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*Rights Constitutionalism and the Canadian Charter of
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Article 7

Guest Editors: Benjamin L. Berger & Jamie Cameron

The Supreme Court of Canada and Constitutional (Equality) Baselines

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The Supreme Court of Canada and Constitutional (Equality) Baselines

Abstract

In its approach to defining “analogous grounds” for the purposes of subsection 15(1) of the Charter of Rights and Freedoms, the Supreme Court of Canada has adopted an unusual mix of broad and generous interpretation, and high formalism. This article argues that one potential reason for this is the degree of heterogeneity among the nine distinct enumerated grounds in section 15. Heterogeneity of this kind can produce quite different interpretive consequences, depending on whether a court adopts a direct, “multi-pronged,” or a more synthetic, “common denominator,” approach to the question of analogical development. The Court, over time, has implicitly shifted from the first to the second of these approaches. For comparative constitutional scholars, a lesson of Canadian Charter jurisprudence is thus that the number and scope of the analogical baseline categories in a constitution—and how courts approach their relationship to each other—can matter a great deal for the subsequent recognition of new constitutional categories. For those seeking to design broad constitutional guarantees of equality, or other provisions containing express analogical baselines, the lesson is potentially even more specific: More may not always be better when it comes to encouraging judges to give effect to a preferred constitutional understanding.

Keywords

Canada. Canadian Charter of Rights and Freedoms; Canada. Supreme Court; Jurisprudence; Canada

The Supreme Court Of Canada And Constitutional (Equality) Baselines

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In its approach to defining “analogous grounds” for the purposes of subsection 15(1) of the Charter of Rights and Freedoms, the Supreme Court of Canada has adopted an unusual mix of broad and generous interpretation, and high formalism. This article argues that one potential reason for this is the degree of heterogeneity among the nine distinct enumerated grounds in section 15. Heterogeneity of this kind can produce quite different interpretive consequences, depending on whether a court adopts a direct, “multi-pronged,” or a more synthetic, “common denominator,” approach to the question of analogical development. The Court, over time, has implicitly shifted from the first to the second of these approaches. For comparative constitutional scholars, a lesson of Canadian Charter jurisprudence is thus that the number and scope of the analogical baseline categories in a constitution—and how courts approach their relationship to each other—can matter a great deal for the subsequent recognition of new constitutional categories. For those seeking to design broad constitutional guarantees of equality, or other provisions containing express analogical baselines, the lesson is potentially even more specific: More may not always be better when it comes to encouraging judges to give effect to a preferred constitutional understanding.

Dans son approche visant à définir les « motifs analogues » aux fins du paragraphe 15(1) de la Charte des droits et libertés, la Cour suprême du Canada a opté pour un mélange inhabituel d'interprétation vaste et généreuse et de formalisme élevé. Cet article fait valoir qu'une raison potentielle en est le degré d'hétérogénéité parmi les neuf motifs distincts énumérés à l'article 15. Une telle hétérogénéité peut amener à des interprétations fort différentes selon

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qu'un tribunal adopte une approche directe « concertée » ou une approche plus synthétique de « dénominateur commun » quant à la question du développement analogique. Avec le temps, la Cour, a implicitement glissé de la première à la deuxième de ces approches. Pour les chercheurs en constitutions comparées, la jurisprudence de la Charte canadienne nous apprend donc que le nombre et la portée des catégories analogiques de départ dans une constitution – et la façon dont les tribunaux abordent leurs relations les uns avec les autres – peuvent s'avérer essentiels pour la reconnaissance ultérieure de nouvelles catégories constitutionnelles. Pour ceux qui cherchent à concevoir de larges garanties constitutionnelles d'égalité ou d'autres dispositions renfermant des bases analogiques expresses, la leçon peut se préciser davantage : plus n'est pas toujours mieux lorsqu'il s'agit d'inciter les juges à appliquer une manière privilégiée d'interpréter la constitution.

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IN INTERPRETING SUBSECTION 15(1) of the *Canadian Charter of Rights and Freedoms* over the last nearly thirty years,¹ the Supreme Court of Canada (SCC) has developed ideas about equality and non-discrimination that have attracted a remarkable global audience.² In contrast, the SCC's "analogous grounds" jurisprudence—that is, its approach to determining whether various grounds of discrimination are analogous to those explicitly enumerated in subsection 15(1) has received far less attention from comparative constitutional scholars.³

This article attempts to fill this gap in comparative constitutional scholarship by considering the broader lessons for comparative constitutional lawyers of the

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1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Unlike other provisions of the *Charter* that came into effect in 1982, the implementation of s 15 was delayed until 1985.
 2. See e.g. Adam Dodek, "Canada as Constitutional Exporter: The Rise of the 'Canadian Model' of Constitutionalism" (2007) 36 Sup Ct L Rev (2d) 309
 3. The SCC's approach has had some influence on foreign courts. See e.g. *Larbi-Odam v Member of the Executive Council for Education (North-West Province) and another*, (1997) 12 B Const LR 1655 at para 19, [1998] 1 S Afr LR 745 (Const Ct). However, that influence has also clearly been far less significant than in the context of other aspects of the Court's approach to s 15. See e.g. Judge DM Davis, "Equality: The Majesty of Legoland Jurisprudence" (1999) 116 SALJ 398 at 404 (on the borrowing of the SCC's dignity-based approach). However, that influence has also clearly been far less significant than in the context of other aspects of the Court's approach to s 15: see e.g. Davis, (*ibid*) at 404 (on the borrowing of the SCC's dignity-based approach).

SCC's analogous grounds jurisprudence and, in particular, the lessons it offers for ongoing debates in other countries about constitutional design, amendment, or both.

The SCC's analogous grounds jurisprudence has been characterized, this article suggests, by two general features: first, a broad and generous approach to recognizing various grounds as analogous; and second, a surprising degree of formalism at the level of constitutional reasoning. The SCC has consistently recognized citizenship, marital status, and sexual orientation as analogous grounds, despite significant disagreement among the framers of the *Charter* over these grounds, and despite the reluctance of other courts, such as the US Supreme Court, to apply heightened scrutiny under the Equal Protection Clause⁴ in these contexts. The SCC has also recognized certain "embedded" or intersecting grounds (such as off-reserve Aboriginal status) as either within, or analogous to, those grounds enumerated in subsection 15(1). Additionally, the SCC has left open the possibility of recognizing certain other grounds on a more contextual, case-by-case basis.

Increasingly, however, the test endorsed by the SCC for determining whether a particular ground is analogous for the purpose of subsection 15(1) has been surprisingly formalistic, namely, a test of whether a particular personal characteristic is "immutable or changeable only at unacceptable cost to personal identity" (an immutability test).⁵ In endorsing such a test, the SCC has largely failed to explain how either actual or "constructive" immutability⁶ relates to three broad underlying notions of equality to which it seeks to give effect under subsection 15(1): a commitment to anti-stereotyping, anti-subordination, and human dignity. The criterion of actual immutability, this article argues, bears little obvious relationship to any of the three underlying conceptions of equality. The idea of constructive immutability is likewise largely a normative conclusion rather than an independent test for whether a particular distinction offends these values.⁷

4. US Const amend XIV, § 1.

5. *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1, McLachlin & Bastarache JJ [*Corbière*].

6. The term "constructive immutability" is used here as shorthand for the SCC's notion that some personal characteristics are changeable "only at unacceptable personal cost." See *e.g. Corbière*, supra note 5 at para 60. The label is imperfect, because as Part II notes, the animating concern here is about human dignity, rather than the fixed or changeable nature of a characteristic. The language, however, tracks the SCC's own formulation in this context.

7. Cf. Dale Gibson, "Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado about Next to Nothing" (1991) 29:4 *Alta L Rev* 772; Wojciech Sadurski, *Equality and Legitimacy* (Oxford: Oxford University Press, 2008).

Part of the aim of this article, therefore, is to attempt to explain this surprising combination of broad and generous interpretation with high formalism on the part of the SCC by linking it to the number and scope of enumerated analogical baselines in subsection 15(1). There is, the article suggests, significant heterogeneity of grounds in subsection 15(1).⁸ Several enumerated grounds touch on characteristics that are almost never morally or practically relevant for governments except in a remedial context (*e.g.*, race, national and ethnic origin, and colour). Others involve characteristics that may be more frequently relevant, at least in the context of certain purportedly real physical differences (*e.g.*, sex and physical disability), or for the purposes of appropriate government support or accommodation (*e.g.*, sex, religion and disability). Others are based on characteristics that are more pervasively relevant (*e.g.*, age). Further, while most grounds are expressed in symmetric terms (*e.g.*, race, national and ethnic origin, colour, sex, and age), some (*i.e.*, mental and physical disability) are expressed in more asymmetric, disadvantage-focused terms.

In the face of such heterogeneity, it matters a great deal how courts seek to analogize from existing constitutional baselines. Courts, the article suggests, have a choice in this context between at least two general approaches: one that allows direct analogies to be drawn between a new constitutional claim and one or more existing constitutional categories or sub-groups of categories (a “direct” or “multi-pronged approach”); and another that, first, requires consideration of what the existing constitutional categories have in common, and only then considers whether a new constitutional category shares those features (a “synthetic” or “common denominator” approach). The two approaches will lead to quite different interpretive responses by courts to heterogeneous grounds.

Under a multi-pronged approach, the heterogeneous grounds will tend to lead to an expansive approach by courts to recognizing new constitutional claims as analogous; the greater the number of diverse categories recognized by a constitution, the greater the likelihood that a new category will share something in common with at least one of those categories. Under a more synthetic, common denominator approach, in contrast, the same heterogeneity is likely to lead to greater abstraction in the level at which courts construe the criteria for recognizing new constitutional categories as analogous. Abstract criteria of this kind will also often have little connection to underlying substantive constitutional concerns or commitments, and thus lead to a distinctly formalist approach.

