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# Grounding Equality in Social Relationships: Suspect Classification, Grounds of Discrimination, and Relational Theory

Jessica Nichol Eisen

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GROUNDING EQUALITY IN SOCIAL RELATIONSHIPS:  
SUSPECT CLASSIFICATION, GROUNDS OF DISCRIMINATION, AND RELATIONAL  
THEORY

JESSICA EISEN

A THESIS SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN PARTIAL  
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## ABSTRACT

This thesis considers the implications of relational theory for doctrinal debates in Canadian and American constitutional equality law, with a focus on grounds of discrimination and suspect classification. Chapter 1 sets out the fundamentals of feminist relational theory, emphasizing relational approaches to difference, equality, and rights. Chapter 2 considers the methodological implications of applying relational theory to doctrinal problems. Chapter 3 sets out the basic structure and evolution of the suspect classification inquiry in American equal protection law. Chapter 4 does the same in respect of the Canadian doctrinal approach to grounds of unconstitutional discrimination. Finally Chapter 5 ties together Canadian and American scholarly debates over the proper shape of inquiries into groups/grounds or class(ification), and suggests a framework by which the relational theory set out in Chapter 1 might help to reframe and resolve aspects of these problems as they emerge in both jurisdictions.

## **DEDICATION**

Dedicated to Paul Thomas Hanlon and Marjorie Helen Nichol (my loving readership),  
with great admiration and gratitude.

## ACKNOWLEDGMENTS

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## INTRODUCTION

This summer, the United States Supreme Court struck down a section of the federal Defence of Marriage Act (DOMA) that excluded same-sex couples from the definition of “spouse” in construing federal statutes.<sup>1</sup> The Court heard vigorous argument in that case as to whether same-sex couples were part of a group in need of special protection under the constitution’s Equal Protection Clause. Even the President weighed in.<sup>2</sup> But not the Supreme Court. The Court struck down the DOMA exclusion, but sidestepped a wide-open question about whether distinctions on the basis of sexual orientation warrant special scrutiny.<sup>3</sup>

Two years earlier, in 2011, the Supreme Court of Canada considered whether Ontario’s Agricultural Employees Protection Act (AEPA), which provided agricultural workers with lesser labour rights than other employees in Ontario, was vulnerable to challenge under Canada’s constitutional equality provision. Extensive arguments were made before the Supreme Court regarding whether agricultural workers were a group warranting protection under Canada’s constitutional equality protection. The majority of the Supreme Court of Canada, however,

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<sup>1</sup> *United States v Windsor*, 570 US \_\_\_ (2013) [*Windsor*].

<sup>2</sup> See Attorney General Eric Holder’s letter to Speaker John Boehner of February 12, 2013, expressing the President’s considered view that the Court should be “suspicious of classifications based on sexual orientation.” Available online at <<http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>>. (Accessed June 29, 2013.)

<sup>3</sup> William J. Rich describes the U.S. courts’ current approach to equal protection analysis in cases of alleged discrimination on the basis of sexual orientation, noting throughout that the Supreme Court has yet to address the requisite level of scrutiny. William J. Rich, *Modern Constitutional Law*, 3d ed (Minnesota: West, 2011) at Chapter 13. Rich further observes that in the most recent (as of the time of writing) Supreme Court case where the Court was called upon to address the question, the Court declined to do so, deeming the question unnecessary: *Romer v Evans*, 517 US 620 (1996).

demurred, declining to address the equality claim on the basis that it was too early to address the impact of the newly-implemented scheme.

Writing in the U.S. context, Professor Kenji Yoshino has suggested that the United States Supreme Court is increasingly reluctant to address thorny questions as to which groups warrant heightened scrutiny under the Equal Protection Clause.<sup>4</sup> Yoshino argues that the Court increasingly prefers to adjudicate cases in other ways – to protect the rights of marginalized people through doctrinal avenues that do not require uncomfortable inquiries about social groups or grounds of discrimination. These inquiries, he argues, have provoked a “pluralism anxiety”—a fear of endlessly proliferating groups clamouring for special protection. The Court assuages this anxiety not by revising their approach to equal protection—an approach that begins by asking whether a “suspect classification” is engaged—but by turning away from equal protection altogether. Yoshino’s descriptive claim is convincing, and by his own admission less forcefully advanced than his weaker normative proposition: maybe this is a good thing. Maybe the universalizing language of human rights is the best tonic for a pluralism-anxious Court –the best way of moving towards a “new, broader sense of ‘we.’”<sup>5</sup>

But there are risks—Yoshino concedes—of turning away from the real circumstances of particular groups, away from the bodies and communities that give substance to the pluralism that makes the Court so anxious. There is a risk that pluralism anxiety is standing in the way of protecting groups that really *need* the protection of heightened judicial scrutiny.<sup>6</sup> There is a risk that shifting to the universalizing language of basic rights encourages us to ignore or minimize instances

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<sup>4</sup> See generally Kenji Yoshino, “The New Equal Protection” (2011) 124 Harv L Rev 747.

<sup>5</sup> *Ibid* at 792-793, quoting Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000) at 139.

<sup>6</sup> Yoshino, *supra* note 4 at 797.



of group-based subordination that warrant judicial intervention.<sup>7</sup> And, there is a risk that such an approach will require oppressed groups to chip away at oppressive structures in a piecemeal fashion—one infringement at a time—without recourse to broader arguments about systemic subordination.<sup>8</sup>

While Yoshino is examining a particular doctrinal turn in the U.S. context, a related set of trends may be emerging in the jurisprudence of the Canadian Supreme Court. The Canadian Court’s early approach to grounds of discrimination was focused on group disadvantage and contextual analysis. The Court has since shifted to an approach that hinges on an abstract and decontextualized inquiry into whether the personal characteristics that define potential claimant groups are impossible or difficult to change. Moreover, the Supreme Court of Canada has declined to add a single ground to the list of protected traits in nearly 15 years.<sup>9</sup> Whether or not this shift is motivated by the same “pluralism anxiety” that Yoshino attributes to the U.S. Supreme Court, the result may be the same: when it comes to constitutional equality protection, new groups need not apply.

### **Finding A Way Out of the Groups/Grounds Problem**

In her broad thematic study of equality laws across a range of jurisdictions, Sandra Fredman identifies the question of “which characteristics...ought to be protected against discrimination?” as one of two central scope-limiting questions posed by laws aiming to combat discrimination.<sup>10</sup> Fredman identifies a typology of three basic textual structures of equality laws: (1) protections based on an exhaustive list of grounds, such as those found in the United Kingdom and the European

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<sup>7</sup> *Ibid* at 798-799.

<sup>8</sup> *Ibid* at 799-800.

<sup>9</sup> No new grounds have been recognized by the Supreme Court of Canada as being “analogous” to those listed in the constitutional text since *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*], as will be discussed more fully below.

<sup>10</sup> Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2011) at 107. The second limiting principle identified by Fredman concerns the “reach” of equality law: “Should discrimination on these grounds be unlawful in all walks of life, or only in specific spheres such as employment and education?” *Ibid* at 107.

Union; (2) protections based on a non-exhaustive list that can be expanded by judicial interpretation, such as those found in Canada, South Africa, and the European Commission; and (3) open-textured provisions that offer no list of prohibited distinctions, such as the United States' Equal Protection Clause.<sup>11</sup> Even where no list is provided in the constitutional text, however, Courts continue to rely on such classifications in interpreting and limiting equality guarantees. The American Equal Protection Clause, for example, has been interpreted through a rubric of judicially prescribed “tiers of scrutiny,” whereby certain “suspect classifications” give rise to “heightened scrutiny.”

Although “grounds” and “classifications” are broadly present in legal tests for equality violations, debate persists as to which grounds warrant protection, and why. In interpreting the Equal Protection Clause, the Supreme Court of the United States has limited “heightened scrutiny” to distinctions on the basis of race, national origin, alienage, sex, and nonmarital parentage.<sup>12</sup> By contrast, the South African constitutional text sets out 16 distinct grounds of proscribed discrimination, to which the South African Constitutional Court has made further judicial additions.<sup>13</sup> In those jurisdictions that do allow for judicial expansion of the list of prohibited grounds, debate continues as to the types of questions equality analysis should ask about equality claimants: do the proper questions about claimants inquire into the mutability or relevancy of a defining trait, or do they inquire into the political history and status of the claimant group?<sup>14</sup>

Thus the two cases that introduced this paper—the American DOMA challenge and the Canadian AEPA challenge—gave rise to a common set of questions despite their different

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<sup>11</sup> *Ibid* at 107-130.

<sup>12</sup> I will use the term “heightened scrutiny” to refer to both “suspect” and “quasi-suspect” classifications—a distinction which will be elaborated more fully below.

<sup>13</sup> Constitution of the Republic of South Africa, 1996, s 9. See *Hoffmann v South African Airways*, 2000 (2) SA 628; 2001 (10) BHRC 571; (2000) 3 CHRLD 146 for the South African Constitutional Court’s judicial addition of HIV status as a protected ground.

<sup>14</sup> Fredman, *supra* note 10 at 107-130.

jurisdictional, political, and material contexts. Do laws targeting or disadvantaging American same-sex couples, or Canadian agricultural workers, engage the special purposes of constitutional equality protections? Are these cases sufficiently “like” or “analogous” to the paradigmatic grounds of discrimination such as race to warrant special constitutional protection?<sup>15</sup> How much choice do agricultural workers or same-sex couples have over these aspects of their lives and identities? Are American same-sex couples or Canadian agricultural workers the victims of present-day or historical disadvantage? Are there factors which make either of these groups less able to represent themselves in the democratic political process?

In both Canada and the U.S., scholarly debates have zeroed in on a key distinction in the potential approaches to these persistent doctrinal problems: should constitutional equality analysis focus on *groups of persons* or on the nature of the *grounds of distinction* that delineate those groups. Returning to the paradigmatic case of racial discrimination against African Americans,<sup>16</sup> this question asks whether the relevant equality problem is best understood with reference to the circumstances of *African Americans*, or if it is best understood with reference to the nature of *race* as a trait. In the Canadian context, Daphne Gilbert has called for a doctrinal emphasis on disadvantaged groups (rather than abstracted grounds) as the best way to account for discrimination in the face of complex identity.<sup>17</sup> Dianne Pothier, on the contrary, has called for an emphasis on the listed grounds

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<sup>15</sup> Writing in the U.S. context, Jed Rubenfeld describes racial discrimination against African Americans as the paradigmatic wrong against which the Equal Protection Clause is aimed: “If the Equal Protection Clause means anything, it means that the black codes, separate but equal laws, and racial miscegenation statutes were unconstitutional. Equal protection jurisprudence is centrally a task of saying what it means to honor the nation’s commitment to abolish all such laws. Any reading of the Equal Protection Clause that does not accord these paradigm cases pride of place—any interpretation that cannot, without bending or breaking, embrace these paradigm cases at its core—is not a satisfactory account.” Jed Rubenfeld, “Affirmative Action” (1997) 107 *Yale LJ* 427 at 457.

<sup>16</sup> See *ibid* for Rubenfeld’s discussion of racial discrimination against African Americans as forming the “paradigm cases” of equal protection violations.

<sup>17</sup> See generally Daphne Gilbert, “Time to Regroup: Rethinking Section 15 of the Charter” (2003) 48 *McGill LJ* 627 [Gilbert, “Regroup”]; and Daphne Gilbert, “Unequaled: Justice Claire L’Heureux-Dubé’s Vision of Equality and Section 15 of the Charter” (2003) 15 *CJWL* 1 [Gilbert, “Unequaled”].

as the specific, historically important fault lines of discriminatory treatment.<sup>18</sup> In the American context, Reginald Oh and Jed Rubenfeld have decried the U.S. Supreme Court’s linguistic and substantive shift from a focus on “suspect classes” to a preoccupation with “suspect classifications” as a betrayal of the demands of anti-subordination.<sup>19</sup> But others have rejected calls for attention to “classes” or “groups” on the basis that such approaches may work to entrench stereotypical and self-fulfilling accounts of group difference.<sup>20</sup>

This paper seeks a “way out” of these intractable groups/grounds debates. In this paper I consider a means of attending to the oppressive relationships that give discrimination its bite, while avoiding the spectre of a Pandora’s box of variously labelled “groups” clamouring for inclusion on an ossified and stereotypical “list.” This way out is one that feminists have been working on for years under the banner of “relational theory,” a body of scholarship that will be fleshed out in the coming pages. Its solutions are both simple and paradigm-shifting: attend to relationships in all their complexity; interrogate the categories with which people are described; listen across difference. But, as will be elaborated below, these relational directives have often faltered on the shoals of legal doctrine. The turn away from categorical thinking, in particular, seems at times to ask too much of a legal culture that knows no other way.

In this paper, I seek to explore the contributions that relational insights might make to a pervasive and persistent doctrinal problem: what is equality law to do with all these groups, and how

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<sup>18</sup> Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 CJWL 37.

<sup>19</sup> See Reginald C Oh, “A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class” (2004) 13 Temp Pol & Civ Rts L Rev 583; and Rubenfeld, *supra* note 15.

<sup>20</sup> See, for example, Richard Thompson Ford, “Unnatural Groups: A Reaction to Owen Fiss’s ‘Groups and the Equal Protection Clause’” (2003) 2:1 Issues in Legal Scholarship 1007; Iris Marion Young, “Status Inequality and Social Groups” (2002) 2:1 Issues in Legal Scholarship 1019; and Rogers M Smith, “‘Black’ and ‘White’ in Brown: Equal Protection and the Legal Construction of Racial Identities” (2003) 2:1 Issues in Legal Scholarship 1014.

is equality law to assess which grounds of distinction should also be seen as grounds of discrimination?

### **Summary and Roadmap**

In Chapter 1 (“Relational Rights”), I set out the fundamentals of feminist relational theory, with a particular focus on relational approaches to difference, equality, and rights. In Chapter 2 (“Embracing an Uneasy Fit”), I consider the methodological implications of applying relational theory to doctrinal problems. In Chapter 3 (“Classes and Classifications in U.S. Equal Protection Law”), I set out the basic structure and evolution of the suspect classification inquiry in American equal protection law. In Chapter 4 (“Groups and Grounds in Canadian Equality Law”), I do the same in respect of the Canadian doctrinal approach to grounds of unconstitutional discrimination. Finally, in Chapter 5 (“Rethinking Class(ification): Relational Approaches to Doctrine”), I revisit the problem of the groups/grounds debates set out in this introduction. In this chapter, I seek to tie together Canadian and American scholarly debates over the proper shape of the inquiry into groups/grounds or class(ifications), and suggest that relational theory might help to reframe and resolve aspects of these problems as they emerge in both jurisdictions.

## CHAPTER 1

### RELATIONAL RIGHTS

Robert Leckey rightly notes that “Relational theory is not an officially constituted school, and its boundaries are contestable.”<sup>21</sup> Yet common threads are discernable among relational theorists—threads comprised of common cosmological and epistemological claims, methodological prescriptions, and normative commitments. Pared down to its most basic premise, relational theory calls for a shift in emphasis—moving relationships from the periphery to the centre of legal and social discourse and reasoning. Importantly, this call for a “shift” acknowledges that relational theory is in important ways a *reaction* to extant framings, rather than a “grand theory” purporting to be spun from whole cloth.<sup>22</sup> In particular, social relations theorists take to task traditional liberal assumptions about persons as autonomous, rational, and independent political actors. Instead, relational theorists posit that relationships are constitutive of persons and institutions—a position which in turn gives rise to a normative demand that problems be reconceived and addressed in ways that honor this core truth. To this end, social relations theorists have worked to build up new metaphorical, rhetorical, political and legal alternatives to the paradigmatic liberal account, in order

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<sup>21</sup> Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008) at 7. Leckey describes relational theory as consisting of three main schools: one which emphasizes differences between men and women, and the ethics of care relationships; another which analyzes rights as relational; and a third which focuses on elaborating relational conceptions of autonomy. The relational theory I discuss here is primarily focused on the second of these (relational rights), but with references to the other two schools where necessary to elaborate relational rights.

<sup>22</sup> See Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1991) at 15.

to correct this failure and to adequately account for the centrality of relationships to political and legal questions.

This chapter will set out the central arguments proposed by relational theorists, as well as certain relevant points of contestation, with an eye to exhuming relational theorists' critiques and prescriptions for revising liberal theory, equality, law, and rights. In this chapter, I will emphasize two core elements of relational theory, most persuasively described by Jennifer Nedelsky and Martha Minow respectively. The first is a portrait of human persons as embodied, affective, and essentially constituted by social relationships—a distinct departure from classical liberal conceptions of legal personhood. The second is an emphasis on the socially constructed and contested deployment of categories, and an attendant wariness of categorical thinking that purports to rely on natural groupings. This discussion will conclude that relational theorists have posed important critiques of the liberal assumptions that animate constitutional equality doctrines, but will also observe that prescriptive links between these criticisms and particular equality projects remain largely uncharted or contested. I take Christine Koggel's development of a relational approach to equality as a largely unsuccessful effort to forge such a link. I propose that one source of difficulty in inscribing equality law projects with relational theory is the admittedly “uneasy fit” between relational theory and doctrinal approaches—most evident in Minow's explicit rejection of doctrinal analysis as a means of exploring relational approaches to legal reasoning. In the following chapter, I will elaborate my reasons for pursuing the link between relational theory and doctrinal projects despite Minow's critique and my own concession of an “uneasy fit.”

### **From Liberal Individuals to Relational Selves**

Relational theorists share a common concern that traditional liberal theory rests on an erroneous assumption that human persons should be understood as independent, atomistic, rational units. Leckey summarizes that “[a]ccording to relational theory, liberals conceive of the subject as

an autonomous, rational agent that selects its relationships and obligations through the instruments of private property and contract.”<sup>23</sup> Thus, writing in the family law context, Martha Minow and Mary Lyndon Shanley describe a liberal, contractarian “model of the individual” which casts the human self as “that of a self-possessing individual linked to others only by agreement.”<sup>24</sup> Relational theorists elaborate that these liberal assumptions about the independence of individuals give rise to particular analytical and prescriptive approaches that affirm and perpetuate the image of a separate self. Lorraine Code describes the liberal premise of separable individuals as directing that “[a]utonomous man is—and should be—self-sufficient, independent, and self-reliant, a self-realizing individual who directs his efforts towards maximizing his personal gains.”<sup>25</sup> In the same vein, Catriona Mackenzie and Natalie Stoljar emphasize the link between the descriptive and prescriptive in the liberal formulation that “human beings are capable of leading self-sufficient, isolated, independent lives,” and that therefore “the goal of human life is the realization of self-sufficiency and individuality.”<sup>26</sup> Martha Minow similarly traces liberalism’s descriptive and prescriptive dimensions, charging that liberalism both “assumed and claimed to create the conditions for autonomous, self-determining individuals.”<sup>27</sup> The atomistic individual of liberal theory, on Minow’s account, “is thought to have wants, desires, and needs independent of social context, relationships with others, or historical setting. The individual, in short, is distinguishable from his or her situation

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<sup>23</sup> Leckey, *supra* note 21 at 106.

<sup>24</sup> Martha Minow & Mary Lyndon Shanley, “Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law” (1996) 11:1 *Hypatia* 4 at 12.

<sup>25</sup> Lorraine Code, “Second Persons” in *What Can She Know? Feminist Theory and the Construction of Knowledge* (New York: Cornell University Press, 1991) at 78.

<sup>26</sup> Catriona Mackenzie & Natalie Stoljar, “Introduction: Autonomy Refigured” in Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford: Oxford University Press, 1999) at 6.

<sup>27</sup> Minow, *supra* note 22 at 124.



and social, political, and religious identities. This idea is a prerequisite for imagining a state of nature, outside of society, from which people enter into a social contract.”<sup>28</sup>

Jennifer Nedelsky offers a sustained and persuasive version of this critique in *Law's Relations: A Relational Theory of Self, Autonomy and Law*. Nedelsky links the particular atomistic vision of the individual to the central role that metaphors of “boundary” have played in Anglo-American law.<sup>29</sup> Nedelsky underlines the historical reality that protection of property was a core concern of the early American democratic project, given the material context of pervasive economic inequality. The founders worried that “property would be inherently vulnerable in a republic because the many would always be poor and the few rich; what would prevent the many from using their numerical power in the legislature to take the property of the few?”<sup>30</sup> The framers presumed that “it was in the very nature of a productive system of private property that many, perhaps most, would have none,” and that this reality was both natural and fearsome for the new republic.<sup>31</sup> Indeed, on Nedelsky’s account, the survival of the republic was seen to hinge on this problem, with the result that protection of property “became the defining instance of the larger problem of securing rights against the threat of majority oppression.”<sup>32</sup> Distortions emerged as a result of this casting of “the general problem in terms of the particular,” which Nedelsky believes persist in both popular and legal thinking today.<sup>33</sup> In particular, rather than seeing rights as being subject to ongoing, collective definition, rights came to be understood as “things to be protected.”<sup>34</sup> The ensuing metaphor of rights as “boundaries” of legitimate power thus “not only has the dark underpinning of inequality but also rests on a flawed

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<sup>28</sup> Minow, *supra* note 22 at 152.

<sup>29</sup> See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at Chapter 2.

<sup>30</sup> *Ibid* at 93.

<sup>31</sup> *Ibid* at 94.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* at 95.

<sup>34</sup> *Ibid* at 96.

conception of the individual, a conception captured, amplified, and entrenched by its association with property. The boundaries central to American constitutionalism are those necessary to protect a bounded or ‘separative’ self: the boundaries around selves form the boundaries to state power.”<sup>35</sup>

Relational theorists propose that liberal legal and political theory are wrong about the nature of human persons and community, and that the metaphorical structure of separation and boundary are inadequate and distorting. On the relational account, the autonomous, independent, self-actualizing rights-bearer is a fiction, and a dangerous fiction at that. Nedelsky argues that the “perverse quality” of boundary metaphors that cast political projects in terms of protecting separative selves from intrusions of the collective “is clearest when taken to its extreme: the most perfectly autonomous man is the most perfectly isolated.”<sup>36</sup> Moreover, a focus on boundary distracts from “the true sources and consequences of the patterns of power that property [and other boundaries] constitut[e].”<sup>37</sup> The alleged distortion and misdirection attending liberal notions of separative selves is thus deeply political. Catherine Albertyn and Beth Goldblatt set out the core concern that “the twin concepts of abstract individualism and legal neutrality mask a complex reality of inequality in which people have unequal access to resources and many do not have sufficient power to control or value their own lives.”<sup>38</sup>

This relational critique of liberal individualism draws heavily on a broader feminist and social criticism that Marilyn Friedman characterizes (with tongue in cheek) as casting individualism as “the evil demon of modern Western social and political life.”<sup>39</sup> The essence of the feminist charge

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid* at 97.

<sup>37</sup> *Ibid* at 108.

<sup>38</sup> Catherine Albertyn & Beth Goldblatt, “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14:2 SAJHR 248 at 251.

<sup>39</sup> Marilyn Friedman, *Autonomy, Gender, Politics* (New York: Oxford University Press, 2003) at 16. Friedman is concerned that “[i]n an effort to combat individualism, critics may shift theoretically too far toward social terms of conceptualization and ignore dimensions of autonomy that are not specifically social.”

is that the abstracted individual of liberal political and legal theory is not a truly abstract, but is rather a caricature of masculine and historically contingent ideals. The caricature's particularity is masked by liberalism's claim to abstraction. Minow points out that "[t]he very human being who could be imagined as abstracted from context is a particular sort of person with a specific history and identity. It is a person living some time after the seventeenth century in western Europe or the United States, a person who avoided feudal bonds and lived away from any religious, ethnic, or family group whose members defined themselves through such a group."<sup>40</sup> Minow notes that philosophers have come to question "whether the abstract individual ever did or ever could apply to women,"<sup>41</sup> and adds her own observation that "it is difficult to imagine that such a person would be... a child, or a disabled individual."<sup>42</sup> Christine Koggel posits that "[t]here is no impartial and neutral point of view removed from the perspectives of concrete persons embedded in social practices and political contexts."<sup>43</sup> In elaborating the danger of such claims to impartiality, Koggel adopts the argument of feminist judgment theorist Seyla Benhabib, that efforts to arrive at principles through reference to de-historicized and de-particularized human selves inevitably do so "surreptitiously by identifying the experiences of a specific group of subjects as the paradigmatic case of the human as such. These subjects are invariably white, male adults who are propertied or at least professional."<sup>44</sup> The fictitious liberal rights-bearer is thus seen to replicate, perpetuate, and mask oppressive power

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<sup>40</sup> Minow, *supra* note 22 at 153.

<sup>41</sup> *Ibid* at 153; citing, *inter alia*, Alison Jaggar, *Feminist Politics and Human Nature* (New Jersey: Rowman & Littlefield, 1983) at 46-47; Susan Moller Okin, *Women in Western Political Thought* (New Jersey: Princeton University Press, 1979) at 197-202; Genevieve Lloyd, *The Man of Reason: "Male" and "Female" in Western Philosophy* (Minnesota: University of Minnesota Press, 1984).

<sup>42</sup> Minow, *supra* note 22 at 153, fn 15.

<sup>43</sup> Christine M Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Maryland: Rowman & Littlefield, 1997) at 113.

<sup>44</sup> Koggel, *supra* note 43 at 105, citing Seyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992) at 152-153.

structures that marginalize those who least accord with a propertied-white-male norm—a norm for which he serves as both guardian and exemplar.

In contrast to the liberal paradigm, relational theorists hold that social relationships are constitutive of human personhood. Leckey explains that “relational theorists understand that subjects are socially constituted, embedded in their contexts, their selfhood and agency formed by thick relationships with others.”<sup>45</sup> Thus, Anne Donchin explains, “[i]nterconnections continue to shape and define us throughout our lifetime, so that patterns through which we construct (and reconstruct) our self-identity and infuse it with meanings are bound up with meanings given in the social world external to us.”<sup>46</sup> On this account, the isolated, abstract individual of liberal theory misrepresents the essentially social nature of real persons. Everything about who we are, what we need, what we are capable of, and what we aspire to, emerges from the dense networks of social relationships in which we are not just embedded, but also generated and regenerated through ongoing and iterative interactions. Mackenzie and Stoljar describe relational approaches as being based on the “shared conviction that persons are socially embedded and that agents’ identities are formed within the context of social relationships shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.”<sup>47</sup> Thus, instead of viewing individuals as separate and atomistic actors whose interactions are relevant only when their interests collide, Nedelsky proposes that “each individual is in basic ways constituted by networks of relationships,” ranging from the intimate and interpersonal—such as those with parents, friends, or lovers—to the systemic—such as the relationship between citizen and state, or the relations entailed by “being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global

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<sup>45</sup> Leckey, *supra* note 21 at 106.

