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# Praise and Promises

Donna Greschner\*

## PREFACE

*During the past 20 years, equality jurisprudence has not followed a straight line. But it does have points and patterns. This paper offers 15 points about section 15 that are divided into two categories: reasons for praise, and promises still to keep. They aim to place the jurisprudence in a celebratory, comparative, and critical context. Many of us reflecting upon the past 20 years have personal memories of the Charter's entrenchment in 1982 and section 15's activation in 1985. Legal events and processes are intertwined with personal stories. While I connect points in a particular way, draw your own web through them and add other ones, too.*

## I. PRAISE

### 1. Politics

In March 1982, I was a graduate student at Oxford University. When the United Kingdom House of Commons was scheduled to debate the *Canada Act 1982*,<sup>1</sup> a fellow student whose father was a Scottish MP obtained Parliamentary passes for several of his Canadian friends, including me. We traveled to Westminster to witness the historic event. A parliamentary aide ushered the four of us to the visitors' gallery, seating us directly behind Jean Chrétien, then federal Minister of Justice, and his officials. I remember that throughout the debates he listened intently, whispering occasionally to an aide. Several MPs spoke forcefully against the bill because they believed that it did not sufficiently protect the rights of Aboriginal peoples. Prime Minister Thatcher entered the

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<sup>1</sup> *Canada Act 1982* (U.K.), 1982, c. 11.

chamber just in time for the vote. The bill was approved, receiving Royal Assent on March 29, 1982.

Toward the end of April, after the Queen had signed the *Canada Act 1982* in Ottawa, I was reading the *London Times* in an Oxford tea shop and noticed a tiny paragraph about the defeat of Saskatchewan's New Democratic Party government. I sputtered in disbelief. Letters from home, always about three weeks in transit, had talked confidently of another NDP victory. I raced to a pay phone and did something indulgently expensive at the time. I called collect to a Saskatoon friend and said, "Who lost?" He groaned, still suffering shock himself, "everyone." I gasped, "Blakeney?" "No," he said, "but Romanow is gone, and everyone else." The NDP had been ousted by the Progressive Conservative party and its novice leader, Grant Devine. Many pundits said that the *Canada Act 1982* had claimed its first casualty. In their view, Alan Blakeney and his Cabinet had focused too much attention on constitutional matters and insufficient time on problems back home. If the constitutional battles had indeed contributed to Blakeney's defeat, the province would pay a high price for participating actively in the constitutional process. For the next decade Devine's government would take the province on a free-fall into enormous debt and unparalleled corruption.

As we know now, the defeat occurred in the early days of deeper political changes at home and abroad. At the same time as the Charter was being negotiated and implemented, with its high hopes of rendering liberal justice through law, major industrialized countries were shifting toward conservative economic and social policies. This was the era of Margaret Thatcher and Ronald Reagan, the time of welfare-state dismantlement in Great Britain and trickle-down economics in the United States. By the time equality rights came into force in 1985, Brian Mulroney's Progressive Conservative party had won a huge landslide, and in several years' time the Mulroney government would negotiate the Free Trade Agreement to strengthen economic ties with the United States.

In our assessment now of section 15 jurisprudence, let us pause, then, to consider the political context of the 1980s. Did the Charter help Canadians resist the worst excesses of Thatcherism and Reaganomics? If so, how? From the vantage point of 2005, it is clear that Canadians

have not been adopting American social values. Our social values are more progressive than American ones, and the divergence is increasing.<sup>2</sup> Has the Charter and its section 15 contributed to the divergence? Or, conversely, has the Charter retarded a progressive trajectory of social values? It is difficult to tell. What is clear is that the jurisprudence could have been much worse.

## 2. Perspective

Whether one praises or pans the past 20 years of equality jurisprudence depends on one's perspective. Until two years ago, I taught constitutional law at the University of Saskatchewan, and I was often critical of the reasoning and results in equality cases. Now I live in California and teach American constitutional law. Not surprisingly my perspective has changed.

## 3. Performance Standard

I spend my days reading recent decisions from America's highest court, and it is a dismal task for anyone who takes equality seriously as a constitutional value. In the past several decades, the United States Supreme Court has severely trimmed the sails of equality norms. The Court continues to require proof of discriminatory purpose as a condition of violating the Equal Protection Clause,<sup>3</sup> which forecloses the effects-based tests that are necessary for a jurisprudence of substantive equality. It has refused to recognize new suspect classifications<sup>4</sup> or fundamental rights.<sup>5</sup> It has cut the scope of existing fundamental rights, sometimes drastically.<sup>6</sup> It is relentlessly hostile to any government's use

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<sup>2</sup> Michael Adams, *Fire and Ice: The United States, Canada and the Myth of Converging Values* (Penguin Books Canada, 2003).

<sup>3</sup> The cases requiring proof of discriminatory purpose began with *Washington v. Davies*, 426 U.S. 239 (1976).

<sup>4</sup> *Heller v. Doe*, 509 U.S. 312 (1993) (discrimination on the basis of mental disability receives rational basis review); *Romer v. Evans*, 517 U.S. 620 (1996) (state constitutional amendment barring laws that protect gays and lesbians from discrimination receives rational basis review).

<sup>5</sup> *Vacco v. Quill*, 521 U.S. 793 (1997) (prohibition of physician-assisted suicide does not violate a fundamental right and therefore does not violate the Equal Protection Clause).