8. Compare *e.g.* Robert Leckey, “Chosen Discrimination” (2002) 18 Sup Ct L Rev (2d) 445 at 446, 448-54.

Support for this proposition can be found in a broader comparative context, but is also the central lesson of the SCC's analogous grounds jurisprudence under subsection 15(1). In almost all of the early cases recognizing new grounds as analogous, the SCC or lower courts adopted some version of a multi-pronged approach: They either employed tests that relied on an implicit analogy to only some of the enumerated grounds in subsection 15(1), or used a multi-factorial test that relied on shared characteristics of sub-groups of enumerated grounds. In more recent cases, however, the SCC has been more formalistic in its reasoning and has shifted towards a more synthetic, common denominator approach. This shift, the article suggests, has potentially important implications for debates in other jurisdictions about the relevance of amendments to a constitution's equality clause and for debates over the design of such clauses more generally.

The article proceeds in four parts. Part I sets out the major decisions of the SCC recognizing new grounds of discrimination as analogous for the purposes of section 15, and explains how such cases contributed to a pattern of broad and generous interpretation on the part of the SCC. Part II contrasts this interpretive approach with a pattern of increasingly formalist reasoning on the part of the SCC in this same context and with the increasingly narrow application of such formalist reasoning by provincial courts in cases involving certain kinds of economic- or poverty-based claims to substantive equality. Part III connects the patterns in Parts I and II to the two potential approaches by courts to the analogical baselines in a constitution, and shows how one approach (the multi-pronged approach) helps explain the SCC's generous approach, while the second (the synthetic approach) explains its formalism. Part IV concludes by considering the importance of these Canadian lessons for ongoing debates among American constitutional scholars about the relevance, or irrelevance, of proposed constitutional amendments such as the 1972 Equal Rights Amendment, and for the design and redesign of constitutional baselines more generally.⁹

I. A BROAD APPROACH TO ANALOGOUS GROUNDS

In interpreting the *Charter's* guarantee of equality, the SCC has generally taken a broad approach to recognizing various grounds of discrimination as analogous to those enumerated in subsection 15(1).

Subsection 15(1) explicitly prohibits discrimination on the basis of nine listed, or "enumerated," grounds: race, national or ethnic origin, colour, religion,

9. HRJ Res 208, 92d Cong, 2d Sess, 86 Stat 1523 [ERA].

sex, age, and mental or physical disability.¹⁰ By recognizing various grounds as analogous to these express grounds, the SCC has extended this list to include discrimination based on citizenship, marital status, sexual orientation, and off-reserve Aboriginal status.

In *Andrews v Law Society of British Columbia*,¹¹ for example, the SCC considered a challenge under subsection 15(1) to provisions of the British Columbia *Barristers and Solicitors Act* limiting admission as a solicitor in the province to Canadian citizens. While dividing on the issue of reasonableness under section 1 of the *Charter*, the SCC was unanimous in upholding the validity of the plaintiff's claim of discrimination based on an analogous ground. Non-citizens who were lawful permanent residents of Canada, Justice McLynre held, were a "discrete and insular minority" of the kind within the protection of section 15.¹² Indeed, citizenship more generally was held, according to Justice La Forest, to be a ground "similar to those enumerated in s. 15."¹³

In *Miron v Trudel*,¹⁴ the SCC considered an equality challenge by parties to a heterosexual common law relationship to provisions of the Ontario *Insurance Act* requiring insurers to provide benefits to the (legal) spouse of a person killed or injured in an auto accident. In upholding the challenge, the SCC explicitly recognized marital status, and in particular non-married status, as a ground analogous to those in subsection 15(1). Four justices in the majority held that "the characteristic of being unmarried—of not having contracted a marriage in a manner recognized by the state—constitutes a ground of discrimination within the ambit of s. 15(1)."¹⁵ The remaining justices were also willing to recognize that distinctions based on marital status, or between marriage and "relationships analogous to marriage," may violate subsection 15(1) in at least some cases: Four dissenting justices held that marital status is an analogous ground at least in contexts where the particular laws under challenge did not seek to define marriage itself, or its rights and

10. The word "enumerated" is, of course, somewhat misleading in this context, given that the list of grounds is open-ended. The term, however, is the prevailing one used to describe the express grounds of prohibited discrimination in s 15(1).

11. [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews* cited to SCR].

12. *Ibid* at para 31. The description of non-citizens in these terms is not necessarily descriptively accurate, given that non-citizens are often quite strongly integrated into the social and economic community of a country. However, the term is often used as shorthand for a concern about the political powerlessness of such groups, in terms of their inability to vote and their limited success in forming broader political coalitions.

13. *Ibid* at para 75.

14. [1995] 2 SCR 418, 124 DLR (4th) 693 [*Miron* cited to SCR].

15. *Ibid* at para 150, McLachlin J with Sopinka, Cory, & Iacobucci JJ concurring.

obligations;¹⁶ and in her concurring judgment, Justice L'Heureux-Dubé suggested that such distinctions were frequently, though not always, a violation of section 15.¹⁷

In *Egan v Canada*,¹⁸ the SCC considered a challenge to provisions of the *Old Age Security Act*¹⁹ providing for the payment of a statutory allowance to the “spouse” of a person receiving a pension under the *Act* whose income fell below a certain level, but not the same-sex partner of a pensioner in the same position. While a majority of the SCC ultimately rejected the claim and found that the relevant discrimination was justified under section 1, the SCC was again unanimous in accepting the claim of prima facie discrimination under subsection 15(1). This, as Justice La Forest noted, also clearly meant accepting the concession by the Attorney General of Canada that sexual orientation is an analogous ground for the purposes of subsection 15(1).²⁰ In upholding a similar subsection 15(1) challenge to the scope of provincial human rights legislation in *Vriend v Alberta*,²¹ the SCC again affirmed that sexual orientation is “analogous to the other personal characteristics enumerated in s. 15(1)” and thus the failure to protect the plaintiff against dismissal from employment based on his sexual orientation violated subsection 15(1).²²

The “generosity” of this approach is particularly clear when viewed in a broader historical and comparative context. One of the key issues surrounding the drafting of subsection 15(1), for example, was whether it would include sexual orientation as an enumerated ground.²³ Feminist groups in particular argued for the inclusion of marital status as an enumerated ground, but were defeated by those who favoured a more limited equality guarantee.²⁴ In fact, the very concept

16. *Ibid* at para 26, Gonthier J with Lamer CJ, La Forest & Major JJ dissenting.

17. See *ibid* at para 91 (eschewing over-reliance on the idea of analogous grounds, but endorsing reasoning of a similar kind as part of a contextual analysis of the nature of the group affected by the law).

18. [1995] 2 SCR 513, 124 DLR (4th) 609 [*Egan* cited to SCR].

19. RSC 1985, c O-9.

20. *Ibid* at para 5.

21. [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend* cited to SCR].

22. *Ibid* at para 90, Cory and Iacobucci JJ.

23. See Mary Eberts, “Section 15: The Next Twenty Years” (2006) 5:1 JL & Equality 47 at 48; Douglas Elliott, “Secrets of the Lavender Mafia: Personal Reflections on Social Activism and the *Charter*” (2006) 5:1 JL & Equality 97 at 105.

24. See Doris Anderson, “The Adoption of Section 15: Origins and Aspirations” (2006) 5:1 JL & Equality 39 at 41. See generally Hon Claire L'Heureux-Dubé, “It Takes a Vision: The Constitutionalization of Equality in Canada” (2002) 14:2 Yale JL & Feminism 363 at 366-67 (regarding the influence of women's groups on the drafting of s 15).

of subsection 15(1) as an analogical baseline, or non-exhaustive list of prohibited grounds, emerged out of this controversy as a compromise between those who favoured an expansive definition of equality in the context of sexual orientation and family status and those who favoured a limited or conservative one.²⁵

In the United States, courts have been far more reluctant to recognize grounds such as sexual orientation as “analogous” to race for the purpose of heightened scrutiny under the Equal Protection Clause. In *Romer v Evans*,²⁶ for example, the Supreme Court of the United States ultimately struck down an attempt by the state of Colorado (by popular initiative) to prevent the adoption of anti-discrimination laws designed to protect gay and lesbian individuals. However, in doing so, the Court relied almost entirely on the fact that the law in question showed clear animus toward gay and lesbian people and imposed a highly unusual restriction on access to the (benefits) of the political process. It did not suggest that distinctions based on sexual orientation were analogous to race or other quasi-suspect classifications in deserving heightened scrutiny. On the contrary, Justice Kennedy suggested, for the majority, that the Court was simply applying an ordinary form of rational basis review.²⁷

In Canada, the SCC has also been willing to recognize certain “embedded,” or intersectional, grounds of discrimination as analogous for the purposes of subsection 15(1). In *Corbière*,²⁸ for example, the SCC was asked to find discrimination contrary to subsection 15(1) in various provisions of the *Indian Act*²⁹ restricting the right to vote in Aboriginal band elections to those living on a reserve. In upholding the challenge, the SCC held that although the grounds of “Aboriginal residenc[y]” or “off-reserve status” could only apply to a “subset of the population,” this was no bar to their recognition as analogous grounds. “Embedded analogous grounds,” it held, were sometimes necessary to “permit meaningful consideration of intra-group discrimination.”³⁰

Likewise, in *Law v Canada (Minister of Employment and Immigration)*³¹ the SCC considered a challenge to provisions of the *Canada Pension Plan* that denied a death benefit to individuals who, at the time of their spouse’s death, were under

25. Elliott, *supra* note 23 at 105; Eberts, *supra* note 23 at 48.

26. 517 US 620 (1996), 116 S Ct 1620 [*Romer* cited to US].

27. *Ibid* at 631-32 (noting that the Court avoids unduly broad review on the Equal Protection Clause by applying rational basis review wherever a law “neither burdens a fundamental right nor targets a suspect class”).

28. *Supra* note 5.

29. RSC 1985, c I-5.

30. *Ibid* at paras 14-15, McLachlin and Bastarache JJ.