<sup>46</sup> Anne Donchin, “Autonomy and Interdependence: Quandaries in Genetic Decision-Making” in Mackenzie & Stoljar, eds, *supra* note 26 at 239-240.

<sup>47</sup> Mackenzie & Stoljar, *supra* note 26 at 4.

warming.”<sup>48</sup> These various levels of relationship operate concurrently and interactively to constitute human subjects, who in turn contribute to the structure and content of those same relationships.<sup>49</sup>

### **Categorically Different: Relational Conceptions of Difference and Identity**

The relational contention that the paradigmatic, isolated individual of liberal theory is in fact particular and historical destabilizes a host of related assumptions. Once we accept the relational premise that there is no possibility of an unsituated perspective, all sorts of liberal intuitions about the meaning of difference, the concerns relevant to adjudicating disputes, and *who* exactly has produced and perpetuated these intuitions are opened up to debate.

Martha Minow’s *Making All the Difference: Inclusion, Exclusion, and American Law* takes up a version of this problem. In Minow’s view, legal analysis often seeks to “break complicated perceptions into discrete items or traits,” and then sort those traits or items into categories – often without interrogating the provenance of those categories.<sup>50</sup> Minow’s core claim is that “we make a mistake when we assume that the categories we use for analysis just exist and simply sort our experiences, perceptions, and problems through them.”<sup>51</sup> Minow emphasizes that acts of categorization are in fact social choices that ascribe and perpetuate meanings and consequences for those traits that we choose to make significant.<sup>52</sup> The persistent presumption that such categories of difference are real or unconstructed “ignores the power of our language, which embeds unstated points of comparison inside categories that falsely imply a natural fit with the world.”<sup>53</sup> Minow does not deny that there are real differences between people, but rather emphasizes that the categories by which we describe and assign meaning to these differences are not given. When we ignore the

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<sup>48</sup> Nedelsky, *supra* note 29 at 19.

<sup>49</sup> *Ibid* at 21.

<sup>50</sup> Minow, *supra* note 22 at 3.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid* at 4.

chosen and situated nature of categories like race, sex, or disability, we run the risk that “the labels point to conclusions about where an item, or an individual, belongs without opening for debate the purposes for which the label will be used.”<sup>54</sup> In response to this problem, Minow advocates a “social relations approach,” which requires “a shift from a focus on the distinctions between people to a focus on the relationships within which we notice and draw distinctions.”<sup>55</sup> Endorsing Minow’s critique, Albertyn and Goldblatt suggest that “[i]t is not the characteristics of the individual or the group that are the concern, but the social arrangements that make these matter.”<sup>56</sup>

Christine Koggel’s *Perspectives on Equality: Constructing a Relational Theory* is premised on the related proposition that language and meaning are forged in particular social contexts, and are shaped by purpose-driven interactions. Koggel illustrates this point drawing on Wittgenstein’s later work, in which language games are used “to study the phenomena of language in primitive kinds of application in which one can command a clear view of the aim and functioning of the words.”<sup>57</sup> In one language game, Wittgenstein describes a team of builders who employ purposive and socially prescribed definitions of similarity and difference in order to communicate requests to bring over objects defined as “blocks,” “pillars,” “slabs” or “beams.”<sup>58</sup> The meanings of these terms are defined by their use, and disputes over which objects fall in which categories can be resolved through reference to agreed-upon standards and rules for application.<sup>59</sup> Koggel seeks to expand (and perhaps depart from) Wittgenstein’s language game to include moral concepts and behaviour, with a focus on equality: “What happens when the builders learn to group people on the basis of features they are

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<sup>54</sup> *Ibid* at 4.

<sup>55</sup> *Ibid* at 15.

<sup>56</sup> Albertyn & Goldblatt, *supra* note 38 at 253.

<sup>57</sup> Koggel, *supra* note 43 at 14, citing Ludwig Wittgenstein, *Philosophical Investigations* [1953], 3d ed, GEM Anscombe, Trans (New York: Prentice Hall, 1973) at 5.

<sup>58</sup> Koggel, *supra* note 43 at 15.

<sup>59</sup> *Ibid* at 16.

judged to have in common and to follow rules that prescribe treatment for members of those groups”<sup>60</sup> For example, Koggel asks what we might make of a situation where Builder A asks Builder B to bring “two slabs”; Builder B returns with two slabs (the correct number of the correct object), but the slabs are rejected because Builder B is a woman. Builder A’s refusal is based on another rule regarding a shared category of meaning: that “woman” means “nonbuilding person.”<sup>61</sup> Koggel is interested in the implications of this use of descriptive features of persons as a basis for prescriptive treatment.<sup>62</sup> Koggel explains that “[w]hat is disturbing about the builder who identifies women for the purpose of excluding them from the activity of building is that the category...and the rule...determine the meaning of difference in ways that specify and circumscribe activities, roles and relationships.”<sup>63</sup> Koggel worries that Builder B may come to “accept these descriptions of what her difference means, not perceive herself as a builder, and never challenge the description of her as a non-builder,” or alternatively, she may believe herself to be capable of building, “but have no power to change the meaning of her difference in the context of an established practice that excludes her from building.”<sup>64</sup> Builder B’s choices for interacting, participating, and acting are limited by the entrenched descriptive and prescriptive dimensions of categories.<sup>65</sup>

Koggel rejects the proposition that descriptions are merely “nominal” in the sense of representing purely arbitrary conventions; but she also rejects the proposition that they are “descriptive facts” in the sense that they are determined by universal categories “under which particulars fall independently of human interpretation.”<sup>66</sup> In Koggel’s relational approach,

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<sup>60</sup> *Ibid* at 20 and 22.

<sup>61</sup> *Ibid* at 24.

<sup>62</sup> *Ibid* at 24.

<sup>63</sup> *Ibid* at 35.

<sup>64</sup> *Ibid* at 35.

<sup>65</sup> *Ibid* at 35.

<sup>66</sup> *Ibid* at 24 and 26.

“categories that group objects capture features in and facts about the world, but those features and facts reflect and rely on human interpretation and interaction.”<sup>67</sup> Koggel thus seeks to focus on category as an *activity* rather than a structure with independent existence.<sup>68</sup> Koggel emphasizes that she does not mean to imply that there are no “real” differences between people, but rather that the fact of these differences “does not adequately explain the close connection that obtains between categories and the purposeful functions for which people create and use categories, purposes which lead them to focus on some features and to ignore others.”<sup>69</sup> Koggel urges a focus on the social contexts within which categories are constructed for “particular purposes,” and attention to the “moral and political implications of ‘describing people.’”<sup>70</sup>

For both Koggel and Minow, questions about who has the power to describe are of central importance to understanding and overcoming the oppressive potential of categories. For Minow, claims to knowledge of who or what counts as different should be “assessed in light of power relationships between those assigning the labels and those receiving them” so that “the meaning of differences may become a subject of debate rather than an observable ‘fact.’”<sup>71</sup> In Minow’s view, attention to social relationships “should alert a decision-maker to the power expressed in the process of categorizing people, or problems.”<sup>72</sup> Koggel similarly emphasizes that identification of “difference” is, as a matter of logic, defined in comparison with a standard, and that those standards are “created and maintained by members who have the power to identify and assign meanings to difference and the authority to apply and maintain the rules for use.”<sup>73</sup> But when a language of

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<sup>67</sup> *Ibid* at 25.

<sup>68</sup> *Ibid* at 27.

<sup>69</sup> *Ibid* at 28, citing Minow, *supra* note 22 at 3.

<sup>70</sup> Koggel, *supra* note 43 at 30.

<sup>71</sup> Minow, *supra* note 22 at 171.

<sup>72</sup> *Ibid* at 215.

<sup>73</sup> Koggel, *supra* note 43 at 37.



difference successfully takes hold, “norms and purposes become so much a part of the background that they are taken for granted and hidden.”<sup>74</sup> In Koggel’s view, “[t]o be complete, a theory of equality must take on the task of uncovering and evaluating who or what counts as equal, for what purposes, and in what sorts of relationships.”<sup>75</sup> The political project of opening discursive space for voices traditionally marginalized from the construction of difference thus becomes crucial to relational prescriptive projects, as will be discussed more fully below.

### **Relational Values: Reconceiving Equality**

The cosmological claim that human beings are relationally constituted (what Leckey refers to as the “descriptive premise” of relational theory<sup>76</sup>) gives rise to a relational imperative to reconceive of core values in terms which comport with this central truism of relational projects. Nedelsky explains that “[a] distorted picture of the self is likely to generate a distorted understanding of autonomy [and other values], and a system of rights designed to promote and protect that vision of self and autonomy is unlikely to optimally foster and protect human capacities, needs and entitlements.”<sup>77</sup> A relational turn in our conception of selfhood thus requires recognition that “[a]ll core values, such as security, dignity, equality, liberty, freedom of speech, are made possible by (or undermined by) structures of relationships.”<sup>78</sup>

The most prevalent focus of these efforts to reconstruct values in relational terms is the disassociation of “autonomy” from its conventional liberal associations with “independence,” “self-determination,” or “control.”<sup>79</sup> Catriona Mackenzie and Natalie Stoljar explain that relational feminist responses seek to destabilize a crude liberal conception of autonomy that is “inherently

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<sup>74</sup> *Ibid* at 37.

<sup>75</sup> *Ibid* at 40

<sup>76</sup> Leckey, *supra* note 21 at 7.

<sup>77</sup> Nedelsky, *supra* note 29 at 159.

<sup>78</sup> *Ibid* at 41.

<sup>79</sup> *Ibid* at 159.

masculinist, that it is inextricably bound up with masculine character ideals, with assumptions about selfhood and agency that are metaphysically, epistemologically, and ethically problematic from a feminist perspective.”<sup>80</sup> To this end, Mackenzie and Stoljar explain, relational accounts “focus attention on the need for a more fine-grained and richer account of the autonomous *agent*,” and a consequent conception of “autonomy as a characteristic of agents who are emotional, embodied, desiring, creative, and feeling, as well as rational, creatures.”<sup>81</sup> Thus, Leckey explains, “[f]or the relational theorist, autonomy is not a capacity that can be exercised in isolation.”<sup>82</sup> Nedelsky elaborates that autonomy is not best understood “as a static presumption about human nature, but a capacity whose realization is ever shifting” in relation to “the inherently fluid and contingent dynamics of process and relationship.”<sup>83</sup> As Ann Donchin explains, such an approach emphasizes that even “the subject-centred activities of reflecting, planning, choosing, and deciding that enter into self-determination are social activities in both a subjective and objective sense.”<sup>84</sup> This is truly the tip of the iceberg of a rich and complex literature exploring feminist and relational accounts of autonomy.<sup>85</sup>

Equality is significantly less widely theorized in the relational literature. Nonetheless, the value of equality emerges repeatedly in the relational literature, alongside calls to avoid or minimize oppressive power relationships.<sup>86</sup> But the precise contours of relational equality—particularly as a legal or constitutional construction, as will be addressed below—remain contested and unclear. Nedelsky, for example, advises that she “presupposes a commitment to equality,”<sup>87</sup> but concedes that

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<sup>80</sup> Mackenzie & Stoljar, *supra* note 26 at 3.

<sup>81</sup> *Ibid* at 21.

<sup>82</sup> Leckey, *supra* note 21 at 10.

<sup>83</sup> Nedelsky, *supra* note 29 at 119.

<sup>84</sup> Donchin, *supra* note 46 at 239.

<sup>85</sup> For an introduction to these debates, and a more nuanced account of the issues at stake, see the essays in Mackenzie & Stoljar, eds, *supra* note 26.

<sup>86</sup> See, for example, Minow, *supra* note 22; Koggel, *supra* note 43; Nedelsky, *supra* note 29.

<sup>87</sup> Nedelsky, *supra* note 29 at 64-65.

she “does not try to answer all the questions of exactly what equality should look like.”<sup>88</sup> Nedelsky does elaborate some of what she sees as important about equality: while *hierarchies of power* may be inevitable, relations of *domination* run afoul of relational commitments to equality.<sup>89</sup> This juxtaposition of hierarchy and domination takes its content from the familiar commitment to equal concern and respect: “those who find themselves at some times and spheres of their lives at the lower end of a hierarchical relationship need not feel humiliated, inadequate, or otherwise unable to claim respect as equal members of society.”<sup>90</sup> Contrasting her project with Koggel’s, Nedelsky elaborates that her own “argument is not about the relational meaning of equality as such, but over and over again it is about how to make a value like autonomy actually equally available to all.”<sup>91</sup>

For her part, Koggel’s central project in *Perspectives on Equality* is an exploration of the question “[w]hat happens when we take the inherent sociality and interdependence of human beings as the starting point for theorizing about conditions for treating people with equal concern and respect?”<sup>92</sup> Koggel takes equality as her primary focus, despite feminist concerns about the utility and value of the language of “equality” in describing feminist and other justice aspirations. Koggel synthesizes the feminist objection as follows: “if the goal of equality means giving up differences and embracing the same values and aspirations as men, then the goal needs to be questioned and even abandoned.”<sup>93</sup> Feminists including Merle Thornton, Catharine MacKinnon, and Ann Scales have argued respectively that the rhetoric of equality has been “stretched beyond its usefulness”; a distraction from a proper focus on “dominance”; and likely to trap us in “interminable and diseased

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<sup>88</sup> *Ibid* at 65.

<sup>89</sup> *Ibid* at 65.

<sup>90</sup> *Ibid* at 65.

<sup>91</sup> *Ibid* at 82.

<sup>92</sup> Koggel, *supra* note 43 at 1.

<sup>93</sup> *Ibid* at 179.

issues of difference between the sexes.”<sup>94</sup> Koggel, however, insists that there is value in pursuing the language of equality. She proposes that the alternative approaches proposed by these and other theorists (Thornton’s focus on liberation; Elizabeth Gross’ autonomy; MacKinnon’s domination; and Karen Offen’s preference for equity over equality) in fact rely on “the logic of equality discourse” to the extent that they “assume agreement that women’s *inequalities* in power, in autonomy, in opportunities, and so forth, are unjust.”<sup>95</sup> From a more practical standpoint, Koggel argues that there are strategic advantages to “working within the accepted discourse and structures to effect change”; the prevalence of the language of equality and equal treatment thus creates an incentive to find a way to make this discourse work.<sup>96</sup> In Koggel’s view, equality can be saved by recasting it as relational and substantive rather than purely formal.<sup>97</sup>

Perhaps the relational theoretical focus on autonomy represents a preference for values that don’t share equality’s connotations of comparison and difference. Koggel, however, tackles the problem of relational equality head-on, seeking to infuse liberal conceptions of equality with relational concerns. She explains her starting point in liberal theory on the basis that liberalism is the primary “focal point” around which theorists have analyzed equality.<sup>98</sup> She endorses liberalism’s departure from an Aristotelian conception of “treating likes alike” within a system where morally relevant differences are accepted between human persons. Koggel adopts liberalism’s “central insight” that “[i]f the process of treating like cases alike is to have any moral substance, it must rest on the fundamental requirement that each person be treated with equal concern and respect.”<sup>99</sup> Koggel criticizes, however, the manner in which liberal theory has purported to determine the

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<sup>94</sup> Merle Thornton, Catharine Mackinnon, and Ann Scales, cited in Koggel, *supra* note 43 at 180.

<sup>95</sup> Koggel, *supra* note 43 at 180.

<sup>96</sup> *Ibid* at 181 and 216.

<sup>97</sup> *Ibid* at 181.

<sup>98</sup> *Ibid* at xi.

<sup>99</sup> *Ibid* at 46-47 and 50.

demands of “equal concern and respect.” Koggel seeks to temper classical liberal accounts with her observations about the intrinsically social nature of categories and their meanings. In her view, an acknowledgment of the role of social power in naming and categorizing people requires that equality theorists resist the presumption that there can be any neutral or definitive account of the demands of equality: “Once we let go of the idea that current standards are the only objective and neutral ones and...resist the tendency to fall into a two-step process of categorization and judgment, we are in a position to take different perspectives as valid points of reference...that can provide valuable contributions to our understanding of...what is required to treat people with equal concern and respect.”<sup>100</sup> Thus, on Koggel’s account, “[t]he basis for moral equality is not any particular quality or qualities of a person’s life, but takes shape in the whole network of activity and relationships within which people live.... Relationships are so fundamental and primary that we cannot conceive of individual interests, projects, and goals having meaning outside of them.”<sup>101</sup> For this reason, Koggel posits an imperative to account for “the perspectives of those who are in relationships of powerlessness, oppression, and inequality as vantage points for understanding particular inequalities and for changing the structures that perpetuate unequal relations.”<sup>102</sup>

To this point, Koggel’s work largely parallels the concerns and prescriptions set out by Minow, Nedelsky, and other relational theorists. Koggel parts ways with these theorists, however, as she delves deeper into her efforts to bridge the concerns of liberal equality with the demands of relational theory. Koggel’s central project is to bring relational insights to bear on John Rawls’ foundational contribution to liberal theory: “the original position.”<sup>103</sup> The original position, as set out in Rawls’

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<sup>100</sup> *Ibid* at 59.

<sup>101</sup> *Ibid* at 64.

<sup>102</sup> *Ibid* at 67-68.

<sup>103</sup> Minow sets out a similar objection to the original position, arguing that the heuristic assumes the position of advantaged persons. See Minow, *supra* note 22 at 100.

*Theory of Justice*, is a heuristic device designed to aid in achieving fair and just reasoning about principles of justice. In the imagined original position, members of society engage with fundamental justice questions, freely and equally, and behind a “veil of ignorance” which precludes knowledge of their own specific personal characteristics and social circumstances. The members know only of certain fundamental shared interests, general facts about human psychology, biology, and other generally applicable ways of predicting and understanding human preferences and behaviours. On Rawls’ account, persons in the original position would agree first, that “all social primary goods—liberty, opportunity, income and wealth, and the bases of self-respect—are to be distributed equally”; and second, that “social and economic inequalities are to be arranged so that they are...to the greatest benefit of the least advantaged...and...attached to offices and positions open to all under conditions of fair equality of opportunity.”<sup>104</sup>

Koggel challenges the value of the original position’s claim to impartiality, arguing that consideration of social relationships should be foregrounded in equality analysis: “we need people with all their encumbrances and in all their embeddedness in social and political contexts engaged in critical thinking about different perspectives to know what equality is and requires.”<sup>105</sup> Koggel’s argument builds on existing feminist critiques of the purported impartiality of the original position. In particular, she notes Susan Moller Okin’s trenchant criticism of Rawls’ initial assumption that the members of the original position were to be heads of household, representing the interests of the next generation; by assuming that family dynamics are not justice problems, Okin posits, important sites of gender oppression are omitted from Rawls’ account. Digging more deeply into Rawls’ framework, Okin argues that simply adding gender to the list of features concealed by the veil of

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<sup>104</sup> John Rawls, *A Theory of Justice* (Massachusetts: The Belknap Press of Harvard University Press, 1971) at 302.

<sup>105</sup> Koggel, *supra* note 43 at 88.

ignorance (as Rawls did in his later work<sup>106</sup>) does not resolve the problem: “When we are forced to think about the effects of considering gender in the original position, the result is a more radical restructuring of society than Rawls imagines.”<sup>107</sup> In particular, Okin points out that *empathy* is required of members of the original position – not mere abstract consideration of impartial distributive concerns. And, Okin posits, such empathy requires understanding of the consequences and disadvantages that flow from *particular* differences.<sup>108</sup>

Koggel elaborates from Okin’s critique a need to account for social relationships in defining justice and equality. On Koggel’s account, real empathic understanding can only emerge through actual (not imagined) conversation with real others, in a background of embeddedness in a network of relationships: “we can think critically about equality and justice only when we are already embedded in social relations of particular sorts...[empathy requires] knowing the factual details of inequalities experienced by particular others and knowing the experiential effects of those inequalities on particular lives.”<sup>109</sup> It is only through learning of the details and experiences of “particular disadvantaged lives” that we may “come to feel the injustice of those inequalities.”<sup>110</sup> Rather than illuminate a useful impartial perspective, monological approaches that claim to achieve justice through the reflections of a solitary moral reasoner in fact frustrate our understandings of inequality by masking biases.<sup>111</sup> In Koggel’s view, “[w]hat Rawls actually knows about different perspectives is partial, inadequate, and distorted.”<sup>112</sup>

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<sup>106</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 25.

<sup>107</sup> Koggel, *supra* note 43 at 95, summarizing Susan Moller Okin, *Gender, Justice and the Family* (New York: Basic Books, 1989).

<sup>108</sup> Okin, *supra* note 107 at 101-109.

<sup>109</sup> Koggel, *supra* note 43 at 98-99 and 101.

<sup>110</sup> *Ibid* at 102.

<sup>111</sup> *Ibid* at 113.

<sup>112</sup> *Ibid* at 113.

Instead, Koggel seeks to theorize equality in a way that highlights the relevance of difference. In her view, the requirements of the liberal ideal of equal concern and respect can only be achieved through an awareness of “the power relations that issue from the human capacities to differentiate and evaluate, . . . how difference looks from the perspective of those identified as different, and . . . the effects on self-concepts and identities and on levels of self-respect of and respect for those grouped and defined as different.”<sup>113</sup> Koggel’s account thus holds a special place for the perspectives of “oppressed groups.” Koggel believes that “oppressed groups have a particular vantage point that can contribute to a greater understanding of how structures maintain and perpetuate oppression.”<sup>114</sup> Koggel explains that “[b]ecause those who are oppressed need to be constantly aware of the particularities of the perspective of the dominant and powerful, they are engaged in ever-changing adjustments to their strategies of resistance.”<sup>115</sup> In Koggel’s view, this creates a particular “vantage point” on oppressive structures that can illuminate “the information and the knowledge of inequalities perpetuated by those structures.”<sup>116</sup>

Although attention to the perspectives of “oppressed groups” is central to Koggel’s account, Koggel offers only a sketch of how we might determine who these groups are. These oppressed groups are important to her theory not only because of their centrality in the account of empathy set out above, but also because she relies on this category as a way of limiting her approach from requiring unrestrained and unfocused attention to the experiences of each individual person.<sup>117</sup> In Koggel’s view, the original position should be revised not by seeking to include particular voices of each real person, but rather by including discussion among “multiple *kinds* of people.”<sup>118</sup> Among

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<sup>113</sup> *Ibid* at 123.

<sup>114</sup> *Ibid* at 161.

<sup>115</sup> *Ibid* at 163.

<sup>116</sup> *Ibid* at 165.

<sup>117</sup> *Ibid* at 162.

<sup>118</sup> *Ibid* at 164.



these “kinds of people,” Koggel places a special premium on perceived shared experiences of oppressed groups which serve to illuminate oppression: “Attention to commonalities in the experiences of those whose differences have mattered to life prospects can explain why all perspectives are not equally viable and valuable.... [T]he focus is on inequalities that emerge from damaging and oppressive relations, relations that are structured when people are categorized into groups and treated as inferior and unequal.”<sup>119</sup> Koggel elaborates a further condition on which perspectives should be given weight: “Perspectives that themselves create or perpetuate damaging and oppressive relationships would...be rejected. This kind of account can explain why, for example, the Ku Klux Klan is not an oppressed group.”<sup>120</sup>

One has the sense that Koggel thinks her KKK example is an obvious one – that this is something of an aside to dispose of an absurd or extreme implication of her approach. But it reveals a problem at the heart of the present inquiry: who are equality laws meant to protect? While I will return to this problem at greater length below, I will pause here to note two serious problems in Koggel’s approach to “oppressed groups.” The first is that, despite her repeated emphasis on particularity and context, Koggel seems to suggest that “oppressed groups” share particular insights and experience in a way that is relevantly homogeneous within a given oppressed group, and even as between various oppressed groups. The second, and related problem, is that Koggel offers no explanation as to how we determine which “kinds of people” warrant inclusion in the community of representative standpoints that she seeks to include in her discussions about the requirements of equal concern and respect. We know only that they are “oppressed,” and that they do not themselves participate in perpetuating oppressive relationships. This limiting factor – that these oppressed groups cannot themselves be oppressors – gives rise to a third objection. Her approach seems to

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<sup>119</sup> *Ibid* at 162-163.

<sup>120</sup> *Ibid* at 162-163.

invite inquiry into the perceived faults of groups who might otherwise have a claim to special attention due to their oppressed status. Although many would cringe at the proposition that KKK members should “count” as persecuted minorities, it is too simple to dispense with this problem on the basis that these group members perpetuate oppressive power relationships. The purportedly oppressive gender relationships perpetuated by Muslim communities is frequently relied upon as a rationale for limiting protection for Muslim men, and even for Muslim women.<sup>121</sup> There is, on the other hand, little doubt that Islamophobia is a real phenomenon that produces discriminatory treatment and power relationships.<sup>122</sup> These examples of competing equality claims resonate with other conflicts between religious and sexual minorities, and between the claims of Palestinians and Israelis.<sup>123</sup> In fact, one would be hard pressed to find a group, oppressed or not, that does not participate in some sort of oppressive power relationships. We will return to the broader problem of defining oppressed groups, particularly in the context of legal claims, below.

Returning now to Koggel’s efforts to reconstruct equality in relational terms: Koggel builds her alternative approach on Carol Gilligan’s “ethic of care,” a theory that forms a strong influence in

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<sup>121</sup> See, for example, *Leyla Sahin v Turkey*, ECtHR 44774/98 (2005) at para 15, wherein the European Court of Human Rights cites “the protection of the rights of women” in upholding a Turkish ban on wearing hijab on university campuses. For a discussion of the irony of using “gender equality” against women applicants in this and other cases before the European Court of Human Rights, see Anastasia Vakulenko, “‘Islamic Headscarves’ and The European Convention on Human Rights: An Intersectional Perspective” (2007) 16:2 Soc & Leg Stud 183 at 189.

