CHAPTER FOUR: EQUALITY (Generally)

KEY CONCEPTS FOR THE CHAPTER

- Although almost all government action classifies individuals, treating them differently, there still is a widespread consensus that every law need not be demonstrably justified in court and that line-drawing is a necessary legislative task.

- In the U.S., courts generally use the highly deferential “rational basis” test unless a classification is based on a “suspect” class or involves a “fundamental right,” in which case stricter judicial review is required.

- In Canada, the equality provisions of the Charter -- which trigger close judicial scrutiny -- only apply to discrimination based on a ground enumerated in S. 15 or on a ground “analogous” to an enumerated ground.

- In Australia, the constitutional framers rejected a general equality provision modeled on the American 14th Amendment, and adopted a provision prohibiting discrimination only against residents (or ‘subjects of the Queen’) of other Australian states.

- The U.S. Supreme Court has characterized the purpose of the 14th Amendment’s equal protection clause as a mandate that “the State must govern impartially”
  - American doctrine does not include facially non-discriminatory laws unless they were intended to discriminate against a protected group.

- The Supreme Court of Canada has characterized the purpose of S. 15 to “prevent the violation of essential human dignity” through “the imposition of disadvantage, stereotyping, or political or social prejudice”
  - Canadian doctrine includes laws that disproportionately impact protected groups.
  - Canadian doctrine only applies where a law constitutes a “substantive discrimination”: formal differences in treatment are insufficient to invoke S. 15.

- In Australia, the Parliament has passed a number of statutes over the years prohibiting specific forms of discrimination, giving effect to obligations that Australia has incurred as a signatory to a number of international conventions. The Parliament relies on the constitution’s ‘external affairs’ power to pass these acts.
I. Background and Overview

A. Origins of constitutional proscription of discrimination

The U.S. Constitution contained no broad provision barring discrimination. Indeed, the U.S. Constitution barred congressional limitation of the slave trade until 1808 and specifically protected the rights of slaveholders against those who sought their freedom.\(^+\) And, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Supreme Court held that slaves were not citizens, and that neither non-slave states nor the federal government could grant them citizenship. Indeed, any legislation limiting slaveholders “rights” (such as the Missouri Compromise, invalidated by that decision, that admitted certain states on condition that slavery was banned) constituted an improper taking of property without due process.\(^+\)

This changed with the ratification of the Fourteenth Amendment. It specifically provided that all persons born or naturalized in the United States are citizens, and enacted a general prohibition against states denying to “any person within its jurisdiction the equal protection of the laws.”\(^+\) The Supreme Court has subsequently interpreted the Due Process Clause of the Fifth Amendment to apply the same standards to actions of the federal government. *Bolling v. Sharpe*, 374 U.S. 497 (1954) (applying *Brown v. Board of Education* desegregation decision to District of Columbia schools).

\(^+\) Art. IV, §2, clause 3 provides: “No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.”

\(^+\) This decision was not foreordained. Justice Curtis wrote a powerful dissent that has been vindicated by the judgment of history that the Court’s conclusions were erroneous, even based on the pre-Civil War text of the Constitution. See generally Rotunda & Nowak, §18.6. Scott was a slave who had traveled with his owner into the Territory of Minnesota and the free state of Illinois, then returning with his owner to the slave state of Missouri. He filed a common law claim of trespass in Missouri federal court, arguing that the act of transporting him into non-slave territories resulted in his freedom. Although no questions of federal law were raised by Scott’s claim, he filed it in federal court based on the constitutional grant of federal court jurisdiction based on diversity of citizenship. (Sanford was executor of his now-deceased owner’s estate, and was a citizen of New York.) Justice Curtis argued that freed slaves had often been recognized as citizens at the time of the adoption of the Constitution, and so if, on the merits, Dred Scott was free, then he was a citizen of Missouri and jurisdiction was proper. On the merits, Curtis argued that Congress enjoyed plenary power over territories and that, as slavery was against natural law, it could only be imposed by specific local acts; thus, Congress had the constitutional power to ban slavery in new territories. An excellent summary of *Dred Scott* can be found in Carl B. Swisher, 5 *The Oliver Wendell Homes Devise of the Supreme Court of the United States: The Taney Period* (1974).

\(^+\) The Fourteenth Amendment also bars state laws that “abridge the privileges or immunities of citizens of the United States.” In *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court narrowly construed this clause, rejecting claims that it protects citizens against state incursions of rights guaranteed by the Bill of Rights or elsewhere; the clause only protects uniquely federal rights such as the right to vote in federal elections or to travel in interstate commerce.
The British North America Act protect against provincial laws discriminating against Indians and aliens by declaring them *ultra vires* the exclusive federal power in that regard. (We discuss in Chapter 5 the various protections provided by the BNA Act for linguistic minorities.) When Canadians sought to constitutionalize their basic human rights, the Charter was drafted to include several provisions that limit discrimination. Section 15(1) provides that “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, color, religion, sex, age or mental or physical disability.” In addition, s. 27 of the Charter requires its construction in a manner “consistent with the preservation and enhancement of the multicultural heritage of Canadians,” and s. 28 provides Charter rights are “guaranteed equally to male and female persons.”

Section 15 guarantees four types of equalities. The first clause constitutionally enshrines the right to "equality before the law" that had been previously guaranteed by the Canadian Bill of Rights. The Charter’s drafters added the phrase "equality under the law" because pre-Charter courts had held that the statutory Bill of Rights only concerned itself with discriminatory administration of law, not the substance of the law itself. "Equal benefit of the law" was added because prior cases had excluded government benefit programs from the scope of the pre-Charter equality provision. "Equal protection of the law" sought to add, to the extent appropriate, jurisprudence developed in the U.S. under the Fourteenth Amendment.

The framers of the Australian Constitution considered incorporating a provision resembling the Fourteenth Amendment. The 1891 draft included the provision: “A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.” The draft Bill completed in 1897 at the Adelaide session of the second Convention retained this section. In his Memorandum of Proposed Amendments to the Bill, Andrew Inglis Clark (Tasmanian Attorney-General) proposed that the section be replaced with: “The citizens of each State, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several States; and a State shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth; nor shall a State deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.” In the event, however, neither version was adopted. The framers settled for a simpler formula, now s 117 of the Constitution (note: the term ‘subject of the Queen’ was the expression used in British common law at the time, to refer to people we would today call ‘citizens’):

‘A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other States.’

Why did Australia’s founders end up prohibiting only ‘out-of-State residency’ discrimination? The framers had several reservations about the Fourteenth Amendment. Some regarded it as a product of uniquely American history, with no relevance for Australia. In the words of Victorian delegate, Isaac Isaacs (later, Justice and Chief Justice of the High Court of Australia, and Governor-General of Australia), the Fourteenth Amendment ‘was put in the American Constitution immediately after the Civil War, because the Southern States refused to concede to persons of African descent the rights of citizenship. The object of the amendment was purely to insure to the black population that they should not be
deprived of the suffrage and various rights of citizenship in the Southern States.’ Some believed that the equal protection of the laws was already guaranteed by English common law, and did not need to be stated in the Constitution. Others did not want the equal protection to extend to all ‘citizens’ (or subjects) because they wanted the States to remain free to discriminate on racial grounds with respect to employment laws, for example (the main minority group targeted was the Chinese). Many were convinced, in any case, that the only relevant ‘mischief’ the Fourteenth Amendment was designed to overcome was discrimination against ‘citizens’ (that is, not specifically minorities). As NSW delegate, Edmund Barton (future Justice of the High Court), put it:

‘I do not think that any … circumstances have arisen as would justify these colonies in inserting in the Constitution such words as were inserted in the American Constitution to meet the case of the freed men… My position has been, from the beginning, that there is a necessity for some provision or other which would prevent citizens of the Commonwealth from being under any undue restriction or inequality.’

Section 117, which is the product of this debate, has been used only rarely to strike down relevantly discriminatory laws. These have included a Queensland law setting more onerous conditions for admission to practice law in Queensland on out-of-State residents who were qualified as legal practitioners in another State (Street v Qld Bar Association (1989) 168 CLR 461); and another Queensland law that restricted the damages out-of-State residents could be awarded under a Queensland State motor accident insurance scheme (Goryl v Greyhound Australia (1994) 179 CLR 463). The test for discrimination under this provision is to imagine the individual, all else being equal, as a resident of the legislating State. If the mere fact of change of residency would remove the legal disadvantage or disability of which the individual has complained, then out-of-state residency discrimination would (probably) be established. The provision relates only to actual residency, and not to the indirect effect of residency or other forms of discrimination that might appear relevant to residency (for example, if a State passed a law giving preference in employment to persons with a degree from any University in that State, this is unlikely to amount to a breach of s 117, since hypothetically changing the residency of a person does not give that person a University degree!)

Despite this constitutional ‘lacuna’, Australia now has many statutes prohibiting discrimination against minorities or historically disadvantaged groups. These give effect to international conventions or treaties to which Australia is a party, and put the obligations Australia has undertaken into domestic legislation. These laws include, among others: the Racial Discrimination Act 1975 (giving effect to the United Nations Convention on the Elimination of All Forms of Racial Discrimination); the Sex Discrimination Act (1984) (giving effect to the United Nations Convention on the Elimination of All Form of Discrimination Against Women – CEDAW); the Disability Discrimination Act 1992 (giving effect to the International Labor Organisation Discrimination (Employment and Occupation) Convention); the Human Rights (Sexual Conduct) Act 1994 (giving effect to the Article 17 of the United Nations International Covenant on Civil and Political Rights - ICCPR.) Of these, only the Racial Discrimination Act extends to other laws. The other Acts prohibit discriminatory conduct only on the part of persons or agencies: official, private, or corporate.

Two sub-national jurisdictions in Australia have comprehensive rights protection legislation. The Australian Capital Territory (ACT) has the Human Rights Act 2004; Victoria has the Charter of Human Rights and Responsibilities Act 2006. Both Acts extend to a very wide range of minority and other rights. Both allow only judicial ‘declarations’ of incompatibility or inconsistency between a law and a protected right; that is, they do not permit judicial invalidation of laws.
B. Illustrative case study: Constitutional protection against gender-based discrimination

Judicial interpretation during the first century following the ratification of the Fourteenth Amendment provided little protection for women. In *Goesaert v. Cleary*, 335 U.S. 464 (1948), for example, the Court upheld differential treatment of female bartenders (who only could be licensed in Michigan if the wife or daughter of the male owner).

These decisions led to efforts to amend the constitution to expressly guarantee equal rights for women. The so-called “Equal Rights Amendment” was passed by 2/3 majorities in the Senate and House but not ratified by the requisite 3/4 of the states. However, as demonstrated by the cases below, most notably *United States v. Virginia*, much of the doctrinal benefits that women would derive from a constitutional amendment have subsequently been achieved by judicial interpretation of the Fourteenth Amendment. Indeed, Justice Ruth Bader Ginsburg, one of the principal architects of the ERA and the cases enhancing judicial scrutiny of gender discrimination, and the author of that opinion, has declared that there “is no practical difference between what has evolved and the ERA.”

In contrast to the unsuccessful effort to add the ERA to the United States Constitution, Section 28 was explicitly added to the Charter to supplement the prohibition on sex discrimination in section 15. Among the reasons for a supplemental provision were to clearly reject Supreme Court of Canada decisions interpreting the equality provisions of the *Canadian Bill of Rights* to render them ineffectual against a host of discriminatory practices. In addition, after the successful demand by a number of provincial premiers for a provision (section 33) that allows them to enact legislation notwithstanding the Charter, women’s advocacy groups demanded a separate provision that would not be subject to legislative opt-out.

After inclusion of a special provision recognizing multiculturalism in Canada (section 27), women’s groups wanted to ensure that practices that discriminated against women could not be justified by links to traditional cultural practices of particular ethnic or racial groups. Although a full analysis of the reasons why specific constitutional protection for women’s equality rights prevailed in Canada but not in the United States is beyond the scope of an introductory note, one factor may have been the need for

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* Even more offensive to modern conceptions was the decision, under the Privileges and Immunities Clause, in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), upholding the state’s refusal to license the petitioner to practice law, especially the concurring opinion finding that differential treatment of women was mandated by “the law of the creator” and admission to the bar was inconsistent with Bradwell’s “paramount destiny” to be a wife and mother.


* This provision is discussed below, prior to the excerpt of the *Ford v. Quebec* case in Chapter Four.