31. [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR].

thirty and did not have children or a relevant disability. Justice Iacobucci held that if the relevant pension plan did not discriminate on age alone, it could be seen as discriminating on a “combination,” or “confluence,” of grounds that was itself analogous to the distinct enumerated grounds in subsection 15(1).³²

In rejecting such grounds as provincial residency and membership in the armed forces as analogous for the purposes of subsection 15(1), the SCC has nonetheless left open the possibility that these grounds might be treated as analogous in the future. In *R v Turpin*,³³ for example, the SCC rejected the status of persons charged with murder outside of Alberta as an analogous ground for the purposes of subsection 15(1). Writing for a unanimous Court, Justice Wilson clarified that she was not suggesting that “a person’s province of residence or place of trial could not in some circumstances be a personal characteristic of the individual or group capable of constituting a[n analogous] ground of discrimination.”³⁴ Similarly, in *R v Généreux*,³⁵ in rejecting the subsection 15(1) claim of a member of the armed services facing trial by court martial for possession of narcotics, the SCC held that it was not suggesting “that military personnel can *never* be the objects of disadvantage or discrimination in a manner that could bring them [as a class] within” the scope of subsection 15(1), or make them a class of persons analogous to those enumerated in subsection 15(1).³⁶

This, of course, is not to say that the SCC could not have been *more* generous in its approach to subsection 15(1) in these or other contexts.³⁷ Justice

32. *Ibid* at paras 93-94.

33. [1989] 1 SCR 1296, 96 NR 115 [*Turpin* cited to SCR].

34. *Ibid* at para 53. See also *ibid* at para 52. Among the “indicia of discrimination,” Justice Wilson cited “stereotyping, *historical disadvantage* or vulnerability to political and social prejudice” [emphasis added]. This in part reflects a concern about the need to ensure a forward- and backward-looking approach to disadvantage, but also introduces some analytic blurring of categories.

35. [1992] 1 SCR 259, 88 DLR (4th) 110 [*Généreux* cited to SCR].

36. *Ibid* at para 104, Lamer CJ [emphasis in original].

37. For criticisms of the SCC’s approach to s 15(1) as overly focused on the comparator group requirement, see *e.g.* Daphne Gilbert & Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dooms Section 15” (2006) 24:1 Windsor YB Access Just 111; Sophia Reibetanz Moreau, “Equality Rights and the Relevance of Comparator Groups” (2006) 5:1 JL & Equality 81. The SCC has also been criticized for placing too much weight on internal limitations under s 15(1), as opposed to a more general limitation approach under s 1. See *e.g.* Peter W Hogg, *Constitutional Law of Canada* 2d ed (Toronto: Carswell, 1985) at 800-801 (advocating the latter approach). See generally Leon E Trakman, “Section 15: Equality? Where?” (1995) 6:4 Constitutional Forum 112. Others suggest that the SCC has a mixed record in this context. See *e.g.* Bruce Ryder, Cidalia C Faria & Emily Lawrence, “What’s Law Good For? An Empirical Overview of Charter Equality Rights Decisions” (2004) 24 Sup Ct L R (2d) 103.

L'Heureux-Dubé, for example, undoubtedly took a more expansive approach to the analogous grounds requirement under subsection 15(1) than did most other justices, in that she adopted a more direct and contextualized focus on the nature of the group affected by a particular distinction.³⁸ In doing so, however, she clearly went beyond simply extending the analogous grounds requirement so as to give it a more generous, dignity-based reading, but explicitly abandoned the analogous grounds requirement as part of the subsection 15(1) analysis.³⁹

In general, therefore, it seems fair to say that the SCC's approach to the recognition of analogous grounds has accorded with its more general commitment under subsection 15(1) to "a broad and generous approach" to enforcing the *Charter's* guarantee of equality.⁴⁰

II. SURPRISING FORMALISM

Yet, over time, in its reasoning on the scope of analogous grounds, the SCC has shifted towards a surprisingly formalist approach that has little clear connection to questions of substance or to any underlying substantive theory, or understanding, of equality endorsed by the SCC itself.⁴¹

Three broad underlying understandings of equality emerge in the SCC's case law on subsection 15(1): (i) the idea of equality as treatment based on individual merit and characteristics, rather than stereotypical assumptions or prejudices (anti-stereotyping); (ii) the idea of equality as equal standing and access to political and economic resources and opportunities for all groups, thus giving rise to a situation in which no group is systematically disadvantaged or subordinated by, or when compared to, another (anti-subordination); and (iii) the idea of equality as a commitment to equal concern and respect for all citizens (equal dignity).⁴²

38. See *e.g.* *Miron*, *supra* note 14; *Corbière*, *supra* note 5. For praise of this approach as better realizing the ideal of substantive equality, see Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48:4 McGill LJ 627; Daphne Gilbert, "Unequalled: Justice Claire L'Heureux-Dubé's Vision of Equality and Section 15 of the *Charter*" (2003) 15:1 CJWL 1.

39. See *e.g.* *Gibson*, *supra* note 7.

40. See *e.g.* *Andrews*, *supra* note 11 at para 64, Wilson J.

41. My criticism of the SCC as "formalist" in this context is thus largely in the mode, or spirit, of immanent critique, rather than any independent idea about the most desirable level of abstraction versus specificity, or generality versus attention to context, in constitutional reasoning.

42. In addition to these three understandings, scholars have also advanced a number of further distinctive approaches to the scope of s 15(1). See *e.g.* Hugh Collins, "Discrimination, Equality and Social Inclusion" (2003) 66 Mod L Rev 16 (for a theory based on social exclusion); Donna Greschner, "The Purpose of Canadian Equality Rights" (2002) 6:2

When he endorsed a three-stage approach to discrimination under subsection 15(1) in *Andrews*, Justice McIntyre recognized the centrality of questions of “stereotyping” and “historical disadvantage” or “prejudice.”⁴³ Justice Wilson, in her concurring judgment, gave even greater emphasis to concerns about historical disadvantage, or subordination, suggesting that a key purpose of section 15 was to ensure that in drawing distinctions between individuals, governments did not “bring about or reinforce the disadvantage of certain groups.”⁴⁴

When it affirmed and refined this three-stage approach in *Law*,⁴⁵ the SCC explicitly emphasized concerns about both stereotyping and subordination.⁴⁶ An “important, but not exclusive” purpose of subsection 15(1), the SCC suggested, is “the protection of individuals and groups who are vulnerable, disadvantaged, or members of ‘discrete and insular minorities,’” or “a guarantee against the evil of [group-based] oppression.”⁴⁷ The SCC also emphasized, however, that subsection 15(1) protects individuals, not just groups, from “stereotyping, or political or social prejudice.”⁴⁸ Human dignity, it suggested, is a value that underpins both these commitments, as well as the *Charter* guarantee of equality more generally. The idea of human dignity entails a society in which “all persons enjoy equal recognition ... as members of Canadian society, equally capable and equally deserving of concern, respect and consideration”; Section 15 prohibits both “unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits” of individuals, and also prohibits distinctions that mean that individuals or groups are “marginalized, ignored, or devalued.”⁴⁹

Rev Const Stud 291 (for a theory based on social diversity); Rahool Parkash Agarwal, “An Autonomy-based Approach to Subsection 15(1) of the *Charter*” (2006) 12:1 Rev Const Stud 83 (for a theory based on autonomy); Moreau, *supra* note 37 (for a theory based on norms of fair treatment).

43. *Supra* note 11 at paras 41-43, citing *Smith, Kline & French Laboratories Ltd v Canada (Attorney General)*, 34 DLR (4th) 584 at para 16, 78 NR 30 (FCA).

44. *Andrews, ibid* at para 5.

45. See e.g. Emily Grabham, “*Law v Canada*: New Directions for Equality under the Canadian Charter?” (2002) 22:4 Oxford J Legal Stud 641.

46. *Supra* note 31 at para 64, Iacobucci J.

47. *Ibid* at paras 68, 42, Iacobucci J.

48. *Ibid* at para 51, Iacobucci J.

49. *Ibid* at para 53, Iacobucci J. See e.g. L’Heureux-Dubé, *supra* note 24 (for further development of the dignity-based vision of s 15(1)).

In *R v Kapp*, the SCC once again refined this test so as to reduce the role played by the four-stage contextual analysis developed in *Law*, and *Law*'s emphasis on human dignity as a freestanding test for discrimination.⁵⁰ However, in doing so, the SCC again affirmed the idea of discrimination as involving either the perpetuation of "disadvantage" or "stereotyping" and the relevance of human dignity as a value underpinning these commitments.⁵¹

Increasingly, however, the SCC has moved towards a test of immutability or constructive immutability for determining whether particular grounds are analogous for subsection 15(1) purposes—a test that has little clear connection to any of these three underlying understandings of equality.

Initially, in *Andrews*, the question of immutability was only one of several factors considered by Justice La Forest in determining whether citizenship, or non-citizen status, was analogous for the purposes of subsection 15(1).⁵² His reasons also evinced a concern with equality as anti-subordination: "Non-citizens," he suggested, are "an example without parallel of a group who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions," and further, against whom there is a long history of discrimination, including in the employment context.⁵³ Justice Wilson in particular went even further in stressing a concern about anti-subordination, suggesting that what was relevant to the status of citizenship as an analogous ground was that non-citizens "are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."⁵⁴

Likewise, in *Miron*, in recognizing marital status as an analogous ground, Justice McLachlin (as she then was) gave limited weight to immutability as a relevant criterion, simply noting that it had been suggested that "distinctions based on personal and immutable characteristics" are discriminatory "by extension" of the logic that "[d]istinctions based on personal characteristics, attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination."⁵⁵ Far more central to her reasoning was a focus on a concern for human dignity in general, and anti-stereotyping in

50. 2008 SCC 41, [2008] 2 SCR 483 [*Kapp* cited to SCC]. For a discussion, see Sophia Moreau, "R v Kapp: New Directions for Section 15" (2008-2009) 40:2 *Ottawa L Rev* 283.

51. *Ibid* at paras 16-25, McLachlin CJ & Abella J.

52. *Supra* note 11 at paras 67-68.

53. *Ibid*.

54. *Ibid* at para 5.