<sup>6</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (government regulation of abortions prior to viability are no longer measured by strict scrutiny, but by the easier "undue burden" test); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)

of affirmative actions programs as an instrument of alleviating inequality suffered by racial minorities.<sup>7</sup> It has hacked at Congressional power under Section 5 of the 14th Amendment to redress inequality,<sup>8</sup> thus denying some persons, such as people with disabilities, any meaningful remedy for violations of their rights.<sup>9</sup> Not only has it shut out claims to end persistent prejudice, it has given some groups a constitutional right to engage in invidious discrimination.<sup>10</sup> Luckily, its human rights decisions do not have much influence beyond American borders,<sup>11</sup> and a good thing, too. By and large, studying American decisions would provide lessons about what not to do<sup>12</sup> with constitutional guarantees of

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(Free Exercise Clause does not prohibit laws that burden religious practice). To put the *Smith* holding into Canadian terminology, the case adopts an “intent” requirement to prove a violation of religious freedom. The disproportionate effect of a neutral law on a religious group is irrelevant.

<sup>7</sup> *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995) (governmental affirmative action programs are always subject to the almost always fatal strict scrutiny standard of review). Affirmative action programs in universities are permitted if they are carefully crafted to promote diversity, but not to remedy societal inequalities: *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>8</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Congress may only use its Section 5 power to create remedies that are congruent and proportional to the constitutional violation); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Section 5 of the 14th Amendment does not allow Congress to abrogate state 11th Amendment immunity for suits under the *Age Discrimination in Employment Act of 1967*); *United States v. Morrison*, 529 U.S. 598 (2000) (Section 5 of the 14th Amendment does not allow Congress to create a federal civil remedy for victims of gender-motivated violence).

<sup>9</sup> *Bd. of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Section 5 of the 14th Amendment does not allow Congress to abrogate state 11th Amendment immunity for damages under Title I of the *Americans with Disabilities Act of 1990*).

<sup>10</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Boy Scouts of America have a constitutional right to expel a scoutmaster, *i.e.*, discriminate against him, because of his homosexuality). If Canadian readers are not yet shocked by the American Court’s harsh anti-equality jurisprudence, this case should do it. For a general overview that puts these cases into the broader context of a Court engaged in a new form of “Lochnering”, see Jed Rubenfeld, “The Anti-Antidiscrimination Agenda” (2002) 111 *Yale L.J.* 1141.

<sup>11</sup> For a frank assessment of why and how the United States Supreme Court’s impact has declined during the Rehnquist period, see Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization, the Rehnquist Court, and Human Rights” in Martin Belsky (ed.), *The Rehnquist Court: A Retrospective* (New York: Oxford University Press, 2002), at 234.

<sup>12</sup> In fairness, not every decision is anti-equality. The Court has removed several of the most egregious forms of discrimination on the basis of sexual orientation, applying a rational basis standard: *Romer v. Evans*, *supra*, note 4; *Lawrence v. Texas*, 539 U.S. 558 (2003) (state law criminalizing homosexual sexual activity violates Due Process Clause). It may require “exceedingly persuasive evidence” to justify overt sex discrimination, a standard which was not met in *United States v. Virginia Military Institute*, 518 U.S. 515 (1996). Furthermore, it upheld Congressional power under Section 5 of the 14th Amendment to apply anti-gender discrimination provisions to the states in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); and it did not apply *Garrett*, *supra*, note 9, to bar federal suits against states for violations of Title II of the

equality, in a manner reminiscent of the negative lessons that the Charter's framers drew from several features of American experience prior to 1982. For instance, remember the inclusion of section 15(2) in the Charter to forestall any *Bakke*-like<sup>13</sup> challenges to affirmative action programs.<sup>14</sup>

Examining style rather than substance does not change the dreary assessment. If our ideal of a constitutional court involves a calm deliberative body dedicated to dispassionate consideration of complex issues of principle, the United States Supreme Court sometimes departs rather markedly from that image.<sup>15</sup> In equality cases its judges divide into predictable, hostile factions. They rarely talk to each other, at least in their written opinions, preferring to fire volleys across deep trenches. Opinions are frequently nasty and vitriolic, with several judges possessing shockingly abusive tongues.<sup>16</sup> The language and tone are, in a word, injudicious. Civility may not be necessary for impartiality, but it certainly enhances the appearance of justice.

#### 4. Praise

Canadian courts deserve praise. Overall, they have done an excellent job of interpreting the Charter's most complex provision, equality rights. The final court, the Supreme Court of Canada, is great. Its section 15 jurisprudence is impressive. Beginning in 1989 with its first decision, *Andrews*,<sup>17</sup> it has interpreted section 15's purpose broadly. It has understood that section 15 is a remedial provision, animated by an ideal of substantive equality. It has realized that implementing substantive equality requires an effects-based jurisprudence, and that a narrow focus on intent would thwart section 15's remedial purpose. It has declared

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*Americans with Disabilities Act of 1990*, at least with respect to access to courtrooms, in *Tennessee v. Lane*, 541 U.S. 509 (2004).

<sup>13</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

<sup>14</sup> As well, the desire to avoid the American phenomenon of "Lochnering" helped produce the omission of property rights and the inclusion of the override clause in the Charter. For a discussion of the Lochner era's impact as a negative model of constitutionalism, see Sujit Choudhry, "The Lochner Era and Comparative Constitutionalism" (2004) 2 Int'l. J. Const. L. 1.

<sup>15</sup> See the depressing account of the Rehnquist Court's acrimonious divisions in Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court* (1998).

<sup>16</sup> Justice Scalia is notorious for viciously attacking his colleagues. For one sample, see his dissent in *Lawrence v. Texas*, *supra*, note 12.

<sup>17</sup> *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143.

that the essence of true equality is accommodating differences. It has treated section 15(2)'s protection of affirmative action programs not as an exception to, but as an exemplification of, substantive equality. It has given life to the open-ended clause with the concept of analogous grounds.<sup>18</sup> In addition, its general style also deserves our praise. Its judges write well. They articulate reasons. They listen to all sides; they do not announce their conclusions before hearing arguments. They understand the ideal of law as reasoned deliberation, as the forum of principle. Let us say, with pride that is uncharacteristically Canadian, that in this area the Supreme Court of Canada is the best in the world.