<sup>122</sup> The Council of Europe, over which the European Court of Human Rights (discussed *ibid*) has jurisdiction, has observed that “the specific need to counter intolerance and discrimination against Muslims has been recognized by the OSCE, the Council of Europe and the UNESCO.” *Addressing Islamophobia through Education Guidelines for Educators on Countering Intolerance and Discrimination against Muslims* (Poland: OSCE/ODIHR, Council of Europe, UNESCO, 2011) at 11.

<sup>123</sup> My thanks to Professor Faisal Bhabha for these examples, and for directing me to Susan Moller Okin’s thoughtful discussion of gender and competing equality claims in “Is Multiculturalism Bad for Women,” in Joshua Cohen, Matthew Howard, and Martha Nussbaum, eds, *Is Multiculturalism Bad for Women?* (New Jersey: Princeton University Press, 1999).

relational theory.<sup>124</sup> Gilligan, a developmental psychologist, has argued that men and women tend towards distinct approaches to moral reasoning—and that women’s modes of moral reasoning have been inappropriately overlooked and devalued.<sup>125</sup> Gilligan’s foundational work, *In a Different Voice: Psychological Theory and Women’s Development*, proposes that women conceive of moral problems as “aris[ing] from conflicting responsibilities rather than from competing rights,” and as requiring resolution through “a mode of thinking that is contextual and narrative rather than formal and abstract.”<sup>126</sup> Gilligan proposes that this feminine “ethics of care” conceives of moral development as centered in “the understanding of responsibility and relationships.”<sup>127</sup> She contrasts this approach with the more masculine conception of an “ethics of justice” that “ties moral development to the understanding of rights and rules.”<sup>128</sup> Koggel seeks to build an ethical approach that she terms “orientation toward other,” building upon the ethics of care identified by Gilligan. Koggel positions her “orientation toward other” as sharing Gilligan’s “core insight about the importance of thinking about people in relationships,” while being more attentive to broader social hierarchies, and to the experiences of a broader “network of relationships that the marginalized, powerless, and oppressed are in.”<sup>129</sup> Koggel endorses a “connection between care and oppressed groups” more generally, arguing that “[c]are is more appropriately described as an ‘orientation to other,’ a perspective that emerges in structures of power when those who are oppressed are forced to situate themselves in relation to their oppressors.”<sup>130</sup> Thus, on Koggel’s account, the type of moral reasoning set out in

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<sup>124</sup> See, for example, Eva Feder Kittay, *Love’s Labor: Essays on Women, Equality, and Dependency* (New York: Routledge, 1999), and Joan C. Tronto, *Moral Boundaries: a Political Argument for an Ethic of Care* (New York: Routledge, 1993).

<sup>125</sup> See generally Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Cambridge: Harvard University Press, 1993).

<sup>126</sup> *Ibid* at 19.

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid*.

<sup>129</sup> Koggel, *supra* note 43 at 153.

<sup>130</sup> *Ibid* at 157-158.

Gilligan's ethic of care is not particular to women, but is evident among many "oppressed persons." In Koggel's view, the "basic insight" of orientation to other is that "those who are oppressed need to take account of the dominant and powerful."<sup>131</sup> By attending to the particular perspectives of oppressed persons, Koggel believes it is possible to discern and transform the operation of oppressive systems. Thus, "the possibility for enabling and enacting change rests on permitting genuine interactions, ones in which the dominant and powerful recognize the validity and value of the different perspectives of those who are other oriented."<sup>132</sup>

Here again we see shades of the concerns raised above respecting Koggel's account of oppressed groups. The attribution of a particular perspective or "orientation toward other" risks essentializing and homogenizing "oppressed persons" – a group which, however defined, must be extremely diverse. I do not believe, however, that the problems with Koggel's account of "oppressed persons" is fatal to a relational approach to equality. In fact, I would suggest that Koggel's efforts to attribute particular perspectives to "oppressed persons," and to assign those perspectives to "representatives" for the purposes of a modified original position, runs counter to the relational theoretic insights set out by Minow and Nedelsky – and even by Koggel herself in elaborating her own relational premises. Other critics have remarked that, in modifying the original position as she does, Koggel loses the only value of the heuristic, "destroys the logic of the original position," and winds up with "a strange and, ultimately, unworkable mix of theoretical elements."<sup>133</sup> I would add that by seeking to divide people into groups of "kinds of people" whose viewpoints might be properly represented by ambassadors to the original position, Koggel also strays from one of the most valuable insights of the relational project she purports to advance: that persons are iteratively

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<sup>131</sup> *Ibid* at 193.

<sup>132</sup> *Ibid*.

<sup>133</sup> Susan Hekman, "Perspectives on Equality: Constructing a Relational Theory by Christine M. Koggel" (2001) 16:3 *Hypatia* 163 at 166.

generated by relational dynamics, and that categorical thinking risks obscuring important particularities of these dynamics.

The contribution to equality doctrine that I flesh out below takes a tack quite opposite to Koggel's. Rather than proposing that relevant groupings can be easily (or possibly) discerned for the purposes of elaborating the demands of equality, relational insights urge us to consider social context in a way that does *not* depend on determinate groupings or representative standpoints. Instead, a relational approach to equality is best served by seeking ways to account for difference and power relationships without recourse to categorical descriptions of social context. I will return to this proposition in Chapter 5. In the following section, I will address relational approaches to law and rights more broadly, before moving on to examine relational approaches to equality doctrine in particular.

### **Relational Approaches to Law and Rights**

The relational project is undeniably a 'law' project—perhaps even an 'equality law' project. Despite the more sustained theoretical focus on autonomy, relational texts consistently take up examples from Canadian and U.S. constitutional equality law to elaborate their frameworks.<sup>134</sup> This concern with the application of law and rights rather than pure theoretical accounts is consistent with Leckey's observation that "[r]elational theory inscribes itself within feminist political philosophy or theory, but it does not content itself with abstract efforts to define its terms. Instead, it often turns to concrete legal issues."<sup>135</sup> Relational theorists often share a wariness of traditional liberal constructions of rights as trumps, but seem also to share a desire to rehabilitate rather than discard rights as a legal mechanism. As the following juxtaposition of Minow and Nedelsky will show,

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<sup>134</sup> See, for example, Minow *supra* note 22 and Nedelsky, *supra* note 29.

<sup>135</sup> Leckey, *supra* note 21 at 11-12.

however, the approaches to rehabilitating rights—along with the perceived value of doctrinal interventions—vary in ways which implicate the usefulness of the present inquiry into U.S. and Canadian equality doctrine.

Minow’s critique of the social construction of categories has serious implications for legal analysis, not only because categories are often central to legal reasoning, but also because “[t]he names given by law carry real consequences in people’s lives.”<sup>136</sup> Minow critiques the role that categorical thinking has played in traditional conceptions of rights, juxtaposing her own social relations approach against two prior frameworks: the abnormal persons approach, and the rights approach. Together, Minow argues, these approaches have constituted “the roots of the legal treatment of difference,” which persist even in contemporary litigation.<sup>137</sup>

On Minow’s account, when the explicitly hierarchical, status-driven social logic of feudalism gave way to the more formally egalitarian logic of contract and individual autonomy, “two tracks” of legal treatment emerged: one track for “normal” people, and one track for those falling in the “residual category” which was left unreformed by liberalism.<sup>138</sup> Normalcy under this approach was defined in accordance with the emerging liberal paradigm of an autonomous, self-determining individual.<sup>139</sup> For groups who were seen as falling in the residual category of “abnormal persons” due to incompetence or dependence—including women, slaves, servants, apprentices, the poor, and the mentally deficient—status relationships that had otherwise been formally eliminated persisted.<sup>140</sup>

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<sup>136</sup> Minow, *supra* note 22 at 97.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid* at 126.

<sup>139</sup> *Ibid* at 124.

<sup>140</sup> *Ibid.*

Those deemed incompetent or abnormal under this model would inhabit “areas that a liberal legal order does not reach, areas where an older notion of law continues to operate.”<sup>141</sup>

This abnormal persons approach to difference was modified, but not entirely displaced, by a “rights approach” expounded by lawyers and theorists during the mid-twentieth century.<sup>142</sup> On Minow’s account, the rights approach preserves the “either/or” construction of persons as either normal or abnormal, but “enables advocates to challenge initial answers” with respect to which persons are “really different” and thus warranting different treatment.<sup>143</sup> The binary conception of difference that characterized the abnormal persons approach persists under this model since a rights approach “allows people to move the line between the normal and the abnormal but maintains the idea of the distinction and its legal consequences.”<sup>144</sup>

For Minow, the persistence of this binary approach to difference limits the “inclusive, participatory, and egalitarian” promise of rights. In Minow’s view, rights analysis “offers release from hierarchy and subordination,” but only for “those who can match the picture of the abstract, autonomous individual presupposed by the theory of rights.”<sup>145</sup> For those who fail to make the case for inclusion in the ‘normal’ group, “rights analysis can be not only unresponsive, but also punitive” because it leaves in place those institutions that define and burden difference.<sup>146</sup> Rights analysis thus allows difference to continue “to represent deviance in the context of existing social arrangements” without allowing challenges to the institutional and social forces that define and enforce those arrangements and their attendant definitions of normalcy and difference.<sup>147</sup> The danger, in Minow’s

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<sup>141</sup> *Ibid* at 126.

<sup>142</sup> *Ibid* at 146.

<sup>143</sup> *Ibid* at 214.

<sup>144</sup> *Ibid* at 214-215.

<sup>145</sup> *Ibid* at 147.

<sup>146</sup> *Ibid*.

<sup>147</sup> *Ibid*.

view, is that reformers who seek inclusion through the language of rights “encounter the dilemma that rights crafted for the norm reiterate the differences of those at the margin,” while “special rights crafted for those at the margin risk perpetuating the negative effects of difference.”<sup>148</sup> The “dilemma of difference” (Minow’s term for this problem) is thus perpetuated because the notion of “difference” as an objective fact persists: rights analysis “depends on claims to know what counts as a real difference” that justifies different treatment.<sup>149</sup> The emancipatory potential of rights analysis is thus constrained by an assumption that “the status quo is natural and good, except where it has mistakenly treated people who are really the same as though they were different.”<sup>150</sup>

Nedelsky elaborates a series of related critiques of rights language, some of which flow from her concern with the role that boundary has played in dominant conceptions of rights. Nedelsky notes that the history and theory of rights in the liberal tradition is based on an excessive individualism that “fails to account for the ways in which our essential humanity is neither possible nor comprehensible without the network of relationships of which it is a part... The selves protected by rights are seen as essentially separate and not creatures whose interests, needs, and capacities are mutually constitutive.”<sup>151</sup> Rights, understood in this way, have the potential to “obscure rather than clarify what is at issue, what people are really after.”<sup>152</sup> Because the individualist conceptions of rights “express and create barriers between people,” they may have a “distancing effect” that works to “help us avoid seeing some of the relationships of which we are in fact a part.”<sup>153</sup>

Nedelsky goes on to challenge another classic conception of rights that remains powerful: “[t]he notion that there are certain basic rights that no government, no matter how democratic, should

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<sup>148</sup> *Ibid* at 224.

<sup>149</sup> *Ibid* at 171.

<sup>150</sup> *Ibid* at 109.

<sup>151</sup> Nedelsky, *supra* note 29 at 248-249.

<sup>152</sup> *Ibid* at 250.

<sup>153</sup> *Ibid*.



be able to violate.”<sup>154</sup> On this view, Nedelsky explains, “basic rights should be enshrined in the constitution, and democratically enacted legislation that violates those rights should be struck down by the courts.”<sup>155</sup> Nedelsky’s concern with this conception of “basic rights” is its potential to obscure the reality that “debates over the meaning and implementation of rights are inherent in rights themselves.”<sup>156</sup> Given the contested nature of rights, “The problem of constitutionalism thus can no longer simply be protecting rights from democracy. The more complex problem can be posed in various ways, with either rights or collective choice on both sides of the balance.”<sup>157</sup>

Despite these criticisms of rights, however, relational theorists have generally sought to rehabilitate rather than reject rights language.<sup>158</sup> Often their concerns are pragmatic. Nedelsky, for example, explains her decision to focus on rights because “the language of rights has become a worldwide phenomenon... The battle over the use of the term has been decisively won in its favour.”<sup>159</sup> Given the institutional entrenchment of rights in constitutional law, and the fact that people around the world use rights language “to identify serious harms, to make claims against governments, to make claims for intervention and assistance,” Nedelsky is of the view that “the best thing to do is to engage with the meaning of rights, to shift in a relational direction.”<sup>160</sup> Moreover, a move to rehabilitate rather than abandon rights is “practical within existing legal systems,” such that relational insights might be deployed through rights without requiring “radical restructuring of existing laws and courts.”<sup>161</sup> For her part, Minow assesses that “[t]here is something too valuable in the aspiration of rights, and something too neglectful of the power embedded in assertions of

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<sup>154</sup> *Ibid* at 238.

<sup>155</sup> *Ibid*.

<sup>156</sup> *Ibid* at 239.

<sup>157</sup> *Ibid* at 239.

<sup>158</sup> I have not found a single relational theorist who advocates rejecting rights altogether, although, as discussed in this paragraph, many focus on the need to rehabilitate the language of rights.

<sup>159</sup> Nedelsky, *supra* note 29 at 73.

<sup>160</sup> *Ibid* at 73. Nedelsky elaborates this point in her Chapter 6.

<sup>161</sup> *Ibid* at 252.

another's need, to abandon rights."<sup>162</sup> She observes that in practical legal work, "It turns out to be helpful, useful, and maybe even essential to be able to couch a request as a claim of right."<sup>163</sup> After all, Minow notes, rights rhetoric is "remarkably well suited" to the task of constraining power.<sup>164</sup>

Aside from these more strategic considerations, relational theorists have also approved of the imperative that rights create for institutions and individuals to "listen" to particular voices and experiences. Koggel asserts that the potential of rights, and equality rights in particular, lies in the claim to attention that rights offer: "The discourse of equality and rights ... makes it possible for marginalized and disadvantaged group members to challenge legislation and policies that violate that commitment."<sup>165</sup> Thus the value of rights emerges from the dialogue they produce: "Rights register a commitment to moral equality.... They stand as agreements by all members of a community or polity that inequality claims will be considered and adjudicated."<sup>166</sup>

On relational accounts, the problems of rights can be cured or alleviated by unmasking rights as contingent, debatable social choices, and by rejecting formalism in favour of approaches that focus on the actual, lived relationships engaged by rights claims. Koggel posits that, "a relational approach rejects the idea that rights are fixed entities attachable to separate and autonomous individuals. Rather, rights emerge in relationships in social contexts and create a forum for dialogue among community members."<sup>167</sup> On Nedelsky's account, the function of rights and law is, inevitably, to "structure relations, which, in turn, promote or undermine core values."<sup>168</sup> Nedelsky proposes that following such a relational approach, "the focus of analysis will shift from an abstraction of

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<sup>162</sup> Minow, *supra* note 22 at 307.

<sup>163</sup> *Ibid* at 307.

<sup>164</sup> *Ibid*.

<sup>165</sup> Koggel, *supra* note 43 at 204.

<sup>166</sup> *Ibid*.

<sup>167</sup> Koggel, *supra* note 43 at 202-203.

<sup>168</sup> Nedelsky, *supra* note 29 at 65.

individual entitlement to an inquiry into the ways the right will shape relations and those relations, in turn, will promote (or undermine) the values at stake.”<sup>169</sup> In Nedelsky’s view this focus will “invite a more accurate reflection on the role of the state.”<sup>170</sup> Rather than casting rights as given, her relational approach proposes that “constitutional protection of rights is best understood as a dialogue of democratic accountability.”<sup>171</sup> Minow, similarly, casts “rights as tools in continuing, communal discourse.”<sup>172</sup> Minow posits that, “[i]nterpreting rights as features of relationships, contingent upon renegotiations within a community committed to this mode of solving problems, pins law not on some force beyond human control but on human responsibility for the patterns of relationships promoted or hindered by this process.”<sup>173</sup> Thus, by “treating rights rhetoric as a particular vocabulary implying roles and relationships within communities and institutions...rights can be real—without being fixed; and can change—without losing their legitimacy”<sup>174</sup>

### **Relational Approaches to (and Retreat from) Equality Doctrine**

When it comes to how best to understand and reform legal reasoning, however, a tension emerges as to whether reforming legal *doctrine* is a useful enterprise. Given the abstract and categorical demands of doctrinal formulations, it is arguably not possible or desirable to approach doctrine as a site of relational transformation. As Minow argues, “the very language of legal ‘tests’ and ‘levels of scrutiny’ converts significant social choices into mechanical and conclusory rhetoric.”<sup>175</sup> Nedelsky, Colleen Sheppard, and Nitya Duclos (now Iyer), on the other hand, pursue projects that actively explore doctrinal solutions to relational critiques of legal rights analysis.

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<sup>169</sup> *Ibid* at 249.

<sup>170</sup> *Ibid* at 65 and 72.

<sup>171</sup> *Ibid* at 234.

<sup>172</sup> Minow *supra* note 22 at 309.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid* at 307-308.

<sup>175</sup> *Ibid* at 105.

For Minow, a consciousness of the power dynamics expressed through categorization requires a preference for particularity and context over abstraction. In her view, a social relations approach “resists solution by category.”<sup>176</sup> Minow is conscious of the radical implications of such a proposition for legal analysis. She acknowledges the uncertainty and risk of turning away from categorical thinking, and proposes that, if taken seriously, relational thinking may “threaten the very idea of law as authoritative and commanding.”<sup>177</sup> Nonetheless, Minow is interested in pursuing the ways that legal reasoning might be transformed by relational thinking—but not through attention to doctrine. One of the most fully elaborated examples in Minow’s *Making all the Difference* is a close reading of the judicial reasons in *Cleburne*. In *Cleburne*, the U.S. Supreme Court considered the constitutionality of the City of Cleburne’s decision to require, then refuse, a permit to an assisted living centre for mentally disabled adults.<sup>178</sup> *Cleburne* was decided under the Equal Protection Clause, and the Supreme Court’s judicial reasons dealt squarely with the doctrinal problem that this paper will examine more closely below: whether laws targeting a particular group (in this case, mentally disabled persons) warrant heightened scrutiny by the courts. Minow, however, declines to engage in these doctrinal debates. Instead, Minow is interested in exhuming the “clash in world views that occurs behind the justices’ arguments over legal doctrine.”<sup>179</sup> Closely parsing the three sets of reasons proffered by the justices of the United States Supreme Court, Minow points to traces of the abnormal persons approach, the rights approach, and the social relations approach, which animate the assumptions and values driving the judicial reasoning.

Minow’s proposals for transforming legal analysis similarly avoid specific doctrinal prescriptions:

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<sup>176</sup> *Ibid* at 215.

<sup>177</sup> *Ibid* at 224.

<sup>178</sup> *City of Cleburne v Cleburne Living Center, Inc*, 473 US 432 (1985) [*Cleburne*].

<sup>179</sup> Minow *supra* note 22 at 105.

As a method of legal analysis, the social-relations approach demands analysis of difference in terms of the relationships that construct it. The approach solicits challenges from the perspective of those labeled different, and it treats existing institutional arrangements as a conceivable source of the problem of difference rather than as an unproblematic background. Besides identifying avenues for inquiry about difference, the social relations approach points toward a particular, normative evaluation of legal assignments of difference: attributions of difference should be sustained only if they do not express or confirm the distribution of power in ways that harm the less powerful and benefit the more powerful.<sup>180</sup>

These directives are general, and do not relate to any particular doctrinal constructions of the Equal Protection Clause. Later, Minow elaborates how judicial reasons might embody these insights and values, again declining to connect these imperatives to doctrinal questions arising from the equal protection context described in this chapter:

An opinion fully embracing the social-relations approach would not assign difference to a group and its members but instead locate difference as a comparison drawn—by somebody—between groups. Paying close attention to exactly who names difference, such an analysis would consider whether a more powerful group assigns meaning to a trait in order to express and consolidate power. Self-assigned difference, names and identities chosen by the group itself, would call for a different analysis. These identities are not the ones embedded in prevailing institutions and assigned to others without their participation. A judicial opinion pursuing the social-relations approach would discuss overtly the relationships between people, including the members of the Court and those affected by the Court's decision. The opinion would avoid the passive voice; its authors would be obliged to disclose their own involvement in and responsibility for their assertions.<sup>181</sup>

Again, Minow might have constructed a doctrinal approach that incorporated these insights, but doctrine is not her concern. In fact, as set out above, she suggests that doctrine more often works to distract from, rather than direct attention towards, the kinds of concerns she hopes judges will take up in their reasons. Minow does not go so far as to say that the Court can do without doctrine altogether, but she is clearly of the view that, when it comes to legal constructions of equality, doctrine is simply not where the action is.

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<sup>180</sup> *Ibid* at 112.

<sup>181</sup> *Ibid* at 119.

Other scholars, however, have approached doctrine as a productive site of relational inquiry and transformation. Nitya Duclos has advanced a relational framework for assessing a statutory human rights regime's success in accounting for intersectional discrimination.<sup>182</sup> Duclos' study explicitly seeks to bring Minow's insights to bear on the doctrinal construction of statutory prohibitions on discrimination: "The most fundamental error in current antidiscrimination doctrine lies in its location of difference in the individual complainant rather than in his or her relationship with others. It treats difference as an intrinsic characteristic of the individual—the discrimination is due to his or her race or sex—rather than as arising out of the relationship between that individual and others."<sup>183</sup> Her prescriptions are similarly aimed at doctrinal reform, urging that "[e]ach ground of discrimination listed in the legislation should serve as a 'jumping off' point, a springboard providing the opportunity to construct an intricate picture of the stereotypes and relationships involved."<sup>184</sup> She elaborates that this "intricate picture" ought to be comprised of "three interrelated considerations: the characteristics of the people involved (race, gender, and so on), their relationship and the conduct arising out of it, and the larger social context within which that relationship is located."<sup>185</sup>

Colleen Sheppard similarly seeks to apply relational analysis to assess judicial and doctrinal responses to constitutional and statutory treatment of systemic discrimination. Sheppard's work carefully surveys doctrinal approaches at the constitutional and statutory level, and offers a relational framework to enrich current doctrine. Invoking Minow and Nedelsky, Sheppard argues that "[i]n the domain of discrimination...individual experiences (the micro-level) need to be connected to larger

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<sup>182</sup> Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 CJWL 25.

<sup>183</sup> *Ibid* at 47-48.

<sup>184</sup> *Ibid* at 49-50.

<sup>185</sup> *Ibid* at 48.

societal and group-based realities (the meso and macro-levels)” such that discrimination analyses “implicate a socially situated individual and are enhanced by a broad contextual inquiry that addresses individual stories, institutional relations, systemic practices, and larger structural and societal patterns of inequality and exclusion.”<sup>186</sup>

Nedelsky is also expressly concerned with elaborating concrete means of applying relational reforms “within existing legal systems,” including through analysis of doctrinal approaches to equality.<sup>187</sup> To this end, Nedelsky offers a “brief comparison” of Canadian and American equality jurisprudence.<sup>188</sup> Nedelsky endorses the Supreme Court of Canada’s early equality jurisprudence, noting in particular the *Andrews* formulation that will be discussed more fully below.<sup>189</sup> On Nedelsky’s assessment, the Canadian equality doctrine set out in *Andrews*—contrary to American equal protection doctrine—requires that claims “must always be assessed in terms of the broad context of whether the claimant already stands in relations of inequality, which the challenged law is worsening.”<sup>190</sup> She approves of the approach taken by the Canadian Supreme Court’s in determining sexual orientation to be a ground warranting constitutional equality protection. In particular, Nedelsky notes that the Court’s focus on historical, political, economic and social disadvantage, makes this a strong example of effective relational reasoning.<sup>191</sup> By contrast, Nedelsky notes the American Supreme Court’s focus on intent to discriminate, and lack of attention to whether equality claimants in affirmative action cases are members of a disadvantaged group:

[T]he focus of the [American] jurisprudence is on the use of categories, such as race, and whether those categories discriminate against the group bringing the complaint... The jurisprudence does not begin with a question of whether the complainants are members of a

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<sup>186</sup> Colleen Sheppard, *Inclusive Equality the Relational Dimensions of Systemic Discrimination in Canada* (Quebec: McGill-Queen’s University Press, 2010) at 35 and 66.

<sup>187</sup> Nedelsky, *supra* note 29 at 252 and 259.

<sup>188</sup> *Ibid* at 259.

<sup>189</sup> *Ibid* at 259, citing *Andrews v Law Society of Upper Canada*, [1989] 1 SCR 143 [*Andrews*].

<sup>190</sup> Nedelsky, *supra* note 29 at 260.

<sup>191</sup> *Ibid* at 260-261, citing *M v H*, [1999] 2 SCR 3.

disadvantaged group, and it does not focus on the ameliorative or harmful effects of the categories. It does not, therefore, ask the key relational question of whether the challenged practice creates a disadvantage through the perpetuation of prejudice or stereotyping.<sup>192</sup>

In contrasting the Canadian and American approaches, Nedelsky acknowledges that “Canadian courts do not always use the textual and jurisprudential openness to a relational approach to a full effect,” nor does the American constitution preclude such a relational approach.<sup>193</sup> Nonetheless, her comparison evinces a view that the doctrinal form of equality inquiries is a productive site for elaborating relational approaches to law and equality. Nedelsky’s analysis here is, by her own admission, a brief sketch of Canadian and American approaches to constitutional equality law.<sup>194</sup> The chapters that follow will propose a more sustained inquiry into the relational implications of the doctrinal approaches to Canadian grounds of discrimination and U.S. suspect classifications.

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<sup>192</sup> Nedelsky, *supra* note 29 at 262.

<sup>193</sup> *Ibid* at 262.

<sup>194</sup> *Ibid* at 259.