* Cf. Catherine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. Chi. L. Rev. 759 (1987) (reviewing Jane Mansbridge, *Why We Lost the ERA* (Chicago: Univ. of Chicago Press 1986) (“when women’s demands for good sex equality guarantees in the proposed Charter of Rights and Freedoms were not met ...Canadian women spontaneously rebelled nationwide” while “American women, a majority of whom were said to have wanted it, let ERA go so quietly”).
COMPARATIVE CONSTITUTIONAL LAW (U.S./CANADA/AUSTRALIA), 2009

the Trudeau government to get political support from women’s groups and others in their battle with provincial premiers over a Charter perceived to constitute a limitation on provincial prerogatives.

As noted above, although Australia lacks a constitutional provision protecting against sex discrimination, in 1984 the Commonwealth Parliament adopted the Sex Discrimination Act (giving effect under the External Affairs head of power, s 51(xxix) to the United Nations Convention on the Elimination of All Form of Discrimination Against Women). It prohibits discrimination on the ground of sex, marital status, and pregnancy or potential pregnancy, in employment, education, accommodation, the provision of services, facilities, the disposal of land, the activities of clubs, and the administration of Commonwealth laws and programs. It also aims to promote recognition and acceptance within the community of the principle of the equality of men and women. (There are counterpart laws in the States.)

Although Australia’s Constitution contains to specific equality provisions and even the new Preamble proposed and defeated at a referendum in 1999 included broad statements of equality, but, to the dismay of some, did not include a reference to the equality of men and women), (white) Australian women have had equal political rights – to vote and stand for political office - for the whole of the 20th century (since the first Commonwealth Franchise Act, 1902). Like their counterparts in many modern countries, however, it was not until the 1960s that women’s disadvantage and inequality in other spheres began to gain official recognition. The principle of equal pay was accepted (even if not fully achieved, even yet); the requirement for women to resign from the public service on marriage or pregnancy was ended. In 1999 the Equal Opportunity for Women in the Workplace Act (Cth) was passed, also giving effect to CEDAW (as well as drawing on the ‘Corporations power’, s 51 (xx) of the Constitution). Its principal objects are stated as: (a) to promote the principle that employment for women should be dealt with on the basis of merit; and (b) to promote, amongst employers, the elimination of discrimination against, and the provision of equal opportunity for, women in relation to employment matters; and (c) to foster workplace consultation between employers and employees on issues concerning equal opportunity for women in relation to employment.

C. Overview of the differences between American and Canadian Constitutional Jurisprudence Concerning Equality

Initially, it was unclear whether the broad language of the Fourteenth Amendment’s Equal Protection Clause extended any further than those who were the directly intended beneficiaries – African Americans recently freed from slavery.

SLAUGHTER-HOUSE CASES
SUPREME COURT OF THE UNITED STATES
83 U.S. 36; 21 L. Ed. 394; 16 Wall. 36

[Before Chase, C.J., and Nelson, Clifford, Swayne, Miller, Davis, Field, Strong, and Bradley, JJ.]

Mr. Justice MILLER delivered the opinion of the Court.

[This litigation challenged a Louisiana statute that created a corporation and gave it the exclusive right for 25 years to maintain slaughter-houses and ancillary facilities for slaughtering cattle within the New Orleans metropolitan area. The Court quickly rejected a claim that the Thirteenth Amendment’s ban on
slavery was implicated, although the statute’s effect was to require all New Orleans workers in this industry to seek employment from the single authorized slaughter-house. The Court also considered and rejected three separate challenges based on the Fourteenth Amendment made by those either put out of work by this monopoly, or who objected to being subject to the economic power of the monopoly. First, the Court narrowly construed the Privileges and Immunities Clause to not apply to the right to conduct a lawful business. Next, the Court disposed of the claim that the statute denied the plaintiffs their property or liberty without due process of law by construing the Due Process Clause to only provide procedural protection. Last, the Court considered the claim that, by exempting the favored corporation from a general ban on slaughter-houses in New Orleans, the statute violated the Equal Protection Clause of the 14th Amendment. The Court wrote, in that regard:

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights -- the rights of person and of property -- was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.
But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

Mr. Justice FIELD, dissenting:

[Justice Field wrote a lengthy historical argument contending that the 14th Amendment protected all United States citizens against abridgement of those privileges and immunities “which of right belong to the citizens of all free governments,” and which include the right to make and enforce contracts, to sue, give evidence in court, inherit and alienate property, and to the same limitations on the right to labor as all other citizens in the community.]

I am authorized by the CHIEF JUSTICE, Mr. Justice SWAYNE, and Mr. Justice BRADLEY, to state that they concur with me in this opinion.

Mr. Justice BRADLEY, also dissenting:

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It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed.

The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

[Justice Bradley acknowledged that such a broad interpretation of congressional power could lead to widespread federal legislation “interfering with the internal affairs of the States” and “abolishing the State governments in everything but name,” but he dismissed these fears because the basic privileges and immunities of all citizens would be relatively narrow and that increased federal litigation could be met by increased numbers of courts.]

Mr. Justice SWAYNE, dissenting: [This dissent responded to objections that a broad congressional power was “novel and large” by noting that “the novelty was known and the measure deliberately adopted.” The majority’s judgment was “much too narrow.” As Swayne, J., observed, the pre-Civil War Constitution gave “ample protection” against oppression by the federal government “but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment.”]

The views of the dissent have prevailed to some degree in modern jurisprudence. The Clause is no longer construed solely to protect African Americans. Rather, as illustrated in NEW YORK CITY TRANSIT AUTHORITY V. BEAZER, 440 U.S. 568, 588 (1979) (emphasis added), the key principle underlying the Equal
The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The Clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject [*588] to its jurisdiction does the question whether this principle is violated arise.

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At its simplest, the District Court's conclusion was that TA's rule is broader than necessary to exclude those methadone users who are not actually qualified to work for TA. We may assume not only that this conclusion is correct but also that it is probably unwise for a large employer like TA to rely on a general rule instead of individualized consideration of every job applicant. But these assumptions concern matters of personnel policy that do not implicate the principle safeguarded by the Equal Protection Clause. As the District Court recognized, the special classification created by TA's rule serves the general objectives of safety and efficiency. [In a footnote, the Court observed that legislation "does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485.] Moreover, the exclusionary line challenged by respondents "is not one which is directed 'against' any individual or category of persons, but rather it represents a policy choice . . . made by that branch of Government vested with the power to make such choices." *Marshall v. United States*, 414 U.S. 417, 428. [*593] Because it does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority. Under these circumstances, it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole.

Although, as later sections of this chapter illustrate, American courts scrutinize some allegedly partial state action more closely than others, the general principle remains applicable to all state classifications.

Despite equally broad language in the Charter, section 15 has not been construed to create a general, judicially enforceable requirement of government impartiality. Rather, the Supreme Court of Canada has reasoned that the purpose of the provision and the relationship between s. 15 and s. 1 means that the provision only protects the groups enumerated in the text and those who are discriminated on the basis of "analogous grounds." The fundamental purpose of the provision, as explained in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice."
ANDREWS v. LAW SOCIETY OF BRITISH COLUMBIA

SUPREME COURT OF CANADA

[The litigation challenged a British Columbia statute that barred the plaintiff, an Oxford-trained lawyer with permanent residency in Canada who was otherwise qualified, from practicing law because he was not a Canadian citizen. In the British tradition, the opinions are listed in order of the seniority of the justice, rather than the majority following by concurrences and dissents. First, we see Justice McIntyre’s individual view that the challenged statute infringed Andrews’ equality rights under s. 15 but that it was a reasonable limit under s. 1. Three justices (Wilson, Dickson and L'Heureux-Dube) adopted McIntyre, J.’s s.15 analysis but found the statute unreasonable and thus invalid. For his own reasons, LaForest, J., also voted to strike down the statute.]

MCINTYRE J. (dissenting in part)--

The Concept of Equality

Mclachlin J.A. in the Court of Appeal expressed the view, at p. 605, that:

"... the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are "similarly situated be similarly treated" and conversely, that persons who are "differently situated be differently treated"...."

In this, she was adopting and applying as a test a proposition which seems to have been widely accepted with some modifications in both trial and appeal court decisions throughout the country on s. 15(1) of the Charter. The reliance on this concept appears to have derived, at least in recent times, from J. T. Tussman and J. tenBroek, "The Equal Protection of Laws" (1949), 37 Calif. L. Rev. 341. The similarly situated test is a restatement of the Aristotelian principle of formal equality -- that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness" (Ethica Nichomachea, trans. W. Ross, Book V3, at p. 1131a-6 (1925)).

The test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews. The similarly situated test would have justified the formalistic separate but equal doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), a doctrine that incidentally was still the law in the United States at the time that Professor Tussman and J. tenBroek wrote their much cited article. ***

This approach was rejected in this Court by Ritchie J. in R. v. Drybones, [1970] S.C.R. 282, in a similar case involving a provision of the Indian Act making it an offence for an Indian to be intoxicated off a reserve. He said, at p. 297:

"... I cannot agree with this interpretation pursuant to which it seems to me that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members "to equality before the law", so long as all the other members are being discriminated against in the same way."

[Next, McIntyre, J. reviewed the unsatisfactory history of judicial interpretation of the equality provision of the pre-Charter, statutory Canadian Bill of Rights, which was narrowly construed to protect]
It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups ...."

Discrimination

The right to equality before and under the law, and the rights to the equal protection and benefit of the law contained in s. 15, are granted with the direction contained in s. 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee.

Discrimination as referred to in s. 15 of the Charter must be understood in the context of pre-Charter history. Prior to the enactment of s. 15(1), the Legislatures of the various provinces and the federal Parliament had passed during the previous fifty years what may be generally referred to as Human Rights Acts. With the steady increase in population from the earliest days of European emigration into Canada and with the consequential growth of industry, agriculture and commerce and the vast increase in national wealth which followed, many social problems developed. The contact of the European immigrant with the indigenous population, the steady increase in immigration bringing those of neither French nor British background, and in more recent years the greatly expanded role of women in all forms of industrial, commercial and professional activity led to much inequality and many forms of discrimination. In great part these developments, in the absence of any significant legislative protection for the victims of discrimination, called into being the Human Rights Acts. In 1944, the Racial Discrimination Act, 1944, S.O. 1944, c. 51, was passed, to be followed in 1947 by The Saskatchewan Bill of Rights Act, 1947, S.S.

[Ed. note: Consistent with this view of s. 15 as correcting some defects in prior jurisprudence, the Supreme Court of Canada held in Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, that an employer’s insurance plan that disentitled pregnant women from certain benefits was illegal sex discrimination. The United States Supreme Court held that differential treatment of pregnant women was neither unconstitutional under the 14th Amendment, Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485 (1974), nor illegal under anti-discrimination legislation, General Electric Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401. The Court concluded that the classification was not based on gender but between two groups -- pregnant women and nonpregnant persons. Geduldig, 417 U.S. at 497. The court reasoned that, while only women can become pregnant, “pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical characteristic.” Id., 417 U.S. at 497 n.20. Congress subsequently overturned the latter interpretation by statutory amendment.]
1947, c. 35, and in 1960 by the *Canadian Bill of Rights*. Since then every jurisdiction in Canada has enacted broad-ranging Human Rights Acts which have attacked most of the more common forms of discrimination found in society. This development has been recorded and discussed by Walter Tarnopolsky, now Tarnopolsky J.A., in *Discrimination and the Law* (2nd ed. 1985).

What does discrimination mean? [Here, McIntyre, J., draws upon the interpretation of that concept in statutory Human Rights Acts, and notes that these rulings focuses on the effects of a challenged rule on a victimized group entitled for protection under s. 15. He noted that Supreme Court in statutory cases had expressly held that] that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint. ***

[McIntyre also noted a key statutory precedent, *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 (better known as the *Action Travail des Femmes* case), where Dickson, C.J. quoted from a report by now-Justice Rosie Abella:

*Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ....*

*It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.*"

*** The Court in the case at bar must address the issue of discrimination as the term is used in s. 15(1) of the Charter. In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). [At the same time, the Court noted certain differences: Human Rights Acts applied to private as well as government discrimination; they specified categories of prohibited discrimination; and they contain a variety of exemptions or defences, while similar issues would be resolved in Charter litigation by claiming that the challenged law was a reasonable limit under s. 1.]