If this assessment seems overly laudable, two additional comparisons may prove persuasive. First, recall equality jurisprudence prior to 1985. The Court's cramped interpretation of equality under the statutory *Canadian Bill of Rights* is represented by *Lavell*<sup>19</sup> and *Bliss*,<sup>20</sup> two anachronistic exultations of formal equality that are now familiar to younger generations of lawyers primarily as footnotes in constitutional textbooks. Even though reversing the interpretations that produced these decisions was a deliberate aim of section 15's drafters, in early Charter days Saskatchewanian skeptics, such as me and my friends, did not imagine that much would change with new words and expanded powers of judicial review. Happily for advocates of substantive equality, the Court's record has proven overall much better than pundits would have predicted in 1982.

Second, if one needs further evidence of how *very good* the Court looks by comparison to the United States Supreme Court, consider cases about gay and lesbian rights. Only in 2003 did a divided United States Supreme Court invalidate state laws prohibiting homosexual sexual activity,<sup>21</sup> the same year that the Ontario Court of Appeal unanimously struck down the ban on same-sex marriage with immediate legal

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<sup>18</sup> For a review of s. 15 jurisprudence, see Peter Hogg, "What is Equality? The Winding Course of Judicial Interpretation" (2005), of this volume, at 39.

<sup>19</sup> *Lavell v. Canada (Attorney General)*, [1974] S.C.R. 1349 (*Canadian Bill of Rights* equality provision is not violated by federal law that strips Indian women, but not Indian men, of their status as Indians if they marry a non-Indian person).

<sup>20</sup> *Bliss v. Canada (Attorney General)*, [1979] 1 S.C.R. 183 (*Canadian Bill of Rights* equality provision is not violated by unemployment benefits law that treat pregnancy more harshly than other reasons to claim benefits).

<sup>21</sup> *Lawrence v. Texas*, *supra*, note 12.

effect,<sup>22</sup> and eight years after the Supreme Court of Canada unanimously declared that sexual orientation was an analogous ground.<sup>23</sup>

Praise for equality jurisprudence is, of necessity, praise for a much larger collection of actors. Section 15's meaning does not spring fully-formed from the brows of Supreme Court judges. Rather, it is painstakingly constructed by the hard work of lawyers, lower court judges, politicians, communities, organizations and the host of other actors involved in campaigns and litigation to interpret and implement equality guarantees. Praise extends to everyone involved in political action and litigation, both friend and foe of particular approaches, whose efforts have shaped and sharpened the practical and philosophic meaning of equality rights.<sup>24</sup>

Of course, the Supreme Court is not perfect. It can render decisions that disappoint many of us, sometimes deeply. It is weaker in some aspects and areas of equality than others. We should not stop examining its decisions closely and criticizing them cogently. But neither should we downplay the strengths of its jurisprudence and its contributions to a more inclusive and egalitarian society.

Expecting perfection will always lead to disappointment.

## 5. One Perfect Moment

In the United States, one vocal approach to constitutional interpretation is originalism. This school sees the job of judges as discerning the original design of the Constitution's framers, and applying that plan to modern controversies. Strict originalism, the purest and most pinched version, tries to discern the intent of the Framers when they wrote and ratified the Constitution and its Amendments. Moderate originalism, which has several variants, interprets the Constitution in light of a provision's original purpose or original meaning, as revealed by historical

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<sup>22</sup> *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, 225 D.L.R. (4th) 529 (C.A.).

<sup>23</sup> *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513.

<sup>24</sup> With respect to political activities, an important contribution to Charter interpretation was, and will be, the continuing evolution of the quasi-constitutional human rights codes; with respect to litigation, perhaps the most important influence has been, and we can hope will be, LEAF's groundbreaking work. For an insightful analysis of the latter, see Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (2004).



practices and understandings in 1787 or, for the 14th Amendment, in 1868.<sup>25</sup> Originalism has attracted many supporters, who regard it as the only legitimate response to what they call the counter-majoritarian difficulty with judicial review. For them, only if judges implement the wishes of a long-ago majority can judicial review avoid the charge that it thwarts democratic wishes when judges invalidate legislation. Originalism also has many critics, who tell strict originalists that intent is either incoherent or impossible to discern, and remind moderate originalists that exalting historical practices and tradition defeats the purpose of protecting minority rights. Critics also suspect that originalism is merely a justificatory facade for deeply conservative views about substantive policies. Many originalists, for instance, would not countenance sex equality challenges under the Equal Protection Clause because the 14th Amendment was intended to address racial discrimination. Much of the bitter disagreement in the current United States Supreme Court revolves around the acceptability of various forms of originalism.

Some originalists support the approach because they believe that the American Constitution is the best constitution ever drafted. They regard the Founding Fathers as political geniuses. The Constitutional Convention's "gathering of demi-gods"<sup>26</sup> created a governmental structure and a Bill of Rights without equal in human history, either before or after 1787. One bit of popular language describing the Constitutional Convention is illustrative: "Miracle at Philadelphia".<sup>27</sup> I call this stance the belief in perfection. There was a perfect moment in 1787 that, because it was and is perfect (notice the circularity?) needs no improvement. A more extreme variant reveres the Constitution as a part of God's plan and the Founding Fathers as His emissaries to effect His design on earth. The Constitution is a sacred text and Americans are His chosen people. I am not exaggerating. In my southern Californian constitutional law class are students with religious beliefs that venerate the American Constitution as God's word. For them, criticizing the Constitution is not only treason, but also blasphemy.

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<sup>25</sup> A succinct overview is given by Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 2d ed. (2002), at 15-25.