## CHAPTER 2

### EMBRACING AN UNEASY FIT

In the chapters that follow, I will explore the implications of relational theory for a relatively narrow set of doctrinal concerns: groups and grounds in Canadian equality law; and suspect classes and classifications in U.S. equal protection law. Three interrelated methodological problems emerge from my choice to focus on these puzzles.<sup>195</sup> The first of these problems inheres in the potential artificiality of hiving off a particular doctrinal question when so many other variables (doctrinal and otherwise) affect outcomes and illuminate judicial responses to equality claims. What use is it to introduce a relational framework for discussing the U.S. suspect classification analysis, one might ask, when no meaningful transformations will be possible so long as the Court continues its myopic focus on discriminatory intent at the expense of attention to actual impact on affected groups?<sup>196</sup> Or, it might be argued, there is no value in analyzing the U.S. Court's approach to suspect classification without addressing the inconsistent manner in which the Court seems to apply the 'levels of scrutiny' that supposedly attend these classifications.<sup>197</sup> In the Canadian context, similar arguments might arise about the propriety of considering the grounds inquiry in relative isolation. Since Canada has a relatively expansive list of protected grounds, might our energies not be better spent interrogating the

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<sup>195</sup> I borrow the term "puzzles" from Nedelsky, who uses this framing to describe those aspects of relational theory that students find most challenging in the context of Anglo-American legal traditions. *Ibid* at 50-51.

<sup>196</sup> For a summary of the American case law rejecting such "disparate impact" discrimination claims, see Yoshino, *supra* note 4 at 763-768.

<sup>197</sup> For a discussion of this problem, see Suzanne B. Goldberg, "Equality Without Tiers" (2004) 77 S Cal L Rev 481.

Court's recent narrowing of the definition of discrimination?<sup>198</sup> Or perhaps an analysis of Canadian constitutional equality law is not complete unless it addresses the apparent increase in focus on intent over impact—departing from the Court's promise to reject the American intent-based jurisprudence?<sup>199</sup> In either jurisdiction, it might be further argued, "equality law" is not the best means of addressing equality concerns. Inequality, some suggest, may be better addressed through constitutional guarantees of fundamental rights or due process, or through less legalistic political channels.<sup>200</sup>

The second concern is disclosed in my discussion of the first: is it not misleading to discuss the Canadian analogous grounds inquiry alongside the American suspect classification inquiry when there is so much that differs between these two national constitutional contexts? The U.S. Equal Protection Clause was adopted nearly 150 years ago, at a time when an entrenched and brutal system of racialized slavery was "almost too recent to be called history."<sup>201</sup> The Canadian Constitutional equality provision has not yet celebrated its thirtieth anniversary as enforceable law, and was drafted and revised through a process of broad consultation with community groups, impact assessments, and months of public hearings.<sup>202</sup> As will be elaborated below, many features of Canada's constitutional equality provision were drafted in direct contrast to developments in American equal protection

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<sup>198</sup> See generally Jennifer Koshan & Jonette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 Rev Const Stud 31; and Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 Sup Ct L Rev 2d 183.

<sup>199</sup> Odelia Bay, "Intention Creep: The Supreme Court of Canada Rebukes Intent Analysis in *Quebec (Attorney General) v A*, Despite a Tradition of Dressing it up as 'Context'" (2013) thecourt.ca, available online at <<http://www.thecourt.ca/2013/07/04/intention-creep-the-supreme-court-of-canada-rebukes-intent-analysis-in-quebec-attorney-general-v-a-despite-a-tradition-of-dressing-it-up-as-context/>>. (Accessed August 5, 2013.)

<sup>200</sup> In the Canadian context, see Yavar Hameed & Niiti Simmonds "The *Charter*, Poverty Rights and the Space Between: Exploring Social Movements as a Forum for Advancing Social and Economic Rights in Canada" (2007) 23 NJCL 181, for an argument that political channels are preferable to litigation in advancing social rights. In the American Context, see Kenji Yoshino's tentative proposal that due process offers a more promising avenue for advancing the rights of minority groups than traditional equal protection analysis. Yoshino *supra* note 4.

<sup>201</sup> *Slaughter-House Cases*, 83 US 36 at 71 (1872) [*Slaughter-house Cases*].

<sup>202</sup> Doris Anderson, "The Adoption of Section 15: Origins and Aspirations" (2006) 5 JL & Equality 39 at 40.

jurisprudence. Moreover the United States Supreme Court has purported to interpret its briefly phrased guarantee of “equal protection of the laws” to focus on intentional discrimination and irrational government distinctions.<sup>203</sup> The Canadian Supreme Court, on the other hand, has interpreted its lengthy equality guarantee—complete with an express allowance for ameliorative programs and an open-ended list of nine expressly protected grounds—with a stated focus on “substantive equality.”<sup>204</sup> This list of differences in constitutional context would still be woefully incomplete even if we were to add the radically different approaches to federalism, to administrative law, and to statutory human and civil rights regimes that have informed the development and impact of constitutional equality laws in these two countries—not to mention those more ephemeral concerns that might be described as “constitutional culture.”<sup>205</sup>

A third and final concern arises from the choice to focus on constitutional doctrine at all. Recall Minow’s caution, set out in the previous chapter, that “the very language of legal ‘tests’ and ‘levels of scrutiny’ converts significant social choices into mechanical and conclusory rhetoric.”<sup>206</sup> I do not pretend to have a true “answer” to these concerns – only an explanation of why I proceed with this project despite their validity.

First, I acknowledge the limitations of focusing on a particular doctrinal question. Jed Rubenfeld observes that, “[u]nsurprisingly, given lawyers’ basic training in doctrinal sorting, the relationships among different doctrines are systematically underappreciated in the legal literature.”<sup>207</sup> At the risk of contributing to this problem, I seek in this paper to bridge relational insights to a

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<sup>203</sup> *Washington v Davis*, 426 US 229 (1976).

<sup>204</sup> *R v Kapp*, 2008 SCC 41 para 22 [*Kapp*]; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 51-52 [*Withler*].

<sup>205</sup> David Schneiderman, “Property Rights and Regulatory Innovation: Comparing Constitutional Cultures” (2006) 4:2 Int J Const Law 371.

<sup>206</sup> Minow, *supra* note 22 at 105.

<sup>207</sup> Jed Rubenfeld, “The Anti-Antidiscrimination Agenda” (2002) 111 Yale LJ 1141 at 1144.

particular set of doctrinal debates in their current form. There are, without a doubt, other conversations into which relational theory might be productively deployed—or other nascent conversations waiting to be started by the introduction of a relational perspectives to various doctrinal or legal debates. My focus here is on the parallel discussions taking place in the Canadian and American courts about their respective doctrinal approaches to the role that social groups and grounds of discrimination should play in equality analysis. I propose that in the context of such a discourse analysis (rather than an effort to advance a predictive or explanatory hypothesis) it is appropriate in this project to take these debates as I find them.

Second, I recognize that there are serious and meaningful differences between Canadian and American equality analyses that give rise to a risk of oversimplification or false analogy in juxtaposing the U.S. suspect classification doctrine with the Canadian analogous grounds approach. I offer more detail on these differences and their significance to this project at the beginning of Chapter 5. My answer to this concern is that the emergence of the groups/grounds and class/classification distinctions in framing two such different approaches to equality is part of what interests me here. I endeavour throughout to avoid false or misleading comparisons of the doctrinal debates in the two countries, and make every effort to elaborate important differences where I see them. Ultimately, risk of false analogy and failure to appreciate differences in context are necessary hazards of comparative study.

Third, I believe that there is much to what Minow says about doctrinal analysis masking or deflecting attention from deeper debates about underlying social choices. I also believe, however, that these debates exist not just “behind” doctrinal debates as Minow suggests, but also within them. I am interested here in exploring doctrine as its own site of meaning-making and expression of values deserving of our attention. This is particularly so since doctrine not only communicates and manifests our assumptions, but also takes the form of explicit directives. Alongside the many factors

that give law its shape and meaning, doctrine persists as part of the language and form of legal reasoning. The present inquiry is not doctrinal in the conventional sense of seeking to discern the true or proper form of legal reasoning; it is an examination of the way the law talks about justice.

All of these reasons speak to an interest in elaborating viable approaches to equality law. But I come to this project with another interest as well—one which supports this paper’s attention to a relatively narrow doctrinal problem. That other interest is in elaborating viable approaches to relational theory. Many of the works expounding the relational dimensions of equality operate in broad strokes, focusing on general approaches to defining equality,<sup>208</sup> understanding relational approaches to difference and diversity,<sup>209</sup> or exploring the many complex puzzles that relational habits of mind provoke across a range of political, social, and legal contexts.<sup>210</sup> Perhaps because of a desire to complicate the very sort of categorical and mechanical reasoning that often dominates doctrinal debate, relational theorists have often chosen to engage in projects that do not require sustained doctrinal study. There are exceptions, of course. Duclos has considered the implications of relational theory for intersectional discrimination claims under Canadian statutory human rights law;<sup>211</sup> Sheppard has studied the relational dimensions of substantive equality analysis in the context of Canadian legal responses to systemic discrimination;<sup>212</sup> Leckey has considered relational theory, and his own related “contextual” approach as applied to family law and administrative law.<sup>213</sup> The present project proceeds in tandem with these efforts.

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<sup>208</sup> See, for example Koggel, *supra* note 43.

<sup>209</sup> See for example Minow, *supra* note 22.

<sup>210</sup> See, for example, Nedelsky, *supra* note 29.

<sup>211</sup> Duclos, *supra* note 182.

<sup>212</sup> Sheppard, *supra* note 186.

<sup>213</sup> Leckey, *supra* note 21. For another relational treatment of family law, see Minow & Shanley, *supra* note 24.

I believe that relational theory offers important insights into how we might better conceptualize persistent debates arising from competing social and legal approaches to equality. Many of these debates, however, take place in the language of doctrine, and in the forum of legal argument and decision. A key challenge for relational theory, if it is to make itself relevant to these debates, is to translate its insights into these languages. Of course, there is always a risk that important meanings will be lost or distorted in translation—a problem that arguably accounts for the shortcomings in Koggel’s efforts to bridge relational and liberal theory. But part of the process of building relational habits of mind must include engagement with the languages that law speaks *now*.

I believe that the puzzles surrounding the meanings expressed through doctrinal approaches to grounds of discrimination and suspect classifications generate a productive starting point for such an engagement. This particular doctrinal problem has something of a Rosetta stone quality—inscribed with relational and doctrinal meanings at once, though perhaps without a clear key for deciphering how they might interact. The doctrinal formulations seem to spill inevitably, if awkwardly, into decidedly relational territory when they ask which groups or grounds matter, and why. Considering this particular connection between relational and doctrinal approaches to equality, it is my hope here to begin a conversation about the ways that relational framings might productively shift the terms of doctrinal debate.

### CHAPTER 3

#### CLASSES AND CLASSIFICATIONS IN U.S. EQUAL PROTECTION LAW

The United States Supreme Court first interpreted the Fourteenth Amendment in the *Slaughter-house Cases*. The majority decision in the *Slaughter-house Cases* emphasized the recent historical context of American racialized slavery, and the persistence of legalized oppression of African Americans, as the core concerns of the Amendment. The decision considered the Thirteenth, Fourteenth, and Fifteenth Amendments—collectively known as the “Reconstruction Amendments” or the “Civil War Amendments”—concluding that “The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history.”<sup>214</sup> For the justices, this attention did not require parsing contested accounts of the causes of war,<sup>215</sup> or minute analysis of the final language of the amendments,<sup>216</sup> since “that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.”<sup>217</sup>

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<sup>214</sup> *Slaughter-house Cases*, *supra* note 201 at 67.

<sup>215</sup> *Ibid* at 68: “whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.”

<sup>216</sup> *Ibid* at 69, regarding the Twelfth Amendment (U.S. Const. amend. XII): “To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes which may have been attached to property in certain localities requires an effort, to say the least of it.”

<sup>217</sup> *Ibid* at 68.

Ninety years after the declaration of independence was signed in 1776, and following many more years of slavery during the colonial period, the first Reconstruction Amendment (the Thirteenth Amendment) abolished slavery and involuntary servitude, except as punishment for a crime.<sup>218</sup> The Court viewed the “obvious purpose” of this “grand yet simple” amendment as being tied to the particular context of racialized slavery in America.<sup>219</sup> The Thirteenth Amendment was to “establish the freedom of four millions of slaves” and “to forbid all shades and conditions of African slavery.”<sup>220</sup> The *Slaughter-house Cases* cast the passage of the Fourteenth and Fifteenth Amendments as being tied to the same historical imperative as the Thirteenth. The Justice recalled that these amendments were promulgated in the wake of efforts by the former Confederate states to place “laws which imposed upon the colored race onerous disabilities and burdens and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.”<sup>221</sup> Laws forbade former slaves from appearing in towns “in any other character than menial servants,” from purchasing or owning land, from participating in specified occupations, from testifying in courts “in any case where a white man was a party,” and from voting.<sup>222</sup> This state of formal law, in combination with lack of enforcement of those laws which might have protected former slaves,<sup>223</sup> led the drafters of the reconstruction amendments to conclude that, “something more was necessary in the way of constitutional protection to the unfortunate race who had suffered

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<sup>218</sup> U.S. Const. amend. XIII, § 1: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

<sup>219</sup> *Slaughter-house Cases*, *supra* note 201 at 69.

<sup>220</sup> *Ibid* at 69.

<sup>221</sup> *Ibid* at 70.

<sup>222</sup> *Ibid* at 70 and 71.

<sup>223</sup> *Ibid* at 70.



so much.”<sup>224</sup> On the Court’s account, these further protections were thus enacted with this particular “unfortunate race” in mind.<sup>225</sup>

The Reconstruction Amendments included a range of protections, including the “Equal Protection Clause” of the Fourteenth Amendment, which is the focus of the present inquiry. The Equal Protection Clause guarantees that “No State shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws.”<sup>226</sup> Other Fourteenth Amendment protections include the Citizenship Clause, which provided that “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside”;<sup>227</sup> and the Due Process Clause, which provided that state governments shall not “deprive any person of life, liberty, or property, without due process of law.”<sup>228</sup> Section 5 of the Fourteenth Amendment granted Congress the power to pass laws enforcing the Amendment’s provisions. The Fifteenth Amendment concluded the trilogy of Reconstruction Amendments, declaring that “the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude.”<sup>229</sup> The Fifteenth Amendment thus evinces a direct textual connection with the historical context of racialized slavery. The Court concluded further that “it is just as true that each of the other [reconstruction] articles was addressed to the grievances of that [negro] race, and designed to remedy them as the fifteenth.”<sup>230</sup>

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<sup>224</sup> *Ibid* at 70.

<sup>225</sup> *Ibid* at 71.

<sup>226</sup> U.S. Const. amend. XIV, § 1.

<sup>227</sup> *Ibid*.

<sup>228</sup> *Ibid*. The Due Process Clause replicates protections against intrusions by the federal government set out in the Fifth Amendment of the original Bill of Rights. The dense interpretive history of this clause, including guarantees of substantive and procedural due process, are beyond the scope of this paper.

<sup>229</sup> U.S. Const. amend. XV. Women would not be granted voting rights until 1920, with the passage of the Nineteenth Amendment. U.S. Const. amend. XIX. For an early Supreme Court case upholding the restriction of the vote to men as permissible under the Fourteenth Amendment, see *Minor v Happersett*, 88 US 162 (1875).

<sup>230</sup> *Slaughter-house Cases*, *supra* note 201 at 71.

The Reconstruction Amendments, including the Equal Protection Clause, were thus seen to be united by “one pervading purpose”: “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”<sup>231</sup>

But the Equal Protection Clause was of secondary importance in the *Slaughter-house Cases*, which were decided primarily on the basis of a now-defunct interpretation of the privileges and immunities clause of the Fourteenth Amendment.<sup>232</sup> Beyond the *obiter dicta* affirming the historical and political purpose of the Fourteenth Amendment set out by the *Slaughter-house Cases* majority, the early years of judicial interpretation of the Fourteenth Amendment have generally been cast as embodying a period of retrenchment from the aspirations of the Reconstruction Amendments. Robert Cover explains that the *Slaughter-house Cases* majority’s approach to “Negroes as a special object of protection” was short-lived, and argues that there was a “massive retreat from protecting Black rights between the 1870’s and the 1920’s—a retreat led by the Court in many instances.”<sup>233</sup> Frank J. Scaturro refers to this period as the “Retreat from Reconstruction,”<sup>234</sup> and William Wiecek described the Courts’ early years of interpretation as having “fabricated a structure of law that gutted the substance of the Civil War Amendments as far as the freedpeople were concerned.”<sup>235</sup> Tussman and tenBroek assessed that the Equal Protection Clause was “[v]irtually strangled in infancy by post-

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<sup>231</sup> *Ibid.*

<sup>232</sup> Akhil Amar explains that “[v]irtually no serious modern scholar—left, right, and center—thinks that *Slaughter-House* is a plausible reading of the Fourteenth Amendment.” Akhil R Amar, “Foreword: The Document and the Doctrine” (2000) 114 Harv L Rev 26 at 123, fn 327.

<sup>233</sup> Robert M. Cover, “The Origins of Judicial Activism in the Protection of Minorities” (1982) 91:7 Yale LJ 1287 at 1295.

<sup>234</sup> Frank J. Scaturro, *The Supreme Court’s Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence* (Connecticut: Greenwood Press, 2000) at 1-158.

<sup>235</sup> William M. Wiecek, “Synoptic of United States Supreme Court Decisions Respecting the Rights of African-Americans, 1873-1940” (2003) 4 Barry L Rev 21 at 21.

civil-war judicial reactionism.”<sup>236</sup> Reva Siegel describes early judicial approaches to the Fourteenth Amendment as an instance of “preservation-through-transformation,” through which institutions that legally subordinated African Americans were substantively maintained, despite rhetorical transformations following legal emancipation and the enactment of the Reconstruction Amendments.<sup>237</sup>

From the early equal protection cases through the *Lochner* era, the Equal Protection Clause was treated as a pure rationality test, often relied upon to strike economic regulation.<sup>238</sup> The provision was deployed in some instances to protect African Americans against more egregious intrusions upon their civil and political rights (for example, in cases relating to exclusions of African Americans as jurors), but was famously held to allow segregation in the 1896 *Plessy v Ferguson* decision—a precedent which would bind the Court into the 1950s.<sup>239</sup> Michael Klarman describes the early equal protection cases as “reveal[ing] a court intuiting that racial classifications were different from others, yet unable to articulate or fully comprehend why.”<sup>240</sup>

In 1938, the Supreme Court issued a decision that would come to re-awaken and transform the Court’s equal protection jurisprudence—and begin to answer Klarman’s pending question about why racial discrimination might differ from other kinds of distinctions. In *Carolene Products*, the Court considered a due process challenge to a law which prohibited the interstate shipment of “filled milk” (a blend of dairy milk with non-dairy fat or oil). This was not an equal protection case, and the issues raised bore no apparent relation to the social justice problems associated with modern equal

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<sup>236</sup> Joseph Tussman & Jacobus tenBroek, “The Equal Protection of the Laws” (1949) 37 Calif L Rev 341 at 381.

<sup>237</sup> Reva B. Siegel, “Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action” (1997) 49 Stan L Rev 1111 at 1119.

<sup>238</sup> Michael Klarman, “An Interpretive History of Modern Equal Protection” (1991) 90:2 Mich L Rev 213 at 216. *Lochner v New York*, 198 US 45 (1905).

<sup>239</sup> *Plessy v Ferguson*, 163 US 537 (1896) [*Plessy*].

<sup>240</sup> Klarman, *supra* note 238 at 231.

protection law. But the Court’s reasons laid the groundwork for the suspect class doctrine that would come to play a pivotal role in modern equal protection jurisprudence. The *Carolene Products* Court upheld the restriction on shipments of filled milk on the basis that such a legislative judgment should be found valid “unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”<sup>241</sup> This broad grant of legislative discretion, however, was qualified by a now famous footnote—a footnote that, Jack Balkin explains, has become “more important than the text.”<sup>242</sup> Footnote Four suggested that the rational basis standard upon which the instant case was decided may not apply in all cases; instead, the footnote reflected tentatively,<sup>243</sup> that, “[t]here may be narrower scope for the operation of the presumption of constitutionality” in certain cases, such as those engaging the fundamental rights set out in the first ten amendments.<sup>244</sup> The footnote went on even more cautiously, asserting that it was “unnecessary to consider” two other circumstances which might warrant special constitutional scrutiny: those which engage restrictions on the political process, and those which engage the rights of certain minorities.<sup>245</sup> These two concerns were linked, with the protection of minorities being supported by a political-process rationale:

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious...or racial minorities....: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry....<sup>246</sup>

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<sup>241</sup> *United States v Carolene Products Company*, 304 US 144 at 152 (1938) [*Carolene Products*].

<sup>242</sup> Jack M Balkin, “The Footnote” (1989) 83 Nw U L Rev 275 at 281.

<sup>243</sup> For a discussion of the tentative tone of Footnote Four, see Balkin, *ibid* at 284.

<sup>244</sup> *Carolene Products*, *supra* note 241 at fn4.

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

This footnote gave rise to a new era of Constitutional interpretation, under which laws which engage certain kinds of rights, or target certain kinds of populations, would warrant heightened judicial scrutiny.<sup>247</sup>

The process by which class-based scrutiny fitfully migrated from a footnote of *obiter dicta* in a due process decision to a controlling doctrinal rule in equal protection law is subject to debate. Many trace the adoption of the *Carolene Products* rationale into equal protection analysis to the *Korematsu* decision in which the Supreme Court upheld the internment of Japanese Americans during the Second World War.<sup>248</sup> After a brief recitation of the facts, the majority in *Korematsu* posited:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Michael Klarman, however, contests the “received wisdom” that *Korematsu* ushered in a doctrinal commitment to heightened scrutiny for suspect classes, even in cases of racial discrimination.<sup>249</sup> He cites *Korematsu* and *Hirabayashi* (a case in which the Court upheld curfew rules targeting Japanese Americans) as being the first instances where the Supreme Court did “discourse generally upon the evils of racial discrimination.”<sup>250</sup> In Klarman’s view, however, these cases were in fact decided on

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<sup>247</sup> Kenji Yoshino explains that this case is “viewed by many as the fountainhead of the heightened scrutiny framework for minority groups.” Yoshino *supra* note 4 at 758, citing Gerald Gunther, *Cases and Materials on Constitutional Law*, 10th ed (New York: Foundation Press, 1980) at 542; Milner S Ball, “Judicial Protection of Powerless Minorities” (1974) 59 Iowa L Rev 1059; and Cover, *supra* note 233. See also Leslie Griedman Goldstein, “Between the Tiers: The New[est] Equal Protection and Bush v. Gore” (2002) 4:2 U Pa J Const L 372 at 372-373.

<sup>248</sup> *Korematsu v United States*, 323 US 214 (1944) [*Korematsu*]. Klarman refers to this interpretation as “received wisdom.” Klarman, *supra* note 238 at 227. See also Goldstein, *supra* note 247.

<sup>249</sup> Klarman, *supra* note 238 at 227.

<sup>250</sup> *Ibid* at 232, citing *Korematsu*, *supra* note 248 and *Hirabayashi v United States*, 320 US 81 (1943). Klarman notes *Strauder v West Virginia*, 100 US 303 (1880) as an early exception.

the same rational basis review that had historically governed equal protection cases. On Klarman's account, the *Carolene Products* call for heightened scrutiny was quickly adopted by the Court in "a wide array of contexts," but was not taken up with any real interpretive weight with respect to racial discrimination under the Equal Protection Clause, until the mid-1960s.<sup>251</sup> He notes that even the famous 1954 *Brown* decision did not state a racial classification rule.<sup>252</sup>

Regardless of the precise shifts in rhetoric and doctrine during this period, however, there is no doubt that by the 1970's, tiered scrutiny on the basis of variably suspect classifications had become the law of the land.<sup>253</sup> The 1970's were marked by a cluster of newly-recognized "suspect classifications," the targeting of which would give rise to special judicial scrutiny.<sup>254</sup> By 1977, the Court had established three distinct "tiers" of classifications, with attendant levels of judicial scrutiny.<sup>255</sup> Unless a petitioner could show that an impugned distinction discriminated against a "suspect" or "quasi-suspect" class, or engaged a fundamental right, the Court would subject legislation to the lowest standard of "rational basis review," requiring only that the classification be "rationally related to furthering a legitimate state interest."<sup>256</sup> Distinctions on the basis of wealth, age and disability were all held to be non-suspect, warranting this lowest level of scrutiny.<sup>257</sup> The most rigorously scrutinized of all classifications, those which discriminated on the basis of a "suspect classification," would only be upheld in cases where the state is able to satisfy the Court that the classification had been "drawn with 'precision'... 'tailored' to serve their legitimate objectives...

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<sup>251</sup> Klarman, *supra* note 238 at 220.

<sup>252</sup> *Ibid* at 247. *Brown v Board of Education*, 347 US 483 (1954).

<sup>253</sup> See generally Goldberg, *supra* note 197.

<sup>254</sup> Suzanne Goldberg links the advocacy for recognition of new suspect classifications in this period to the "fertile period of social change in the 1960's and 1970's." *Ibid* at 498-499.

<sup>255</sup> *Craig v Boren*, 429 US 190 (1976) [*Craig*].

<sup>256</sup> *Massachusetts Board of Retirement v Murgia*, 427 US 307 at 312 (1976) [*Murgia*].

<sup>257</sup> *Ibid*; *Cleburne*, *supra* note 178; and *San Antonio Independent School District v Rodriguez*, 411 U.S. 1 (1973) [*Rodriguez*].

[and is] the ‘less drastic means.’”<sup>258</sup> This highest degree of scrutiny was reserved for cases involving classifications on the basis of race, national origin, religion, and (in certain cases) alienage.<sup>259</sup> Between these extremes, the Court determined that classifications on the basis of gender and illegitimacy are “quasi-suspect,” engaging an intermediate level of scrutiny which requires the law to be “substantially related” to “important” or “significant” government objectives.<sup>260</sup> These classifications, and the attendant level of scrutiny assigned to them in the 1970’s, continue to control equal protection analysis today.