**Relationship Between s. 15(1) and s. 1 of the Charter**

*** The Canadian Charter requires a two-step inquiry. First, the court inquires into whether an infringement of the rights guaranteed by s.15 have occurred. Second, and analytically distinct, the inquiry turns to whether the discrimination is reasonable. To determine if an infringement occurred, McIntyre adopted the "enumerated or analogous grounds," which is that s. 15(1) is designed to prevent discrimination based on these grounds enumerated in the text, and other grounds analogous to the ones enumerated. McIntyre cited with approval the judgment of Hugessen J.A. in *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General)*, [[1987] 2 F.C. 359, 367-69]:

*As far as the text of section 15 itself is concerned, 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 and there may even be a recognition that for some people equality has a different meaning than for others.***
The rights guaranteed in s. 15(1) apply to all persons whether citizens or not. A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights. Non-citizens, lawfully permanent residents of Canada, are -- in the words of the U.S. Supreme Court in United States v. Carolene Products Co., 304 U.S. 144 (1938), at pp. 152-53, n. 4, subsequently affirmed in Graham v. Richardson, 403 U.S. 365 (1971), at p. 372 -- a good example of a "discrete and insular minority" who come within the protection of s. 15.

Section 1

[Here, McIntyre, J. disagreed with his colleagues. He noted that when “making distinctions between groups and individuals to achieve desirable social goals, it will rarely be possible to say of any legislative distinction that it is clearly the right legislative choice or that it is clearly a wrong one.” In “seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures.” He therefore concluded that the limitation on bar membership was reasonable.]

LA FOREST J.-- ***

*** I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that all legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.

I realize that it is no easy task to distinguish between what is fundamental and what is not and that in this context this may demand consideration of abstruse theories of equality. For example, there may well be legislative or governmental differentiation between individuals or groups that is so grossly unfair to an individual or group and so devoid of any rational relationship to a legitimate state purpose as to offend against the principle of equality before and under the law as to merit intervention pursuant to s. 15. For these reasons I would think it better at this stage of Charter development to leave the question open. I am aware that in the United States, where Holmes J. has referred to the equal protection clause there as the "last resort of constitutional arguments" (Buck v. Bell, 274 U.S. 200 (1927), at p. 208), the courts have been extremely reluctant to interfere with legislative judgment. Still, as I stated, there may be cases where it is indeed the last constitutional resort to protect the individual from fundamental unfairness. Assuming there is room under s. 15 for judicial intervention beyond the traditionally established and analogous

[Ed. note: Applying the language of strict judicial scrutiny from Graham, a requirement of citizenship for admission to the bar was rejected in Application of Griffiths, 394 U.S. 618, 89 S. Ct. 1322 (1969). Since that time, the U.S. Supreme Court has used different standards for review of alienage cases, demanding compelling justifications for state or local denial of economic benefits on the basis of citizenship, reasonable tailoring to meet state interests in allocating political power to citizens, and deferring to federal judgments. See Nowak & Rotunda, §14.12, at 754.]
policies against discrimination discussed by my colleague, it bears repeating that considerations of institutional functions and resources should make courts extremely wary about questioning legislative and governmental choices in such areas.

***

While it cannot be said that citizenship is a characteristic which "bears no relation to the individual's ability to perform or contribute to society" (Fontiero v. Richardson, 411 U.S. 677 (1973), at p. 686), it certainly typically bears an attenuated sense of relevance to these. That is not to say that no legislative conditioning of benefits (for example) on the basis of citizenship is acceptable in the free and democratic society that is Canada, merely that legislation purporting to do so ought to be measured against the touchstone of our Constitution. It requires justification. ***

WILSON, J., (joined by DICKSON, C.J., and L’HEUREUX-DUBÉ, J:)

[These justices joined McIntyre, J.’s analysis of the s.15 infringement, but concluded that the statute was not a reasonable limit under s.1.]

Before turning to s. 1, I would like to add a brief comment to what my colleague has said concerning non-citizens permanently resident in Canada forming the kind of "discrete and insular minority" to which the Supreme Court of the United States referred in United States v. Carolene Products Co., 304 U.S. 144 (1938), at pp. 152-53, n. 4.

Relative 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. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. Ely, Democracy and Distrust (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation in Book III of Considerations on Representative Government that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked ...." I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

I believe also that it is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. For example, Stone J. writing in 1938, was concerned with religious, national and racial minorities. In enumerating the specific grounds in s. 15, the framers of the Charter embraced these concerns in 1982 but also addressed themselves to the difficulties experienced by the disadvantaged on the grounds of ethnic origin, colour, sex, age and physical and mental disability. It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the "unremitting protection" of equality rights in the years to come.

***
II. Two levels of judicial scrutiny

The puzzle for courts in protecting constitutional principles of equality is to create judiciably manageable standards to implement these grand principles. Professor Hogg, at §52.6,catalogues the challenge. Every statute or regulation classifies citizens in some way, so a rule of absolute equality can’t possibly be required by the Fourteenth Amendment or s. 15. Aristotle’s definition of equality – “persons who are equal should have assigned to them equal things” – sounds great, but as Hogg concludes, this idea is stated at too high a level of generality to be useful. Most significantly, it fails to identify who is similarly situated to whom. As McIntyre, J. observed in Andrews, the Nazi’s Nuremberg Laws could have been upheld by racist judges on the grounds that all Jews were treated alike. At the other end of the spectrum, in attempting to give some meaning to these important constitutional provisions, both Supreme Courts have also recognized that a standard that sustains any classification that the legislature thinks is “reasonable” or if the classification “pursued a valid federal objective” (the standard under the statutory Bill of Rights) was insufficient to protect citizens against discrimination.†

In Australia, the question of which classifications warrant active judicial or administrative scrutiny is made by the Commonwealth Parliament, in deciding to enact laws against race, sex, disability, and orientation discrimination, for example. The solution implemented by North American courts, albeit in different ways, is to carefully scrutinize certain kinds of classifications and provide minimal or no scrutiny of others.

A. Canada: substantive discrimination based on enumerated or analogous grounds

If the differential treatment challenged in the litigation is based on one of the grounds enumerated in s.15, or a ground found by the courts to be “analogous” to these grounds, then the Charter applies. (As noted below, the plaintiff must still demonstrate that the differential treatment constitutes “substantive discrimination” and the government can still demonstrate that the discrimination constitutes a reasonable limit.) If the classification is based on a ground neither enumerated nor analogous, s.15 simply isn’t applicable. Thus, in Andrews, supra, the Court found that alienage was analogous to the enumerated grounds, and proceeded to apply s.15. In contrast, in Workers’ Compensation Reference, [1989] 1 S.C.R. 922, the Court rejected a challenge to a statute denying a tort remedy to persons injured in the course of employment while preserving it for other injured parties, because discrimination based on the context of an injury was not analogous to the grounds enumerated in s.15. And, in Egan v. Canada, [1995] 2 S.C.R. 513, 528-29, the Court employed this approach in finding that s.15 protected against discrimination based on sexual orientation:

The appellants’ claim before this Court is that the Act contravenes s. 15 of the Charter in that it discriminates on the basis of sexual orientation. To establish that claim, it must first be determined that s. 15’s protection of equality without discrimination extends to sexual orientation as a ground analogous to those specifically mentioned in the section. This poses no great hurdle for the appellants; the respondent Attorney General of Canada conceded this point. While I ordinarily have reservations about concessions of constitutional issues, I have no difficulty accepting the appellants’ contention that whether or not sexual orientation is based on biological

† Indeed, the legislative history of s.15 makes it clear that the Charter’s drafters expressly rejected this deferential approach.
or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds. As the courts below observed, this is entirely consistent with a number of cases on the point. Indeed, there is a measure of support for this position in this Court. In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at pp. 737-39, speaking for my colleagues as well, I observed that the analogous grounds approach in s. 15 was appropriate to a consideration of the character of "social groups" subject to protection as Convention refugees. These, I continued, encompass groups defined by an innate or unchangeable characteristic which, I added, would include sexual orientation.+

It is necessary but not sufficient for a classification to be based on an enumerated or analogous ground. The challenged provision must also operate to discriminate in a substantive way. *Andrews*, *supra*, concluded that the use of the word “discrimination” in the text of s.15 limited “those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.” This was spelled out in more detail in the following pathmarking case:

**LAW V. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)**

*Supreme Court of Canada*  
[1999] 1 S.C.R. 497, 170 D.L.R. 4th 1

[Before Lamer C.J.C., L'Heureux-Dube, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.]

The judgment of the court was delivered by IACOBUCCI J.:

[The claimant, who was 30 years old at the time of her spouse's death, challenged provisions of the Canada Pension Plan that deny the usual survivor's pension to non-disabled surviving spouses under the age of 35.]

I. Introduction and Overview  

***

[2] Section 15 of the Charter guarantees to every individual the right to equal treatment by the state without discrimination. It is perhaps the Charter's most conceptually difficult provision. In this Court's first s. 15 case, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R 143 at p. 164, 56 D.L.R. (4th) 1, McIntyre J. noted that, as embodied in s. 15(1) of the Charter, the concept of equality is "an elusive concept", and that "more than any of the other rights and freedoms guaranteed in the Charter, it lacks precise definition". Part of the difficulty in defining the concept of equality stems from its exalted status. The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s. 15(1) of the Charter is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision.

[Ed. note: Almost all the enumerated grounds in s. 15 are immutable, in that they cannot be changed by the choice of the individual, with the exception of religion. Thus, *Andrews, supra*, created the doctrine that citizenship was analogous to religion because it could not be changed “except on the basis of unacceptable costs.” In *Egan*, the Court found the same to be true of sexual orientation.]
VI. Analysis

A. Approach to s. 15(1)

[39] [Synthesizing the prior case law, Justice Iacobucci held that] a court that is called upon to
determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First,
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? If so, there is differential treatment for the
purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more
of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a
substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as
prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with
whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

B. The Purpose of s. 15(1)

[Here, the Court details the conclusion highlighted above that the purpose of s. 15(1) is] to prevent the
violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or
political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law
as human beings or as members of Canadian society, equally capable and equally deserving of concern,
respect and consideration. Legislation which effects differential treatment between individuals or groups
will violate this fundamental purpose where those who are subject to differential treatment fall within one
or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical
application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or
promoting the view that the individual is less capable, or less worthy of recognition or value as a human
being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute
discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a
person or group in this way, and in particular where the differential treatment also assists in ameliorating
the position of the disadvantaged within Canadian society.

C. The Comparative Approach

[56] As discussed above, McIntyre J. emphasized in Andrews, supra, that the equality guarantee is a
comparative concept. Ultimately, a court must identify differential treatment as compared to one or more
other persons or groups. Locating the appropriate comparator is necessary in identifying differential
treatment and the grounds of the distinction. Identifying the appropriate comparator will be relevant when
considering many of the contextual factors in the discrimination analysis.

D. Establishing Discrimination in a Purposive Sense: Contextual Factors

(a) Pre-existing Disadvantage

[63] As has been consistently recognized throughout this Court's jurisprudence, probably the most
compelling factor favouring a conclusion that differential treatment imposed by legislation is truly
discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice
experienced by the individual or group. These factors are relevant because, to the extent that the claimant
is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or
circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

[64] One consideration which the Court has frequently referred to with respect to the issue of pre-existing disadvantage is the role of stereotypes. A stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess. In my view, probably the most prevalent reason that a given legislative provision may be found to infringe s. 15(1) is that it reflects and reinforces existing inaccurate understandings of the merits, capabilities and worth of a particular person or group within Canadian society, resulting in further stigmatization of that person or the members of the group or otherwise in their unfair treatment.

[The court stressed, however, that proof of membership in a disadvantaged group was not essential to establish a s. 15(1) violation, especially where discrimination is based on an enumerated ground.]

(b) Relationship Between Grounds and the Claimant's Characteristics or Circumstances

*** legislation which takes into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity. This is not to say that the mere fact of impugned legislation's having to some degree taken into account the actual situation of persons like the claimant will be sufficient to defeat a s. 15(1) claim. The focus must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity. The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee.

(c) Ameliorative Purpose or Effects

[72] An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the Charter will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination: see Vriend, supra, at paras. 94-104, per Cory J. [holding that Alberta human rights statute barring discrimination on numerous grounds, but not on the basis of sexual orientation, violated s.15.]