<sup>26</sup> This description is usually attributed to Thomas Jefferson.

<sup>27</sup> Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (1966).

In sharp contrast, Canadians have never laboured under any misapprehension that the Fathers of Confederation were uniquely talented, let alone that the *Constitution Act, 1867*, was a perfect design or an instrument of God's will. John A. McDonald and his cohorts were ordinary Canadian politicians who muddled through tricky political puzzles with a mixture of savvy and luck. With the modern *Constitution Act, 1982*, and its Charter, one can discern even less glorification or reification of the politicians involved in its creation and implementation. For goodness' sake, most of them are still with us. Post-1982, it would have required huge dollops of *chutzpah* to sanctify the Charter's deal-makers, as they continued to engage actively in Canadian politics, exposing their warts to public scrutiny. More pertinently, the constitutional consensus excluded the government of Québec, which made the deal look glaringly imperfect, or at best incomplete. In hindsight, it was fortunate that Québec politicians did not hesitate to remind the rest of us about the Constitution's inadequacies.

Let us be grateful that Canadians, and especially the Court, have not bought into the mythology of a perfect moment. It tends to thwart careful self-examination and critical internal appraisal of a country's constitutional arrangements. More specifically, the arrogant certainty and self-righteousness that accompany the mythology of perfection hamper the construction of a more egalitarian society.

## 6. Parochialism

One consequence of both originalism and perfectionism is parochialism. If you think that the judicial task in adjudicating constitutional cases is solely to implement an original understanding of the historical text or distill historical practices, then looking elsewhere, such as internationally, is *irrelevant*. If you think that your constitution is perfect, then looking elsewhere is *unnecessary*. Not surprisingly, the current United States Supreme Court is likely the most parochial high court in the Anglo-American world. Many of its judges most of the time, and certainly its far-right faction all of the time, refuse to look at international law principles or foreign opinions for any insight or guidance in wrestling with constitutional questions.<sup>28</sup> When judges do refer to

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<sup>28</sup> In the past several years, this issue has generated considerable controversy. For a historical account, see Rex D. Glensy, "Which Countries Count? *Lawrence v. Texas* and the Selection of

foreign understandings in their opinions, as Breyer J. did recently in invalidating the death penalty for children,<sup>29</sup> the strategy attracts almost as much attention as the substantive result: irate Congressional politicians submit resolutions admonishing the Court,<sup>30</sup> and more aggressively, they introduce bills, thus far not enacted, to forbid judges from considering foreign law on pain of impeachment.<sup>31</sup>

Parochialism is not the Canadian experience. Beginning with their first Charter cases, and from the Supreme Court to provincial trial divisions, Canadian courts have looked to international norms and foreign opinions for inspiration and guidance.<sup>32</sup> Thankfully, the practice shows little sign of abating. The willingness to examine international norms and judicial opinions interpreting foreign constitutional texts indicates, *inter alia*, an attitude of humility. Answers to difficult questions are not treated as obvious.

## 7. Progressive Interpretation

As we all know, the general approach to Charter interpretation has always been progressive. Section 15 is no exception. Interpreters do not search for the original understanding of words or freeze Charter concepts at a particular moment in history. Rather, they interpret words in light of modern understandings to ensure that the principles keep up with the times and have power in new circumstances. In the well-worn

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Foreign Persuasive Authority” (2005) 45 *Virg. J. of Int’l L.* 2. In the common law world, criticizing judges on this basis is certainly unusual. However, since other industrialized countries have ratified far more international human rights conventions than the United States, international law is a more commonplace component of their legal systems.

<sup>29</sup> *Roper v. Simmons*, 125 S.Ct. 1183, 1189-99 (2005); see also *Lawrence v. Texas*, *supra*, note 12, *per* Kennedy J.

<sup>30</sup> For example, see S. Res. 92, 109th Cong. 1st Sess. (2005): “Resolved. That it is the sense of the Senate that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions, unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States”.

<sup>31</sup> For example, see S. 520, 109th Cong. 1st Sess. (2005), “The Constitution Restoration Act of 2005”. It would do the following: strip the federal courts of jurisdiction over any governmental official’s or entity’s acknowledgment of God as the sovereign source of law, liberty or government; order the courts not to rely on any foreign or international law of any type in interpreting the Constitution, except English law prior to the Constitution’s adoption; and make violation of these dictates an offence for which a judge may be removed from office.

<sup>32</sup> The best review remains William Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed. (1996).

words of that most famous metaphor, the Constitution is a “living tree capable of growth and expansion within its natural limits”.<sup>33</sup> A society and its courts learn from mistakes, meet unanticipated challenges, and alter their constitutional interpretations accordingly. Section 15 expressly calls for progressive interpretation because it contains an open-ended clause. Its drafters recognized that other grounds of discrimination might become pernicious, or recognized as such, and that section 15 would need to address them. Needless to say, progressive interpretation is the antithesis of the mythology of perfection.

If we take progressive interpretation seriously, it leads to the realization that equality litigation will always be with us. Just as we reject the mythology of perfection as the genesis of equality rights (*i.e.*, no perfect moment produced the text of section 15), we need to reject any belief in an equality nirvana, a perfect moment in the future when equality will be with us here on earth. In other words, there will never be a time when the work of building a better, *i.e.*, more egalitarian, society will be complete, when we can wash our hands, put on our party clothes, and say that the job is done. There is no end of history. Section 15 jurisprudence will *always* be a work in progress.

