.

Here then is what happens when the Canadian Court suddenly feels it appropriate to look to the American Supreme Court for guidance. In the Canadian cases also, freedom of expression, almost as soon as it has been given Bill of Rights protection to all, begins to be balanced against property rights with the latter growing heavier and heavier until expression grows so light that the slightest breeze blows it off the scales. First, it grows lighter when its name changes. Once it has become a policy rather than a fundamental right, it grows lighter still labeled as a socioeconomic belief. Thus by the process of increasing abstraction, it loses more and more concrete substance until it virtually disappears.

**IV. CONCLUSIONS**

Looking at the American trends reflected in the Canadian ones is a disturbing experience. For one thing, while one does not expect to find any discussion of ripeness in the Canadian cases, one does expect pre-arrest United States cases to differ significantly from post-arrest Canadian cases because of the particular doctrines of justiciability in the United States. For this reason, the great similarity is striking between *Harrison v. Carswell*, restoring a conviction, and *Peters*, affirming one, on the one hand, and *Lloyd, Hudgens* and *Spock* on the other hand. In both systems there is now a great willingness to go directly to regulations and proscriptions and to declare their validity based on rights, or even values and interests, which one would think less weighty than rights, that have nothing to do with how crucial it is for freedom of expression to prevail if democracy in our governments is to survive.

Ultimately, having a Bill of Rights either as part of a Constitution or as a separate document, is of little significance if its spirit does not inhere in the thinking of the Justices who are charged with applying it in the cases that come before them. "[T]he words are hollow if the tradition and belief of the people, or the power of the government, is contrary to the existence of the freedom." The analysis here has not attempted to assess the tradition and belief of the Canadian and American people; however, it does bear upon the power of the judicial branch of the two governments. That power rests with the individuals...
who happen to sit at the bench when any given case comes before the Courts. Thus the analysis here has given special attention to the language of the various justices in both majority opinions and dissents. It is consequently easy to see that the trends shift with shifts in the composition of the Courts. The landmark 1950's cases in Canada were infused with the bold spirit of Justices Rand, Kellock, Kerwin, and, to some lesser extent, Locke and Estey. When *Harrison v. Carswell* came before that Court, all of those Justices were gone. The leading free speech advocate in the liberal American 1960's was, of course, Justice Douglas, joined usually by Justices Brennan and Marshall. Now that Justice Douglas has left the Court, it has turned out to be Justice Marshall who writes the bold dissents in the trespass cases, with the conservative majority opinions penned by Justice Stewart.

Justice Stewart's opinions, like that of Justice Dickson in *Harrison v. Carswell* and those of Justices Rinfert and Taschereau in the 1950's, take no risks. They take a narrow look at a property owner's account of the facts, and never look beyond to the wider view of the seriously unequal opportunities for expression available to political majorities and minorities. They are more than ready to defer to the regulations, prohibitions, and compulsions dictated by those in positions of established authority.

Precisely because of the power such opinions wield over the lives of human beings, it is important to understand the danger inherent in that power.

Liberty depends upon a recognition of two realities: first, that men who mean to enjoy it must run some risk for the sake of maintaining it; and, second, that through excessive zeal, or through the incorrigibly corrupting influence of power, authority is forever in danger of overstepping its boundaries.

The central problem of political science in a free society is the preservation of a rational balance between order and liberty. It is quite true, of course, that eternal vigilance is the price of liberty. But it is imperative to remember that the vigilance demanded by this maxim means vigilance against the forces of order.201

The duly constituted authority of the Supreme Court has now become unmistakably, both in Canada and in the United States, a force of order. How miniscule a threat are a few distributors of anti-war leaflets to the wealthy, established order of the fifty-acre Lloyd Center,

or the aging Dr. Spock to the mighty United States military establishment? How little would be risked to allow such thin voices to compete with the multi-million dollar blare of the majority's propaganda machines? It is at best excessive zeal to silence them with the gags that the United States Supreme Court has imposed.

It may be easy for the American reader to read some of the Canadian opinions, particularly those of the lower courts such as Coffin or Burko, and assume that such travesties of justice could never occur in the United States because the First Amendment would prevent them, but, after all, one system appears as able as the other to abridge the rights of free speech and association. If the Courts want to protect those rights, they do so. If they do not want to, they find a way not to easily enough. What turns out to matter more than any provision in a bill of rights or constitution is who is in the powerful position of deciding how, or whether, to apply it.