(d) Nature of the Interest Affected

[74] [In Egan, L’Heureux-Dubé, J., explained] "[i]f all other things are equal, the more severe and localized the . . . consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter". Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society", or "constitute[s] a complete non-recognition of a particular group".
F. Application to the Case at Bar

[Here, Justice Iacobucci applied the three-part analysis to the statute providing reduced benefits to younger surviving spouses. First, he concluded that this benefit reduction constituted a denial of “equal benefit of the law” under the first step of the equality analysis. Then he agreed that the distinction was based on age, which is an enumerated ground in s. 15(1), satisfying the second prong. Ultimately, however, the Court concluded that the applicant failed to establish that the age-based distinction constituted the sort of discrimination violating essential human dignity and freedom that s. 15(1) was designed to prevent. The Court explained that adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. The appellant specifically challenged as faulty the stereotype that younger widows and widowers have a greater ability to enter or re-enter the workforce following their spouse’s death. She challenged this stereotype as unsupported by evidence, thus demeaning the dignity of under-45 adults as less worthy. She noted that the minister responsible for the enactment of the Canada Pension Plan remarked to Parliament in 1964 that "Young widows in their twenties and early thirties usually have little difficulty in finding employment, and of course many of them remarry": see House of Commons Debates (November 16, 1964), at p. 10122. The Court noted that the purpose and function of the impugned CPP provisions is not to remedy the immediate financial need experienced by widows and widowers, but rather to enable older widows and widowers to meet their basic needs during the longer term. Because of the “greater flexibility and opportunity of younger people without dependent children or disabilities to achieve long-term security absent their spouse,” the “differential treatment does not reflect or promote the notion that they are less capable or less deserving of concern, respect, and consideration, when the dual perspectives of long-term security and the greater opportunity of youth are considered. Nor does the differential treatment perpetuate the view that people in this class are less capable or less worthy of recognition or value as human beings or as members of Canadian society.”]

[106] Under these circumstances, the fact that the legislation is premised upon informed statistical generalizations which may not correspond perfectly with the long-term financial need of all surviving spouses does not affect the ultimate conclusion the legislation is consonant with the human dignity and freedom of the appellant. Parliament is entitled, under these limited circumstances at least, to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the Charter and being required to justify its position under s. 1. I emphasize, though, that under other circumstances a more precise correspondence will undoubtedly be required in order to comply with s. 15(1). In particular, a more precise correspondence will likely be important where the individual or group which is excluded by the legislation is already disadvantaged or vulnerable within Canadian society.
In finding that the impugned legislative provisions do not infringe s. 15(1) of the Charter, I do not wish in any way to minimize the emotional and economic upset which affects surviving dependents when a spouse dies. My analysis herein is not meant to suggest that young people do not suffer following the death of a loved one, but only that the impugned CPP provisions are not discriminatory between younger and older adults within the purpose and meaning of s. 15(1) of the Charter.

The SCC subsequently sharpened and clarified the post-Law doctrine regarding substantive discrimination in *R. v. Kapp*, 232 C.C.C. (3d) 349 (2008), upholding a statute giving fishers designated by First Nations bands the exclusive right to fish in certain rivers. Although this case will be discussed in Chapter Five in connection with affirmative action, at this point it is useful to observe the Court’s further elaboration on the purposes of s. 15(1). The Court reaffirmed Andrews’ commitment to substantive equality and raised concerns about the difficulty for lower courts in literally employing Law’s emphasis on “human dignity.” The Court wrote:

[25] The central purpose of combating discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on preventing governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on enabling governments to proactively combat existing discrimination through affirmative measures.

Under *Andrews*, as previously noted, s. 15 does not mean identical treatment. McIntyre J. explained that "every difference in treatment between individuals under the law will not necessarily result in inequality", and that "identical treatment may frequently produce serious inequality" (p. 164).

**B. U.S.: suspect classes and fundamental rights**

As the following two cases demonstrate, all classifications by Congress or state legislatures are subject to the equality guarantee. However, most classifications will be lightly reviewed under a “rational basis” test. Close judicial scrutiny is reserved for discrimination based on certain classifications or with regard to certain fundamental rights.

**UNITED STATES v. CAROLENE PRODUCTS CO.**  
**SUPREME COURT OF THE UNITED STATES**  
**304 U.S. 144; 58 S. Ct. 778; 82 L. Ed. 1234 (1938)**

[Before Hughes, C.J., and McReynolds, Brandeis, Butler, Stone, Roberts, Black, JJ.]

MR. JUSTICE STONE delivered the opinion of the Court.

[The appellee was indicted for violating a federal statute banning the shipment in interstate commerce of “filled milk,” *i.e.* skimmed milk with other fat or cream added. The statute declared that these products were injurious to public health and misled the public. The appellee argued that the statute was invalid on due process and equal protection grounds.]  

Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another.
Third. We may assume for present purposes that no pronouncement of a legislature can forestall
attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to
the prohibited act, and that a statute would deny due process which precluded the disproof in judicial
proceedings of all facts which would show or tend to show that a statute depriving the suitor of life,
liberty or property had a rational basis. But such we think is not the purpose or construction of the
statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is
no need to consider it here as more than a declaration of the legislative findings deemed to support
and justify the action taken as a constitutional exertion of the legislative power, aiding informed
judicial review, as do the reports of legislative committees, by revealing the rationale of the
legislation. Even in the absence of such aids the existence of facts supporting the legislative judgment
is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be
pronounced unconstitutional 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.4 The present statutory findings affect appellee no more
than the reports of the Congressional committees; and since in the absence of the statutory findings
they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends
upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of
judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state
of facts may be challenged by showing to the court that those facts have ceased to exist. Similarly we
recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts
tending to show that the statute as applied to a particular article is without support in reason because
the article, although within the prohibited class, is so different from others of the class as to be
without the reason for the prohibition, though the effect of such proof depends on the relevant
circumstances of each case, as for example the administrative difficulty of excluding the article from
the regulated class. But by their very nature such inquiries, where the legislative judgment is drawn in
question, must be restricted to the issue whether any state of facts either known or which could
reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute
on its face and it is evident from all the considerations presented to Congress, and those of which we
may take judicial notice, that the question is at least debatable whether commerce in filled milk should

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4 There may be narrower scope for operation of the presumption of constitutionality when legislation appears
on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments,
which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v.

It is unnecessary to consider now whether legislation which restricts those political processes which can
ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting
judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of
legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286
U.S. 73; on restraints upon the dissemination of information, see Near v. Minnesota ex rel. Olson, 283 U.S. 697,
713-714, 718-720, 722; Grosjean v. American Press Co., 297 U.S. 233; Lovell v. Griffin, supra; on interferences
with political organizations, see Stromberg v. California, supra, 369; Fiske v. Kansas, 274 U.S. 380; Whitney v.
California, 274 U.S. 357, 373-378; Herndon v. Lowry, 301 U.S. 242; and see Holmes, J., in Gitlow v. New York,
268 U.S. 652, 673; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular
Iowa, 262 U.S. 404; Farrington v. Tokushige, 273 U.S. 284, or racial minorities, Nixon v. Herndon, supra; Nixon
v. Condon, supra: 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. Compare McCulloch v.
Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., 303 U.S. 177, 184, n. 2, and cases cited.
be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

The prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise of the power to regulate interstate commerce. As the statute is not unconstitutional on its face the demurrer should have been overruled and the judgment will be Reversed.

MR. JUSTICE BLACK concurs in the result and in all of the opinion except the part marked "Third."

MR. JUSTICE McREYNOLDS thinks that the judgment should be affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

[MR. JUSTICE BUTLER concurred, emphasizing that the appellee was free to introduce at trial evidence to show that the declaration of the Act that the described product is injurious to public health and that the sale of it is a fraud upon the public are without any substantial foundation.]

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MASSACHUSETTS BOARD OF RETIREMENT v. MURGIA

SUPREME COURT OF THE UNITED STATES

427 U.S. 307; 96 S. Ct. 2562; 49 L. Ed. 2d 520 (1976)

[Before Burger, C.J., and Brennan, Stewart, White, Marshall, Blackmun, Powell, and Rehnquist, JJ.]

PER CURIAM.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26(3)(a) (1966), that a uniformed state police officer "shall be retired... upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.

I

We need state only briefly our reasons for agreeing that strict scrutiny is not the proper test for determining whether the mandatory retirement provision denies appellee equal protection. San Antonio School District v. Rodriguez, 411 U.S. 1, 16 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Mandatory retirement at age 50 under the Massachusetts statute involves neither situation.


This Court’s decisions give no support to the proposition that a right of governmental employment per se is fundamental. See San Antonio School District v. Rodriguez, supra; Lindsey v. Normet, 405 U.S. 56, 73 (1972); Dandridge v. Williams, supra, at 485. Accordingly, we have expressly stated that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availability of employment opportunities." Ibid.

Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal protection analysis. Rodriguez, supra, at 28, observed that a suspect class is one "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." While 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" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. The class subject to the compulsory retirement feature of the Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life. But even old age does not define a "discrete and insular" group, United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938), 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. Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny. Under the circumstances, it is unnecessary to subject the State's resolution of competing interests in this case to the degree of critical examination that our cases under the Equal Protection Clause recently have characterized as "strict judicial scrutiny."

II

We turn then to examine this state classification under the rational-basis standard. This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. Dandridge v. Williams, supra, at 485. Such action by a legislature is presumed to be valid.

In this case, the Massachusetts statute clearly meets the requirements of the Equal Protection Clause, for the State's classification rationally further the purpose identified by the State. [The Court noted that mandatory retirement removed those whose fitness had "presumptively has diminished with age." The State’s decision to adopt a generalization rather than adopt individualized fitness testing might well demonstrate that “the State perhaps has not chosen the best means to accomplish this purpose.”] But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." Dandridge v. Williams, 397 U.S., at 485.

We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. The problems of retirement have been well documented and are beyond serious dispute. But "[w]e do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and humane system could not be devised." Id., at 487. We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws.
C. Rationales for the absence of close scrutiny of most economic and social legislation

The general theory that does not support close judicial scrutiny of most legislative classifications is based on a trust in the political process to work out these problems. The Court explained this in VANCE v. BRADLEY, 440 U.S. 93, 99 S.Ct. 939 (1979), upholding mandatory retirement at age 60 for foreign service officers.

Appellees have not suggested that the statutory distinction between Foreign Service personnel over age 60 and other federal employees over that age burdens a suspect group or a fundamental interest; and in cases where these considerations are absent, courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.

The Supreme Court of Canada initially nodded in the same direction in R. v. TURPIN, [1989] 1 S.C.R. 1296. Although in 1985 the Criminal Code was amended to allow the Crown and accused to agree to waive a jury trial in serious criminal cases, prior to that time a strange provision required juries for serious crimes except in Alberta. Turpin, accused in Ontario of murder, challenged her inability to waive a jury trial on constitutional equality grounds. The Court rejected the challenge, finding that the differential treatment did not constitute discrimination, and thus did not infringe Turpin’s rights under s.15. It would “be stretching the imagination to characterize persons accused of one of the crimes listed in s. 427 of the Criminal Code in all the provinces except Alberta as members of a ‘discrete and insular minority’. The SCC later retreated from a rigid limit on s.15 to the politically powerless. In R. v. Hess, [1990] 2 S.C.R. 906, 943, the court rejected an effort to summarily dismiss a s.15 challenge by a man accused of a criminal code provision (since repealed) criminalizing sexual intercourse between a man of any age and a girl under the age of fourteen, noting that the argument “take the language in Turpin further than is justified.” Today, the law seems to focus particularly on whether the challenged classification is based on stereotype or disadvantage. See, e.g., Law v. Canada (Minister of Employment and Immigration), supra; Lovelace v. Ontario, [2000] 1 S.C.R. 950 (upholding Casino-management agreement between Ontario and First Nation communities that were registered as bands under the Indian Act, because “an almost precise correspondence between the casino project and the needs and circumstances of the [registered] First Nation bands” meant that landless non-registered bands suffered no further disadvantage and program was “less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society.”)

The Supreme Court of Canada has also carefully used its own judgment in identifying the relevant “comparator” group to determine if challenged legislation constitutes substantive discrimination. For example, in MINISTER OF HUMAN RESOURCES DEVELOPMENT v. HODGE, [2004] 3 S.C.R. 357, the Court reversed lower tribunals’ invalidation of a provision of the Canada Pension Plan that denied survivor benefits to those who had been a common law spouse but at the time of death were separated from their former partner. The claimant asserted that the relevant ‘comparator group’ was separated married spouses (who did receive benefits if widowed). The Court held that it was for the court, not the claimant, to determine the relevant ‘comparator group’ and in this case it was divorced spouses, who did not receive benefits. See also Attorney General (B.C.) v. Auton, [2004] 3 S.C.R. 657 (refusal of BC public health plan to cover innovative treatment for autistic children not discrimination on the
basis of disability, absent evidence that refusal differed from government policy toward other comparable, novel therapies for non-disabled persons or persons with different types of disabilities).