55. *Supra* note 14 at para 148, citing *Andrews*, Sopinka, Cory & Iacobucci JJ concurring.

particular. Namely, the “unifying principle” behind all prior analogous grounds jurisprudence was

the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual.⁵⁶

In *Egan*, however, several members of the SCC began to shift towards a much more exclusive reliance on an immutability test.⁵⁷ Justice La Forest suggested (on behalf of four justices) that the concession by the Attorney General that sexual orientation is an analogous ground for the purposes of subsection 15(1) was proper because sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.” He gave no further explanation for why this test was determinative, or for why it took precedence over other factors.⁵⁸

In *Corbière*, in 1999, the SCC moved even more clearly to endorse immutability—or constructive immutability—as more or less the sole determinant of whether a ground is analogous for the purposes of subsection 15(1). This paralleled a broader shift by the SCC in *Law* toward a more tightly structured, unified approach to subsection 15(1).⁵⁹ Thus, the SCC suggested in *Corbière* that what the enumerated grounds have in common is that they “often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity;” on this basis, the SCC held that “the thrust of identification of analogous grounds” is that they are “based on characteristics that we cannot change or that the government

56. *Ibid* at para 149, 496–97 McLachlin J (Sopinka, Cory & Iacobucci JJ concurring).

57. But see *Egan*, *supra* note 18 at paras 150–59, 171, Cory & Iacobucci JJ (continuing to apply a more multi-factor, substantive test, with a clear focus on the underlying question of whether a group claiming analogous ground status had “suffered discrimination arising from stereotyping, historical disadvantage or vulnerability to political and social prejudice”).

58. *Ibid* at para 5. See also *Vriend*, *supra* note 21 at para 90, Cory & Iacobucci JJ (citing *Egan* and affirming this finding, the SCC again gave prominence to immutability as one of the key factors to be considered).

59. For the connection between a synthetic approach and a more structured, analytic approach in this context, see *e.g.* Martha C Nussbaum, “Foreword: Constitutions and Capabilities: ‘Perception’ against Lofty Formalism” (2007) 121:1 Harvard L Rev 4 (criticizing certain aspects of the US Supreme Court’s approach as “lofty” and formalist). See also Majury, *supra* note 37 (criticizing certain aspects of the SCC’s early equality jurisprudence for insufficient attention to context and substantive notions of equality).

has no legitimate interest in expecting us to change to receive equal treatment under the law.”⁶⁰

The SCC, however, did not explain what, if any, connection it saw between this criterion of immutability, or constructive immutability, and the more substantive values underpinning subsection 15(1).⁶¹ There is, this article argues, at best only a very weak, indirect connection between such a test and the three understandings of equality endorsed by the SCC in the application of the other limbs of subsection 15(1).⁶²

From an anti-stereotyping perspective, for example, the most reliable indicator of suspect decision making will be the reliance on individual characteristics that have no (presumptive) moral or practical relevance. This was the vision of analogous grounds endorsed by Justice Gonthier, on behalf of four justices, in *Miron*; the key purpose of subsection 15(1), Justice Gonthier suggested, was to prevent stereotyping, or reliance on irrelevant distinctions, by the government.⁶³ This, for Justice Gonthier, meant that “[r]elevancy is also at the heart of the identification of an analogous ground.”⁶⁴

In most cases, immutability will also be a poor proxy for moral or practical relevance of this kind. Age, for example, while always changing, is also a morally relevant or legitimate basis on which the government may draw certain distinctions, including distinctions about the degree to which individuals can exercise informed

60. *Supra* note 5 at para 13, McLachlin and Bastarache JJ.

61. See *e.g. ibid* at para 13, McLachlin and Bastarache JJ (suggesting some connection between the immutability test and all three understandings of equality, or that immutable personal characteristics are often the basis of “stereotypical” or “illegitimate and demeaning proxies for merit-based decision making,” or that concerns about historical disadvantage, or political powerlessness “could also be seen to flow from the central concept of immutability,” but providing no further explanation for how, or why, this is the case).

62. Perhaps the most promising defence of such a criterion is that it helps to direct attention to individual choice or autonomy as important values underpinning the *Charter*. See *e.g.* Leckey, *supra* note 8; Agarwal, *supra* note 42 (on the connection between autonomy and an immutability test and on the importance of autonomy to the interpretation of s 15(1) in general). Autonomy, however, has not been the explicit focus of the SCC’s own account of s 15(1), and has an uneasy fit with the SCC’s approach to ideas of constructive immutability. See Leckey, *supra* note 8 at 450-51. Autonomy is also a value that may not necessarily always be best enforced via a commitment to non-discrimination, rather than to liberty of the person more directly. See Avigail Eisenberg, “Rights in the Age of Identity Politics” (2013) 50:3 Osgoode Hall LJ 609 (another potential justification is that immutability can help focus attention on the relationship between individual and group identity); Richard Moon, “Government Support for Religious Practice” in Richard Moon, ed, *Law and Religious Pluralism* (Vancouver: UBC Press, 2008) 217.

63. *Supra* note 14 at paras 23-32.

64. *Ibid* at para 25.

consent, make informed personal or public decisions, or be required to engage in certain compulsory activities (such as compulsory education or vision and hearing testing). Likewise, a criminal record is something that is generally impossible to change, once obtained, but a legitimate basis on which governments may make certain distinctions, such as those relating to access to certain kinds of jobs or information. Marital status or citizenship, on the other hand, are often at least somewhat “mutable” or open to change, or control, by individuals.⁶⁵ Yet they are also morally irrelevant for most government purposes, outside the context of immigration law or the regulation of the rights and obligations of marriage itself.⁶⁶

The immutability of a characteristic will tend to be closely linked to questions of moral and practical relevance in only a relatively small subset of cases, where it is presumptively legitimate for the government to draw certain distinctions in order to regulate individual conduct. Yet the distinction in question is in fact illegitimate because of an individual’s lack of control over that conduct. In the United States, the canonical example of this kind of case is *Plyler v Doe*,⁶⁷ which concerned the rights of undocumented immigrant children. The fact that the relevant alien children could affect “neither their parents’ conduct nor their own status” was a central reason for the Court’s decision that it violated the Equal Protection Clause for Texas to exclude them from access to its public schools, notwithstanding the Court’s finding that it was legitimate for the state to attempt to deter illegal immigration by denying certain benefits to undocumented aliens.⁶⁸

From an anti-subordination perspective, in turn, the most important indicator of suspect decision making by the government will be that it targets a group subject to historical prejudice, exclusion, or disadvantage. In most cases, identifying such disadvantage is best done directly, by focusing on the actual history of disadvantage experienced by a particular group or sub-group of citizens, and not on abstract criteria (whether immutability, or some other criterion) about the defining characteristics of the group. While there are certainly structural factors that contribute to systemic disadvantage, including political powerlessness,⁶⁹ there is

65. *Ibid* at para 25 (significant emphasis was placed on this argument by the defendants).

66. *Cf. ibid* at paras 26-27, Gonthier J.

67. 457 US 202, 102 S Ct 2382 (1982) [*Plyler* cited to US].

68. *Ibid* at 238. The US Supreme Court also stressed the danger of excluding children from schooling, and thereby creating a “discrete underclass” of future citizens (*ibid* at 234). The plurality also raised some questions about the extent to which it was legitimate to deter entry, while also encouraging and tolerating the presence of undocumented aliens in certain respects as a source of cheap labour (*ibid* at 218-19).

69. See *Andrews*, *supra* note 11 at para 68.

often little logic to the particular groups in a society who experience the most acute disadvantage.

Where such a backward-looking approach is not possible because, for example, the concern is about creating newly disadvantaged groups, it is also far from clear how, or why, immutability (as opposed to, say, the centrality or visibility of a characteristic) is a good predictor of subordination. Where a government treats a particular group adversely, the most critical question, from an anti-subordination perspective, will be whether the relevant form of adverse treatment is either likely to lead to, or be correlated with, further adverse treatment by other government actors or private individuals.

One factor that will affect the answer to this question will be whether the particular adverse treatment relates to a person's status, rather than conduct, and thus sends a clear message of disrespect or disregard for a particular group as less worthy of full human dignity. Another factor, as Justice Wilson noted in *Andrews* and *Turpin*, will be whether the relevant group lacks effective legal and political power, and thus cannot obtain effective protection against such adverse treatment.⁷⁰ Beyond this, when it comes to individual characteristics, the most relevant question would seem to be whether a particular ground of adverse treatment is visible to others, either as an individual characteristic or group identity, and thus easily targeted as a basis of adverse treatment. If so, the ground is so "central," or defining, for individuals as part of their individual or group identity that they are likely to interact frequently with others on the same basis that has attracted disadvantage.⁷¹

Consider, for instance, the adverse government treatment of three groups: waitresses, sex workers, and women generally. Waitresses, in most contexts, seem unlikely to be systematically disadvantaged, whereas women, as a class, have experienced a long history of social, economic, and political disadvantage. Sex workers, in turn, arguably fall somewhere in the middle. The most compelling explanation for this, however, is not that it is relatively easy to stop being a waitress (and become, say, a sales assistant), significantly harder to leave the sex industry (because of a lack of relevant marketable skills and coercion within the sex industry), and almost impossible to stop being female for those who identify as such (except at "unacceptable personal cost"). In a society committed to

70. *Andrews*, *supra* note 11 at para 5; *Turpin*, *supra* note 33 at para 47. This, as Justice Wilson notes, is also one reason why in the United States, even though the label is not wholly accurate, suspect or quasi-suspect classes are often referred to as "discrete and insular minorities." See *Andrews*, *supra* note 11 at para 6.

71. *Cf.* Sadurski, *supra* note 7.

equality, we do not generally think that the victims of adverse treatment should be told to “escape” such treatment by changing their attributes, or status, as opposed to conduct. Rather, it is that when the government treats waitresses poorly (by, for example, allowing them to be paid a lower wage or providing them with fewer workplace protections), we do not generally think that this will lead to, or be correlated with, systematic mistreatment of waitresses outside the workplace.