## 8. Peaks and Principles

What do you consider the highpoints of section 15 jurisprudence? Permit me to offer as one candidate the line of cases about the equality rights of gay men and lesbians. Its genealogy is well known. The starting-point at the Supreme Court was *Egan v. Canada*<sup>34</sup> in which the Court decided that sexual orientation was an analogous ground. It progressed to *Vriend v. Alberta*,<sup>35</sup> in which the Court emphatically proclaimed an individual’s right to be free from discrimination on the basis of sexual orientation, and read that ground into Alberta’s human rights legislation. The next step was *M. v. H.*,<sup>36</sup> which held that persons in same-sex conjugal relationships could not be denied access to courts for orders of support from their partners. It culminated in the same-sex

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<sup>33</sup> *Edwards v. Attorney General for Canada*, [1930] A.C. 124, at 136 (P.C.).

<sup>34</sup> *Supra*, note 23.

<sup>35</sup> [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493.

<sup>36</sup> [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3.

marriage cases, such as *Halpern v. Canada (Attorney General)*<sup>37</sup> at the Ontario Court of Appeal, and *Reference re Same-Sex Marriage*<sup>38</sup> at the Supreme Court of Canada. The decisions have become instant classics, cited by courts in other countries, and for good reason. Equality for gay men and lesbians is a significant step forward in human rights.<sup>39</sup>

This line of cases is also paradigmatic, revealing several broader points about equality jurisprudence. While courts often follow the lead of political actors, affirming and broadening rights created by statutes, their decisions can also be catalytic. For instance, when the Supreme Court heard *Vriend*, most provinces had already amended their human rights codes to prohibit discrimination in employment, housing, public services, and education on the basis of sexual orientation. In contrast, no province had granted equal marriage rights for same-sex couples when the courts in Quebec, British Columbia, and Ontario issued their rulings.<sup>40</sup> It was judges who accepted arguments from principle about equality for same-sex couples, and prompted federal legislators to deal politically with the issue. Without court challenges under the Charter, same-sex marriage would likely not have happened, at least not in the near future. Only in cooler, dispassionate courtrooms could arguments against same-sex marriage be exposed as mere prejudice. The cases show that law's forum (and *Law's* method, for that matter) is one of principle. Moreover, with respect to marriage rights, lower courts blazed the trail, applying equality principles to hold that marriage restrictions violated section 15 and concluding that governments could not muster sound policy reasons under section 1 for denying the right to marry to same-sex couples. Decisions such as *Halpern* show that equality principles do not reside exclusively at the Supreme Court.

These cases also illustrate one pattern in the past two decades of equality jurisprudence. The Supreme Court has consistently upheld

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<sup>37</sup> [2003] O.J. No. 2268, 65 O.R. (3d) 161 (C.A.).

<sup>38</sup> [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698.

<sup>39</sup> While controversy exists about whether or not marriage rights ought to be a goal for the gay and lesbian movement (see, e.g., the thoughtful discussion by Susan Boyd and Claire Young, "From Same-Sex to No Sex"? Trends Towards Recognition of (Same-Sex) Relationships in Canada" (2003) 1 Seattle J. for Soc. Just. 757), laws against discrimination on the basis of sexual orientation in employment, housing, education and other public services, as required in *Vriend*, *supra*, note 35, seem indisputably a good thing.

<sup>40</sup> See, respectively, *Hendricks v. Québec (Attorney General)*, [2002] Q.J. No. 3816, R.J.Q. 2506 (S.C.); *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] B.C.J. No. 994 (C.A.); *Halpern*, *supra*, note 37.

equality claims that involved a denial of liberty for a disadvantaged group. I deliberately use the old-fashioned term “liberty”, and not the more modern word “autonomy” because liberty connotes the negative freedom to make choices without governmentally-imposed barriers, which is what these cases involve. The first equality case, *Andrews*, is the first example: Mark Andrews complained about a law preventing him from practising law for three years. The successful cases involving gay and lesbian rights involve negative liberty: Delwin Vriend wanted access to the complaint process established for other victims of discrimination; M and H wanted access to the courts in order to resolve their property dispute; Hedy Halpern and other claimants in the same-sex marriage litigation wanted access to the symbolism of marriage. Their common plea was “let us in”. The first equality case involving indirect discrimination in distributing material resources, *Eldridge v. British Columbia (Attorney General)*,<sup>41</sup> also fits into this pattern of using equality rights to ensure that disadvantaged groups can make choices: Robin Eldridge needed sign language interpreters in order to give informed consent, to make choices about medical treatment.

The pattern is praiseworthy and unsurprising. Equal liberty is a valuable social good. Denials of liberty to members of disadvantaged groups typically raise issues with both individual dignity and social inclusion, purposes that underlie section 15. However, tracing this pattern also reveals those areas in which more work needs to be done in the future if section 15’s promise of substantive equality is to be fulfilled: positive liberty.

## II. PROMISES STILL TO KEEP

### 1. Poverty

In 1982, some critics feared that section 15 would reinforce identity politics to the detriment of class politics. It is likely impossible to prove whether section 15 made any difference to these dynamics. What we do know is that poverty issues have fit awkwardly, if at all, into the section 15 matrix. When Charter challenges have moved beyond negative liberty to positive liberty, such as the provision of basic necessities in

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<sup>41</sup> [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624.

*Gosselin v. Quebec (Attorney General)*,<sup>42</sup> courts have shown less willingness to apply section 15 broadly or to scrutinize section 1 justifications too closely. This is disappointing, but not surprising. Liberty cases present relatively discrete problems. Striking down restrictions on access, such as in *Andrews*, is a simple solution for an identifiable and legally narrow problem. By contrast, social programs that involve material resources, such as income assistance or health services, typically raise more complex issues: defining need, establishing eligibility criteria, implementing delivery methods, allocating resources, dealing with budgetary shortfalls, perhaps experimenting with innovative pilot programs, and so on. Scores of trained experts mull over these issues, finding them frustratingly complex. Why would we expect a Charter action, with its narrowing of issues and focus, to address these problems more fruitfully?