The level of scrutiny assigned by the Courts to an impugned distinction is more than a formality in U.S. equal protection legislation. Although the Court has occasionally been accused of sporadically and covertly deploying “rational basis with bite,”<sup>261</sup> or otherwise applying a level of scrutiny more or less demanding than it declares,<sup>262</sup> commentators have generally concluded that the assigned levels of scrutiny are strongly associated with outcomes. Kenji Yoshino explains that “[t]he words “scrutiny” and “review” suggest an examination rather than a result. Yet in this jurisprudence, looks can kill.”<sup>263</sup> Gerald Gunther has similarly referred to strict scrutiny as “fatal in fact,”<sup>264</sup> and Jed

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<sup>258</sup> *Dunn v Blumstein*, 405 US 330 at 343 (1972).

<sup>259</sup> For a summary of the restrictions on the scope of suspect classification in cases where discrimination is alleged on the basis of alienage, see Yoshino, *supra* note 4 at 176, fn 65.

<sup>260</sup> *Metro Broadcasting, Inc v FCC*, 497 US 547 at 564-565 (1990); *Craig*, *supra* note 255; and *Trimble v Gordon*, 430 US 762 (1977) [*Trimble*].

<sup>261</sup> See for example Gayle Lynn Pettinga, “Note, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name” (1987) 62 Ind LJ 779.

<sup>262</sup> See for example Jeremy B Smith, “Note, The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation” (2005) 73 Fordham L Rev 2769.

<sup>263</sup> Yoshino, *supra* note 4 at 756.

<sup>264</sup> Gerald Gunther, “Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection” (1972) 86:1 Harv L Rev 1 at 8. The Court has denied this characterization: *Adarand Constructors, Inc v Peña*, 515 US 200 at 237 (1995) [*Adarand*].

Rubinfeld has said that “strict equal protection scrutiny is almost always fatal.”<sup>265</sup> Laurence Tribe has called this higher standard of review a “virtual death blow” to challenged state action.<sup>266</sup>

Yet despite the controlling force of the level of scrutiny applied, the assignment of various classifications to the three tiers of scrutiny appears to have been piecemeal and unprincipled.<sup>267</sup>

Thomas Simon, has referred to the current approach as “an analytical muddle.”<sup>268</sup> Darren Lenard Hutchinson summarizes that, while historical discrimination, political powerlessness, and the presence of immutable and visible characteristics are often discussed in these cases, the Courts “have often disregarded some or all of them in their analysis.”<sup>269</sup> Marcy Strauss’ recent review of suspect classification case law similarly reveals that courts emphasize certain factors over others “without any real explanation,”<sup>270</sup> and that “[e]ven the most commonly utilized factors have no clearly established meaning.”<sup>271</sup> The following brief survey of the Court’s reasons in accepting and rejecting various proposed classifications reveals this lack of consistent or coherent jurisprudence.

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<sup>265</sup> Rubinfeld, *supra* note 15 at 433.

<sup>266</sup> Laurence Tribe, *American Constitutional Law* (1978) 1st ed (New York: Foundation Press) at 16-30. See also Robert C. Farrell’s quantitative analysis of rational basis claims between 1971 and 1996, finding that the Court upheld over 100 classifications under rational basis scrutiny, while striking fewer than a dozen on this standard. Robert C Varrell, “Successful Rational Basis Claims in the Supreme Court from the 1971 Term through *Romer v. Evans*” (1999) 32 Ind L Rev 357.

<sup>267</sup> Thomas Simon has called the Court’s approach to defining heightened scrutiny as “haphazard.” Thomas Simon, “Suspect Class Democracy: A Social Theory” (1990) 45 U Miami L Rev 107 at 141. Similar criticisms date back to the early days of tiered scrutiny. See, for example, J Harvie Wilkinson III, “The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality” (1975) 61 Va L Rev 945 at 983: “[T]he law of suspect classes is largely one of latent confusion . . . . The criteria of suspectness have not been thoughtfully defined or consistently applied”; and Gunther, *supra* note 264 at 16: “[t]he Supreme Court has never provided a clear explanation of the concept of suspectness.”

<sup>268</sup> Simon, *supra* note 267 at 141.

<sup>269</sup> Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence” (2003) 3 U Ill L Rev 615 at 636.

<sup>270</sup> Marcy Strauss, “Reevaluating Suspect Classifications” (2011) 35 Seattle U L Rev 135 at 138.

<sup>271</sup> *Ibid* at 139. Strauss concludes that “[t]he Supreme Court has not provided a coherent explanation for precisely what factors trigger heightened scrutiny.” *Ibid* at 138.



Race and alienage were both granted suspect status, essentially without explanation.<sup>272</sup> Suzanne Goldberg has suggested that “widespread awareness that the equal protection guarantee condemned race discrimination...rendered unnecessary the creation of a test to explicate or justify the Court’s suspicion of racial classifications.”<sup>273</sup> As noted above, the extent to which the *Korematsu* case affirmed heightened scrutiny on the basis of race is debatable; in fact, the reasons disclose both references to strict scrutiny for race cases, and the clear application of a rational basis review in the instant case.<sup>274</sup> In any event, the Court did not explain *why* racial distinctions in general, or racial distinctions targeting the Japanese petitioners, might be suspect.<sup>275</sup> The Court’s later pronouncement in *McLaughlin* that the “widest discretion” normally allowed to legislative judgment is to be supplanted by “most rigid scrutiny” in cases of racial classification,<sup>276</sup> noted the importance of “the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States,” and emphasized that racial distinctions are generally irrelevant to “any constitutionally acceptable legislative purpose.”<sup>277</sup> Subsequently, in *Graham*, the Court concluded that distinctions based on alienage were “like those based on

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<sup>272</sup> *Korematsu*, *supra* note 248; and *Graham v Richardson*, 403 US 365 (1971) [*Graham*]. Marcy Strauss has also noted the lack of justification offered for these classifications. Strauss, *supra* note 270 at 144-145.

<sup>273</sup> Goldberg, *supra* note 197 at 498, fn66.

<sup>274</sup> Compare the Court’s description of the law in *Korematsu*, *supra* note 248 at 216 (“all legal restrictions which curtail the civil rights of a single racial group are immediately suspect”) with the Court’s deferential application of the law at 223-224 (“the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that, at that time, these actions were unjustified.”)

<sup>275</sup> Instead, the Court posited simply that, “It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.” *Korematsu*, *supra* note 248 at 216.

<sup>276</sup> *McLaughlin v Florida*, 379 US 184 at 192 (1964) [*McLaughlin*].

<sup>277</sup> *Ibid* at 192 and 198.

nationality or race,” and were therefore “inherently suspect.”<sup>278</sup> The Court posited without further explanation that “Aliens as a class are a prime example of a ‘discrete and insular’ minority” as described in *Carolene Products*.<sup>279</sup>

In 1973, in *Frontiero*, the Court struck down a law which required that uniformed servicewomen prove their husbands’ actual financial dependence in order to claim them as dependents, while male servicemen were entitled to claim their wives as dependents regardless of those couples’ actual financial circumstances.<sup>280</sup> In so holding, a plurality of the Court concluded that such gender-based distinctions should be held to strict scrutiny.<sup>281</sup> (A majority of the Court would later conclude in *Craig* that gender distinctions should receive intermediate scrutiny.<sup>282</sup>) Justice Brennan’s plurality reasons elaborated a variety of factors which have continued to hold sway in equal protection analysis. First and foremost, he emphasized that the United States “has had a long and unfortunate history of sex discrimination.”<sup>283</sup> He analyzed the Court’s own discursive stance towards women, citing a then-100-year-old decision in which the Court reflected that “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”<sup>284</sup> He concluded that a pervasive “romantic paternalism” resulted in women being put “not on a pedestal, but in a cage,” such that “our statute books gradually became laden with gross, stereotyped distinctions between the sexes.”<sup>285</sup> This reflection on the interrelationship between social attitudes and legal oppression was followed by a direct analogy to

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<sup>278</sup> *Graham*, *supra* note 272 at 372.

<sup>279</sup> *Ibid* at 372. See Yoshino 756, fn 65, for a description of restrictions on heightened scrutiny on the basis of alienage. Both Reginald Oh and Suzanne Goldberg have noted the lack of reasons in this passage. Oh, *supra* note 19 at 594. Goldberg, *supra* note 197 at 501.

<sup>280</sup> *Frontiero v Richardson*, 411 US 677 (1973) [*Frontiero*].

<sup>281</sup> *Ibid* at 682-691.

<sup>282</sup> *Craig*, *supra* note 255.

<sup>283</sup> *Frontiero*, *supra* note 280 at 684.

<sup>284</sup> *Ibid*, citing *Bradwell v State*, 16 Wall 130 at 141 (1873).

<sup>285</sup> *Frontiero*, *supra* note 280 at 684-685.

the social and legal context of slavery: “throughout much of the 19th century, the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.”<sup>286</sup> The bulk of the reasons, and the substance of the analogy on which the Court relied, was thus focused on “the position of women in our society,” as manifest in legal rules. Shorter shrift was given to other factors such as “the high visibility of the sex characteristic” (cited briefly for its contribution to ongoing limitations on women’s opportunities),<sup>287</sup> evidence of congressional efforts to protect women against discrimination;<sup>288</sup> the proposition that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth;”<sup>289</sup> and Justice Brennan’s assessment that, unlike intelligence or physical disability, “the sex characteristic frequently bears no relation to ability to perform or contribute to society.”<sup>290</sup>

While Justice Brennan acknowledged that women’s social circumstances have improved, he observed that “women still face pervasive, although at times more subtle discrimination in our educational institutions, in the job market and perhaps most conspicuously in the political arena.”<sup>291</sup> To this point, Brennan appended a footnote reflecting on the application of the *Carolene Products* political process rationale in light of the fact that “when viewed in the abstract, women do not constitute a small and powerless minority.”<sup>292</sup> Brennan, however, rejected this analysis “in the abstract,” focusing instead on the fact of women’s political underrepresentation: “There has never

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<sup>286</sup> *Ibid* at 685.

<sup>287</sup> *Ibid*.

<sup>288</sup> *Ibid* at 687-688.

<sup>289</sup> *Ibid* at 686.

<sup>290</sup> *Ibid*.

<sup>291</sup> *Ibid* at 685.

<sup>292</sup> *Ibid* at fn17.

been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And...this underrepresentation is present throughout all levels of our State and Federal Government.”<sup>293</sup>

Also in 1973, the Supreme Court upheld a property-tax-based public school funding scheme that resulted in substantially lower quality of education for students living in property-poor districts.<sup>294</sup> Justice Powell’s majority reasons in *Rodriguez* reveal a preoccupation with the ease of defining membership in the proposed suspect class, at the expense of attention to the relational dimensions of the claim that had been emphasized in the Court’s discussion of women in *Frontiero*. Justice Powell remarks that the petitioners’ case lacked a “definitive description of the classifying facts or delineation of the disfavored class,”<sup>295</sup> suggesting that this left the Court with “serious unanswered questions” about “whether a class of this size and diversity could ever claim the special protection accorded ‘suspect’ classes.”<sup>296</sup> Justice Powell spends several pages of his reasons parsing the difficulties in defining with precision the circumstances of such possible suspect classes as “‘poor’ persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally indigent”; “those who are relatively poorer than others”; or “those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts.”<sup>297</sup> He rejects the proposition that heightened scrutiny should be afforded to “a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts,”<sup>298</sup> then offers a perfunctory and conclusory assessment that “[t]he

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<sup>293</sup> *Ibid.*

<sup>294</sup> *Rodriguez*, *supra* note 257.

<sup>295</sup> *Ibid* at 19.

<sup>296</sup> *Ibid* at 26.

<sup>297</sup> *Ibid* at 19-20.

<sup>298</sup> *Ibid* at 28. Justice Stewart agrees with this focus on the ease of delineating the proposed suspect class: “First, as the Court points out, the Texas system has hardly created the kind of objectively identifiable classes that are cognizable under the Equal Protection Clause.” *Ibid* at 62.

system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>299</sup>

The Court’s concentration on group definition in *Rodriguez* worked to crowd out consideration of the actual social circumstances of the claimants—children in underfunded school districts. Moreover, Justice Powell’s exacting scrutiny of who exactly “counts” in a suspect class—and the ease of drawing a precise border around who is “in” and who is “out” —betrays an underlying assumption that some social groupings *do* reflect precise and naturalized boundaries between groups of people. It assumes, moreover, that the differences which are the most “obvious” or easily discernable from the vantage point of the judiciary are the differences that matter most for the purposes of equal protection analysis. This assumption runs counter to Bruce Ackerman’s famous observation that it is “anonymous and diffuse” groups, rather than “discrete and insular” groups (in the sense of being obvious and visible), who are “systematically disadvantaged in a pluralist democracy.”<sup>300</sup> Moreover, even race, presumptively demarcating the paradigmatic “discrete and insular minority,” does not create the kind of clean lines that Justice Powell seems to require here: it is often forgotten that, in the case that enshrined America’s most notorious judicial approval of racial segregation, Mr. Plessy’s first line of argument was that he was wrongly sent to the “colored” carriage—not because racial segregation was wrong, but because Mr. Plessy should have been considered white.<sup>301</sup>

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<sup>299</sup> *Ibid* at 28.

<sup>300</sup> Bruce A. Ackerman, “Beyond *Carolene Products*” (1985) 98 Harvard LR 713 at 724.

<sup>301</sup> Mr. Plessy’s writ pled “[t]hat petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right,

In the Court's 1976 decision in *Murgia*, the Court upheld a rule requiring uniformed police officers to retire at age 50 regardless of fitness for duty.<sup>302</sup> In that case, the Court was unconcerned with visibility or immutability, and focused their (again perfunctory) analysis on historical and political marginalization, and the generalized relevance of "age" as a characteristic. The Court held that, "[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment.'"<sup>303</sup> The Court emphasized that, in their view, "the aged" had not "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."<sup>304</sup> This comment was somewhat ironic in the case of an individual officer who was being relieved of duties on the basis of assumptions about the abilities of older workers which all parties agreed were untrue of the petitioner.<sup>305</sup> The Court posited without further analysis that "old age does not define a 'discrete and insular' group...in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span."<sup>306</sup>

In the 1977 *Trimble* decision, the Supreme Court struck down an Illinois law which prevented "illegitimate" children from inheriting from intestate fathers, although "legitimate" children were permitted to do so.<sup>307</sup> The Court determined that laws which discriminate on the basis of legitimacy should be subject to intermediate scrutiny—neither warranting "our most exacting

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privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws." *Plessy*, *supra* note 239 at 538.

<sup>302</sup> *Murgia*, *supra* note 256.

<sup>303</sup> *Ibid* at 313.

<sup>304</sup> *Ibid*.

<sup>305</sup> *Ibid* at 311.

<sup>306</sup> *Ibid* at 313-314.

<sup>307</sup> *Trimble*, *supra* note 260. Both legitimate and illegitimate children were able to inherit from intestate mothers pursuant to the same statute (at 763). The Court declined to consider the possibility that the legislation was discriminatory on the basis of sex since it was unnecessary to do so in light of their finding that of discrimination on the basis of legitimacy (at 766).

scrutiny,” nor “toothless” rational basis review.<sup>308</sup> In support of this decision, the Court endorsed the reasons in an earlier case, *Mathews*, in which the Court had reflected that “illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect.”<sup>309</sup> In *Mathews*, the Court found that the analogy to race or national origin held insofar as illegitimacy was “a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society.”<sup>310</sup> The Court’s decision not to grant the highest level of scrutiny, however, was controlled by an inquiry into the extent of historical discrimination, and their conclusion that “this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.”<sup>311</sup>

And with that, the Court shut the doors on suspect classification. Despite much clamouring at the gates,<sup>312</sup> the Court has not granted heightened scrutiny to distinctions targeting any new group or classification since the 1977 *Trimble* decision. As Professor Yoshino explains, “with respect to federal equal protection jurisprudence, the canon has closed.”<sup>313</sup> Efforts to achieve heightened scrutiny for such diverse classifications as sexual orientation and mental disability have either failed outright, or been evaded by a Court eager to decide cases without delving into the thorny question of suspect classification.<sup>314</sup> In the 1985 *Cleburne* decision, the majority of the Court practically announced this shift in declining to extend heightened scrutiny to “mentally retarded” persons:

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<sup>308</sup> *Ibid* at 767.

<sup>309</sup> *Ibid*, citing *Mathews v Lucas*, 427 US 495 at 505 (1976) [*Mathews*].

<sup>310</sup> *Mathews*, *supra* note 309 at 505.

<sup>311</sup> *Ibid*. Note that despite this implicit equation of the experiences of women and African Americans, gender classifications continued to receive the same intermediate scrutiny as classifications on the basis of legitimacy.

<sup>312</sup> For a discussion of continued litigation advancing arguments for the application of heightened scrutiny to new classifications, see Yoshino, *supra* note 4 at 757, fn 71.

<sup>313</sup> Yoshino, *supra* note 4 at 757. See also Goldberg, *supra* note 197 at 485.

<sup>314</sup> *Cleburne*, *supra* note 178. *Lawrence v Texas*, 539 US 558 (2003). *Windsor*, *supra* note 1.

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect ... it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.<sup>315</sup>

Suzanne Goldberg has suggested that, given the strong correlation between the ostensible indicia of suspectness, and the refusal of protection in cases like *Cleburne*, the Court has proceeded with a “first in time is first in right” approach: “it appears that a central reason for heightened scrutiny’s restriction to five traits is temporal, in that those traits received the Court’s protection before slippery slope-type fears about the potential reach of rigorous review set in.”<sup>316</sup> In any event, the DOMA decision referenced at the beginning of this paper is just the most recent example of the Court’s continued reluctance to seriously consider extending heightened scrutiny to new classes.

Notably, the evolution of tiered scrutiny was punctuated throughout by vigorous opposition from dissenting Justices opposed to the Court’s emerging approach. Justice Stevens famously rejected tiered scrutiny altogether, asserting that, “there is only one Equal Protection Clause,” and calling on the Court to adopt a single standard of review.<sup>317</sup> He called for a universal standard of rationality, while “[l]oosening the phrase ‘rational basis’ from its diluted, technical use.”<sup>318</sup> Justice Stevens cautioned that groups suffering a “tradition of disfavour” are likely to be subject to classification on the basis of “[h]abit rather than analysis” such that the classification has “no rational relationship – other than pure prejudicial discrimination – to the stated purpose for which the

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<sup>315</sup> *Cleburne*, *supra* note 178 at 445-446.

<sup>316</sup> Goldberg, *supra* note 197 at 503.

<sup>317</sup> *Craig*, *supra* note 255 at 211-212.

<sup>318</sup> “Note, Stevens’ Equal Protection Jurisprudence” (1987) 100 Harv L Rev 1146 at 1146 [Stevens Note].



classification is being made.”<sup>319</sup> Justice Stevens thus anchored his brand of universally-applicable rational basis analysis in history and context, proposing that:

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a “tradition of disfavor” by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases, the answer to these questions will tell us whether the statute has a “rational basis.”<sup>320</sup>

Justice Stevens’ version of relevance was thus “given direction through the incorporation of normative premises that reflect a social vision of equality.”<sup>321</sup> His vision of rationality involved a balancing of interests that inquired into whether the legislator could reasonably have concluded that the achievement of its purpose warranted the harm caused: “The term ‘rational,’ of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the disadvantaged class.”<sup>322</sup> Thus, his analysis directed focus on the circumstances of disadvantaged groups without requiring categorical assertions about whether or not particular kinds of classifications are presumptively irrational.<sup>323</sup>

Justice Marshall similarly objected to the Court’s rigid approach to tiered scrutiny, but offered a different proposal: a sliding scale of review which he referred to as a “spectrum of standards.”<sup>324</sup> Justice Marshall charged the majority approach with “focusing obsessively on the appropriate label to give its standard of review,” and questioned the validity of the bases relied upon to determine suspect classification.<sup>325</sup> He cautioned that a formalistic understanding of the political process rationale fails to account for the invidious nature of gender discrimination, and that a

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<sup>319</sup> *Mathews*, *supra* note 309 at 520-521. See also *New York Transit Authority v Beazer*, 440 US 568 at 593 (1979), and *Cleburne*, *supra* note 178 at fn 6.

<sup>320</sup> *Cleburne*, *supra* note 178 at 453.

<sup>321</sup> Stevens Note, *supra* note 318 at 1154.

<sup>322</sup> *Cleburne*, *supra* note 178 at 452.

<sup>323</sup> Stevens Note, *supra* note 318 at 1162.

<sup>324</sup> *Rodriguez*, *supra* note 257 at 98.

<sup>325</sup> *Cleburne*, *supra* note 178 at 478.

decontextualized immutability analysis may improperly emphasize grounds such as height.<sup>326</sup> Rather than focus on any “single talisman,” Justice Marshall called for a relational focus on the actual, lived experiences of groups, noting that “the political powerlessness of a group and the immutability of its defining trait are relevant only insofar as they point to a *social and cultural isolation* that gives the majority little reason to respect or be concerned with the group’s interests and needs.”<sup>327</sup> Rather than the mechanical process of assigning scrutiny with reference to abstract classifications, Justice Marshall prescribed an open-textured balancing approach, in which “concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.”<sup>328</sup> In this analysis, Marshall directed, “[E]xperience, not abstract logic, must be the primary guide,” and “a page of history is worth a volume of logic.”<sup>329</sup>

But despite these objections, tiered scrutiny has yet to be repudiated by a majority of the Court. The above survey confirms observations that the awarding of suspect status has not followed, or even purported to follow, any clear framework for the addition of new grounds. The common thread appears to be concern over political or social disadvantage, but *Rodriguez* and *Cleburne* establish that such factors are insufficient in themselves to attract heightened scrutiny. In any event, as Yoshino and Goldberg have observed, the Court does not appear interested in clarifying its approach, or seriously considering the extension of heightened scrutiny to new groups.

One further development in the equal protection jurisprudence requires our attention here. As tiered scrutiny hardened into doctrine, laws that used racial classifications to ameliorate the circumstances of disadvantaged groups (i.e. affirmative action) posed a special problem. As set out

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<sup>326</sup> *Ibid* at 472, fn 2.

<sup>327</sup> *Ibid*. Emphasis added.

<sup>328</sup> *Dandridge v Williams*, 397 US 471 at 520-521 (1970).

<sup>329</sup> *Cleburne*, *supra* note 178 at 472, fn 2, citing *New York Trust Co v Eisner*, 256 US 345 at 349 (1921).

above, the suspect class doctrine was largely focused on identifying disadvantaged groups. It remained unclear, however, how the Court should approach categorizations deployed to the *advantage* of such groups. In the 1978 *Bakke* decision, Justice Powell's plurality opinion laid the groundwork for the approach which would ultimately be endorsed by the majority of the Court.<sup>330</sup> That case considered a constitutional challenge by a white male medical school applicant who had been rejected twice for admission to the University of California at Davis. Mr. Bakke complained that he would have been admitted but for the medical school's affirmative action program, under which 16 out of 100 places were effectively reserved for racial minority students.<sup>331</sup> Among his arguments before the Court, he contended that the school's affirmative action program violated the Equal Protection Clause. In so arguing, he proposed that, because the program engaged racial classification, it should be subject to heightened scrutiny. The state, in defending the program, cited the *Carolene Products* footnote, and argued that heightened scrutiny "should be reserved for classifications that disadvantage 'discrete and insular minorities.'"<sup>332</sup> Justice Powell rejected the state's argument, holding that 'discrete and insular minority' status "may be relevant in deciding whether or not to add *new types of classifications* to the list of 'suspect categories,'" but that "[r]acial and ethnic classifications...are subject to stringent examination *without regard to these additional characteristics*."<sup>333</sup>

Among the reasons offered for this decision, a version of Yoshino's pluralism anxiety was prominent. Justice Powell remarked that, while the *Slaughter-house Cases* had emphasized the particular historical purpose of alleviating discrimination against African Americans, by the time the

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<sup>330</sup> *Regents of the University of California v Bakke*, 438 US 265 (1978) [*Bakke*]. Justice Powell's opinion was endorsed by the majority of the Court in *City of Richmond v JA Croson Co*, 488 US 469 (1989) [*Croson*].

<sup>331</sup> *Bakke*, *supra* note 330 at 265-266.

<sup>332</sup> *Ibid* at 288.

<sup>333</sup> *Ibid* at 290. Emphasis added.

famous footnote was proffered, America had become a “Nation of minorities” for which such targeted protection was no longer possible or desirable.<sup>334</sup> In the contemporary context, Justice Powell argued, it is “too late” to posit a form of equal protection that “permits the recognition of special wards entitled to a degree of protection greater than that accorded to others.”<sup>335</sup> Noting that even “the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination,” Powell concludes that “[t]here is no principled basis for deciding which groups would merit “heightened judicial solicitude” and which would not.”<sup>336</sup> The task, he observes, would also require the Court to constantly re-evaluate which groups, in a given social and historical moment, achieve a “societal injury...thought to exceed some arbitrary level of tolerability” warranting “preferential classification.”<sup>337</sup> Powell protests that changing social circumstances would require a constant re-assessment of “new judicial rankings” that would engage a “variable sociological and political analysis” that exceeds the proper role of the Court.<sup>338</sup>

As noted above, Justice Powell’s reasons in *Bakke* were not supported by a majority of the Court. Debate persisted in the Court’s decisions as to the proper approach to affirmative action cases until the 1995 decision in *Adarand*.<sup>339</sup> In *Adarand*, the Court endorsed Justice Powell’s reasons in *Bakke*, holding that all racial classifications—by any government actor, and regardless of purposes or effects—should be subjected to the highest scrutiny. The decision was made over Justice Stevens and Justice Ginsburg’s protestations that “[t]he consistency that the Court espouses” in treating all racial classifications with the same heightened suspicion, “would disregard the difference between a

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<sup>334</sup> *Ibid* at 292.

<sup>335</sup> *Ibid* at 295.

<sup>336</sup> *Ibid* at 295-296.

<sup>337</sup> *Ibid* at 297.

<sup>338</sup> *Ibid* at 297.

<sup>339</sup> *Adarand*, *supra* note 264.