Waitresses are not generally identified by others, or themselves, by their occupation in non-work related contexts. As voters, they have a real chance of obtaining support from others with similar workplace conditions and experiences (for example via “Unite Here!,” the umbrella trade union for hospitality, airport, laundry, food service, gaming, manufacturing, and textile workers).⁷² Sex workers, in contrast, are often labelled or defined by others in a range of other contexts by reference to their working identity; and, depending on the legal status of their work, may have much greater difficulty forming a successful political coalition. It is more likely still that if waitresses or sex workers experience adverse treatment as women (or more specifically, poor women, immigrant women, or women of colour), this adverse treatment will turn out to carry over into all aspects of their life. This treatment will be truly systemic, by tracking a highly visible and for many, defining, individual characteristic and by relying far more strongly on individual status, rather than conduct, as the basis of adverse treatment.

The actual or constructive immutability of an individual characteristic will, at best, be only tangentially relevant to these criteria of political power, visibility, or centrality. Distinctions based on truly immutable characteristics may be more likely to track a person’s status, rather than conduct, or to be based on visible personal characteristics. The immutability test, however, also encompasses a range of “constructively immutable” characteristics (such as citizenship, marital status, and sexual orientation) where there is a much blurrier line between conduct, choice, and status, and where there is little real connection to visibility.⁷³ Similarly, truly immutable characteristics may or may not be “central” or defining for particular individuals. Often, it is the *choice* to identify oneself in terms of particular personal characteristics (such as sex, religion, or sexual orientation) that makes the particular characteristic defining, and not the fact that the characteristic is unalterable or given.⁷⁴

72. Online: <<http://www.uniteherecanada.org>>.

73. Compare Leckey, *supra* note 8.

74. *Cf.* Sadurski, *supra* note 7 (for statements of leading women and African-Americans downplaying gender or race as defining characteristics).

From a human dignity perspective, there is again a limited connection between those grounds of distinction that are most fraught and those characteristics of an individual that are truly immutable. Government action based on individual characteristics that are generally morally or practically irrelevant will certainly raise concerns from a dignity-based perspective. Distinctions that track characteristics of a highly personal, or defining, nature will also tend to be more problematic than those based on less central or defining aspects of individual identity, particularly where those distinctions involve adverse treatment. True immutability, however, is neither a necessary nor a sufficient condition for either the irrelevancy or personal nature of a characteristic. “Constructive immutability” is also a test that has little factual connection in this context to ideas about irrelevance or centrality: its connection depends on ideas about fairness and individual autonomy and dignity, which are in no way advanced or made easier to apply by invocation of the idea of immutability itself.⁷⁵

The historical disadvantage of particular groups may also be relevant, in some cases, under a human dignity-based approach. Where particular characteristics have attracted systematic adverse treatment in the past, distinctions based on them are certainly more likely to feel threatening to individuals and their sense of being afforded equal concern and respect in the present. Likewise, previous adverse treatment may give certain groups a special claim to respect and accommodation as part of true respect for their collective human dignity.⁷⁶ Again, however, such concerns will have little to do with the immutability of the characteristics that define a particular group, since it is the sense of insult or psychological injury that is critical to the violation of human dignity in both contexts, not the inability to flee from past or ongoing disadvantage because of lack of control over, or the immutability of, characteristics.

In several cases, this gap between the substantive equality values identified by the SCC in the context of subsection 15(1) and the criterion of immutability has led lower courts to take a surprisingly narrow approach to claims of inequality based on concepts of economic disadvantage or subordination.⁷⁷ Prior to *Corbière*,

75. See *ibid* (for an extremely eloquent and more extensive version of this argument in a more general context).

76. Cf. *e.g. Holocaust Denial Case*, 90 BVerfGE 241, 1994 NJW 1779 (Fed Const Ct) (Germany) (noting that for German Jews “[i]t is part of their personal self-image that they are seen as attached to a group of persons marked out by their fate, against which group there exists a special moral responsibility on the part of everyone else and which is a part of their dignity”).

77. For scholarly arguments in favour of the importance of structural, or systemic, disadvantage as a touchstone for the scope of s 15(1), see *e.g.* Hart Schwartz, “Making Sense of Section 15 of the Charter” (2011) 29:2 NJCL 201; Ian Savage, “Systemic Discrimination and

in *Sparks v Dartmouth/Halifax County Regional Housing Authority*,⁷⁸ for example, provincial courts took a broad approach to claims of discrimination based on poverty or income, as at least one intersecting ground of discrimination under subsection 15(1). In *Sparks*, a public housing tenant who was a black, poor, single mother challenged provisions denying her the same protections for security of tenure available to tenants in privately owned housing. In upholding this claim, the Nova Scotia Court of Appeal gave extensive attention to historical disadvantage suffered both by public housing tenants generally and by particular subgroups of public housing tenants. Poverty for single mothers, it suggested, was “no less a personal characteristic ... than non-citizenship was in *Andrews*.”⁷⁹ On this basis, the court concluded that public housing tenants were a group analogous to those identified in subsection 15(1).

Since *Corbière*, in contrast, provincial courts have applied a far more mechanical test, asking whether the poor are “a discrete and insular group defined by a common personal characteristic,”⁸⁰ whether poverty as a condition is in any way alterable by individuals, whether “financial circumstances may change” such that “individuals may enter and leave poverty,” and whether the government has a legitimate interest in encouraging individuals to exit from poverty.⁸¹ By answering these questions in the negative, provincial courts have given little meaningful scrutiny to the potential for various laws to draw distinctions that both track and entrench pre-existing economic disadvantage (for example, laws prohibiting certain forms of public solicitation of money or laws imposing uniform tariffs for energy consumption).⁸²

Section 15 of the Charter” (1985-1986) 50:1 Sask L Rev 141. For this kind of argument in the context of socioeconomic disadvantage specifically, see Bruce Porter, “Twenty Years of Equality Rights: Reclaiming Expectation” (2005) 23:1 Windsor YB of Access Just 145.

78. (1993), 119 NSR (2d) 91, 101 DLR (4th) 224 (CA) [*Sparks* cited to NSR].

79. *Ibid* at para 32.

80. See e.g. *R v Banks* (2007) 84 OR (3d) 1 at para 104, 275 DLR (4th) 640 (CA) [*Banks*] [emphasis added].

81. See e.g. *Boulter v Nova Scotia Power Inc* (2009), 275 NSR (2d) 214 at para 42 [*Boulter*] (noting that “a clinging web” is “not an indelible trait like race, national or ethnic origin, color, gender or age” because “financial circumstances may change, and individuals may enter and leave poverty or gain or lose resources”).

82. See the facts in *Banks*, *supra* note 80; *ibid*. There is, of course, an important question as to whether, in a market economy, courts are well-equipped to distinguish “legitimate” from illegitimate discrimination based on poverty, or whether poverty is an analogous ground that “fits” with the general absence of socioeconomic rights in the *Charter*. There does, however, seem to be at least some potential scope for the SCC and lower courts to have gone further in applying scrutiny to such distinctions. See e.g. Margot Young, “Social Justice and the *Charter*: Comparison and Choice” (2013) 50:3 Osgoode Hall LJ 669 (expressing similar concerns).

III. WHY THE COMBINATION? THE IMPORTANCE OF CONSTITUTIONAL BASELINES

What, then, accounts for this surprising combination of generous interpretation and increasing formalism on the part of the SCC within the same body of equality jurisprudence? One potential answer, this Part suggests, can be found in the number and scope of the analogical baselines in subsection 15(1), and how the SCC has approached their relationship to each other.⁸³

A. SUBSECTION 15(1) AND HETEROGENEOUS GROUNDS

From the perspective of different theories of equality, subsection 15(1) contains a great deal of heterogeneity in the grounds it lists as enumerated grounds of discrimination.

From an anti-stereotyping perspective, for example, many of the grounds listed in subsection 15(1) touch on personal characteristics that are almost never morally or practically relevant for government action, except possibly in a remedial context. Others involve characteristics that may sometimes be relevant, from a practical perspective, but which in general society regards as having limited moral relevance for the opportunities and rewards open to individuals. Others, however, involve characteristics with a far closer relationship to individuals' actual needs and capacities,⁸⁴ and thus with a far less natural relationship to a theory of "moral and practical irrelevance."⁸⁵

One way in which courts might have done so would have been to focus, as the Court of Appeal did in *Sparks*, on the intersection between poverty and other prohibited grounds of discrimination. See *supra* note 78. I am indebted to Jennifer Nedelsky for this suggestion.

83. Another explanation, of course, is that the analogous grounds requirement under s 15(1) actually does no work in the SCC's analysis, and is simply equivalent to a conclusion that the SCC does, or does not, regard particular discrimination as justified. See *e.g.* Gibson, *supra* note 7. This would also explain why the SCC has been somewhat inconsistent over time in its approach to the analogous grounds question, though not necessarily why there has been convergence toward a more consistently formalist test, even in the face of a quite generous application of that test, as in *Corbière*. Another potential explanation might be changes in the composition of the SCC. See *e.g.* Rosalind Dixon, "Weak-form Judicial Review and American Exceptionalism" (2012) 32:2 Oxford J Legal Stud 487. Such changes, however, do not seem to offer a sufficient explanation in the circumstances, given the presence of at least five of the same justices in cases such as *Miron* and *Corbière*.
84. See *e.g.* Rosalind Dixon & Martha C Nussbaum, "Children's Rights and a Capabilities Approach: The Question of Special Priority" (2012) 97:3 Cornell L Rev 549 [Dixon & Nussbaum, "Children's Rights"].
85. This precise issue was in fact raised by feminist groups at the time s 15(1) was drafted in the form of a concern that age, as an enumerated ground, could potentially dilute the

Consider the differences between race, gender, disability, and age as enumerated grounds of discrimination in this context. Race, most Canadians agree, is almost never morally or practically relevant to government action, except to the extent it is part of an attempt to “ameliorate the predicament of a group more disadvantaged.”⁸⁶ Gender is similarly morally and practically irrelevant for most purposes, though not necessarily in the context of “real” differences between the sexes in terms of physical strength, vulnerability to certain forms of sexual violence⁸⁷ or certain consequences associated with such violence,⁸⁸ and medical and other needs associated with pregnancy.⁸⁹

Disability, on the other hand, will be far more frequently relevant to government policy. As the SCC noted in *Eaton v Brant County Board of Education*,⁹⁰ it is both empirically true and practically relevant for certain purposes (such as who may obtain a driver’s license, for example, or be a fire captain) that “[t]he blind person cannot see and the person in a wheelchair needs a ramp.”⁹¹ Thus, in most cases, it is not “the attribution of stereotypical characteristics” to persons with disabilities that is the source of discrimination based on disability. Rather, it is the failure to provide appropriate accommodation and support for persons with disabilities, based on their “actual characteristics” and needs, that causes restrictions on their opportunity for full social and economic inclusion and participation.⁹²

A person’s age will be similarly relevant to a range of legitimate government interests, or objectives,⁹³ particularly at the very early and later stages of life when

guarantee of equal opportunity, or anti-stereotyping, for women. See *e.g.* BL Strayer, “In the Beginning...: The Origins of Section 15 of the *Charter*” (2006) 5:1 JL & Equality 13 at 22. The response of the drafters of s 15(1), however, was simply to reverse the order of sex and age in the list of enumerated grounds found in s 15(1). See Mary Dawson, “The Making of Section 15 of the *Charter*” (2006) 5:1 JL & Equality 25 at 30-31. This response, however, has had no discernible effect on the subsequent interpretation of the provision.