But neither can one ignore the potentially effective role of litigation in addressing indignities caused by poverty. Perhaps one way to develop better section 15 tools is to do more work about handling poverty problems through human rights legislation. After all, as I note above, important advances have usually come from political campaigns to enact or amend human rights codes. To date, however, these statutes have barely made inroads into addressing the oppression and exclusion caused by poverty. Most provincial codes prohibit discrimination on the very narrow basis of “source of income” or “receipt of public assistance”.<sup>43</sup> One province prohibits discrimination on the broader basis of “social origin”<sup>44</sup> and only two have taken a further step to “social condition”.<sup>45</sup> Parliament has not yet amended the *Canadian Human Rights*

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<sup>42</sup> [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429.

<sup>43</sup> Five provincial or territorial human rights codes include “source of income” or “lawful source of income” as a prohibited ground of discrimination: *Human Rights, Citizenship and Multiculturalism Act*, R.S.A., c. H-11.7; *Human Rights Act*, R.S.N.S. 1989, c. 214; *Human Rights Act*, S.N. 2003, c. 12; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12; *Human Rights Act*, R.S.Y. 2002, c. 116. One province prohibits “lawful source of income” discrimination only with respect to accommodation: *Human Rights Code*, R.S.B.C. 1996, c. 210, s.10.

Two provincial codes include “receipt of public assistance”: *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 2(m.01), in all covered areas; and the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, s. 2, with respect to accommodation only.

<sup>44</sup> *Human Rights Code*, R.S.N.L. 1990, c. H.14.

<sup>45</sup> Québec’s *Charter of Human Rights and Freedoms*, R.S.Q. 1997, c. C-12, led the way, first including “social origin” in 1964 and replacing it with “social condition” in 1975. The Northwest Territories law, which is also the newest code, has the most pertinent definition. See *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 1(1): “social condition”, in respect of an individual, means the

*Act*<sup>46</sup> to permit complaints of discrimination on the basis of “social condition”, in spite of the recommendation of the *Act’s* Review Panel.<sup>47</sup> We could expect more from courts in addressing poverty issues adequately if statutory human rights mechanisms developed an appropriate legal framework and a corresponding body of jurisprudence.<sup>48</sup> This suggestion is not to let courts off the hook, nor to deny that they can point and prod politicians in the right direction. But to expect courts to fix the problem — without more help from codes and commissions — seems overly optimistic.

## 2. The Puzzle of Section 28

In 1981-82, many Canadian women worked hard to have an invincible sex equality clause added to the Charter. They thought that they had succeeded. Section 28 guarantees the equality of female and male persons notwithstanding anything else in the Charter.<sup>49</sup> No provision in the Charter has language so unequivocal. On a literal reading, the guarantee of sex equality is not qualified by either section 1’s limits or section 33’s override. Section 28 was a constitutional promise that women’s perspectives and concerns would always be taken seriously.

In spite of its strong words, section 28 has disappeared from Charter discourse. A collective amnesia has befallen legal consciousness. Section 28 was first downplayed, and now it is apparently forgotten. It rarely merits a mention, none of them recently, in the Supreme Court’s

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condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance”.

<sup>46</sup> R.S.C. 1985, c. H-6.

<sup>47</sup> Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (2000), at 106-13. Adding this ground is not a solution, but it would be a small step in the right direction. For a thorough and friendly analysis of its drawbacks, see Shelagh Day and Gwen Brodsky, “Women’s Economic Inequality and the *Canadian Human Rights Act*” in Status of Women Canada, *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (1999).

<sup>48</sup> For instance, a stance of using human rights legislation to address poverty issues would favour McLachlin C.J.’s dissent in *Québec (Attorney General) v. Québec (Human Rights Tribunal)*, [2004] S.C.J. No. 35, [2004] 2 S.C.R. 223. The Chief Justice’s interpretation would have permitted the Human Rights Tribunal to hear the complaint of a woman with low income who was denied additional income support because of her pregnancy. The majority held that the woman’s appeal rights were exclusively with another tribunal, one with no expertise in human rights matters.

<sup>49</sup> Section 28 reads: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”.



equality analysis.<sup>50</sup> A similar fate has befallen the other constitutional sex equality provision, section 35(4), a non-Charter provision that guarantees the equality of male and female Aboriginal persons.<sup>51</sup> Yet a robust sex equality clause would still have a lot of work to do. After all, patriarchy has not been eliminated from Canadian society. To mention two obvious disparities, women still earn less than men and exercise far less political power.

There is also a paradox here. Although section 28 receives almost no explicit attention in legal analysis, its spirit is more widespread. The aspirational principle of equality for women has figured prominently in many legal areas that attract constitutional scrutiny, such as reproductive choice and the regulation of pornography.<sup>52</sup> But supportive judicial opinions have almost never considered section 28 expressly.

Why has section 28 not taken a visible and influential place in constitutional discourse? If it blossomed, would it make any difference in sex equality analysis?

### 3. Pay Equity

The pay equity litigation from Newfoundland and Labrador calls out for consideration of section 28. In *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*

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<sup>50</sup> Since 1982, very few Supreme Court opinions for the majority have referred to s. 28: *Native Women's Assn. of Canada v. Canada*, [1994] S.C.J. No. 93, [1994] 3 S.C.R. 627, per Sopinka J. for the Court (s. 2(b) and s. 28 not violated by federal government's decision to fund four national Aboriginal organizations, but not a national Aboriginal women's organization); *R. v. Hess*; *R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906, at paras. 47-50, per Wilson J., for the Court (s. 28 does not prevent a legislature from creating an offence that as a matter of biological fact can only be committed by one sex). In addition, s. 28 is mentioned by L'Heureux-Dubé J. in several dissenting opinions: *R. v. Esau*, [1997] S.C.J. No. 71, [1997] 2 S.C.R. 777, at para. 39; *Symes v. Canada*, [1993] S.C.J. No. 131, 4 S.C.R. 695, at para. 227; *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at paras. 243, 255.