‘No Trespassing’ sign and a welcome mat.’<sup>340</sup> But the rule that “benign” racial classifications should be subjected to heightened scrutiny continues to hold. Most recently, the Supreme Court vacated a Court of Appeals decision to uphold a University of Texas affirmative action program on the basis that the Court of Appeals failed to apply the strict scrutiny required by *Adarand*.<sup>341</sup> Justice Ginsburg, conceding to the Court’s settled approach, objected only that on her assessment the Court of Appeals had already held the impugned affirmative action program to the strict scrutiny called for by Justice Powell in *Bakke*.<sup>342</sup>

Thus, the Court’s current approach blends a symmetrical hostility towards certain “classifications,” with an unwillingness to extend heightened protections to new “suspect classes.” A vast critical commentary, some of which will be addressed more fully below, has addressed the perceived inconsistencies and injustices of this approach.<sup>343</sup> Before moving on to consider a relational response to these developments, however, the following chapter will set out the doctrinal evolution of the Canadian approach to grounds of discrimination.

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<sup>340</sup> *Ibid* at 245.

<sup>341</sup> *Fisher v Texas University of Texas*, 570 US \_\_ (2013).

<sup>342</sup> *Ibid*.

<sup>343</sup> See, for example, Rubinfeld, *supra* note 15; Rubinfeld, *supra* note 207; Oh, *supra* note 19; and Siegel, *supra* note 237.

## CHAPTER 4

### GROUPS AND GROUNDS IN CANADIAN EQUALITY LAW

The U.S. Equal Protection Clause was born in a nation recovering from a bloody civil war, and facing the very immediate and material concerns of a vast population of newly-emancipated slaves whose legal status was deeply contested and uncertain. By all accounts, the Equal Protection Clause was, at its inception, aimed primarily at protecting that particular social group. Canada's constitutional equality provision emerged in very different circumstances. The *Canadian Charter of Rights and Freedoms* was born in the 1980s, crafted in consultation with independent advisory groups, and following the solicitation and submission of briefs from members of the public, and three months of hearings before a joint committee of the House of Commons and the Senate.<sup>344</sup> The resultant equality provision was therefore “shaped in large part by women, as well as by advocates for the disabled and other disadvantaged groups in Canadian society.”<sup>345</sup> Canada's constitutional equality provision was also drafted and interpreted after much of the American constitutional history set out above had already unfurled—the famous footnote, the adoption of tiered scrutiny, and the striking of affirmative action provisions under strict scrutiny. The drafting and interpretation of the Canadian constitutional equality provision took the American equal protection experience as both exemplar and cautionary tale.<sup>346</sup>

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<sup>344</sup> Anderson, *supra* note 202 at 40.

<sup>345</sup> Hon. Claire L'Heureux-Dubé, “It Takes a Vision: The Constitutionalization of Equality in Canada” (2002) 14 *Yale JL & Feminism* 363 at 366.

<sup>346</sup> Contrast the Canadian Supreme Court's adoption of the American “discrete and insular minority” standard with the repudiation of *Bakke* in the drafting of the Canadian *Charter* (both of which are addressed below).

Section 15 of the Canadian Charter of Rights and Freedoms provides:

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>347</sup>

As with all rights enumerated in the *Charter*, s. 15 equality rights are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” pursuant to the limitation provision set out in s. 1 of the Charter.

The textual differences between this provision and the terse American guarantee of “equal protection of the laws” are apparent. First, the Canadian protection expressly provides a lengthy list of grounds, including grounds such as age and disability which have not attracted special scrutiny under U.S. equal protection analysis.<sup>348</sup> Moreover, the list of grounds is prefaced by the phrase “and, in particular”—a grammatical invitation to consider claims that do not necessarily engage the listed grounds. Second, the limitations clause opened up a possibility (arguably not adequately taken up by the Court) of separating the identification of a rights violation from consideration of whether that violation was justifiable. Raj Anand notes that this structural separation of s. 1 from the equality provision is distinguishable from the American provision which casts equality rights in “expansive, largely unqualified terms,” with the result that “the U.S. Supreme Court was forced to incorporate

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<sup>347</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 15 [*Charter*].

<sup>348</sup> See *Murgia*, *supra* note 256; and *Cleburne*, *supra* note 178.

general welfare interests into the definition of the right itself and into the analysis of what constitutes an infringement of that right.”<sup>349</sup>

Finally, subsection 15(2), which provides express Constitutional sanction to affirmative measures aimed at ameliorating conditions of group disadvantage, was included as a direct response to the American experience with judicial review of affirmative action programs. David Lepofsky and Jerome Bickenbach report that s. 15(2) was commonly referred to in the *Charter*'s early days as an “anti-*Bakke*” provision, referencing a desire to avoid the calls of “reverse discrimination” evident in the U.S. *Bakke* decision.<sup>350</sup> The Ontario Court of Appeal similarly concluded that “[s]ection 15(2) was undoubtedly included in the *Charter* to silence this debate in Canada and to avoid litigation similar to *Bakke*.”<sup>351</sup> Elsewhere, I have elaborated the evolution of the Court's treatment of ameliorative programs under s. 15(2).<sup>352</sup> Here I will confine myself to remarking that the Canadian jurisprudence has not followed the U.S. in striking ameliorative programs under their constitutional equality protections. Instead, s. 15(2) has been interpreted to direct that, where the government can establish that a program is rationally connected to the objective of ameliorating conditions of group disadvantage, it is effectively insulated from review under s. 15(1) of the *Charter*.<sup>353</sup>

The approach to groups and grounds under consideration in the present study emerged in the context of the Court's s. 15(1) jurisprudence. In the Supreme Court's first s. 15 decision, *Andrews*, the Supreme Court of Canada struck down a British Columbia rule that restricted membership in the provincial bar association to Canadian citizens. At this early stage, the Court resisted creating a clear

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<sup>349</sup> Raj Anand, “Ethnic Equality” in Anne F Bayefsky & Mary A Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985).

<sup>350</sup> David Lepofsky & Jerome Bickenbach, “Equality Rights and the Physically Handicapped” in Anne F Bayefsky & Mary A Eberts, eds, *supra* note 349 at 354.

<sup>351</sup> *Lovelace v Ontario*, (1997) 33 OR (3d) 735 at para 51.

<sup>352</sup> Jess Eisen, “Rethinking Affirmative Action Analysis in the Wake of *Kapp*: A Limitations Interpretation Approach” (2008) 6:1 JL & Equality 1.

<sup>353</sup> See *Kapp*, *supra* note 204, and Eisen, *supra* note 352.



“test” for s. 15 analysis, cautioning that it would be “unwise, if not foolhardy, to attempt to provide exhaustive definitions of phrases which by their nature are not susceptible of easy definition and which are intended to provide a framework for the ‘unremitting protection’ of equality rights in the years to come.”<sup>354</sup> But despite this wariness, the Court was ready at the outset to give a starring role to the grounds of discrimination listed in the constitutional text, unanimously endorsing an interpretive structure which they termed the “enumerated and analogous grounds approach.”<sup>355</sup> Under this approach, the listed grounds, and grounds determined to be analogous thereto, would serve the function of “screening out the obviously trivial and vexatious claim,” while leaving “any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment” to the s. 1 inquiry, where the government bears the burden of proof.<sup>356</sup> As to the s. 15(1) inquiry, the Court endorsed the following account of the purpose of the grounds inquiry: “one may look to whether or not there is ‘discrimination’, in the pejorative sense of that word, and as to whether the categories are based upon the grounds enumerated or grounds analogous to them. The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantage, in a word, of prejudice, are the focus...”<sup>357</sup>

In *Andrews*, the Court concluded that citizenship was sufficiently analogous to the listed grounds to warrant s. 15 protection. Justice McIntyre’s brief consideration of this point adopted the American ‘discrete and insular minority’ formulation: “Non-citizens, lawfully permanent residents of

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<sup>354</sup> *R v Turpin*, [1989] 1 SCR 1296.

<sup>355</sup> Although Justice McIntyre dissented in the result, the “enumerated and analogous grounds approach” set out in his reasons was endorsed by all members of the Court. *Andrews*, *supra* note 189.

<sup>356</sup> *Ibid* at 182-183.

<sup>357</sup> *Ibid* at 180, citing *Smith, Kline & French Laboratories v Canada (Attorney General)*, [1987] 2 FC 359 at 367-69.

Canada, are—in the words of the U.S. Supreme Court in *United States v. Carolene Products Co.*... a good example of a ‘discrete and insular minority’ who come within the protection of s. 15.”<sup>358</sup> Justice Wilson, concurring in Justice McIntyre’s finding of a s. 15 violation, repeated his reference to *Carolene Products* and elaborated on the underlying political process rationale: “[r]elative to citizens, 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.”<sup>359</sup> She emphasized the vulnerability that non-citizens faced in the political sphere due to their lack of voting rights, and found that for this reason “non-citizens fall into an analogous category to those specifically enumerated in s. 15.”<sup>360</sup> Justice Wilson was emphatic that this determination is properly made “in the context of the place of the group in the entire social, political and legal fabric of our society.”<sup>361</sup> This attention to context, she added, must account for changing “political and social circumstances” which might in turn change the shape and definition of the relevant social groups: “It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today.”<sup>362</sup>

In the cases following *Andrews*, the Court continued to deploy the term “discrete and insular minority” in defining analogous grounds, emphasizing social and historical disadvantage when assessing proposed grounds of discrimination.<sup>363</sup> Disadvantage was the analytic cornerstone, even where factors like “immutability” were referred to by members of the Court.<sup>364</sup> In Justice Wilson’s unanimous decision in *Turpin*, the Court rejected a claim that s. 15 was violated by the differential

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<sup>358</sup> *Andrews*, *supra* note 189 at 183.

<sup>359</sup> *Ibid* at 152.

<sup>360</sup> *Ibid*.

<sup>361</sup> *Ibid*.

<sup>362</sup> *Ibid* at 152-153.

<sup>363</sup> See, for example, *Turpin*, *supra* note 354 at 1331-33.

<sup>364</sup> See, for example, the reasons of Justice La Forest in *Andrews*, *supra* note 189 at 330. Dale Gibson surveys the presence of various factors during this early period in “Analogous Grounds of Discrimination under the Canadian *Charter*: Much Ado About Next to Nothing” (1991) 29 *Alberta L Rev* 772. Gibson concedes, though, that group disadvantage was a core factor in all of the analogous grounds recognized by the Court in this period. *Ibid* at 791.

availability of judge-alone trials for identical *Criminal Code* offences as between Ontario and Alberta. In rejecting the proposition that the claim engaged an analogous ground, Justice Wilson, writing for a unanimous Court, affirmed that, “[i]n determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look...to the larger social, political and legal context.... A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.”<sup>365</sup> She emphasized, moreover, that this attention to context and “search for disadvantage” might mean that a proposed ground can be “analogous” in some cases but not others, depending on whether group disadvantage was present in a given context. In *Turpin*, wherein the Court found that the claimant’s province of residence did not engage a protected ground, Justice Wilson qualified this holding: “I would not wish to suggest 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 ground of discrimination. I simply say that it is not so here” since the claimants “do not constitute a disadvantaged group in Canadian society within the contemplation of s. 15”<sup>366</sup> Similarly, in *Généreux*, the Court found that in the context before the Court, military personnel were not subject to unconstitutional discrimination when they were required to appear before the military (rather than civilian) justice system. The Court noted that military personnel were not disadvantaged in the present circumstances, but stipulated that if “for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel...suffer from disadvantages and discrimination peculiar to their status,” they

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<sup>365</sup> *Turpin*, *supra* note 354 at 1331-33.

<sup>366</sup> *Ibid* at 1333.

“might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances.”<sup>367</sup>

In 1995, the Court released a trilogy of decisions which revealed a Court divided over the proper interpretation of s. 15. All three cases involved proposed analogous grounds: *Egan* considered alleged discrimination on the basis of sexual orientation,<sup>368</sup> *Miron* considered alleged discrimination on the basis of marital status,<sup>369</sup> and *Thibaudeau* considered alleged discrimination against divorced custodial parents.<sup>370</sup> Elsewhere, I have more fully elaborated the doctrinal tests associated with the three approaches emergent in this trilogy.<sup>371</sup> Here, I confine my remarks to the stances that each of the three judicial cohorts took towards groups and grounds.

Justices La Forest, Lamer, Major and Gonthier endorsed an approach which focused on whether or not a distinction was based on “irrelevant personal characteristics.”<sup>372</sup> Under this “relevancy” approach, the enumerated grounds exemplified personal characteristics which have often formed the basis of irrelevant distinctions; analogous grounds would be defined with reference to the relevancy of the proposed ground in relation to the particular legislative objective in issue.<sup>373</sup> On this account, it “may be useful” to consider group disadvantage, but only insofar as it assists in illuminating the presence of an irrelevant distinction.<sup>374</sup> Because of the deep connection between analogousness and impugned legislative objective on this account, a ground may be found analogous in some cases and not in others. In *Miron*, for example, the justices of the relevancy coalition

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<sup>367</sup> *R v Généreux*, [1992] 1 SCR 259 at 311.

<sup>368</sup> *Egan v Canada*, [1995] 2 SCR 513 [*Egan*].

<sup>369</sup> *Miron v Trudel*, (1995) 124 DLR (4th) 693 [*Miron*].

<sup>370</sup> *Thibaudeau v Canada*, [1995] 2 SCR 627 [*Thibaudeau*].

<sup>371</sup> Jessica Eisen, “On Shaky Grounds: Poverty and Analogous Grounds under the Charter” (2013) *Canadian Journal of Poverty Law* (forthcoming).

<sup>372</sup> *Thibaudeau*, *supra* note 370 at 682. *Miron*, *supra* note 369 at 702.

<sup>373</sup> *Miron*, *supra* note 369 at 702-703.

<sup>374</sup> *Ibid* at 717.

concluded that “marital status is an example of a ground which, while analogous in certain respects, cannot be so with respect to those attributes and effects which serve to define marriage itself.”<sup>375</sup> In the circumstances of the instant case, marital status was found to be sufficiently relevant to the benefit in issue that it was *not* analogous to the enumerated grounds. This coalition also emphasized the importance that the irrelevant characteristic be a “personal characteristic,” holding in *Thibaudeau* that groups should not be “subdivided” by income level since income is not, in their view, a “characteristic attaching to the individual.”<sup>376</sup> This coalition did not delve into the relevancy of sexual orientation in *Egan*, finding on other grounds that the distinction was not, in any event, discriminatory.<sup>377</sup>

Justices McLachlin, Sopinka, Cory, and Iacobucci espoused an interpretive approach to s. 15 that focused on “stereotyping.” These justices proposed that the enumerated grounds indicated historical bases for stereotypical decision-making; analogous grounds would be determined on the basis of the likelihood that they might form the basis of stereotypical decision-making.<sup>378</sup> Despite apparent similarities between a prescribed focus on “irrelevant” or “stereotypical” decision-making,<sup>379</sup> advocates of the stereotyping approach cast a wider net for assessing analogous grounds, listing a range of factors relevant to assessing vulnerability to stereotype: whether the groups suffers from historical disadvantage; whether the group constitutes a “discrete and insular minority” vulnerable to being overlooked by majoritarian politics; whether the distinction is made on the basis of a “personal characteristic” and “by extension” whether the distinction is based on “personal and immutable

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<sup>375</sup> *Ibid* at 707.

<sup>376</sup> *Thibaudeau*, *supra* note 370 at 687.

<sup>377</sup> *Egan*, *supra* note 368 at 529.

<sup>378</sup> *Miron*, *supra* note 369 at 741.

<sup>379</sup> See Justice Gonthier’s assessment that the two approaches share a common goal: “a criterion defined in terms of stereotype based on presumed group characteristics, rather than on the basis of merit, capacity or circumstances, is but an elaboration of the concept of relevance.” *Ibid* at 708.

characteristics”); whether the ground in issue is comparable to any particular listed ground; and whether the ground had been recognized by other judges or in human rights legislation.<sup>380</sup> These factors were to be understood as “analytical tools,” and a proposed analogous ground need not prove the presence of every listed factor.<sup>381</sup> The “unifying principle” in the analogous grounds assessment is the desire to avoid distinctions “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.”<sup>382</sup> In *Miron*, the stereotyping coalition systematically considered each factor and concluded that marital status warranted recognition as an analogous ground because the “essential elements necessary to engage the overarching purpose of s. 15(1)—violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making—are present.”<sup>383</sup> A similarly wide-ranging assessment of the social circumstances of divorced custodial parents—including such material considerations as “standard of living”—led Justice McLachlin to declare that group to be analogous in *Thibaudeau*.<sup>384</sup> In *Egan*, this coalition again provided a wide-ranging and historically rooted assessment of prejudice and disadvantage facing “homosexual individuals and homosexual couples,” concluding that sexual orientation was an analogous ground of discrimination.<sup>385</sup>

Both the relevancy and the stereotyping approaches represented a departure from the decidedly disadvantage-oriented focus of the *Andrews* era. The relevancy approach could be deployed without ever inquiring into the social and political power of the groups affected by impugned legislation. While the stereotyping approach did include some social contextual concerns

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<sup>380</sup> *Ibid* at 748.

<sup>381</sup> *Ibid*.

<sup>382</sup> *Ibid*.

<sup>383</sup> *Ibid* at 750.

<sup>384</sup> *Thibaudeau*, *supra* note 370 at 722-725.

<sup>385</sup> *Egan*, *supra* note 368 at 599-603.

(in particular, historical disadvantage and discrete and insular minority status), these stood on equal footing with more abstract considerations (personal characteristics; immutability; and abstract analogy to other particular grounds). Attention to disadvantage did not, under this approach, operate with the same decisive force as it did under *Andrews*. This receding focus on social context, moreover, was accompanied by another doctrinal shift—common to both the relevancy and stereotyping approaches—that further insulated the grounds analysis from relational concerns: the grounds assessment shifted its shape from that of an analytical tool to that of a freestanding “test” that could defeat a discrimination claim at the outset.<sup>386</sup>

Only Justice L’Heureux-Dubé advocated an approach that continued to emphasize group disadvantage and open-textured analysis. Justice L’Heureux-Dubé proposed that discrimination should be assessed in context, with reference to the nature of that actual group(s) affected, and the nature of the interest impacted by the impugned differential treatment. She prescribed an inquiry into “groups rather than grounds, and discriminatory impact rather than discriminatory potential.”<sup>387</sup> She posited that discrimination should be found more readily in cases where serious interests were engaged, and/or where a “socially vulnerable” group is disadvantaged by a legislative distinction.<sup>388</sup> Throughout the trilogy, Justice L’Heureux-Dubé concurred with the stereotyping coalition’s findings that the impugned legislation violated s. 15, but emphasized that she rejected a talismanic focus on grounds which she saw as encouraging “too much analysis at the wrong level.”<sup>389</sup> Justice L’Heureux-Dubé warned that by “looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced

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<sup>386</sup> The majority in *Symes v Canada*, [1993] 4 SCR 695 at 756-757 observed that under *Andrews* the enumerated and analogous grounds inquiry “may be less a requirement of s. 15(1), and more of an analytical trend.”

<sup>387</sup> *Egan*, *supra* note 368 at 552.

<sup>388</sup> *Ibid* at 520.

<sup>389</sup> *Ibid* at 551.

and desensitized from real people's real experiences.”<sup>390</sup> She cautioned that reliance on “appropriate categories” gave rise to a risk of “relying on conventions and stereotypes...[that] further entrench a discriminatory *status quo*.”<sup>391</sup> Rejecting an approach that was overly focused on the characteristics of claimants, Justice L’Heureux-Dubé offered the distinctly relational insight that “More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals.”<sup>392</sup>

The Court sought to resolve the conflicting trilogy approaches, and offer a unified “test” to be applied in constitutional equality claims in *Law*.<sup>393</sup> In *Law*, the Court directed a three-part test for s.

15 analysis:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?<sup>394</sup>

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<sup>390</sup> *Ibid* at 552.

<sup>391</sup> *Ibid*.

<sup>392</sup> *Ibid*.

<sup>393</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*]. The consensus was arguably illusory: “*Law*’s tentative cohesion only superficially addresses the divergent views.” Gilbert, “Unequaled,” *supra* note 17 at 18.

<sup>394</sup> *Law*, *supra* note 393 at para 88.



The third and final inquiry—commonly referred to as the “dignity” analysis—called for assessment of four “contextual factors”: (1) Pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group in issue; (2) the correspondence between the ground(s) on which the claim is based and the actual needs, capacities or circumstances of the claimant; (3) the ameliorative purpose or effect of the law; and (4) the nature and scope of the interest affected.<sup>395</sup>

Shortly after *Law*, the Court decided *Corbiere*, a case concerning the rights of off-reserve aboriginal band members.<sup>396</sup> Together, *Law* and *Corbiere* conclusively reshaped the Court’s approach to defining analogous grounds. First, the Court confirmed the trend towards a threshold grounds inquiry emergent in the approaches proposed by the relevancy and stereotyping cohorts under the trilogy. The Court held in *Corbiere* that the analogous grounds inquiry would now serve a “screening out” function, whereby claims which failed to make out a distinction on the basis of an approved ground would merit no further inquiry.<sup>397</sup> This move was perhaps incipient in the *Law* decision’s isolation of the grounds inquiry at the second step in the three-part test. The *Law* Court had left the door open to claims based upon multiple grounds, but emphasized that, for claims based on a “newly postulated analogous ground, or on the basis of a combination of different grounds,” the second step of the *Law* test “must focus upon the issue of whether and why a ground or confluence of grounds is analogous to those listed in s. 15(1).”<sup>398</sup>

Second, the Court in *Corbiere* emphasized that this threshold inquiry was to be conducted in the abstract, rather than in the particular context of the case before the Court. The grounds were found to represent “a legal expression of a general characteristic, not a contextual, fact-based

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<sup>395</sup> *Ibid* at para 88.

<sup>396</sup> *Corbiere*, *supra* note 9.

<sup>397</sup> *Ibid* at para 11. Contrast this with earlier statements by the Court that the enumerated and analogous grounds were best understood as an “analytical trend” rather than as a discrete requirement, *supra* note 386.

<sup>398</sup> *Law*, *supra* note 393 at para 93.

conclusion about whether discrimination exists in a particular case.”<sup>399</sup> Analogousness was no longer to be determined, as the *Andrews* Court had suggested, with references to the particular social relationships giving rise to a given claim. According to the *Cobiere* majority, “we should not speak of analogous grounds existing in one circumstance and not another.”<sup>400</sup>

The Court further elaborated that this analogous grounds analysis—now an abstract, threshold test—should hinge on an inquiry into whether the proposed ground constituted an immutable or “constructively immutable” personal characteristic: “the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.”<sup>401</sup> The government has no legitimate interest, on this view, in requiring people to alter those personal characteristics that are “changeable only at unacceptable cost to personal identity.”<sup>402</sup> The Court emphasized that this test was rooted in analogy to the listed grounds: race was offered as an example of a listed ground that is “actually immutable”; religion served as an example of a “constructively immutable personal characteristic.” Strikingly, the Court argued that the immutability inquiry displaced any need for distinct inquiry into social or political disadvantage:

Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.<sup>403</sup>

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<sup>399</sup> *Corbiere*, *supra* note 9 at para 7.

<sup>400</sup> *Ibid* at para 8.

<sup>401</sup> *Ibid* at para 13.

<sup>402</sup> *Ibid*.

<sup>403</sup> *Ibid*.

The *Corbiere* decision remains the Court’s leading statement on the content and doctrinal significance of the analogous grounds inquiry.<sup>404</sup> In *Kapp* and *Withler* the Court revisited other aspects of the *Law* formula, replacing the multi-part dignity analysis with an inquiry into the perpetuation of disadvantage through prejudice and stereotype.<sup>405</sup> The analogous grounds inquiry set out in *Corbiere*, however, remains untouched by this latest revision of the Court’s equality analysis.

Elsewhere, I have argued that there is no basis for the Court’s assertion in *Corbiere* that attention to historical disadvantage “may be seen to flow from” (constructive) immutability, and that in practice the lower courts have taken this doctrinal directive as an invitation to ignore disadvantage.<sup>406</sup> Rosalind Dixon has similarly observed that “[t]he actual or constructive immutability of an individual characteristic will, at best, be only tangentially relevant to these criteria of political power.”<sup>407</sup> Whether or not (constructively) immutable personal characteristics such as race and religion in fact characterize disadvantaged groups, there is no question that such characteristics are symmetrical: if race is immutable, it is equally so for black and white; if religion is constructively immutable, it is equally so for Christianity and Islam. As Sebastián Grammond described the reasoning in *Corbiere*: “the focus is on the ground of distinction, rather than on the vulnerable group delineated by that ground.”<sup>408</sup>

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<sup>404</sup> For a recent Supreme Court decision confirming *Corbiere* as the governing test for analogousness, see *Quebec (Attorney General) v A*, 2013 SCC 5 at para 190 [A].

<sup>405</sup> *Kapp*, *supra* note 204; and *Withler*, *supra* note 204. The Court has since showed disagreement about the way that the prejudice and stereotyping factors should be applied. See the divergent reasons on this point in *A*, *supra* note 404.

<sup>406</sup> Eisen, *supra* note 371.

<sup>407</sup> Rosalind Dixon, “The Supreme Court of Canada and Constitutional (Equality) Baselines” (2013) 50 *Osgoode Hall L J* 637 at 653.

<sup>408</sup> Sebastián Grammond, *Identity Captured by Law: Membership in Canada’s Indigenous Peoples and Linguistic Minorities* (Quebec: McGill-Queen’s University Press, 2009) at 103.