86. *Lavoie v Canada*, 2002 SCC 23 at para 45, 1 SCR 769, Bastarache J; *Kapp*, *supra* note 50 at 508, McLachlin CJ & Abella J (discussing the scope and purpose of s 15(2)). See also discussion in Leckey, *supra* note 8 at 460-61.

87. See *e.g.* *Weatherall v Canada (Attorney General)*, [1993] 2 SCR 872, 105 DLR (4th) 210 (upholding differences in male-to-female, versus female-to-male, searches by prison guards on this basis).

88. See *e.g.* *R v Nguyen; R v Hess*, [1990] 2 SCR 906, [1990] SCJ No 91 (QL) (upholding a sex-specific prohibition on statutory rape).

89. See *e.g.* discussion in *Miron*, *supra* note 14 at para 30, Gonthier J.

90. [1997] 1 SCR 241, 31 OR (3d) 574 [*Eaton* cited to SCR].

91. *Ibid* at para 67, Sopinka J.

92. *Ibid*.

93. See *e.g.* *McKinney v University of Guelph*, [1990] 3 SCR 229 at para 88, 2 OR (3d) 319 [*McKinney*]. La Forest J notes that

the government has a legitimate interest in protecting individuals from exploitation and mistreatment, and, in the case of children, protecting and fostering the capacity for later autonomous and informed adult choice.⁹⁴

Likewise, from an anti-subordination perspective, subsection 15(1) contains grounds that are both completely neutral as regards the experience of historical disadvantage, and that are far more asymmetric or specifically focused on a history of subordination.⁹⁵ The clearest example of such an asymmetric guarantee is the prohibition in subsection 15(1) on discrimination based on mental or physical disability. As the SCC noted in *Eldridge v British Columbia (Attorney General)*, persons with disabilities have been subjected to a long and unfortunate history of “exclusion and marginalization” in the workplace and in various other contexts, resulting in persistent social and economic disadvantage compared to those conforming to “able-bodied norms.”⁹⁶ Most other enumerated grounds, in contrast, encompass groups that clearly have experienced historical prejudice and disadvantage, and groups that have not.⁹⁷

there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1). To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age.

94. Dixon & Nussbaum, “Children’s Rights,” *supra* note 84.
95. *Cf. Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 31, 4 SCR 429, McLachlin CJ [Gosselin] (suggesting that “[m]any of the enumerated grounds correspond to historically disadvantaged groups”).
96. [1997] 3 SCR 624 at para 56, 151 DLR (4th) 577, La Forest J (citing M David Lepofsky, “A Report Card on the Charter’s Guarantee of Equality to Persons with Disabilities after 10 Years – What Progress? What Prospects?” (1997) 7:2 NJCL 263); Statistics Canada, *A Portrait of Persons with Disabilities* (Minister of Industry, Science and Technology, 1995) at 46-49; Sandra A Goundry & Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls* (Winnipeg: Canadian Disabilities Rights Council, 1994) at 5-6. See also CGK Atkins, “A Cripple at a Rich Man’s Gate: A Comparison of Disability, Employment and Anti-discrimination Law in the United States and Canada” (2006) 21:2 Canadian J L & Society 87.
97. There is, of course, always the potential for this to change, or for old hierarchies to not simply disappear, but to actually be reversed. This, for example, is a concern implicit in some affirmative action jurisprudence in the US. See *e.g. Adarand Constructors Inc v Peña*, 515 US 200 at 239, 115 S Ct 2097 (1995), Scalia J (emphasizing the danger of ideas about “debtor” and “creditor” races). This potential also often underpins courts’ approaches to equality guarantees more generally. See *e.g. Pretoria (City of) v Walker*, [1998] 3 B Const LR 257 at para 47, 2 S Afr LR 363 (Const Ct). There is, nonetheless, an important distinction between the symmetry and asymmetry of grounds from a backward-looking perspective. I am indebted to Mark Tushnet for pressing me on this point.

Whiteness, for example, has not, by itself, been a marker of historical disadvantage in Canada, whereas being black,⁹⁸ or Aboriginal,⁹⁹ has frequently been associated with such disadvantage.¹⁰⁰ Being male has generally been associated with social, political, and economic privilege, rather than disadvantage,¹⁰¹ whereas being female has meant the systematic denial of access to political and economic power and opportunity,¹⁰² disproportionate vulnerability to physical and sexual violence,¹⁰³ and economic deprivation.¹⁰⁴ Whereas being young (at least for adults) has often meant access to social and economic opportunity,¹⁰⁵ old age has often been associated with social stigma, and social and economic marginalization.¹⁰⁶ Similarly, dominant faith groups within mainstream Christian churches have tended to enjoy significant social and government support, whereas various religious minorities, such as Jehovah's Witnesses¹⁰⁷ and Jewish Canadians, have been the object of widespread societal prejudice and, in some cases, legally sanctioned disadvantage and marginalization.¹⁰⁸ Roman Catholics have also experienced significant social prejudice and hatred (while enjoying certain constitutionally sanctioned forms of support in other contexts),¹⁰⁹ as have

98. See *e.g.* Sparks, *supra* note 78.

99. See *e.g.* Corbière, *supra* note 5 at paras 18-19, McLachlin and Bastarache JJ.

100. See *e.g.* J Helen Beck, Jeffrey G Reitz & Nan Weiner, "Addressing Systemic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change" (2002) 28:3 Can Pub Pol'y 373. See also Julie Jai & Joseph Cheng, "The Invisibility of Race in Section 15: Why Section 15 of the *Charter* Has Not Done More to Promote Racial Equality" (2006) 5:1 JL & Equality 125.

101. *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34 at para 20, 1 SCR 835.

102. See *e.g.* *Edwards v Canada (Attorney General)*, [1928] SCR 276, 4 DLR 98.

103. See *e.g.* *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, 4 OR (3d) 383, L'Heureux-Dubé & Gonthier JJ (dissenting).

104. See *e.g.* Sparks, *supra* note 78; Anderson, *supra* note 24 at 43. See more generally Statistics Canada, *Women in Canada: A Gender-Based Statistical Report*, 5th ed (Ottawa: Minister of Industry, 2006).

105. See *e.g.* Law, *supra* note 31 at para 101, Iacobucci J; Gosselin, *supra* note 95 at paras 32-33, McLachlin CJ ("[y]oung people do not have a similar history of being undervalued ... as a general matter ... young adults as a class simply do not seem especially vulnerable or undervalued").

106. See *e.g.* McKinney, *supra* note 93 at 431-32, L'Heureux-Dubé J (discussion of the potentially marginalizing effect of retirement).

107. See *e.g.* *Saumur v Quebec (City)*, [1953] 2 SCR 299, 4 DLR 641 [*Saumar* cited to SCR]; *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli* cited to SCR], as discussed in *Adler v Ontario*, [1996] 3 SCR 609 at 661, 30 OR (3d) 642, L'Heureux-Dubé J (dissenting).

108. See *e.g.* *Saumar*, *supra* note 107; *Roncarelli*, *supra* note 107.

109. See *e.g.* David Matas, "*Waldman v Canada: Religious Discrimination in the Constitution*" (2000) 11:3 Const Forum Const 99.

members of certain South Asian religions, who have likewise experienced significant social prejudice and hatred.¹¹⁰

B. MULTI-PRONGED VS. SYNTHETIC APPROACHES TO CONSTITUTIONAL BASELINES

Heterogeneity of this kind in a constitution's baseline categories can prompt courts to respond quite differently to new constitutional claims, depending on how judges approach the task of comparing new and existing constitutional categories.

One approach is to ask whether the new category has any similarity with one or more of the existing baseline constitutional categories. Under this "direct" or "multi-pronged" approach, the greater the number and heterogeneity of baseline categories, the more likely that a court will find such similarity. The greater the diversity of features that can be identified among constitutional baselines, the more likely it is that any new constitutional category will share one or more of those features.

A good example of this, from a comparative perspective, is the approach of the Delhi High Court and the legal committee of the House of Lords to the recognition of sexual orientation as an "analogous" ground for the purposes of Articles 15 and 16 of the Indian *Constitution*,¹¹¹ and Article 14 of the *European Convention on Human Rights*,¹¹² respectively. In both India and the UK, the constitutional guarantee of equality, or non-discrimination, contains a number of (at least somewhat) diverse enumerated grounds, but is otherwise much narrower than in Canada.¹¹³ Yet it has been relatively easy for plaintiffs in both countries to persuade the relevant courts to apply heightened scrutiny to distinctions based

110. Canada, House of Commons, Special Committee on Visible Minorities in Canadian Society, *Equality Now!* (March 1984) at 69 (Chair: Bob Daudlin), as discussed in *R v Keegstra*, [1990] 3 SCR 697 at para 59, 3 CRR (2d) 193.