<sup>51</sup> Section 35(4) reads: "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons." It is broader than s. 28 because it trumps every other provision of the *Constitution Act, 1982* ("this Act"), not merely the Charter; at the same time it is narrower than s. 28 because it refers only to rights in s. 35(1), not all Charter rights.

<sup>52</sup> For an excellent synopsis of constitutional cases that implicate women's equality, see Beverly Baines, "Using the Canadian Charter of Rights and Freedoms to Constitute Women" in Beverly Baines and Ruth Rubio-Marin, eds., *The Gender of Constitutional Jurisprudence* (2005); and Manfredi, *supra*, note 24.

(*N.A.P.E.*)<sup>53</sup> the provincial government admitted that it had discriminated against female health care employees in the public service. It promised to remedy the past discrimination by making a one-time payment to its female employees. However, when the government faced a severe budgetary shortfall, it broke its promise. At the Supreme Court, the only issue was whether the broken promise, which violated section 15's guarantee of sex equality, was justifiable under section 1 of the Charter. In a unanimous decision, the Court said yes. In setting budgets, the government could give greater priority to commitments, programs and pressures that it perceived as more important than redressing pay inequity suffered by women employees. Surprisingly, section 28 was not mentioned, and apparently not argued by counsel. How did this happen?

The failure to consider section 28 is especially perplexing in light of the narrow situation in the *N.A.P.E.* litigation. The government admitted that it violated women's equality, and it promised to make good the wrong. Since holding the government to its one-time promise would not open the floodgates to undefined monetary commitments in the future, the Court did not need to worry about causing persistent judicial intermeddling in a government's budgetary deliberations. Contrast *N.A.P.E.* to the challenge in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*.<sup>54</sup> If the Court in *Auton* had extended medicare funding beyond hospital and physician services to cover services offered by other professions, it would have opened court house doors — and government coffers — to many claims for many different types of health-related services. Caution was surely called for. But the floodgates fear did not exist in *N.A.P.E.*

If section 28 does not have a role in cases like *N.A.P.E.*, when will it ever have any power?

#### 4. The Presumption of Sameness

In pondering why the sex equality provisions have been ignored, it is easy to understand why governments would not press for a vibrant interpretation of section 28. On its face, section 28 does not permit section 1 justifications, which is unhelpful to government counsel. But why

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<sup>53</sup> [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381.

<sup>54</sup> [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657.

have women's groups, academic commentators,<sup>55</sup> and claimants' counsel ignored it?

Here are my recollections of sex equality litigation in the 1980s. In some circles, arguing that section 28 should have a vital and prominent role in legal arguments quickly became unpopular. To focus on section 28 would run the risk of minimizing other ways that women experience discrimination, such as racial oppression and exclusion based on disability. Giving attention to section 28 was regarded as elevating sex-based discrimination above other forms, creating an undesirable hierarchy of oppression. It would send a message that other types of discrimination were not as important. Better to focus on the multiple grounds of section 15, in which sex was only one of nine, rather than the sole ground in section 28 with its unique status apparently beyond section 1 restrictions and section 33 overrides.

These arguments, advanced with the best of intentions and for meritorious reasons, contributed to what I have called the presumption of sameness.<sup>56</sup> It has two aspects: first, a prescriptive aspect that all grounds deserve equal attention and weight; and second, a descriptive aspect that all grounds of discrimination are the same. The prescriptive aspect does not fit with the express words of section 28. More importantly, the descriptive aspect does not match reality. In daily life, people's problems are not only quite different, but some problems are worse than others. An unwillingness to recognize that some forms of discrimination are worse than others is another pernicious manifestation of formal equality — or rather, its obverse, formal inequality.

In pondering the reasons for section 28's disappearance, therefore, one question is the extent to which the presumption of sameness contributed to the abandonment of sections 28 and 35(4) as potent tools against gender oppression. Conversely, maybe section 28 was ignored because people did *not* accept a presumption of sameness; rather, they concluded that sex-based discrimination *simpliciter* was not the worst

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<sup>55</sup> *Mea culpa*. Only two dusty essays discuss s. 28 at any length: Donna Greschner, "How Not to Drown in Meech Lake: Rules, Principles and Women's Equality Rights" in K.E. Swinton and C.J. Rogerson, eds., *Competing Constitutional Visions: The Meech Lake Accord* (1988), at 55; and Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" (1992) U.B.C.L.R. 338 (Special Edition).

<sup>56</sup> See Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 *Queen's L.J.* 299, at 317.

problem, and thus its amelioration did not deserve the highest form of constitutional guarantee. Which is it? Does it matter?

## 5. The Problems with *Law*

Many commentators have written about the difficulties of bringing successful challenges using the framework established in *Law v. Canada*.<sup>57</sup> I will not repeat here the cogent criticisms, all of which deserve attention.<sup>58</sup> One central problem is that *Law* puts all equality claims into the same doctrinal box, regardless of the form that they take. Every claimant must go through three steps to prove a section 15 violation. In the third step, every claimant must jump over the hurdles of the four contextual factors in order to prove the infringement of dignity necessary for a finding of discrimination. Justice Iacobucci, when he laid down the *Law* test, cautioned that contextual factors had different weight, and that perhaps not every one would be necessary in every case.<sup>59</sup> His words have not been heeded. Many claimants now find that fluid contextual factors have solidified into legal cement.