Dixon has observed that the *Corbiere* decision also represents a shift in analogical reasoning that results in a greater level of abstraction. On Dixon's account, the listed grounds constitute "baselines" from which the Court analogizes. The Court's early jurisprudence represented a process of "multi-pronged" analogy, from which numerous points of similarity might be relied upon to draw analogies to "one or more of the existing baseline constitutional categories."<sup>409</sup> For example, the Court's recognition of marital status as an analogous ground in *Miron* focused on an anti-stereotyping rationale, while immutability figured more prominently in the Court's adoption of sexual orientation as an analogous ground in *Egan*.<sup>410</sup> The *Corbiere* focus on immutability, however, represents a "synthetic" approach by which courts "attempt *first* to identify a common thread or denominator behind existing constitutional categories, and only then... proceed to compare new (claimed) constitutional categories with a constitution's existing baselines."<sup>411</sup> Because the listed grounds in the Canadian constitution are so heterogeneous, Dixon notes that a synthetic approach requires courts to adopt highly abstract and formal reasoning.<sup>412</sup> In Dixon's view, "The more diverse existing constitutional categories, the more difficult it will be for courts to find commonality among those grounds in their scope, significance or underlying purpose; and thus, the more likely it is a court will need to resort to higher levels of abstraction in order to identify even some form of internal coherence or common denominator."<sup>413</sup> Among the dangers Dixon associates with such abstraction, is that it is likely to engage a "form of 'lofty' reasoning with little or no connection to underlying constitutional commitments or concerns."<sup>414</sup>

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<sup>409</sup> Dixon, *supra* note 407 at 660.

<sup>410</sup> *Ibid* at 642-643.

<sup>411</sup> *Ibid* at 661.

<sup>412</sup> *Ibid* at 662.

<sup>413</sup> *Ibid*.

<sup>414</sup> *Ibid*.

Both Dixon and I have observed that the lower courts have interpreted the Supreme Court of Canada's more formalist and decontextualized *Corbiere* analysis to require increased resistance to new grounds—particularly in the case of claims rooted in economic disadvantage.<sup>415</sup> But here I will emphasize another important trend emerging at the Supreme Court level. Since *Corbiere*, the Court has shown signs that it may now treat the existing list of analogous grounds as fixed. In a recent Supreme Court case considering discrimination on the basis of the previously-recognized analogous ground of marital status, the judicial reasons focused on questions about whether marital status is truly immutable, and whether unmarried couples continue to face discrimination.<sup>416</sup> But these debates took place *only* in the context of assessing prejudice and stereotype, not in revisiting whether marital status constitutes an analogous ground. Even those justices who proposed that marriage was a chosen status, and that social stigma against unmarried couples has waned, accepted without hesitation that the established position of marital status on the 'list' of analogous grounds was not up for debate.<sup>417</sup> If this were a mere question of 'constitutional displacement'—considering the same issues in a different doctrinal forum—this might not matter much.<sup>418</sup> But the threshold nature of the grounds analysis persists, such that for proposed grounds that do not pass the threshold analogousness inquiry, there is nowhere for these concerns to displace *to*.

This brings us to the most consequential aspect of the Court's possible emergent treatment of the existing list as fixed. The Court has repeatedly shied away from considering proposed grounds that have produced conflicting results in the lower courts.<sup>419</sup> As I have set out in detail elsewhere, the question of whether and when new grounds associated with economic disadvantage might ground

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<sup>415</sup> *Ibid* at 654-655; and Eisen, *supra* note 371.

<sup>416</sup> See generally *A*, *supra* note 404.

<sup>417</sup> See the reasons of Justice LeBel in *A*, *ibid*.

<sup>418</sup> Louis Henkin, "Privacy and Autonomy" (1974) 74 Colum L Rev 1410 at 1417, cited in Yoshino, *supra* note 4 at 748.

<sup>419</sup> See *supra* note 415 and accompanying text.

equality claims has arisen persistently in the lower courts.<sup>420</sup> As Bruce Ryder and Taufiq Hashmani have observed, the Supreme Court of Canada has chosen time and again not to deal with cases “raising the issue of whether poverty or receipt of social assistance is an analogous ground of discrimination.”<sup>421</sup> In the two cases that the Supreme Court has considered since *Corbiere* where a proposed analogous ground was advanced (both dealing with agricultural workers—one instance of which was referenced at the beginning of this paper), the Court declined to address the analogous grounds question, preferring instead to decide both cases on other grounds.<sup>422</sup>

Since the recognition of aboriginality residence in *Corbiere*, no new grounds have been recognized; in fact, neither have any new grounds been *rejected* in the nearly 15 years since the *Corbiere* test was established. The Court continues to reject leave applications relating to the most persistently proposed new grounds, and the lower courts continue to apply the restrictive and abstract (constructive) immutability standard directed by the Supreme Court in *Corbiere*.<sup>423</sup> The following chapter will set out a debate in the Canadian scholarship over the proper shape of the ‘groups’ and ‘grounds’ inquiries, comparing the terms of that debate to a related line of inquiry in the U.S. scholarship. I hope to show that a relational framework can productively reshape these discussions, and open up new directions for attending to the relational context of equality claims.

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<sup>420</sup> Eisen, *supra* note 371.

<sup>421</sup> Bruce Ryder & Taufiq Hashmani, “Managing Charter Equality Rights: The Supreme Court of Canada’s Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010” (2010) 51 Sup Ct L Rev (2d) 505 at 527. See also Eisen, *supra* note 371.

<sup>422</sup> *Ontario (Attorney General) v Fraser*, 2011 SCC 20. *Dunmore v Ontario (Attorney General)*, 2001 SCC 94.

<sup>423</sup> See note 415, *supra*, and accompanying text.

## CHAPTER 5

### RETHINKING CLASS(IFICATION): RELATIONAL APPROACHES TO DOCTRINE

In the first chapter of this paper, I examined the broad contours of relational theory, emphasizing relational theory's core insights that rights are best understood in the context of the relationships they produce; that categories of salient difference are socially defined; and that reflexive use of categories often obscures our ability to perceive and respond to justice problems. After pausing to consider the uneasy fit between relational approaches and doctrinal projects, the following two chapters examined the evolution of the U.S. suspect classification doctrine, and the Canadian analogous grounds analysis. This chapter will elaborate doctrinal debates arising from the Canadian and American constitutional equality jurisprudence, arguing that the relational insights set out in the first chapter might shed fresh light on these problems.

Before proceeding to set out the debates in question, however, it is important to recall the vast differences in the doctrinal context in which the American classification inquiry and the Canadian grounds approach operate. I have alluded to some of these in Chapter 2, but they bear emphasizing in the context of the comparison I will elaborate here. First, I do not wish my emphasis on the hesitation to recognize new grounds in both jurisdictions to elide the significant differences in the lists of grounds that have access to special constitutional equality protection in these two jurisdictions. Canada's constitutional text has enumerated equality protections on the basis of age and mental or physical disability—statuses which have been expressly denied heightened scrutiny in

the U.S. context.<sup>424</sup> The Supreme Court of Canada recognized sexual orientation as an analogous ground over fifteen years ago, while the United States Supreme Court continues to decline to address persistent calls to recognize this as a suspect classification.<sup>425</sup> The closing of the canon, as Yoshino puts it, thus has very different implications for equality-seeking groups in these countries.

Second, and cutting the other way, the doctrinal function of the grounds analysis can be formally determinative of outcomes in a way that suspect classification is not. Despite arguments that strict scrutiny can be “fatal in fact,” the U.S. Court can and does recognize equality violations on rational basis review.<sup>426</sup> As described in the preceding analysis, however, the Canadian analogous grounds inquiry now stands as a threshold question, capable of defeating claims without further analysis. I have used the phrase “special protection” to capture the role of the Canadian grounds analysis and the U.S. suspect class analysis, but in fact, in the Canadian context, a claimant who cannot establish an analogous ground under the current approach attracts no equality protection at all.

Third, in both jurisdictions, the grounds and classification inquiries are merely doctrinal first-steps in the respective equality doctrines of these two countries. And the remaining steps are important. The United States has pursued an equality doctrine focused on invidious purpose and facial classifications, refusing to recognize claims based on unintentional disparate impact, even in respect of suspect classes.<sup>427</sup> The Supreme Court of Canada, though sometimes criticized for not going far enough to protect against unintentional discrimination, has not required claimants to establish an intent to discriminate, or a facial distinction in treatment.<sup>428</sup> Finally, the U.S. equal

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<sup>424</sup> See *Murgia*, *supra* note 256; and *Cleburne*, *supra* note 178.

<sup>425</sup> Compare *Miron*, *supra* note 369, with note 3, *supra*, and accompanying text.

<sup>426</sup> See for example the recent *Windsor* decision, *supra* note 1, where the U.S. Supreme Court declined to address the question of suspect classification, but nonetheless struck down a provision that discriminated on the basis of sexual orientation under rational basis review.

<sup>427</sup> *Washington v Davis*, *supra* note 203.

<sup>428</sup> For an example of the Canadian Supreme Court’s expressed rejection of an intent requirement, see *A*, *supra* note 404. For a criticism that the Court does in fact require discriminatory intent, see *Bay*, *supra* note 199.



protection inquiry is squarely focused on the rationality of state action, *not* on the impact or experience of petitioners. Even on strict scrutiny, the inquiry simply calls for a tighter connection between legitimate state objectives and the means employed. The Canadian equality doctrine prescribes that distinctions on the basis of prohibited grounds may not perpetuate disadvantage through prejudice and stereotype. While this formulation has been charged with moving Canada closer to the U.S. focus on rationality, the Canadian doctrine's focus on disadvantage, prejudice and stereotype are decidedly more claimant-focused than its American counterpart.

This brings us back to Professor Nedelsky's conclusion that Canadian equality doctrine is more amenable to relational analysis than U.S. equal protection analysis. My aim in this chapter will be to offer a relational reframing of two related debates in these jurisdictions, not to elaborate a comparative assessment of the receptivity of the respective doctrines to relational analysis. Nonetheless, I think it is important to express my agreement with Professor Nedelsky's conclusions on this point. On the whole, the U.S. equal protection analysis offers little doctrinal space for consideration of relational factors. By comparison, the Canadian approach directs courts to attend to the social context of claims in assessing the perpetuation of disadvantage. Thus the hardening and abstraction of the classification and grounds analysis have differing practical effects. In the U.S. jurisprudence, the suspect class analysis offered an unusually rare doctrinal opening for attention to social context. In the Canadian context, for claims that are able to show distinction on the basis of a protected ground, there remains further doctrinal space for such considerations.

### **From Suspect Classes to Suspect Classifications**

In his incisive article "The Anti-Antidiscrimination Agenda," Jed Rubenfeld suggests in an "exploratory vein" that a number of the United States Supreme Court's doctrinal turns can best be understood as manifesting a political rejection of "the 'liberal' antidiscrimination movement" in the face of perceived threats to "fundamental American values and freedoms," including "the erosion of

meritocracy, the creation of a sense of entitlement among undeserving people, the insistence that homosexuality be protected instead of condemned, the fomenting of a victimization culture, and so on.”<sup>429</sup> Among the phenomena Rubenfeld associates with this movement is an “important doctrinal shift, finally realized in [*Adarand*] but insufficiently discussed in the literature, from *suspect classes* to *suspect classifications* as the linchpin of strict scrutiny in equal protection law.”<sup>430</sup> Elsewhere, Rubenfeld describes this as “a momentous, if often unnoticed shift” that “never is acknowledged or explained in the case law.”<sup>431</sup> Rubenfeld elaborates that, though the term “suspect class” was “never precisely defined,” it was “clear enough” that it “referred to minority groups historically treated with...prejudice and hostility... Accordingly, the most prominent indicators of a group’s ‘suspectness’ included a history of discrimination and a relative lack of political power.”<sup>432</sup>

Rubenfeld proposes that the application of heightened scrutiny in affirmative action cases “essentially treats whites as if they were a suspect class, even though this result would violate everything the Court has ever said about the types of groups that qualify for suspect class status.”<sup>433</sup> Rubenfeld finds this result particularly unsettling in light of the fact that “[p]oor people, veterans, disabled people, railroad workers, ophthalmologists—just about any minority group can be singled out by law for special advantages in the allocation of government benefits or opportunities without running afoul of the Equal Protection Clause. But blacks cannot.”<sup>434</sup> Thus Rubenfeld posits, “the present majority of the Supreme Court essentially uses the Constitution’s phrase ‘the equal protection

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<sup>429</sup> Rubenfeld, *supra* note 207 at 1142. Professor Yoshino, *supra* note 4, posits “pluralism anxiety” as an alternative to this interpretation of the Court’s equal protection jurisprudence.

<sup>430</sup> Rubenfeld, *supra* note 207 at 1167.

<sup>431</sup> Jed Rubenfeld, “The New Unwritten Constitution” (2001) 51 *Duke LJ* 289 at 301 and 303-304.

<sup>432</sup> Rubenfeld, *supra* note 207 at 1168.

<sup>433</sup> *Ibid* at 1169.

<sup>434</sup> *Ibid* at 1170.

of the laws’ to force states to deny blacks (and other racial minorities) a legal right enjoyed by many other minority groups.”<sup>435</sup>

This concern echoes Reva Siegel’s identification of the Court’s recent emphasis on classification as an instance of “preservation through transformation,” whereby status-enforcing regimes shift in logical and rhetorical structure under political pressure. While Siegel’s emphasis in “Why Equal Protection No Longer Protects” is on the role of intent analysis, her comments are apposite. Siegel proposes that “the historical narrative the Court invokes to justify its current use of strict scrutiny doctrine is highly abstracted, depicting centuries of racial status regulation as a ‘history of racial classifications.’”<sup>436</sup> She elaborates that “by abstracting the history of racial status regulation into a narrative of ‘racial classifications,’ the Court obscures the multiple and mutable forms of racial status regulation that have subordinated African Americans since the Founding.”<sup>437</sup> Siegel protests this “highly abstracted standpoint” as being “inattentive to the social meaning of racial status regulation.”<sup>438</sup> On her analysis, “classification” represents just one form of a mutable system of “status-enforcing state action” that is “mutable in form, evolving in rule structure and justificatory rhetoric as it is contested.”<sup>439</sup> In the result, “today doctrines of heightened scrutiny function primarily to constrain legislatures from adopting policies designed to reduce race and gender stratification.”<sup>440</sup> In Siegel’s view, the focus on “classification” that has emerged in the Court’s affirmative action case law has the effect of “obscuring the myriad forms of state action that contribute to the social stratification affirmative action addresses.”<sup>441</sup>

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<sup>435</sup> *Ibid* at 1172-1173.

<sup>436</sup> Siegel, *supra* note 237 at 1142. Emphasis in the original.

<sup>437</sup> *Ibid* at 1142.

<sup>438</sup> *Ibid*.

<sup>439</sup> *Ibid*.

<sup>440</sup> *Ibid* at 1143.

<sup>441</sup> *Ibid* at 1144.

Reginald Oh takes up Rubinfeld's observation that the U.S. Court has shifted its focus from "suspect classes" to "suspect classifications," emphasizing that the "language structure of suspect classification analysis made it possible for the Court to develop a suspect classification analysis without any reference at all to suspect or vulnerable groups."<sup>442</sup> As Dixon observed of the Canadian adoption of the immutability standard, Oh posits that the U.S. move towards classification "moved the doctrine up to a higher level of abstraction."<sup>443</sup> Oh argues that a discussion of "traits" like race, rather than "groups" like African Americans, "tends to create essentialist discourse about the essence or true nature of a particular trait."<sup>444</sup> Oh elaborates that, "Once we begin to talk about the nature of a thing like race, then we are engaging in Aristotelian essentialist discourse trying to figure out the true essence of things."<sup>445</sup> Thus, Oh explains, a "pure suspect classification analysis" allows for an analysis that is "completely divorced from the concerns about the actual, material realities of people who continue to suffer from long standing subordination and political isolation."<sup>446</sup> For this reason, Oh argues, "the law of suspect classes is more consistent with the anti-caste or anti-subordination theory of equal protection, while the law of suspect classifications is more consistent with the anti-classification or anti-differentiation theory of equal protection."<sup>447</sup>

Here, Oh evokes Owen Fiss' foundational articulation of two competing strands of equal protection theory: anti-subordination and anti-classification. In *Groups and the Equal Protection Clause*, Fiss argued that the Court had been applying an anti-classification principle (originally termed by Fiss an "anti-discrimination principle") whose "foundational concept" was one of "means-

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<sup>442</sup> Oh, *supra* note 19 at 606.

<sup>443</sup> *Ibid* at 606.

<sup>444</sup> *Ibid* at 607.

<sup>445</sup> *Ibid*.

<sup>446</sup> *Ibid* at 608.

<sup>447</sup> *Ibid* at 588.

ends rationality.”<sup>448</sup> Suspect classifications, on this account, are “essentially standards for determining the requisite degree of fit.”<sup>449</sup> Fiss points out that the suspect classification doctrine “affords some recognition to the role or importance of social groups” in the anti-classification rule’s otherwise individualistic account of equality: “the important fact to note is that almost all of the serious candidates for the status of suspect classification are those that coincide with what might be conceived of as natural classes—for example, blacks, Chicanos, women, and maybe the poor.”<sup>450</sup> In fact, Fiss suggests, “it is not at all clear to me that an adequate explanation [as to why certain classifications were suspect] can be given that does not recognize the role and importance of social groups.”<sup>451</sup> On Fiss’ account, therefore, the anti-classification claim to sidestep recognition of social groups is a mere “illusion of individualism.”<sup>452</sup> But this illusion of individualism, Fiss explains, leaves the Courts ill-equipped to deal with important equality problems, including affirmative action: “The anti-discrimination principle does not formally acknowledge social groups, such as blacks; nor does it offer any special dispensation for conduct that benefits a disadvantaged group. It only knows criteria or classifications; and the color black is as much a racial criterion as the color white.”<sup>453</sup>

Fiss crafted an alternative mediating principle, the “group disadvantaging principle” (since referred to as the anti-caste principle or the anti-subordination principle), arising from Fiss’ view that “[t]here are natural classes, or social groups, in American society,” and that the historic and interpretive significance of discrimination against African Americans as a group requires an Equal Protection Clause that responds to this reality.<sup>454</sup> The phrase “natural classes” is used to distinguish

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<sup>448</sup> Owen Fiss, “Groups and the Equal Protection Clause” (1976) 5:2 *Philosophy & Public Affairs* 107 at 111.

<sup>449</sup> *Ibid* at 113.

<sup>450</sup> *Ibid* at 124-125.

<sup>451</sup> *Ibid* at 125.

<sup>452</sup> *Ibid* at 126.

<sup>453</sup> *Ibid* at 129.

<sup>454</sup> *Ibid* at 148.

groups with real social significance from “artificial classes” that are created purely by legislative distinctions (for example tax brackets).<sup>455</sup> Using the example of African Americans, Fiss elaborates his conception of social groups or “natural classes”: “Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group.”<sup>456</sup> Fiss’ anti-subordination principle would cast the Equal Protection Clause as a protection for “specially disadvantaged groups,” defined by “perpetual subordination” and “severely circumscribed” political power.<sup>457</sup> He posits that the identification of such groups may shift with changing social circumstances, and proposes that Justice Marshall’s variable standards of protection might provide the requisite flexibility in light of the fact that “Jews or women might be entitled to less protection than American Indians, though nonetheless entitled to some protection.”<sup>458</sup> The focus, in any event, is on the principle that “certain social practices, including but not limited to discrimination [i.e. classification], should be condemned not because of any unfairness in the transaction attributable to the poor fit between means and ends, but rather because such practices create or perpetuate the subordination of [a] group.”<sup>459</sup> This approach, Fiss posits, is able to account for “status harm” in a way that the anticlassification principle cannot.<sup>460</sup>

Fiss’ focus on the identification of “natural classes” has attracted criticism. Iris Marion Young has argued that “[t]he concept of group that Fiss offered in his essay...poorly serves the end of promoting social justice.”<sup>461</sup> Young agrees with Fiss’ proposition that “[i]f we care about the ways that many individuals have restricted opportunities and suffer various forms of stigmatization

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<sup>455</sup> *Ibid* at 156.

<sup>456</sup> *Ibid* at 148.

<sup>457</sup> *Ibid* at 155.

<sup>458</sup> *Ibid*.

<sup>459</sup> Owen Fiss, “Another Equality” (2004) 2:1 *Issues in Legal Scholarship* 1051 at 3.

<sup>460</sup> Fiss, *supra* note 448 at 157.

<sup>461</sup> Young, *supra* note 20 at 4.

and marginalization, we must pay attention to groups,” but worries that the language of “natural classes” introduces “reifying language” that elides the reality that “[g]roups are entirely constituted by social norms and interaction.”<sup>462</sup> Young notes that a broad literature has considered a related anti-essentialist imperative in the deployment of “groups,” asking “[h]ow is a politics that pays attention to group difference to take account of the fact that individuals have multiple group memberships, and that there are numerous differences among group members? Should we worry that paying attention to social groups may itself have the effect of reinforcing or even enlarging group disadvantage?”<sup>463</sup>

Rogers M. Smith has similarly cautioned that Fiss’ distinction between “natural” and “artificial” classes risks obscuring the role that law plays in constructing and reinforcing particular racial identities. In Smith’s view, Fiss thus overlooks Angela Harris’ insight that “race law” has contributed “to the formation, recognition, and maintenance of racial groups,” rather than simply mediating “relationships among these groups.”<sup>464</sup> Richard Thompson Ford echoes this sentiment, expressing concern that Fiss’ focus on blacks as a “badly off” social group distracts from the reality that “blacks were *produced* as a discrete social group so that they could be treated badly.”<sup>465</sup>

Writing years later, Fiss responded that he did not intend the phrase “natural groups” to import these essentializing connotations, or to reify particular social groupings. Fiss responds that anti-subordination “does not create group identification,” but rather “acknowledges this reality, and seeks to provide a legal principle capable of eradicating the injustice that arises when group identification is turned into a system of subjugation.”<sup>466</sup> Fiss’ response, however, points to an underlying assumption or analytical framework that pervades the perceived choice between “class”

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<sup>462</sup> *Ibid* at 4-5.

<sup>463</sup> *Ibid* at 6.

<sup>464</sup> Smith, *supra* note 20 at 4, citing Angela P Harris, “Equality Trouble: Sameness and Difference in Twentieth-Century Race Law” (2000) 88 Cal L Rev 1923 at 2015.

<sup>465</sup> Ford, *supra* note 20 at 4.

<sup>466</sup> Fiss, *supra* note 459 at 9.

and “classification” that Oh and Rubinfeld observe. The assumption is that a focus on ‘classes’ is the best or only route to attending to social context, while a focus on classification must lead us to abstraction. While labelling groups, or perpetuating social labelling, may raise problems, on this account, the alternative is to ignore context. I propose that the relational theoretic accounts surveyed in Chapter 1 offer a different way of conceptualizing the need to attend to context. But before moving on to elaborate that approach, I will first turn to a Canadian debate that reveals a parallel but distinct conversation about the risks and potential of attending to groups and grounds.

### **Groups and Grounds under Section 15 of the Canadian *Charter***

Canadian discussions of the demands of constitutional equality have relied on a distinction that is related, but not identical, to Fiss’ distinction between anti-subordination and anti-classification. In Canada, approaches to constitutional equality law are generally assessed with reference to a distinction between “substantive” and “formal” equality. Margot Young summarizes “substantive equality” as requiring 1) attention to power differentials; 2) sensitivity to the effects of law; 3) deployment of a deeply contextual analysis; and 4) recognition of broad and positive state duties.<sup>467</sup> Young elaborates that, “terminology appropriate to such power differentials includes the notions of oppression and subordination – these are the problems that a substantive equality analysis names and seeks to remedy.”<sup>468</sup>

The Canadian Supreme Court has purported to support substantive equality, rejecting the alternative “formal equality” of “treating likes alike.”<sup>469</sup> Young proposes that formal equality is “underpinned by an idealized vision of the liberal individual: autonomous, self-interested and self-

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<sup>467</sup> Young, *supra* note 198 at 193-199. For an alternative elaboration of the definitions of formal and substantive equality, see Grammond, *supra* note 408 at 16-23.

<sup>468</sup> Young, *supra* note 198 at 196.

<sup>469</sup> Withler, *supra* note 204 at 41. Kapp, *supra* note 204 at 22.



determined”—the same liberal ideal criticized by the relational theorists discussed in Chapter 1.<sup>470</sup> Young elaborates that the ideal of treating likes alike (also known as the “similarly situated” test) operates “in deliberate blindness to such things as race, gender, sexual orientation, and other markers of individual, but group based difference.”<sup>471</sup> The concern of formal equality is not “outcomes or distributional results,” but rather “process or procedure.”<sup>472</sup> Thus, Young explains, formal equality “does not require careful or subtle calibration of state action in response to nuances of individual/group difference.”<sup>473</sup> Because it assumes that sameness and difference in treatment is permissible so long as it tracks *real* sameness and differences, “as popular and legal understandings of what counts as ‘real’ difference shift, formal equality analyses grow in usefulness and critical bite.”<sup>474</sup> (This approach echoes the “rights analysis” critiqued by Minow, as set out in Chapter 1.)

This distinction between formal and substantive equality shares certain contours of the distinction between anti-subordination and anti-classification. Anti-classification, like formal equality, is concerned instead with the propriety of the “lines” used to divide people. The anti-classification pre-occupation with the rationality of distinctions echoes the formal inquiry into whether legal distinctions accord with “real” differences. Substantive equality, like anti-subordination, is directly concerned with actual conditions of social, political and material inequality. Substantive equality, however, does not necessarily import Fiss’ anti-subordination concern with identifying particular *groups* in need of special protection; substantive equality casts the concern more broadly in terms of attending to power relations and deploying contextual analysis.<sup>475</sup> As the

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<sup>470</sup> Young, *supra* note 198 at 190-191.

<sup>471</sup> *Ibid.*

<sup>472</sup> *Ibid* at 192.

<sup>473</sup> *Ibid.*

<sup>474</sup> *Ibid.*

<sup>475</sup> Compare Young, *ibid* at 193-199, with Fiss, *supra* note 448.

discussion below will show, debates about the proper scope of substantive equality have sometimes, but not always, called for identification of such groups.