Although not articulated in the same way, the Supreme Court of Canada seems to be adopting an approach similar to that expressed by the U.S. Supreme Court in Vance v. Bradley, supra. Legislative classifications that adversely affect disadvantaged groups and that are based on stereotype are those that require careful judicial scrutiny. Where legislation adversely affects a group not subject to disadvantage, or classifies in a tailored way that is not based on stereotype, then the political process can be relied upon to remedy any unfairness.

D. What constitutes close* judicial scrutiny

When close scrutiny is justified, courts in both countries use similar standards. Both countries require (1) a strong justification for the classification and that the classification not be (2) based on pretext; (3) based on stereotypes; or (4) significantly overbroad or underinclusive. Two examples follow.

UNITED STATES v. VIRGINIA

SUPREME COURT OF THE UNITED STATES
518 U.S. 515; 116 S. Ct. 2264; 135 L.Ed. 2d 735 (1996)

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

I

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an adversative method modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

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* The term “close judicial scrutiny” is used for clarity in the comparative effort. As detailed below, all Canadian classifications found to substantively discriminate on analogous or enumerated grounds are considered to be violations of s.15 and justifications are considered under s.1, as elaborated in the Oakes test, which is detailed in Chapter Two, supra. Some U.S. classifications not analyzed under the “rational basis test” explained above are subject to what courts have called “strict scrutiny,” while others are subject to “intermediate scrutiny.” The differences between those two standards, detailed in Rotunda & Nowak §18.3, is beyond the scope of these comparative materials.
II
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C

[The opinion describes an alternative “parallel” program for women, a leadership institute that would share VMI’s mission of producing “citizen-soldiers” but would be located at Mary Baldwin College, a private liberal arts school for women. Justice Ginsburg noted that Mary Baldwin students average 100 points lower on the SAT, their faculty is lower-paid and has fewer Ph.Ds, and offers no degrees in sciences and engineering, and even after state and VMI contributions, would have an endowment a fraction of VMI’s size.]

IV

We note, once again, the core instruction of this Court's pathmarking decisions in J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127, 136-137, 128 L. Ed. 2d 89, 114 S. Ct. 1419, and n. 6 (1994), and Mississippi Univ. for Women, 458 U.S.[718, 724 (1982)]: Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." Frontiero v. Richardson, 411 U.S. 677, 684, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. Id., at 685. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. See, e. g., Goesaert v. Cleary, 335 U.S. 464, 467, 93 L. Ed. 163, 69 S. Ct. 198 (1948) (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females -- except for wives and daughters of male tavern owners; Court would not "give ear" to the contention that "an unchivalrous desire of male bartenders to . . . monopolize the calling" prompted the legislation).

***

Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-Reed decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). See J. E. B., 511 U.S. at 152 (KENNEDY, J., concurring in judgment) (case law evolving since 1971 "reveal[s] a strong presumption that gender classifications are invalid"). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). Physical differences between men and women, however, are enduring: "The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." Ballard v. United States, 329 U.S. 187, 193, 91 L. Ed. 181, 67 S. Ct. 261 (1946).

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an
individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano v. Webster*, 430 U.S. 313, 320, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977) (per curiam), to "promote equal employment opportunity," see *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289, 93 L. Ed. 2d 613, 107 S. Ct. 683 (1987), to advance full development of the talent and capacities of our Nation's people.7 But such classifications may not be used, as they once were, see *Goesaert*, 335 U.S. at 467, to create or perpetuate the legal, social, and economic inferiority of women.

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**V**

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**A**

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

***

Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. [Here, Justice Ginsburg recounted a legacy of educational discrimination against women, noting that women were only admitted to the flagship University of Virginia in 1972 after a bitter struggle.]

In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.'" No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." A purpose genuinely to advance an array of educational options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan -- a plan to "afford a unique educational benefit only to males." However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not equal protection.

**B**

Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. *** Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminate the very aspects of [the] program that distinguish [VMI] from . . . other

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7 Several amici have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools "to dissipate, rather than perpetuate, traditional gender classifications." See Brief for Twenty-six Private Women's Colleges as Amici Curiae 5. We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique," see 766 F. Supp., at 1413, 1432; 976 F. 2d, at 892, an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college. Cf. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720, n. 1, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982) ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.").
institutions of higher education in Virginia."

* * *

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based developmental differences." These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." For example, "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere." "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception."

The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in Reed v. Reed, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971), we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. See O'Connor, Portia's Progress, 66 N. Y. U. L. Rev. 1546, 1551 (1991). State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." Mississippi Univ. for Women, 458 U.S. at 725; see J. E. B., 511 U.S. at 139, n. 11 (equal protection principles, as applied to gender classifications, mean state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination").

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[Justice Ginsburg observed that VMI’s argument was “a prediction hardly different” from those “once routinely used to deny rights or opportunities.” For example, she noted that a 1925 report counseled against admission of women to Columbia Law School (Justice Ginsburg’s alma mater) because “then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!” The Nation, Feb. 18, 1925, p. 173. Similar forecasts preceded admission of women to federal military academies and medical schools. She also noted that VMI successfully managed another notable change – the 1968 admission of African American cadets.]

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VII

* * *

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI’s story continued as our comprehension of "We the People" expanded. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

JUSTICE THOMAS took no part in the consideration or decision of this case.

CHIEF JUSTICE REHNQUIST, concurring in the judgment. [The Chief Justice wrote that it was “unfortunate” for the Court to change prior formulations of the test for sex-based discrimination by demanding an “exceedingly persuasive justification,” but under other precedents requiring that gender classifications serve “important governmental interests” and by “substantially related” to those objectives, he found that Virginia’s claim to promote diversity in educational opportunity was “problematic” because the diversity benefitted only one sex. He also demurred as to whether admitting women to VMI was the only appropriate remedy, suggesting that Virginia might constitutionally comply by offering a women-only institution with strengths in areas demanded by women.]

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JUSTICE SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closedminded they were -- as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy -- so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States -- the old one -- takes no sides in this educational debate, I dissent.

I

***

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede -- and indeed ought to be crafted so as to reflect -- those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." Rutan v. Republican Party of Ill., 497 U.S. 62, 95, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990) (SCALIA, J., dissenting). The same applies, mutatis mutandis, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.

The all-male constitution of VMI comes squarely within such a governing tradition.***

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II

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The Court's intimations are particularly out of place because it is perfectly clear that, if the question
of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. ***

It is hard to consider women a "discrete and insular minority" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. Moreover, a long list of legislation proves the proposition false. See, e. g., Equal Pay Act of 1963, 29 U.S.C. § 206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; Women's Business Ownership Act of 1988, Pub. L. 100-533, 102 Stat. 2689; Violence Against Women Act of 1994, Pub. L. 103-322, Title IV, 108 Stat. 1902.

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IV

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Justice Brandeis said it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 (1932) (dissenting opinion). But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "more perfect Union," ante, (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide. As today's disposition, and others this single Term, show, this places it beyond the power of a "single courageous State," not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. The sphere of self-government reserved to the people of the Republic is progressively narrowed.

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M. v. H.

SUPREME COURT OF CANADA

CORY AND IACOBUCCI JJ. (LAMER C.J.C., L'HEUREUX-DUBE, MCLACHLIN AND BINNIE JJ. CONCURRING):--

I. Introduction and Overview

[Ontario’s Family Law Act creates special support obligations toward one’s spouse. In Part II, the statute sets forth a variety of rights and responsibilities of married couples to each other. In addition, Part III of the Act provides spousal and child support obligations applicable both to married couples as well as to “a man and woman who are not married to each other and have cohabited” either for three continuous years or “in a relationship of some permanence, if they are the natural or adoptive parents of a child.” This litigation was brought by M., a woman who had cohabited with another woman, H., for almost a decade. She alleged that the distinction between same-sex and opposite-sex conjugal relationships violated s.15(1) of the Charter.]

[3] The crux of the issue is that this differential treatment discriminates in a substantive sense by violating the human dignity of individuals in same-sex relationships. As Law v. Canada (Minister of Employment and Immigration) [reported at 170 D.L.R. (4th) 1], established, the inquiry into substantive discrimination is to be undertaken in a purposive and contextual manner. In the present appeal, several factors are important to consider. First, individuals in same-sex relationships face significant pre-existing disadvantage and vulnerability, which is exacerbated by the impugned
legislation. Second, the legislation at issue fails to take into account the claimant's actual situation. Third, there is no compelling argument that the ameliorative purpose of the legislation does anything to lessen the charge of discrimination in this case. Fourth, the nature of the interest affected is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. The exclusion of same-sex partners from the benefits of the spousal support scheme implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances. Taking these factors into account, it is clear that the human dignity of individuals in same-sex relationships is violated by the definition of "spouse" in s. 29 of the FLA.

[4] This infringement is not justified under s. 1 of the Charter because there is no rational connection between the objectives of the spousal support provisions and the means chosen to further this objective. The objectives were accurately identified by Charron J.A., in the court below, as providing for the equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down, and alleviating the burden on the public purse to provide for dependent spouses. Neither of these objectives is furthered by the exclusion of individuals in same-sex couples from the spousal support regime. If anything, these goals are undermined by this exclusion.

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V. Analysis

B. Does s. 29 of the FLA Infringe s. 15(1) of the Charter?

[The Court emphasized that, although “women in common law relationships often tended to become financially dependent on their male partners because they raised their children and because of their unequal earning power,” the “legislature drafted s. 29 to allow either a man or a woman to apply for support, thereby recognizing that financial dependence can arise in an intimate relationship in a context entirely unrelated either to child-rearing or to any gender-based discrimination existing in our society.” The Court also emphasized that “the special situation of financial dependence potentially created by procreation is specifically addressed in s. 29(b)” concerning child support, while this appeal only relates to what was traditionally called alimony under s. 29(a), which the Court found to be “aimed at remedying situations of dependence in intimate relationships without imposing any limitation relating to the circumstances that may give rise to that dependence.”]

[The Court found facially differential treatment because members “of same-sex couples are denied access to this system entirely on the basis of their sexual orientation.”]

[Next, the Court re-affirmed its conclusion that sexual orientation is an analogous ground.] In addition, a majority of this Court explicitly recognized that gays, lesbians and bisexuals, "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage" (at para. 175 per Cory J.; at para. 89 per L'Heureux-Dube J.).

[Applying the Law factors, the Court concluded that --

• “there is significant pre-existing disadvantage and vulnerability, and these circumstances are exacerbated by the impugned legislation” resulting in the denial of “a benefit regarding an important aspect of life in today's society” that “may impose a financial burden on persons in the position of the claimant, contribut[ing] to the general vulnerability experienced by individuals in same-sex relationships.”

• there was a lack of correspondence between the same-sex/opposite-sex classification and “the actual need, capacity, or circumstances of the claimant or others.”

• although the challenged provisions had an ameliorative purpose, excluding same-sex couples did not and “Underinclusive ameliorative legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination: see Vriend, [v. Alberta, [1998] 1 S.C.R. 483, 156 D.L.R. (4th) 385], at paras. 94-104, per Cory J.”]
[72] A fourth contextual factor specifically adverted to by Iacobucci J. in Law, at para. 74, was the nature of the interest affected by the impugned legislation. Drawing upon the reasons of L’Heureux-Dube J. in Egan, supra, Iacobucci J. stated that the discriminatory calibre of differential treatment cannot be fully appreciated without considering whether the distinction in question restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group. In the present case, the interest protected by s. 29 of the FLA is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. Members of same-sex couples are entirely ignored by the statute, notwithstanding the undeniable importance to them of the benefits accorded by the statute.

[73] The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of s. 29 of the FLA promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. As the intervener EGALE submitted, such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.

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C. Is Section 29 of the FLA Justified Under Section 1 of the Charter?