The hardening of *Law*'s factors may rest on a presumption of sameness, *i.e.*, a belief that all problems of inequality are essentially the same and therefore can be examined in the same way. Maybe one way out of the *Law* box is to develop, explicitly, different criteria for each type of discrimination. Maybe in the cases this is already happening; as I have noted above, discrimination claims that are tied to denials of liberty have done well. The trick is to develop more sensitive and specific understandings of each type of discrimination, with corresponding legal tests for their identification and redress, without masking or minimizing any one of them.<sup>60</sup> That will not be easy. But does full substantive equality deserve anything less?

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<sup>57</sup> [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497.

<sup>58</sup> For a summary of criticisms, and an excellent contribution, see Bruce Ryder, Cidalia Faria and Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 S.C.L.R. (2d) 103. The most sophisticated and persuasive understanding of dignity as the essential core of equality rights is offered by Denise Réaume, "Discrimination and Dignity" (2003) 63 Louisiana L. R. 645.

<sup>59</sup> *Law*, *supra*, note 57, at paras. 55, 62, 88.

<sup>60</sup> For one exceptionally helpful analysis, see Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 54 U.T. L.J. 291.

## 6. Priority for the Worst-Off

Another explanation for section 28's desuetude is that significant segments of Canadian society do not want to take women's equality as seriously as the words of section 28 ought to require. In the specific context of the *N.A.P.E.* litigation, perhaps the Newfoundland and Labrador government could break its promise to remedy pay discrimination because the pay equity law and settlement did not have broad support.

If this is so, it raises a further question. Overall, equality rights are popular. Why not in this case? One possible explanation is that many people are worse off than female public servants, in spite of the discrimination that unjustly reduced women's wages. In economically depressed provinces, public employees are among the most well-paid and privileged members of their communities, especially in rural areas. They have good wages, relative job security, enhanced health benefits, and pensions.<sup>61</sup> Maybe residents of Canada's poorest province rejected the presumption of sameness and concluded that other members of its communities were in more dire need. Hence their politicians could break the pay equity agreement without paying a political price.

In the past I have asked whether equality jurisprudence should include a version of the Rawlsian difference principle: do not justify a rights violation unless it helps the worst-off.<sup>62</sup> This principle has a communitarian element. It tells us to take heed of the least well-off members of our community. Keep them in mind. Pay attention to their needs. Such a principle supports an overall goal of section 15, what I have called belonging<sup>63</sup> and others may call social inclusion.<sup>64</sup> Maybe the Court's section 1 analysis in *N.A.P.E.* represents a budding principle of giving priority to the worst-off, or at least not standing in the way

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<sup>61</sup> My memories colour my analysis. When I was growing up in impoverished rural Saskatchewan, obtaining a job at the local hospital was akin to winning the lottery. In the early 1970s, when my mother was not hired as a cook's helper in the local hospital, she cried for many days. It was not merely the best job for a woman with little formal education, it was the only job. In the 1990s, a large part of the resistance to hospital closures throughout the prairies sprang from the economic hardship such closures would wreak on rural communities.

<sup>62</sup> *Supra*, note 56.

<sup>63</sup> Donna Greschner, "The Purpose of Canadian Equality Rights" (2002) 6 Rev. Const. Studies 291; "The Right To Belong: The Promise of *Vriend*" (1998) 9 Nat. J. Con. L. 417.

<sup>64</sup> For a thorough assessment of, and advocacy for, the goal of social inclusion as justification for anti-discrimination laws, see Hugh Collins, "Discrimination, Equality and Social Inclusion" (2003) 66 Mod. L. Rev. 16.

when government decides to do so.<sup>65</sup> Encouraging this development may help the Charter address problems of poverty more effectively. However, while the principle sounds great on paper, in specific circumstances its application will cause unease because it will require some of us with privilege to forgo, or at least postpone, our rights. One troublesome danger is that the greatest sacrifices will be asked of members of other disadvantaged groups, not the most well-off.<sup>66</sup> Consider, for instance, that no pay equity scheme ever requires the beneficiaries of past discrimination against women to disgorge their profits.

## 7. The Past May Not be Prologue

I finished my legal education in 1982. Thus, I belong to the last generation of lawyers who received their legal education in pre-Charter times. With each passing year, fewer lawyers will examine equality issues without automatically seeing them through the prism of section 15.

The difference in pedagogical experience has salience. Lawyers of my generation and older remember politics without section 15. We can assess political strategies without comparing them to the pros and cons of Charter challenges. In making these evaluations sans Charter, we can rely on our memories. But for younger lawyers, politics without the Charter is outside their personal experiences. They must imagine a counter-factual. In a recent article, Harry Arthurs asks us to develop the constitutional courage to return to pre-Charter political work.<sup>67</sup> In my view, that task will be increasingly difficult to the extent that such courage will demand imagination, not merely memory. However, such imaginative efforts will be necessary, but not precisely for the reasons Arthurs gives. We need extra-Charter political work, such as constructing better human rights laws, for section 15 to fulfill its promise of substantive equality and for the courts' work to merit our praise during the next two decades.

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<sup>65</sup> The communitarian themes in the Court's recent equality decisions are thoughtfully explored in this volume by Roslyn Levine and Jonathon Penney, "The Evolving Approach to Section 15(1): Diminished Rights or Bolder Communities?" (2005), of this volume, at 137.

<sup>66</sup> Amongst other difficulties, there are problems with determining which group is the worst-off, a question for which a court's telescopic vision is not well-suited to answer, as illustrated by lower court opinions in the *Auton* litigation. See Donna Greschner and Steven Lewis, "Auton and Evidence-Based Decision-Making: Medicare in the Courts" (2003) 82 C.B.R. 510.

<sup>67</sup> Harry Arthurs, "Constitutional Courage" (2003) 49 McGill L.J. 1.