Canadian equality scholars have debated whether “grounds of discrimination” or the identification of “groups” warranting protection offer the better doctrinal vehicle for promoting substantive equality.<sup>476</sup> As we saw in Chapter 3, this debate played out in the trilogy era jurisprudence, wherein the majority of the Court moved towards a grounds-based approach, while Justice L’Heureux-Dubé advocated a focus on groups. (Mirroring the U.S. distinction between classes and classifications, ‘grounds’ describe the lines by which ‘groups’ of people are demarcated.) Dianne Pothier describes the Canadian debate as follows: “The essence of the critique of grounds is the claim that they are an artificial compartmentalization which obscures the complex reality of real life. In contrast, the defense of grounds is based on the contention that they serve to focus attention on the real sources of discrimination.”<sup>477</sup> Sheppard, in her call for expansive definitions of grounds, nicely casts the debate between group-based and grounds-based approaches to equality as a “feminist post-modern dilemma” since “[i]t may be politically, strategically or rhetorically important to name a social phenomenon sexism, classism or racism, while acknowledging the limits of such categories in the same breath.”<sup>478</sup>

Pothier herself proposes that “it would be a mistake to abandon or de-emphasize grounds” in the manner suggested by Justice L’Heureux-Dubé’s group-based analysis.<sup>479</sup> Pothier acknowledges that her difference with Justice L’Heureux-Dubé is one of emphasis rather than true opposition. In

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<sup>476</sup> In addition to the constitutional debate discussed below, see Denise Réaume, “Of Pigeonholes and Principles: A Reconsideration of Discrimination Law” (2002) 40 Osgoode Hall LJ 113, and Duclos, *supra* note 182, addressing related concerns in the statutory human rights context.

<sup>477</sup> Pothier, *supra* note 18 at 44-45.

<sup>478</sup> Colleen Sheppard, “Grounds of Discrimination: Toward an Inclusive and Contextual Approach” (2001) 80:3 Can Bar Rev 893 at 915.

<sup>479</sup> Pothier, *supra* note 18 at 39.

Pothier’s view, “a fuller appreciation of the significance of grounds, rather than a de-emphasis on grounds, is what is needed.”<sup>480</sup> Pothier proposes that “a thorough understanding of the grounds of discrimination, including intersecting grounds, provides an opportunity for a more complex and richer understanding of equality and discrimination, which thereby enables anti-discrimination law to be relevant to real people’s real experiences.”<sup>481</sup> Pothier elaborates that “[g]rounds of discrimination are not a purely legal construct. They reflect a political and social reality to which the law has, belatedly, given recognition. Discrimination was a fact of life long before the law decided that it should intervene to prohibit it.”<sup>482</sup> Thus, in Pothier’s view, “as long as people and institutions factor in grounds both intentionally and structurally, legal analysis must pay close attention to grounds in order to remain relevant.”<sup>483</sup> She emphasizes that “abandoning grounds would weaken, rather than strengthen equality analysis... As long as discrimination continues to be practiced following historic patterns marked by grounds of discrimination, anti-discrimination law must pay close attention to those historic markers of the dynamics of power relationships.”<sup>484</sup> On Pothier’s account, “[e]stablishing discrimination requires an explanatory link to ground(s) of discrimination. This connection can be done by inference, but some basis for linking conduct to grounds is still necessary to establish discrimination that is distinguished from simple disagreement, even between people of unequal power.”<sup>485</sup>

Sheila McIntyre similarly advocates a continued reliance on grounds, with the caveat that the Court should be urged to presumptively apply grounds “only to those who have been subordinated on

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<sup>480</sup> *Ibid.*

<sup>481</sup> *Ibid* at 39.

<sup>482</sup> *Ibid* at 41.

<sup>483</sup> *Ibid* at 44.

<sup>484</sup> *Ibid* at 72.

<sup>485</sup> *Ibid* at 66.

that ground.”<sup>486</sup> (Pothier seems, implicitly to share some version of this view.) McIntyre elaborates that “[m]en, for instance, would only have standing to make a claim on the ground of sex, if they can establish how a sex-based assignment of benefits or penalties shores up male (or race or ageist or heterosexist) domination.”<sup>487</sup> McIntyre declines to endorse a departure from a grounds-based focus since “[w]e need the grounds to illuminate who oppresses whom systematically.”<sup>488</sup> The grounds, in her view, allow a focus on “how a law reinforces structural inequalities in two directions, by further dispossessing those already deprived by specific relations of oppression...while increasing the unjust enrichment of the oppressor group(s).”<sup>489</sup>

Daphne Gilbert, conversely, endorses Justice L’Heureux-Dubé’s group-based focus on disadvantage, arguing that it is better able to account for conditions of group disadvantage, address intersectional claims, and allow claimants to self-identify and “illustrate a particular history or practice of oppression.”<sup>490</sup> In Gilbert’s view, “Looking at the group does not require contextual abandonment. Looking at the ground, however, may require just that.”<sup>491</sup> Gilbert argues that, “L’Heureux-Dubé J.’s group-based approach is, at its core, relational and her concern is for the interaction between advantaged and disadvantaged members of society. Skipping over the identification of grounds does not mean denying the value of group history or context.”<sup>492</sup> On the contrary, Gilbert argues, Justice L’Heureux-Dubé’s “analysis of the group with whom the claimant identified would inevitably consider whether that group was disadvantaged. It would, by necessity,

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<sup>486</sup> Sheila McIntyre, “Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 113.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid* at 113.

<sup>489</sup> *Ibid.*

<sup>490</sup> Gilbert, “Unequaled,” *supra* note 17 at 16.

<sup>491</sup> Gilbert, “Regroup,” *supra* note 17 at 648.

<sup>492</sup> Gilbert, “Unequaled,” *supra* note 17 at 14-15.

consider context (social, historic, cultural, economic) in an effort to put the discrimination analysis front and centre.”<sup>493</sup>

Elsewhere, I have suggested that there is no essential disagreement between the groups and grounds camps in this Canadian debate.<sup>494</sup> Both argue that attending to the context of oppressive power relationships, accounting for intersectional discrimination claims, and attention to the claimant’s perspective, are the proper functions of this initial inquiry (whether cast in terms of groups or grounds.) Neither of the sides in this debate argues that attention to disadvantage or power differentials should be abandoned in favour of a formal analysis that would favour the sorts of outcomes arising in the U.S. affirmative action context.<sup>495</sup> While the “groups” analysis advanced by Gilbert may resemble the “class” analysis endorsed by Oh and Rubinfeld, the ‘grounds’ analysis endorsed by Pothier and McIntyre bears no relation to the “classification” analysis that Oh and Rubinfeld criticize. The ostensible choice between groups and grounds, or classes and classifications, does not adequately explain what is at stake in these debates.

### **A Relational Turn**

In the preceding sections, we have seen two very different sets of debates surrounding the proper role of groups/grounds and class(ification) in the U.S. and Canadian contexts. Both the Canadian and American scholarly conversations engage in very different ways the kinds of legal meanings that might be relevant to these doctrinal invitations to consider categories of difference.

We have seen that in the U.S. context, class-based analysis is generally cast as the approach most amenable to advancing anti-subordination principles. Fiss has suggested that the reification of

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<sup>493</sup> *Ibid* at 27.

<sup>494</sup> Eisen, *supra* note 371.

<sup>495</sup> For an argument that grounds should be abandoned for reasons along these lines, see Gibson, *supra* note 364; and Dale Gibson, “Equality for Some” (1991) 40 UNBLJ 2 at 5-6.

social groups that may attend a focus on classes is a necessary evil if we are to construct an equal protection analysis that attends to social context. Suspect classification is set out as the alternative to suspect classes, and is criticized by Oh and Rubinfeld as distraction from the oppressive relationships which ought to be the concern of equal protection law.

The Canadian groups/grounds debate identified here takes a very different form. A shared concern over substantive equality is cast as being best served either by attention to social groups or by attention to grounds of discrimination. Both groups and grounds are advanced in this debate as the best means of providing a nuanced picture of the historical, social, and political context of equality claims. In contrast to these approaches, the current Canadian test for new analogous grounds focuses on (constructively) immutable personal characteristics, a symmetrical and decontextualized approach that arguably shares some aspects of the U.S. classification analysis. We have seen, for example, that Oh's criticism of the linguistic abstractions entailed by U.S. suspect classification is echoed in Dixon's concerns over analogical abstraction invited by the Canadian Court's immutability test.

There is a certain conceptual parallel between grounds and classifications (such as race), and groups and classes (such as African Americans). But the Canadian and American debates reveal thus different assumptions about the relational implications of attending to one analytic mode over the other. This conceptual confusion over what attention to groups or classes might entail (as opposed to attention to grounds or classifications), points to a significant analytical division that is obscured by the language of "groups" and "grounds" or "classes" and "classifications." This deeper fissure is illuminated by the relational theoretic insights explored in Chapter 1.

In Chapter 1, we learned that relational theorists have called for legal approaches that attend to the centrality of relationships in people's lives; that acknowledge and contest social constructions of difference; and that avoid a reflexive reliance on categories that risk obscuring the relationships

that give rise to legal conflicts. The groups/grounds and class(ification) inquiries serve in their respective jurisdictions as the first step in framing equality problems. This initial framing has the potential to embody the insights of relational theory by creating doctrinal space for attention to the social relationships giving rise to a claim. This initial framing also, however, has the potential to produce categorical approaches to difference that ignore or masks those relationships. It is these two possibilities that I wish to draw out here: relational framing on the one hand, and categorical framing on the other. In my view, the distinction between relational and categorical framing better describes the underlying differences animating the debates currently expressed through the doctrinal rubric of groups/grounds and class(ification).

Before returning to the American and Canadian doctrinal debates, however, I will elaborate the relational and categorical approaches to framing equality problems that I see underlying these debates. A relational framing focuses on the social relationships relevant to assessing an equality claim. These may be multiple, and may engage the social and legal significance of either particular classes *or* particular classifications. Such a focus considers the actual histories of the groups and individuals involved. The word “groups” in this description is to be understood not as connoting naturalized or necessary cohorts, but rather as embracing a more fluid conception of interpersonal and structural associations. On the broad account of relational context which I invoke, any associational matrix relevant to a claim may constitute the kind of group I have in mind. Children living in a San Antonio school district with a low property-tax base may be a relevant group.<sup>496</sup> The fact that these children are largely members of other relevant social groupings that we might refer to variously as “poor” or “minority” or “school children” may also be important elements of the

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<sup>496</sup> See *Rodriguez*, *supra* note 257, discussed above.

relational context of a claim.<sup>497</sup> It may also be relevant to identify the potential for complex or intersectional discrimination arising from these facts.<sup>498</sup> The precise boundaries of groups, and the ease of identifying membership in groups, are not important to assessing relational context. Relational context, rather, is concerned with unearthing and understanding the social relationships, which may or may not be easily described with reference to popularly or judicially recognized categories.

Conversely, a categorical framing zeroes in on the classes or classifications relevant to a claim, seeking to label and sort those groups or grounds. What matters to a categorical framing are not the specifics of the individuals or groups involved, but rather whether their experiences can be described with reference to categories which have been used before, or will be easy to use again. Because ease of defining and sorting the groups or grounds is essential, recourse to abstract reasoning is more important than examination of the unique social matrices that are engaged by a claim. What matters about the children living in a San Antonio school district with low property taxes is whether there is a label that can accurately and abstractly describe the group in a manner consistent with other abstract labels. Factors like “immutability” and abstract conceptions of “relevancy” are attractive to a categorical approach to the extent that they strip away particularities that are unique to the claim or claimants. A category, once recognized, is hardened; a label, once affixed, is permanent.

We can understand the debates over groups/grounds and class(ification) differently once we reconceptualise this moment of initial framing as attending to either category or relationship.

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<sup>497</sup> Justice Powell describes the children on whose behalf the *Rodriguez* claim was brought as “school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base.” *Ibid* at 4-5.

<sup>498</sup> See Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 *Stan L Rev* 1241; and Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 *Queen’s LJ* 179.



Beginning with the Canadian debate between Pothier and McIntyre and Gilbert and Justice L’Heureux-Dubé, we see that the language of groups and grounds has produced an artificial or superficial disagreement that obscures the essential similarity of their proposals. All parties to this conversation are seeking means of framing equality claims in relational terms. While Gilbert and Justice L’Heureux-Dubé focus their doctrinal arguments on the need to identify and describe disadvantaged groups, it is clear that the underlying concern is to illuminate the relationships relevant to equality claims. Their focus is on creating doctrinal space in which to describe history and context, rather than on identifying the particular group in question. In fact, the nature and definition of “groups” is a subject which receives little attention from either Gilbert or Justice L’Heureux-Dubé, despite their ostensible focus on groups. On the other side of the coin, Pothier and McIntyre’s doctrinal prescription to attend to grounds is similarly rooted in a desire to begin equality analysis with a relational framing. Again, the calls for a focus on grounds like “race” and “sex” are explicitly rooted in a concern to illuminate the power relationships at stake—there is no interest expressed by these authors in creating abstract links between these “grounds,” or assigning to them relevance beyond their role as “historic markers of the dynamics of power relationships.”<sup>499</sup>

This academic debate over groups and grounds thus focuses on a linguistic distinction that fails to identify what is actually at stake in the differing approaches. This confusion is exacerbated by the fact that the Court’s use of the terms groups and grounds is not faithful to the meanings attributed to these words in the academic debate set out above. The Court’s jurisprudence in the *Andrews* era frequently deployed the language of “grounds” (in fact terming its framework the “enumerated and analogous grounds approach”) while clearly attending to the relational concerns that Justice L’Heureux-Dubé would later associate with a focus on groups. Justice L’Heureux-

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<sup>499</sup> McIntyre, *supra* note 486 at 72.

Dubé’s call to focus on groups, moreover was expressly attentive to the “historic patterns marked by grounds of discrimination” that Pothier and McIntyre associate with grounds.

The grounds analysis set out by the Canadian Supreme Court in *Law* and *Corbiere*, however, represent a true turn towards the categorical framing that I have set out in opposition to the relational approach shared by the participants in the groups/grounds debate. An analytic focus on immutability evokes an intrinsic notion of difference, located within the individual. The Court’s turn to immutability recalls the assumptions—challenged by relational theory—that categories of difference are given, and adopts the attendant view that relevant differences are essential and intrinsic. The exercise the Court is called upon to engage in is one of sorting and categorizing, rather than assessing the broader relationships that might have produced certain differences as socially relevant. Again, the groups/grounds linguistic divide does not help us to understand this shift in focus.

The different reasons offered in *Corbiere* by the majority as opposed to the concurring opinion of Justice L’Heureux-Dubé illustrate this problem. The *Corbiere* majority, as set out above, proposed a grounds analysis focused on the (constructive) immutability of personal characteristics, and repeatedly emphasized that the Court’s findings on analogousness in a given case must constitute enduring categories to be applied in future cases.<sup>500</sup> While the Court’s decision was clearly aimed at the circumstances of a particular “group”—off-reserve band members—the “grounds” analysis deployed focused on differences as intrinsic to the group members (i.e. immutability), rather than produced in the context of a broader web of social relationships. By the time *Corbiere* was decided, Justice L’Heureux-Dubé had joined the unanimous *Law* Court in accepting the language of “grounds” to describe the doctrinal framing for which she had previously urged a focus on

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<sup>500</sup> See notes 399 to 403, *supra*, and accompanying text.

“groups.”<sup>501</sup> But her discussion of grounds remained anchored in relational rather than categorical approaches to framing cases before the Court. Unlike the *Cobiere* majority, Justice L’Heureux-Dubé rejected the possibility that the (constructive) immutability of personal characteristics could stand as the lone indicator of analogousness, holding that no single indicator was “necessary,” and maintaining as a distinct basis of analogousness cases wherein “those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked.”<sup>502</sup> For Justice L’Heureux-Dubé, the grounds inquiry is not a categorical, list-making exercise: “if indicia of an analogous ground are not present in general, or among a certain group in Canadian society, they may nevertheless be present in another social or legislative context, within a different group in Canadian society, or in a given geographic area, to give only a few examples.”<sup>503</sup>

A categorical approach or a relational approach thus might equally be brought to groups or to grounds—the choice between groups and grounds as analytic tools misrepresents what is at stake: a choice between relational or categorical framing. Questions about sex or race as grounds might call for relational interrogations into how these classifications have been deployed to produce and entrench oppressive social relationships. Or questions about these grounds might call for essentializing assessments of abstract aspects of these traits. Similarly, a focus on groups might call for questions about the material and social relationships experienced by their members; but it might just as easily treat the relevant differences as asocial and intrinsic. A doctrinal call to attend to relationships must be just that—efforts to achieve that goal with reference to proxies like “groups” or “grounds” risk missing the mark about why groups and grounds matter. They risk missing the

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<sup>501</sup> See notes 387 to 392, *supra*, and accompanying text.

<sup>502</sup> *Corbiere*, *supra* note 9 at para 60.

<sup>503</sup> *Ibid* at para 61.

opportunity that groups and grounds analyses might provide to frame equality claims in their relational context.

The role that “classification” analysis has played in the American affirmative action jurisprudence reveals a very different discursive landscape than that in which the Canadian groups/grounds debate has unfurled. In the U.S. context, the rise of a classification approach has in fact been intimately associated with a turn to categorical framing, and an abandonment of attention to the relational context of equality claims—particularly in affirmative action cases. As noted earlier in this chapter, Oh and Rubinfeld’s alignment of “classes” with the advancement of an anti-subordination agenda is directly responsive to the Court’s use of “classifications” to frustrate efforts to ameliorate conditions of disadvantage.

As with the deployment of “grounds” in the Canadian context, however, attention to “classes” does not necessarily invite a relational approach, or avoid categorical thinking. Young, Smith, and Ford point out that even a focus on classes risks a jurisprudence fraught with hardened and essentialized group categories.<sup>504</sup> Moreover, as we have seen in *Rodriguez*, a focus on groups can very easily slip into a categorical inquiry into the size or diffuseness of the group, rather than a relational inquiry into the social context of a claim.<sup>505</sup>

In the U.S. context in particular, attention to groups at the stage of identifying suspect classes cannot undo the essentially categorical nature of the Court’s approach to heightened scrutiny once a class is recognized. Under the Court’s current approach, once a suspect *class* is recognized, heightened scrutiny necessarily attaches to all distinctions based on that *classification*. As Rubinfeld has noted, this produces a fundamental instability as between the identification of suspect “classes”

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<sup>504</sup> See notes 461 to 465, *supra*, and accompanying text.

<sup>505</sup> See notes 294 to 300, *supra*, and accompanying text.

(to the extent that this term invokes relational attention to disadvantage), and the symmetrical and categorical application of heightened scrutiny to all future distinctions that rely on that “classification.”<sup>506</sup> Whatever relational framing may arise from the analysis by which a suspect class is identified necessarily dissolves into a process of categorical sorting in subsequent cases. Moreover, since the balance of the Court’s equal protection analysis focuses on a narrow conception of rationality (with varying degrees of ‘fit’ required depending on the suspectness of the classification), there is effectively no further doctrinal space for relational considerations once they have been excised from this initial framing.<sup>507</sup>

In both Canada and the U.S., moreover, the jurisprudence has revolved around a list-making process that necessarily invites categorical framings. Since the Canadian Supreme Court has now confirmed an abstract grounds inquiry whose results will hold in all future cases, it has followed the U.S. in creating a fixed list of characteristics warranting special constitutional protection. The pluralism anxiety that Yoshino identifies is in part animated by a categorical stance towards the framing of equality claims. The Court’s concern about proliferating groups, as expressed by the majority of the Court in *Cleburne*, arises from the fact that the inquiry is focused on general rules for sorting and classification, not on analyzing the instant claim in light of its relational context.

The alternative approaches advocated by Canadian Justice L’Heureux-Dubé, and U.S. Justices Marshall and Stevens each offer possible means of introducing greater doctrinal space for relational framing. While their precise focuses differ, all three justices eschew the list-making qualities that have dominated the prevailing approaches in their respective courts. On all three approaches, the initial framing of equality claims is not about naming groups or identifying grounds,

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<sup>506</sup> Golberg, *supra* note 197, also refers to this “deeply rooted conflict” at 504.

<sup>507</sup> As set out above, Justice Stevens’ special approach to rationality avoids this problem. See notes 320 to 323, *supra*, and accompanying text.

but is rather on identifying a constellation of factors that illuminate the relationships at stake in a claim. Justice L’Heureux-Dubé’s inquiry into the nature of the groups and interests affected attends to the social position of the claimant. Justice Marshall’s focus on the character of the classification in question and the relative importance of the benefit to those discriminated against again requires attention to the actual relational context of the particular claim. Justice Stevens foregoes the initial “framing” moment evident in the other approaches discussed, but incorporates relational considerations into the substance of his analysis by introducing a proportionality-style rationality assessment, considering the severity of the impact on those affected in light of their relational circumstances. Under all three approaches, the more relational framing is unencumbered by fears of a growing “list” of classes or classifications that will have to be applied categorically in future cases regardless of the actual relational context of those cases.

Furthermore, by eschewing list-making categorical approaches, these Justices are well positioned to consider a variety of relationships that may be relevant to a claim—a quality that makes them particularly well-suited to claims of intersectional discrimination. The dominant approaches in the U.S. and Canadian courts hinge on identifying a ground or classification; this is a very different kind of inquiry than a broad search for relevant relationships. As discussed above in relation to the *Rodriguez* example, any number of classes or classifications might be relevant to framing a claim in relational terms. Understanding the circumstances of such *classes* as children, low-income families, and racial minorities may be illuminating, as might the social significance of such *classifications* as age, race, and class. The more relational approaches of Canadian Justice L’Heureux-Dubé, and U.S. Justices Marshall and Stevens create space for considering these factors in every case. In contrast, the majorities’ approaches to groups and grounds, classes and classifications, only creates some limited space for these considerations when new grounds are raised. In cases that subsequently

engage the resultant judicial categories, however, the Court retreats to a pattern of sorting and listing that crowds out relational framing.

The approaches of Canadian Justice L'Heureux-Dubé, and U.S. Justices Marshall and Stevens are thus more amenable to the kinds of doctrinal approaches that have been advanced in the relational literature. We have seen that Sheppard calls for an approach to discrimination wherein “individual experiences (the micro-level) need to be connected to larger societal and group-based realities (the meso and macro-levels).”<sup>508</sup> Sheppard urges that such multi-levelled analyses “implicate a socially situated individual and are enhanced by a broad contextual inquiry that addresses individual stories, institutional relations, systemic practices, and larger structural and societal patterns of inequality and exclusion.”<sup>509</sup> Similarly, Jennifer Nedelsky has advocated a general approach to rights adjudication that begins with a directive to “examine the rights dispute to determine what is structuring the relations that have generated the problem.”<sup>510</sup> In the statutory human rights context, Duclos has argued that “Discrimination ought to be assessed in light of three interrelated considerations: the characteristics of the people involved (race, gender, and so on), their relationship and the conduct arising out of it, and the larger social context within which that relationship is located.”<sup>511</sup>

Observing the particular problems that a categorical approach creates for new groups, or groups based on intersecting grounds not captured by existing categories, Duclos urges that, “[f]or racial minority women and for others who straddle the current categories of difference, complicating our human rights law in the ways I have suggested is not one of several options for reform. It is the

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<sup>508</sup> Sheppard, *supra* note 186 at 66.

<sup>509</sup> *Ibid.*

<sup>510</sup> Nedelsky, *supra* note 29 at 236.

<sup>511</sup> Duclos, *supra* note 182 at 48.

only way not to disappear.”<sup>512</sup> A focus on categories practically necessitates such disappearing, and not just in cases of intersectional discrimination. Legal claims involve real people in real relationships; legal doctrines that fail to attend to that truth necessarily disappear aspects of the claimants and their circumstances. Relationships are complex, multiple, and interlocking in ways that categorical approaches cannot accommodate. Categories ask us to abstract, to list, and to sort experiences, not to listen for what is really there.

Debates over groups and grounds, classes and classifications, risk obscuring the essential opportunity that these doctrinal moments open up for framing equality claims in relational terms. The opportunity is lost when these doctrinal spaces are colonized by categorical approaches that replace attention to context and specificity with attention to abstraction and list-making. In order to truly illuminate what is at stake in these debates, the focus must remain squarely on the extent to which these doctrinal openings are deployed to frame claims in relational rather than categorical terms.

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<sup>512</sup> *Ibid* at 51.



## CONCLUSION

As set out in the introduction to this paper, questions as to “which characteristics...ought to be protected against discrimination” are among the most commonly deployed means of defining the scope of equality protections.<sup>513</sup> I have suggested here that these doctrinal questions create an opportunity to infuse equality analysis with relational concerns. I have focused on the ways that this opportunity has been seized or lost in two jurisdictions that have quite different approaches to their constitutional equality guarantees. I have argued that debates in these jurisdictions regarding the role of groups and grounds, classes and classifications, are more productively cast in terms that emphasize the possibilities for relational framing of equality claims—and conversely, the risk that categorical framings may crowd out these relational insights.

At the beginning of this paper, I suggested that the insights of relational theory might offer us “ways out” of apparently intractable doctrinal problems—in particular, how we might attend to the realities of social context without provoking the spectre of endless “groups” seeking special status from the courts. I have proposed that relational theory illuminates the power of attention to relationships as an alternative to attention to categories. The “way out” is to disassociate doctrinal attention to context from the drive to categorize.

Writing in the South African context, Albertyn and Goldblatt have explained that relational scholars have called for “an equality jurisprudence which places difference and disadvantage at the centre of the concept. They point to the importance of the relationship of the individual to the group

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<sup>513</sup> Fredman, *supra* note 10 at 107.

and the often complicated and intersectional nature of inequalities that are found in reality. They insist on the remedial purpose of the right and the contextual nature of its determination.”<sup>514</sup> Among the greatest challenges facing relational theorists is the difficult work of translating these aspirations into prescriptions—a task which in many cases requires an initial act of translation between theory and doctrine. This paper has been an effort towards such a project—untangling the linguistic and conceptual confusion surrounding groups and grounds, and the relational aspirations that might be expressed in a doctrinal moment that is common to many jurisdictions. It is one small piece of a grander relational project that must necessarily be comprised of small pieces: “to shift habits of thought so that people routinely attend to the relations of interconnection that shape human experience, create problems, and constitute solutions...in everyday conversation, in scholarship, in policy making, and in legal interpretation.”<sup>515</sup>

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<sup>514</sup> Albertyn and Goldblatt, *supra* note 38 at 253. Note that Albertyn and Goldblatt refer to the same body of scholarship that I have termed “relational” theorists, but use the term “critical” theorists. *Ibid* at 251.

<sup>515</sup> Nedelsky, *supra* note 29 at 4.

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