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3. Pressing and Substantial Objective

[Justice Iacobucci found that the best description of the objective of the current version of the FLA is provided by the Ontario Law Reform Commission ("OLRC") – “to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down.” Although the legislature recognized that married women tend to become economically dependent upon their partners owing to the traditional division of labour between husbands and wives, the 1978 FLRA abandoned a statutory spousal support regime under which only a wife could oblige her husband to pay support in favour of one which imposed mutual support obligations on both men and women. Indeed, “the thrust of the OLRC's 1975 remarks which preceded the new legislation emphasize the importance of a gender-neutral scheme.”]

[The opinion noted that the statute] is silent with respect to the economic vulnerability of heterosexual women, their tendency to take on primary responsibility for parenting, the greater earning capacity of men, and systemic sexual inequality. In the face of this clearly gender-neutral scheme, the fact that a significant majority of the spousal support claimants are women does not, in my view, establish that the goal of Part III of the FLA is to address the special needs of women in opposite-sex relationships.

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4. Proportionality Analysis

(a) Rational Connection

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[110] Although there is evidence to suggest that same-sex relationships are not typically characterized by the same economic and other inequalities which affect opposite-sex relationships (see, e.g., M.S. Schneider, "The Relationships of Cohabitng Lesbian and Heterosexual Couples: A Comparison", Psychology of Women Quarterly, 10 (1986), 234-239, at p. 237, and J.M. Lynhe and
M.E. Reilly, "Role Relationships: Lesbian Perspectives", Journal of Homosexuality, 12(2) (Winter 1985/86), 53-69, at pp. 53-54, 66), this does not, in my mind, explain why the right to apply for support is limited to heterosexuals. As submitted by LEAF, the infrequency with which members of same-sex relationships find themselves in circumstances resembling those of many heterosexual women is no different from heterosexual men who, notwithstanding that they tend to benefit from the gender-based division of labour and inequality of earning power, have as much right to apply for support as their female partners.

[113] Even if I were to accept that the object of the legislation is the protection of children, I would have to conclude that the spousal support provisions in Part III of the FLA are simultaneously underinclusive and overinclusive. They are overinclusive because members of opposite-sex couples are entitled to apply for spousal support irrespective of whether or not they are parents and regardless of their reproductive capabilities or desires. Thus, if the legislation was meant to protect children, it would be incongruous that childless opposite-sex couples were included among those eligible to apply for and to receive the support in question.

[114] The impugned provisions are also underinclusive. An increasing percentage of children are being conceived and raised by lesbian and gay couples as a result of adoption, surrogacy and donor insemination. Although their numbers are still fairly small, it seems to me that the goal of protecting children cannot be but incompletely achieved by denying some children the benefits that flow from a spousal support award merely because their parents were in a same-sex relationship. As Cory J. and I noted in Egan, supra, at para. 191, "[i]f there is an intention to ameliorate the position of a group, it cannot be considered entirely rational to assist only a portion of that group".

(b) Minimal Impairment

[Here, the Court rejected the claim that the existence of alternative remedies is available where economic dependence occurs in same-sex relationships. The court analyzed and demonstrated the inadequacies of contract or constructive trust doctrines. The Court observed that] if these remedies were considered satisfactory there would have been no need for the spousal support regime, or its extension to unmarried, opposite-sex couples. It must also be remembered that the exclusion of same-sex partners from this support regime does not simply deny them a certain benefit, but does so in a manner that violates their right to be given equal concern and respect by the government. The alternative regimes just outlined do not address the fact that exclusion from the statutory scheme has moral and societal implications beyond economic ones, as discussed by my colleague, Cory J., at paras. 71-72. Therefore the existence of these remedies fails to minimize sufficiently the denial of same-sex partners' constitutionally guaranteed equality rights.

[128] In addition, the deferential approach is not warranted, as submitted by the appellant, on the basis that Part III of the FLA and s. 29 thereof are steps in an incremental process of reform of spousal support. As this Court noted in Vriend, supra, government incrementalism, or the notion that government ought to be accorded time to amend discriminatory legislation, is generally an inappropriate justification for Charter violations. However, even if I were to accept that such a justification might be suitable in the present case, it seems to me that its application to the facts of the case at bar cannot legitimize the continued exclusion of same-sex couples from the FLA's spousal support regime.

[130] Moreover, in contrast to Egan, supra, where Sopinka J. relied in part on incrementalism in upholding [discriminatory pension] legislation under s. 1 of the Charter, there is no concern regarding the financial implications of extending benefits to gay men and lesbians in the case at bar. As already pointed out, rather than increasing the strain on the public coffers, the extension will likely go some way toward alleviating those concerns because same-sex couples as a group will be less reliant on government welfare if the support scheme is available to them. Thus, I conclude that government incrementalism cannot constitute a reason to show deference to the legislature in the present case.
VI. Remedy

[The Court’s discussion of remedy is omitted. In the court below, the words "a man and woman" were read out of the definition of "spouse" in s. 29 of the FLA and replaced with the words "two persons". The application of the order was suspended for a period of one year. The Supreme Court concluded that this result wreaked too much havoc with the overall statutory scheme. Thus, the Court ruled that severing s. 29 of the Act such that it alone is declared of no force or effect is the most appropriate remedy in the present case. This remedy should be temporarily suspended for a period of six months to give the Ontario provincial legislature time to re-enact non-discriminatory legislation.]

[The basic approach in Canadian and American cases concerning the issue of remedy when a statute is under-inclusive appears to be similar. The Court considers a variety of circumstances that, in sum, attempt to determine whether the legislature, once apprised of the inability to discriminate, would prefer to provide benefits to all or deny them to all. The leading cases are Schacter v. Canada, [1992] 2 S.C.R. 679 and Califano v. Westcott, 443 U.S. 76, 99 S.Ct. 2655 (1979).]

GONTHIER J. (DISSENTING):

[The dissent found that the purpose of the statute was to] recognize the specific social function of opposite-sex couples in society, and to address a dynamic of dependence unique to both men and women in opposite-sex couples that flows from three basic realities. First, this dynamic of dependence relates to the biological reality of the opposite-sex relationship and its unique potential for giving birth to children and its being the primary forum for raising them. Second, this dynamic relates to a unique form of dependence that is unrelated to children but is specific to heterosexual relationships. And third, this dynamic of dependence is particularly acute for women in opposite-sex relationships, who suffer from pre-existing economic disadvantage as compared with men. Providing a benefit (and concomitantly imposing a burden) on a group that uniquely possesses this social function, biological reality and economic disadvantage, in my opinion, is not discriminatory. Although the legislature is free to extend this benefit to others who do not possess these characteristics, the Constitution does not impose such a duty on that sovereign body.

[Gonthier, J., began by noting that under the common law individuals are expected to provide for themselves, and governmental intervention is generally limited to assisting those in need, not in mandating assistance from third parties. Family law was always an exception, although characterized historically by discrimination against women. In general, wives’ dependence on their husbands, and dealing with this dependence in the case of marital breakdown, remains a serious problem.]

[The dissent complained that the majority “ascribes to the impugned legislation a purpose that bears little relation to the actual statute, its structure, or its history. It comes as no surprise that, having ascribed to the FLA a purpose that its language does not bear, my colleague then strikes down the legislation for failing to fulfill a purpose never intended by the Legislative Assembly.” In his view, the gender-neutral language chosen because of “the tenor of the times” did not detract from the expectation that the vast majority of claimants would be women and that the statute was enacted because of the unequal economic dependence of women on husbands. Focusing on the key role of stereotype in s. 15 analysis, he noted that a “description is unlikely to be a stereotype when it is an accurate account of the characteristic being described.”]

* * *

[237] Even in the absence of children, women in cohabiting opposite-sex relationships often take on increased domestic responsibilities which limit their prospects for outside employment, precisely because their lower average earnings make this an efficient division of labour for the couple. Again, gender roles are both a cause and effect of this division of labour. If the relationship breaks down, the woman is usually left in a worse situation, probably with impaired earning capacity and limited employment opportunities. The economic disadvantages faced by women upon the breakdown of opposite-sex relationships, as indicated by reduced earning capacity, more fragile employment prospects, and underinvestment in education and training, occur for the very reason that the woman
did not anticipate that she would have to support herself. She engaged in a division of labour with her former partner in the expectation that such an arrangement would yield a higher joint economic position.

[243] The evidence before us also indicates that partners in a lesbian couple are more likely to each pursue a career and to work outside the home than are partners in an opposite-sex couple: ibid., at pp. 183-84; N. S. Eldridge and L. A. Gilbert, "Correlates of Relationship Satisfaction in Lesbian Couples", Psychology of Women Quarterly, 14 (1990), 43-62, at p. 44. As members of same-sex couples are, obviously, of the same sex, they are more likely than members of opposite-sex couples to earn similar incomes, because no male-female income differential is present. For the same reason, the gendered division of domestic and child-care responsibilities that continues to characterize opposite-sex relationships simply has no purchase in same-sex relationships.

[244] Undoubtedly, in some same-sex relationships, one partner may become financially dependent on the other. This may happen for any number of reasons, including explicit or implicit agreement, differences in age, health, or education, and so on. However, no pattern of dependence emerges. Put another way, dependence in same-sex relationships is not systemic: it does not exhibit the gendered dependency characteristic of many cohabiting opposite-sex relationships. Due to the high degree of equality observed in lesbian relationships, very few women were dependent on their same-sex partners for financial support, and even differences in income between same-sex partners did not affect women's perception of their financial dependence on one another in same-sex relationships.

[245] Mere need in an individual case, unrelated to systemic factors, is, in my view, insufficient to render the FLA's scheme constitutionally underinclusive. This is especially true because the scheme involves, in counterpart to an access to support, a restriction on freedom and a burden. Taken as a group, same-sex relationships simply do not resemble opposite-sex relationships on this fundamental point. Consequently, I see no reason why the Charter requires the legislature to treat them identically with regard to it. The FLA scheme was intended to address need of a particular kind, and does so. There is no evidence that that particular need exists to any significant degree outside of long-term opposite-sex relationships. Consequently, although the distinction drawn by s. 29 of the FLA undoubtedly denies a benefit to individuals in same-sex couples, and the distinction may be seen, in its effects, to be drawn on the basis of sexual orientation, no discrimination arises, because no stereotypical assumptions motivate the distinction. On the contrary, the legislation takes into account the claimant's actual need, capacity and circumstances as compared with individuals in opposite-sex couples and by doing so it does not violate human dignity.

[249] I pause to underline that nothing in my reasons should be taken as suggesting that same-sex couples are incapable of forming enduring relationships of love and support, nor do I wish to imply that individuals living in same-sex relationships are less deserving of respect. To this end, I reiterate the position that the Court recently adopted in Vriend, supra, where I concurred with the majority reasons of Cory and Iacobucci JJ., that discrimination on the basis of sexual orientation is abhorrent and corrosive of our values. However, the difference between this case and Vriend is that in this case the Legislative Assembly has not discriminated on the basis of arbitrary distinctions or stereotypes. In Vriend, the stated purpose of the legislation was to address comprehensively discrimination in several contexts such as employment and housing. By failing to include sexual orientation as one of the protected grounds, the legislation was thus found to be "underinclusive", having regard to its stated purpose. Unlike those listed in the legislation, homosexuals were denied access to the remedial procedures specifically designed to redress discrimination. Whereas in Vriend, the target of the legislation was those individuals who suffered discrimination in these contexts, the legislation here is entirely different. Here, we are asked whether the legislature violates the Charter by imposing a special support regime on individuals who are in a particular type of relationship that fulfills a special social function, and has special needs, without extending that support regime to other types of relationships which do not, as a group, fulfil a similar role or exhibit those needs. Considering all of the contextual factors, I believe that the question must be answered in the negative. While discrimination on the basis of sexual orientation is abhorrent, mere distinction that takes into account
the actual circumstances of the claimant and comparison group in a manner which does not violate the claimant's human dignity is not.

[279] MAJOR J.:-- Although I agree with much of the reasoning of my colleagues and their result, I reach the same result on a narrow basis. Justice Major found the legislative purpose was to relieve financial hardship for those who had become financially dependent in the course of a lengthy conjugal relationship, and found no justification for excluding those emerging from same-sex relationships from legislative protection.

[285] BASTARACHE J.:--

[322] Determining legislative purpose is theoretically and practically a difficult task. As Professor Hogg has remarked (Constitutional Law of Canada (looseleaf ed.), vol. 2, at p. 35-17):

At the practical level, the objective of the legislators in enacting the challenged law may be unknown. To be sure, the courts will now willingly receive the legislative history of the law, but this is often silent or unclear with respect to the provision under attack. Courts have not been troubled by this difficulty as much as one might expect. They usually assume that the statute itself reveals its objective, and they may pronounce confidently on the point even if there is no supporting evidence.