111. *India Const*, 1950.

112. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [*Convention*].

113. In contrast to the four distinct guarantees of equality under s 15(1) of the *Charter*, s 15(1) of the Indian *Constitution* prohibits discrimination on the basis of "religion, race, caste, sex, [and] place of birth." Section 16(1) guarantees equality of opportunity and prohibits discrimination on those grounds; s 16(2) prohibits discrimination on the basis of "descent" and "residence," but only in respect of public employment. In the UK, art 14 of the *European Convention* simply provides a guarantee of non-discrimination in respect of the enjoyment of other rights, and not an independent guarantee of equality. For discussion, see e.g. Rory O'Connell, "Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR" (2009) 29:2 LS 211.

on sexual orientation by relying on a multi-pronged approach to the question of analogous grounds.

In *Naz Foundation v Government of DCT of Delhi*,¹¹⁴ for example, the Delhi High Court held that certain provisions of the Indian *Criminal Code*¹¹⁵ prohibiting “unnatural sexual acts,” such as anal intercourse between men violated the guarantee of equality in Article 15 of the *Constitution*. In reaching this conclusion, the Court relied strongly on an analogy between sex and sexual orientation, first noting cases that found discrimination based on sexual orientation to be equivalent to sex-based discrimination,¹¹⁶ and then concluding (without further analysis) that “sexual orientation is a ground analogous to sex.”¹¹⁷

Similarly, in *Ghaidan v Godin-Mendoza*,¹¹⁸ the House of Lords held that it was incompatible with Article 8 (the right to family life) and Article 14 of the *Convention* for the UK Parliament to extend certain statutory tenancy rights to opposite but not to same-sex couples on the death of a partner. Lord Nicholls, in reaching this decision, reasoned simply that laws “must not draw a distinction on grounds *such as sex or sexual orientation* without good reason.”¹¹⁹ Baroness Hale, in turn, drew a direct analogy between discrimination based on sexual orientation and discrimination based on sex or race. In her view, these two express grounds of discrimination were united by “stereotypical assumptions ... which had nothing to do with the qualities of the individual involved,” and which were equally applicable to discrimination against gay and lesbian people, or same-sex relationships.¹²⁰

An alternative approach, however, is for courts to attempt *first* to identify a common thread or denominator behind existing constitutional categories and only then to proceed to compare new (claimed) constitutional categories with a constitution’s existing baselines. Such an approach has the attraction for courts

114. (2009) 160 DLT 277 at para 1, [2009] WP(C) No.7455/2001 (H Ct Delhi) [*Naz Foundation*] (currently subject to an appeal to the Supreme Court of India). For commentary, see Pritam Baruah, “Logic and Coherence in *Naz Foundation*: The Arguments of Non-Discrimination, Privacy and Dignity” (2009) 2:3 NUJS L Rev 505; Vikram Raghavan, “Navigating the Noteworthy and Nebulous in *Naz Foundation*” (2009) 2 NUJS L Rev 397.

115. RSC 1985, c C-46.

116. *Naz Foundation*, *supra* note 114 at para 100, citing *Selected Decisions of the Human Rights Committee Under the Optional Protocol*, HRC Dec 488/1992, UNHRCOR, 50th Sess, UN Doc CCPR/C/50/D/488/1992, (1994) 133 at 139-40 (referring to *Toonen v Australia*).

117. *Naz Foundation*, *supra* note 114 at para 104.

118. [2004] UKHL 30, [2004] 2 AC 557, (UK) [*Ghaidan* cited to UKHL].

119. *Ibid* at para 6 [emphasis added] (the opinion was joined by Lord Steyn, Lord Rodger & Baroness Hale).

120. *Ibid* at paras 130-32.

of being more systematic and consistent in its formal application than a direct or multi-pronged approach. It thus appeals understandably to judges as part of an attempt to develop an analytically rigorous and predictable body of equality jurisprudence.¹²¹

Such an approach, however, produces a different response by courts to the heterogeneous grounds. Rather than leading to a broader, more permissive approach to the recognition of new constitutional grounds as analogous, it tends to lead to more abstract reasoning by courts about the test for analogous grounds.

The more numerous and diverse the existing constitutional categories, the more difficult it will be for courts, under such an approach, to find commonality among those grounds in their scope, significance, or underlying purpose. And thus the more likely it will be that courts will need to resort to high levels of abstraction in order to identify even some form of internal coherence or common denominator amongst them. Some degree of abstraction in constitutional reasoning may be desirable (and unavoidable), to generate greater judicial impartiality or neutrality.¹²² Abstraction of this kind is, however, likely to lead courts significantly beyond that level, instead involving a form of “lofty” reasoning with little or no connection to underlying constitutional commitments or concerns.¹²³

Support for this understanding can be found in the approach of the Constitutional Court of South Africa to the test for analogousness under section 8(2) of the 1993 *South African Constitution*¹²⁴ and under section 9(3) of the 1996 *Constitution*.¹²⁵ Section 8(2) of the 1993 *Constitution* contained a prohibition against unfair discrimination on 13 distinct enumerated grounds: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, and language. Like subsection 15(1) of the *Charter*, this list also included characteristics, or grounds, with quite different attributes, relevance, and degrees of symmetry.¹²⁶ In developing a test for analogousness

121. See Leckey, *supra* note 8 (for the potential relevance of this in the Canadian context).

122. Compare *e.g.* John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) (on the relationship between abstraction and values of impartiality in constitutional decision making); Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York: Oxford University Press, 2007) (providing similar arguments about the relationship between “veil rules” and impartiality values). I am indebted to Wojciech Sadurski for this point.

123. See the sources cited at *supra* note 59.

124. *Constitution of the Republic of South Africa, 1993*, No 200 of 1993.

125. *Constitution of the Republic of South Africa, 1996*, No 108 of 1996.

126. See *e.g.* *Harksen v Lane NO and Others* (1997), [1998] 1 SA 300 at para 49, (CCT9/97) [1997] ZACC 12, Goldstone J (S Afr Const Ct) [*Harksen*] (“[i]n some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some

under section 8(2), the Constitutional Court also ultimately attempted to develop a common denominator approach to “unfairness,” similar to that of the SCC in *Corbière*.¹²⁷

In *Prinsloo*, for example, the Constitutional Court suggested that what underpinned unfair discrimination, and thus the definition of an analogous ground for the purposes of section 8(2), was “treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.”¹²⁸ Similarly, in *Harksen*, it held that the key test was whether discrimination was based on “attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.”¹²⁹ On their own, such criteria are so broad and abstract¹³⁰ as to provide almost no guidance to subsequent judges regarding whether particular grounds are analogous¹³¹ for the purposes either of

cases to a combination of one or more of these features”).

127. *Prinsloo v Van der Linde*, [1997] ZACC 5 at para 31, (6) B Const LR 759 (S Afr Const Ct) [*Prinsloo*] (“[a]lthough one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination ... [and thus unfair discrimination] *in the context of section 8 as a whole*” [emphasis added]).
128. *Ibid* at para 31.
129. *Harksen*, *supra* note 126 at para 49. At the same time, the Constitutional Court also noted that “the temptation to force [the different enumerated grounds] into neatly self-contained categories should be resisted” (at para 47).
130. It should be noted that the Constitutional Court has not necessarily closely followed this test in subsequent cases involving the question of analogous grounds, but rather engaged in a far more wide-ranging inquiry, involving greater focus on more substantive understandings of equality. See *e.g. Hoffman v South African Airways*, [2000] ZACC 17 at para 28, (11) B Const LR 1235, (S Afr Const Ct) (identifying HIV status as an analogous ground for the purposes of section 9(3), after considering the history of “systemic disadvantage and discrimination,” “stigm[a]” and “marginali[zation]” experienced by those living with HIV, and their social and political “vulnerability”); *Khosa v Minister of Social Development*, [2004] ZACC 11 at para 71, (6) B Const LR 569, (S Afr Const Ct) [*Khosa*] (holding that permanent resident status was an analogous ground in large part because of permanent residents’ lack of “political muscle,” and the fact that “in the South African context individuals were deprived of rights or benefits ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race”).
131. The idea of human dignity certainly has the potential to provide valuable guidance to a court in determining the scope of a constitutional guarantee of equality but to do so, it requires a great deal more elaboration and development. See *e.g.* Rory O’Connell, “The Role of Dignity in Equality Law: Lessons from Canada and South Africa” (2008) 6:2 Intl J Const L 267. One such approach to its elaboration or development can be found in the “capabilities approach” of Martha Nussbaum. See *e.g.* Rosalind Dixon & Martha C Nussbaum, “Abortion, Dignity, and a Capabilities Approach” in Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, eds,

section 8(2), or of the largely equivalent provisions in section 9(3) of the 1996 *Constitution*.¹³²

Moreover, this difference between the multi-pronged and common denominator approaches provides at least one plausible explanation for the surprising combination of broad and generous interpretation with high formalism on the part of the SCC in its analogous grounds jurisprudence because, over time, there has been a subtle shift by the SCC in this context from a multi-pronged to a more synthetic approach.

In some early cases, the SCC and lower courts were quite explicit in their willingness to apply a multi-pronged approach to the analogous grounds question. Take the decision of the Federal Court of Appeal in *Egan*¹³³ in which it held, on the basis of a concession by the parties, that sexual orientation is “a ground analogous to discrimination based on ‘sex.’”¹³⁴ In justifying its conclusion, the court relied strongly on the connection between discrimination based on sexual orientation and sex in the particular case, noting that one of the plaintiffs had “been denied a benefit under the law equal to that to which an opposite sex common law spouse is entitled.”¹³⁵

Similarly, in *Miron*, Justice McLachlin (as she then was) found that marital status is an analogous ground in part by relying on a direct analogy to religion as an enumerated ground. Discrimination on the basis of marital status, she suggested, could be analogized to discrimination on the ground of religion “to the extent that it finds its roots and expression in moral disapproval of all sexual unions except those sanctioned by church and state.”¹³⁶ Even more important, she suggested that the fact that marital status is at least partially chosen by individuals (even if unevenly so by different individuals) need not be a bar to its recognition as an analogous ground because “[r]eligion, an enumerated ground, is not immutable.”¹³⁷

In *Andrews*, in adopting a range of substantive criteria for analogousness in addition to a test of immutability, the SCC also gave implicit effect to a multi-pronged approach. The SCC’s emphasis on the notion of a “discrete and insular

Feminist Constitutionalism: Global Perspectives (Cambridge, UK: Cambridge University Press, 2012) 64.