Despite these obstacles, the search for legislative intention has been laid as the cornerstone of the s. 1 analysis. It has even been suggested that "how the Court characterizes the objective of the impugned legislation essentially determines whether legislation should be struck down or upheld" (E. P. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" in G. A. Beaudoin and E. Mendes, The Canadian Charter of Rights and Freedoms, 3rd ed. (1996), at p. 3-14). Given the particular difficulties surrounding the determination of the legislative purpose in this case, it may be necessary at this point to sound some of the theoretical underpinnings of this approach, and to define precisely the nature of the task.

[323] The search for legislative purpose as a method of statutory interpretation is not a novel concept. In Heydon's Case (1584), 3 Co. Rep. 7a, 76 E.R. 637, Lord Coke reports, at p. 638:

And it was resolved by them, that for the sure and true interpretation of all statutes in general . . . four things are to be discerned and considered: --

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief . . . according to the true intent of the makers of the Act . . . [Emphasis added.]

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In Justice Bastarache’s view, the purpose of Part III of the FLA was “to impose support obligations upon partners in relationships in which they have consciously signalled a desire to be so bound (i.e., through marriage); and upon those partners in relationships of sufficient duration to indicate permanence and seriousness, and which involve the assumption of household responsibilities, or other career or financial sacrifices, by one partner for the common benefit of the couple, and which cause or enhance an economic disparity between the partners.” Under this view, the distinction was not supported.]
Another example of legislation surviving active judicial scrutiny is Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.), [2004] 3 S.C.R. 381. The Court upheld a provision of the province’s Public Sector Restraint Act, passed in 1991 to respond to an unprecedented fiscal crisis caused by a $130 million reduction in federal transfer payments at a time when the traditionally-poor province was still reeling from the dramatic loss of much of the North Atlantic fishery due to international over-fishing. The challenged provision erased an agreement with public sector employees to spend $24 million over three years to provide pay equity for workers in traditionally-female job categories.

The Court first determined that the effect of the challenged law was to affirm a policy of gender discrimination which the provincial government had itself denounced three years previously. The Act draws a clear formal distinction between those who were entitled to benefit from pay equity, and everyone else. The appropriate comparator group consists of men in male-dominated classifications performing work of equal value. That group was not similarly targeted. They were paid according to their contractual entitlement. The adverse impact of the legislation therefore fell disproportionately on women, who were already at a disadvantage relative to male-dominated jobs as they earned less money.

The Court thus distinguished this case from Ferrel v. Ontario (Attorney General) (1998), 42 O.R. (3d) 97 (C.A.), which upheld the authority of the Conservative Ontario government to repeal an affirmative action provision in the Employment Equity Act, 1993, put in place by the previous NDP government, on the ground that the repealed statute went beyond what was constitutionally required. Both the prior policy of pay inequity and the 1991 repealer “perpetuated and reinforced the idea that women could be paid less for no reason other than the fact they are women.”

However, the Court concluded that the legislation was a reasonable limit under section 1. First, the Court found that the government was indeed in the midst of a fiscal crisis. Second, the Court limited language in a prior opinion that suggested that financial purposes “can never” serve as a justification under s.1. While “normal budgetary considerations” could always justify delays in Charter compliance, and hence could not be invoked, the legislation here, the Court found, avoided the layoff of 1,300 permanent employees and 700 part-time and seasonal workers, and avoided a costly loss of credit rating. Noting that the legislation reflected the government’s role as mediating between claims of many stakeholders, the Court noted that “a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures.

At the same time, the Court reaffirmed its active scrutiny, expressly rejecting the reasoning of the Newfoundland & Labrador Court of Appeal that the non-deferential scrutiny mandated by Oakes did not reflect a proper regard for separation of powers. The Court reasoned that legislatures generally think that their own work is reasonable, so section 1 would be superfluous if it did not contemplate an independent, non-deferential judicial review. And the minimal impairment test was justified by wondering “how a court could satisfy itself that a particular legislative limit is ‘reasonable’ if it is blinkered from considering whether other less limiting measures were available.”

E. Which Classifications Warrant Close Judicial Scrutiny?

The cases excerpted above fairly address this question. As Law v. Canada, supra, states, there is a three-step process the Supreme Court of Canada uses to make this determination. First, the court inquires as to whether the classification is based on a ground specified in the text of s. 15. Second, if the challenged classification is not based on an enumerated ground, the court inquires as to whether
the distinction is based on an analogous ground. Immutable traits are considered analogous. In addition, traits that cannot be changed by the disadvantaged individual except at an “unacceptable personal cost” are also analogous. Third, the court looks to see whether the challenged classification constitutes a substantive discrimination.

American constitutional equality doctrine has proceeded along a different path. Strict scrutiny is appropriate both for laws or government activity that distinguishes among people based on certain “suspect” classifications, but also a “law that uses a classification that burdens or impairs the ability of only one class of persons who wished to exercise a fundamental constitutional right.” Nowak & Rotunda, §14.2(a). As noted in Chapter Two, in a series of decisions in the 1970s the U.S. Supreme Court rejected the argument that social and economic rights should be given special constitutional protection. SAN ANTONIO INDEPENDENT SCHOOL DIST. V. RODRIGUEZ, 411 U.S. 1, 93 S.Ct. 1278 (1973), first rejected the argument that statutes classifying on the basis of wealth must be justified as necessary to accomplish an important governmental interests. Discrimination against residents of tax-poor school districts, the majority reasoned, had “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.” Id. at 28. Nor was education a “fundamental right” for purposes of the Fourteenth Amendment. The Court held:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. Id. at 33.

Likewise, although differential treatment in the exercise of rights guaranteed in the Bill of Rights triggered close judicial scrutiny, in LINDSAY V. NORMET, 405 U.S. 56, 74, 92 S.Ct. 862 (1972), the court held that differential treatment in provision of benefits or with regard to social and economic needs, such as housing or education, did not. The Court held:

The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

The Court added that this result was necessary to avoid interference with state fiscal judgments, based on an acknowledgment that “the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.”

In Canada, these issues do not arise under s. 15. Classifications based on wealth, housing, or educational status are not “analogous” grounds under Andrews, supra. As discussed in Chapter Two, the Supreme Court of Canada rejected an invitation to expand s. 7 to cover rights to essential services necessary for “life, liberty, and security of the person” (although the Court did not forever
close the door on the idea"). In so holding, the Court did not explicitly invoke the limited competence of judges as their American colleagues have done. Rather, the Court focused specifically on textual concerns that s. 7 was designed primarily to protect procedural rights and meta-structural concerns (not rigidly borne out by other precedents) that the Charter primarily protects people against government (rather than requiring the government to affirmatively act on their behalf) and that economic and social rights of the sort advocated were deliberately omitted, along with freedom to contract and the right to property, from rights protected by the Charter.

In Australia, as we saw above, many forms of discrimination are prohibited by statute (sex, race, age, disability, and sexual conduct, among others). These prohibitions are largely ‘negative’; that is to say, they outlaw particular types of discriminatory conduct, rather than ‘positively’ guaranteeing socio-economic rights such as housing or health services. However, there are some laws containing ‘positive’ rights; State laws, for example, guarantee education to all children; and the Equal Opportunity for Women in the Workplace Act 1999 (Cth) – see above – requires employers (including private employers of more than 100 employees) to develop an equal employment opportunity program. In late 2008, the national government established an official ‘National Human Rights Consultation’. Its purpose is to inquire into the current protection of rights in Australia, to assess whether this is adequate, and to make recommendations, where necessary, for new or enhanced forms of protection. One of the major issues in the public debate generated by the Consultation is whether socio-economic rights should be guaranteed. The Committee conducting this Consultation will report at the end of September 2009.

F. “Colourable” justifications

Canadian courts have used “colourability” for years to invalidate legislation where the asserted legitimate basis for the law was found to be pretextual. Initially, this took place with regard to federalism issues under the BNA Act. For example, the Margarine Reference, supra, invalidated the criminalization of intra-provincial sale of margarine, because Parliament’s real concern was not one of morality or public safety (the realm of the federal criminal law power) but economic advantage for dairy farmers (the realm of the provincial trade & commerce power). Under the Charter, to justify an infringement of protected rights under the Oakes test, Canadian courts have used the “rational connection” and “minimal impairment” inquiries to reject justifications that in theory may be pressing but substantial but are not really the legislature’s design.

When American courts engage in close judicial scrutiny, colourability (or pretext, as the term would be used in the U.S.) clearly plays a rule, as the Court made clear in United States v. Virginia, supra, in rejecting VMI’s claim that the state’s goal in maintaining an all-male school was to promote diversity in single-sex education. The role for colourability analysis when close judicial scrutiny is not warranted has recently become a more perplexing question. As Rotunda and Nowak observe, §18.3(b), in the three decades after the end of the Lochner era, “it appeared that any classification would be upheld if it was subjected only to the rational relationship test.” And Carolene Products, supra, makes clear that under this deferential test courts were not going to sit in judgement as to whether Congress was really concerned about the health effects of filled milk or were simply trying to protect dairy farmers. However, Rotunda & Nowak’s comprehensive analysis identifies cases governing at least three different non-suspect classifications where the Court has recently invalidated statutes despite its refusal to acknowledge that it was engaging in close judicial scrutiny. The Court has on several occasions struck down statutes where it determined that the only state

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+ In declining to be as definitive as the U.S. Supreme Court, the Court in Gosselin invoked the venerable precedent that the Canadian Constitution is “a living tree capable of growth and expansion within its natural limits.” Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.), at p. 136.
interest is one of favoring long-time residents or local businesses. See, e.g., Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676 (1985) (higher tax on out-of-state insurance companies); Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465 (1985) (sales tax exemption for car purchases only for buyers who were residents of Vermont at time of purchase); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862 (1985) (property tax exemption available only to those in residents prior to certain date); Zabel v. Williams, 457 U.S. 55, 102 S.Ct. 2309 (1982) (retroactive distribution of state money to residents based on length of residency). In another well-known case, the Court invalidated a city zoning ordinance that prohibited operation of a group home for the mentally retarded in a residential area while permitting other group homes (like fraternities). City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249 (1985). In two more recent cases, the Court concluded that the challenged statutes were designed solely out of animus directed at gay men and lesbians. And in Lawrence v. Texas, 123 S.Ct. 2472 (2003), the Court struck down a state sodomy law prohibiting specified sexual practices between persons of the same sex, again noting the absence of any legitimate state interest other than antipathy toward homosexuals. In each case, the Court declared that the statute lacked a rational basis.

Although these decisions may superficially appear to reflect an erosion in the Carolene Products two-tier approach that has dominated post-Lochner jurisprudence, on reflection they appear to be better explained as careful exceptions that are faithful to Carolene Products reasoning. As specifically articulated in Vance v. Bradley, supra, the Court assumes that unfair or improvident discrimination against slaughterhouse operators, filled milk sellers, methadone users, older police or foreign service officers, residents of low-wage school districts, or poor tenants are likely to be corrected by the political process. Non-residents, the mentally retarded, and gays may not meet the requisite qualifications to officially merit strict scrutiny, but the justices are apparently not sufficiently trusting of ordinary politics to completely foreclose closer scrutiny in these cases, at least to the extent of assuring the existence of a real, legitimate, and non-pretextual justification for any disadvantaging legislation.

A related case with potentially farther-reaching implications is Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620 (1996), where the Court invalidated a state law enacted by voter initiative that prevented municipalities from proscribing discrimination on the basis of sexual orientation. Justice Kennedy began by quoting from Justice John Marshall Harlan’s famous dissent in Plessy v. Ferguson (discussed more extensively in Chapter Five) that “the constitution ‘neither knows nor tolerates classes among citizens.’” He emphasized that the state law did not simply preempt particular local statutes. Rather, it preserved broad powers for local governments in other areas, including the authority to prevent discrimination against other classes of people. In contrast, gay men and lesbians “by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.” Id. at 627.

The Court held that precedents calling for active judicial scrutiny did not apply, but that the challenged initiative failed to pass the deferential standard requiring the court to “uphold the legislative classification so long as it bears a rational relation to some legitimate end.” The majority reached this conclusion by finding that “its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” Id. at 631-32. The initiative, by “making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.” Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented, arguing that
The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "'bare . . . desire to harm'" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.