132. The Constitutional Court has affirmed the same test under s 9(3) of the *Constitution*. See e.g. *Khosa*, *supra* note 130 at para 70.

133. *Supra* note 18.

134. *Ibid* at para 3.

135. *Ibid*.

136. *Miron*, *supra* note 14 at para 154.

137. *Ibid* at para 149.

minority,” for example, clearly applies to only a subset of the enumerated grounds under subsection 15(1), such as certain racial, ethnic, or religious minorities, and some non-citizen groups, but not to women¹³⁸ or the aged.¹³⁹ The focus on historical disadvantage by Justice La Forest was also more relevant to certain clearly asymmetric, rather than symmetric, grounds.

In *Corbière*, in contrast, the SCC shifted quite explicitly toward a synthetic approach to the analogous grounds question, suggesting that

what [the enumerated] grounds *have in common* is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.¹⁴⁰

IV. CONCLUSION: CANADIAN LESSONS FOR CONSTITUTIONAL DESIGN AND AMENDMENT

In the United States in the last decade, there has been a vibrant debate among constitutional scholars as to the relevance (or irrelevance) of formal amendments to the US *Constitution* and as to the failure of certain proposed amendments, such as the ERA. To date, however, this debate has tended to focus almost exclusively on the immediate jurisprudential consequences of the success or failure of particular amendments. Scholars such as David Strauss have argued that because the US Supreme Court has increasingly required “an exceedingly persuasive justification” for all classifications based on sex, even in the absence of the ERA,¹⁴¹ “it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted.”¹⁴² Others, such as Adrian Vermeule, have responded by arguing that it is important to consider the degree to which amendments may alter the probability of particular legal outcomes.¹⁴³ Neither side in the debate has focused on the way in which formal constitutional amendments such as the ERA may have had the potential to expand the analogical baseline employed by the US Supreme Court in responding to new, unrelated claims to constitutional protection or recognition.

138. See Kathleen M Sullivan, “Constitutionalizing Women’s Equality” (2002) 90:3 Cal L Rev 735.

139. See Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2010) at 55.18ff.

140. *Supra* note 5 at para 13, McLachlin and Bastarache JJ [emphasis added].

141. See *United States v Virginia*, [1996] 518 US 515 at 524, 116 S Ct 2264 (SC).

142. David A Strauss, “The Irrelevance of Constitutional Amendments” (2001) 114:5 Harv L Rev 1457 at 1476-77.

143. Adrian Vermeule, “Constitutional Amendments and the Constitutional Common Law” in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 229.

The lessons of the SCC's *Charter* jurisprudence for an American audience, in this context, are thus both important and quite simple, namely that the number and scope of analogical baselines in a constitution can matter a great deal, even if in unpredictable ways. This, in turn, suggests that had proposed amendments such as the ERA been enacted, they would very likely have had real, if also unpredictable, consequences for the US Supreme Court's approach to other equal protection cases, by making gender a distinct analogical baseline against which new claims to heightened scrutiny could be measured, rather than simply a category itself dependent on an analogy to race.

The most likely consequence of this, as I have argued elsewhere, would have been to encourage a greater willingness on the part of the US Supreme Court to recognize certain claims to heightened scrutiny, such as those based on age, disability, and sexual orientation.¹⁴⁴ Another possibility, however, is that the US Supreme Court could simply have moved to adopt a quite different, even if not necessarily more expansive, approach to the test for heightened scrutiny.¹⁴⁵

In other countries, the SCC's approach offers potentially even more important and specific lessons for constitutional drafters and re-drafters who are debating the scope of constitutional rights to equality more generally. Many governments in recent years have ostensibly attempted to strengthen small "c" constitutional commitments to equality by adopting (or proposing) legislation that both expands and unifies pre-existing legislative prohibitions on discrimination.¹⁴⁶ The drafters of new constitutions in countries such as Kenya have been praised for progressively refining the draft of constitutional guarantees of equality so as to provide "additional protection" via the recognition of a larger and more diverse list of enumerated grounds of discrimination.¹⁴⁷

144. Rosalind Dixon, "Amending Constitutional Identity" (2012) 33:5 *Cardozo L Rev* 1847-58 (especially 1855) [Dixon, "Constitutional Identity"].

145. In the UK, for example, a synthetic approach to race and gender tended to produce a distinctive focus on notions of moral and practical irrelevance as the touchstone for analogousness or heightened scrutiny under art 14. See *e.g.* *Ghaidan*, *supra* note 118 at para 130, Baroness Hale. At present, the US Supreme Court focuses on a far greater range of factors it deems implicit in race-based discrimination. See Dixon, "Constitutional Identity," *supra* note 144.

146. See *e.g.* *Equality Act 2010* (UK), c 15. See also Law Council of Australia, submission to the Attorney General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (1 February 2012) (for similar proposals in Australia).

147. See *e.g.* Jim Fitzgerald, "The Road to Equality? The Right to Equality in Kenya's New Constitution" (2010) 5 *Equal Rights Rev* 55 at 58.

The lesson of *Corbière* in this context, however, is that more may not always be better—at least within the same constitutional instrument¹⁴⁸—if the aim is to encourage judges to give broad effect to a particular preferred vision of equality. Given the kind of synthetic approach adopted by the SCC in *Corbière*, too much internal diversity in a constitution's baseline categories will tend to deflect attention away from drafters' substantive underlying understandings or purposes in favour of a more abstract, formalist account of what lies behind drafters' constitutional choices. This, in turn, can create a serious risk of both over- and under-enforcement from the perspective of a constitutional designer seeking to achieve a particular vision of equality or constitutionalism more generally.

Take a constitution drafter wishing to encourage courts to give broad effect to an anti-subordination principle under a constitutional equality guarantee. One approach for such a drafter would be to attempt to enumerate all those grounds of discrimination that could potentially be used by the government to undermine the equal standing of groups in society. Another would be to list only those grounds that, historically, had been the basis of actual systemic disadvantage for particular groups in the society. The first approach could be expected to produce a long and symmetric list of grounds common to all modern liberal constitutions, including race, ethnic origin, colour, tribe, place of origin, gender, sexual orientation, birth, primary language, social or economic status, age, disability, creed or religion, and political opinion.¹⁴⁹ In contrast, the second approach could be expected to produce a much shorter, more context-specific, asymmetric list (such as, in Canada, for instance, one focused on aboriginality; femaleness; new immigrant, religious or sexual minority status; poverty; old-age; and disability).

The first approach might thus also, intuitively, be seen as more consistent with a broad approach by courts to the enforcement of the drafter's vision of equality. This article argues, however, that the lesson of the SCC's equality jurisprudence in this context is that the opposite may in fact be the case: namely, that at least within the scope of a single guarantee, it is the second, narrower, and more parsimonious approach, rather than the first broader and more comprehensive

148. One question, which is beyond the scope of this paper to explore, is whether internally separating or dividing certain guarantees may help alleviate this problem (by, for example, grouping different express constitutional baselines by distinct underlying purpose). Subsection 15(1), of course, does not do this and it is clear that mere word ordering will be insufficient to achieve this. Separate guarantees, however, arguably adhere to the logic of constitutional design curves by showing that particular provisions cannot be too broad in coverage without creating dangers of interpretive formalism.

149. Compare *e.g.* Fiji Islands, *Constitution Amendment Act 1997*, s 39 (PacLII); *Constitution of the Republic of Uganda* 1995, s 21, online: <www.statehouse.go.ug>.

approach, that will produce the more consistent enforcement of anti-subordination principles by a court. It will do so by reasoning that, in all cases, pays attention to those principles, rather than more abstract notions of equality.¹⁵⁰ This approach also seems to conform to a more general principle of constitutional design: after some tipping point, increasing breadth or specificity in constitutional language may not always increase long-term control over constitutional outcomes.¹⁵¹ The reasons for this may vary from one context to the next, and be quite different in the context of constitutional analogical baselines than in most other contexts. The phenomenon, however, seems quite widespread, and thus, what seems like an anomaly in the SCC's analogical grounds jurisprudence may in fact be part of a much broader pattern of a distinctly non-linear, inverted "U-shaped" relationship between specific constitutional design choices and courts' approach to constitutional interpretation.¹⁵²

For this reason alone, if no other, the SCC's analogous grounds jurisprudence also seems worthy of further attention and study by comparative constitutional lawyers in the years to come.

150. One possibility, for example, is that a constitutional equality clause could be internally divided to reflect commitments to anti-subordination, anti-stereotyping, and rule of law or formal individual equality values. See *e.g.* s 9(1) of the *Constitution of South Africa* (clearly delineating formal rule of law and more substantive equality concerns). Such a vision might also in some ways help relieve pressure on a court, under an anti-subordination guarantee, to dilute the substantive focus of that guarantee in order to accommodate meritorious claims of this latter kind.

151. One of the contexts in which this seems true is in the allocation of general, versus specific, grants of power to one or other level of government in a federal system. See *e.g.* Rosalind Dixon, "Constitutional Design Curves" (2012) [working paper, on file with author] [Dixon, "Constitutional Design"] (discussing Art I of the US *Constitution* versus s 51 of the Australian *Constitution* in this context). I also thank Jamie Cameron for the suggestion that ss 29 and 91 of the *Constitution Act (British North America Act)* of 1867 may follow this same pattern.

152. See Dixon, "Constitutional Design," *ibid.*