_id_. at 636.

_Romer_ has significant implications because, while obviously not requiring that laws adversely treating gay men and lesbians be justified and necessary for a compelling state interest, in does require some degree of closer judicial scrutiny to determine whether any purported state justification is not a pretext for unadulterated homophobic animus.

G. “Intentional Discrimination” or “Adverse Effects”

Canadian and American courts have taken sharply different paths in this regard, as the following two cases demonstrate.

**PERSONNEL ADMINISTRATOR OF MASSACHUSETTS v. FEENEY**

SUPREME COURT OF THE UNITED STATES

442 U.S. 256; 99 S. Ct. 2282; 60 L. Ed.2d 870 (1979)

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined.

This case presents a challenge to the constitutionality of the Massachusetts veterans' preference statute, Mass. Gen. Laws Ann., ch. 31, § 23, on the ground that it discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment. Under ch. 31, § 23, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The preference operates overwhelmingly to the advantage of males.

The appellee Helen B. Feeney is not a veteran. She brought this action pursuant to 42 U. S. C. § 1983, alleging that the absolute-preference formula established in ch. 31, § 23, inevitably operates to exclude women from consideration for the best Massachusetts civil service jobs and thus unconstitutionally denies them the equal protection of the laws.13 The three-judge District Court agreed, one judge dissenting.

The District Court found that the absolute preference afforded by Massachusetts to veterans has a devastating impact upon the employment opportunities of women. Although it found that the goals of the preference were worthy and legitimate and that the legislation had not been enacted for the purpose of discriminating against women, the court reasoned that its exclusionary impact upon women was nonetheless so severe as to require the State to further its goals through a more limited form of preference. Finding that a more modest preference formula would readily accommodate the State's interest in aiding veterans, the court declared ch. 31, § 23, unconstitutional and enjoined its operation.

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13 No statutory claim was brought under Title VII of the Civil Rights Act of 1964 [which has been interpreted to bar employment practices that have a disproportionate impact on race or sex unless justified by “business necessity”]. Section 712 of the Act, 42 U. S. C. § 2000e-11, provides that “[n]othing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans.” The parties have evidently assumed that this provision precludes a Title VII challenge.
Upon an appeal taken by the Attorney General of Massachusetts, this Court vacated the judgment and remanded the case for further consideration in light of our intervening decision in Washington v. Davis, 426 U.S. 229. Massachusetts v. Feeney, 434 U.S. 884. The Davis case held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race. 426 U.S., at 238-244.

***

I

[The Court noted the widespread practice of providing hiring preferences to veterans, although Massachusetts' preference is particularly generous. It applies to all veterans, male or female. However, at time of suit over 98% of veterans were male.]

II

***

A

The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification. When some other independent right is not at stake, see, e. g., Shapiro v. Thompson, 394 U.S. 618, [involving the right to travel] and when there is no "reason to infer antipathy," Vance v. Bradley, 440 U.S. 93, 97, it is presumed that "even improvident decisions will eventually be rectified by the democratic process . . . ." Ibid. Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. Brown v. Board of Education, 347 U.S. 483; McLaughlin v. Florida, 379 U.S. 184. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. But, as was made clear in Washington v. Davis, 426 U.S. 229, and Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose. [Davis upheld a job-related employment test that white people passed in proportionately greater numbers than Negroes, for there had been no showing that racial discrimination entered into the establishment or formulation of the test. Arlington Heights upheld a zoning board decision that tended to perpetuate racially segregated housing patterns, since, apart from its effect, the board's decision was shown to be nothing more than an application of a constitutionally neutral zoning policy.]

Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives, Craig v. Boren, 429 U.S. 190, 197, and are in many settings unconstitutional. Although public employment is not a constitutional right, and the States have wide discretion in framing employee qualifications, these precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.

B

The cases of Washington v. Davis, supra, and Arlington Heights v. Metropolitan Housing Dev. Corp., supra, recognize that when a neutral law has a disparate impact upon a group that has historically
been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results. *** When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionally adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. ***

It is against this background of precedent that we consider the merits of the case before us.

III

A

[Ms. Feeney conceded that the veterans preference was neither established for the purpose of discriminating against women, nor was a pretext for gender discrimination; rather, the state created the preference for a legitimate and worthy purpose, although she argued the absolute preference went too far.]

If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral. See Washington v. Davis, 426 U.S., at 242; Arlington Heights v. Metropolitan Housing Dev. Corp., supra, at 266. But there can be but one answer to the question whether this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans. Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground. Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans -- male as well as female -- are placed at a disadvantage. Too many men are affected by ch. 31, § 23, to permit the inference that the statute is but a pretext for preferring men over women. ***

B

* * *

[The Court rejected the argument that the State had incorporated prior federal law discriminating against women in regard to military service. The concession that the discrimination was not intentional meant that the preference was not adopted with the intent to incorporate prior discrimination. Moreover, it is inconsistent with Feeney’s concession that some more modest veterans’ preference would be acceptable.] Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude.23 Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not. The District Court's conclusion that the absolute veterans' preference was not originally enacted or subsequently reaffirmed for the purpose of giving an advantage to males as such necessarily compels the conclusion that the State intended nothing more than to prefer "veterans." Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law. To reason that it was, by describing the preference as "inherently nonneutral" or "gender-biased," is merely to restate the fact of impact, not to answer the question of intent.

23 This is not to say that the degree of impact is irrelevant to the question of intent. But it is to say that a more modest preference, while it might well lessen impact and, as the State argues, might lessen the effectiveness of the statute in helping veterans, would not be any more or less "neutral" in the constitutional sense.
The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See United Jewish Organizations v. Carey, 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.25 Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE joins, concurring.

If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender based is the same as the question whether its adverse effects reflect invidious gender-based discrimination. However the question is phrased, for me the answer is largely provided by the fact that the number of males disadvantaged by Massachusetts' veterans' preference (1,867,000) is sufficiently large -- and sufficiently close to the number of disadvantaged females (2,954,000) -- to refute the claim that the rule was intended to benefit males as a class over females as a class.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

[The dissent found purposeful discrimination, and was not substantially related to a legitimate governmental objective. It notes that judges cannot ascertain the sole or dominant purpose behind a statute, because lawmakers frequently act for a variety of reasons. "Thus, the critical constitutional inquiry is not whether an illicit consideration was the primary or but-for cause of a decision, but rather whether it had an appreciable role in shaping a given legislative enactment." The key, citing Arlington Heights at 265-66, is "proof that a discriminatory purpose has been a motivating factor in the decision." In Marshall, J.'s view, where "the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme."

Clearly, that burden was not sustained here. The legislative history of the statute reflects the Commonwealth's patent appreciation of the impact the preference system would have on women, and an equally evident desire to mitigate that impact only with respect to certain traditionally female occupations. Until 1971, the statute and implementing civil service regulations exempted from operation of the preference any job requisitions "especially calling for women." 1954 Mass. Acts, ch. 627, § 5. See also 1896 Mass. Acts, ch. 517, § 6; 1919 Mass. Acts, ch. 150, § 2; 1945 Mass. Acts, ch. 725, § 2 (e); 1965 Mass. Acts, ch. 53; ante, at 266 nn. 13, 14. In practice, this exemption, coupled with the absolute preference for veterans, has created a gender-based civil service hierarchy, with women occupying low-grade clerical and secretarial jobs and men holding more responsible and remunerative positions. See 415 F.Supp., at 488; 451 F.Supp., at 148 n. 9.

25 This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of ch. 31, § 23, a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry -- made as it is under the Constitution -- an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.
Thus, for over 70 years, the Commonwealth has maintained, as an integral part of its veterans' preference system, an exemption relegating female civil service applicants to occupations traditionally filled by women. Such a statutory scheme both reflects and perpetuates precisely the kind of archaic assumptions about women's roles which we have previously held invalid. Particularly when viewed against the range of less discriminatory alternatives available to assist veterans [only four states have such a generous veterans preference], Massachusetts' choice of a formula that so severely restricts public employment opportunities for women cannot reasonably be thought gender-neutral. The Court's conclusion to the contrary -- that "nothing in the record" evinces a "collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service," ante, at 279 -- displays a singularly myopic view of the facts established below.2

ELDRIDGE v. BRITISH COLUMBIA (ATTORNEY GENERAL)

SUPREME COURT OF CANADA
[1997] 3 S.C.R. 624

[Before: Lamer C.J. and La Forest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.]

The judgment of the Court was delivered by

[1] LA FOREST J. -- This appeal raises the question whether a provincial government's failure to provide funding for sign language interpreters for deaf persons when they receive medical services violates s. 15(1) of the Canadian Charter of Rights and Freedoms. The appellants assert that, because of the communication barrier that exists between deaf persons and health care providers, they receive a lesser quality of medical services than hearing persons. The failure to pay for interpreters, they contend, infringes their right to equal benefit of the law without discrimination based on physical disability.

[2] Medical care in British Columbia is delivered through two primary mechanisms. Hospital services are funded by the government through the Hospital Insurance Act, which reimburses hospitals for the medically required services they provide to the public. Funding for medically required services delivered by doctors and other health care practitioners is provided by the province's Medical Services Plan, which is established and regulated by the [statute] now known as the Medicare Protection Act. Neither of these programs pays for sign language interpretation for the deaf.

***

[At trial, appellants presented testimony about their need for medical services and the difficulty in obtaining services without a sign language interpreter. The respondents presented evidence relating to the budgetary process of the Ministry of Health and the structure of the Medical Services Plan. Hospitals in British Columbia are funded through lump sum "global" payments that they are for the most part free to allocate as they see fit. They are rarely ordered by government to provide specific services. Under the Medicare Protection Act, all persons resident in British Columbia for three months are entitled to benefits including "medically required services."]

[The Court next noted that, as deaf persons, the appellants belong to an enumerated group under s. 15(1) -- the physically disabled.]

2 Although it is relevant that the preference statute also disadvantages a substantial group of men, it is equally pertinent that 47% of Massachusetts men over 18 are veterans, as compared to 0.8% of Massachusetts women. Given this disparity, and the indicia of intent noted supra, at 284-285, the absolute number of men denied preference cannot be dispositive, especially since they have not faced the barriers to achieving veteran status confronted by women.
It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; see generally M. David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years -- What Progress? What Prospects?" (1997), 7 N.J.C.L. 263. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms; see Sandra A. Goundry and Yvonne Peters, Litigating for Disability Equality Rights: The Promises and the Pitfalls (1994), at pp. 5-6. One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed; see Minister of Human Resources Development, Persons with Disabilities: A Supplementary Paper (1994), at pp. 3-4, and Statistics Canada, A Portrait of Persons with Disabilities (1995), at pp. 46-49.

This Court has consistently held that s. 15(1) of the Charter protects against [adverse effects] discrimination. In *Andrews*, supra, McIntyre J. found that facially neutral laws may be discriminatory. "It must be recognized at once", he commented, at p. 164, "... that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality". Section 15(1), the Court held, was intended to measure substantive, and not merely formal equality.

I note that in *Andrews*, McIntyre J. made it clear that the equality principles developed by the Court in human rights cases are equally applicable in s. 15(1) cases. ***

Adverse effects discrimination is especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled. This was recognized by the Chief Justice in his dissenting opinion in *Rodriguez*, supra, where he held that the law criminalizing assisted suicide violated s. 15(1) of the Charter by discriminating on the basis of physical disability. There, a majority of the Court determined, inter alia, that the law was saved by s. 1 of the Charter, assuming without deciding that it infringed s. 15(1). While I refrain from commenting on the correctness of the Chief Justice's conclusion on the application of s. 15(1) in that case, I endorse his general approach to the scope of that provision, which he set out as follows, at p. 549:

"Not only does s. 15(1) require the government to exercise greater caution in making express or
direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s. 1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons."

[65] The Court elaborated upon this principle in its recent decision in Eaton [v. Brant County Board of Education, [1997] 1 S.C.R. 241]. Although Eaton involved direct discrimination [the plaintiff, a disabled student, had been excluded from mainstream classes], Sopinka J. observed that in the case of disabled persons, it is often the failure to take into account the adverse effects of generally applicable laws that results in discrimination. [Unlike other forms of discrimination, Eaton held that discrimination against the disabled lies not in the attribution of untrue characteristics but rather “the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation.”]

[66] Unlike in Simpsons-Sears and Rodriguez, in the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone. It is on this basis that the trial judge and the majority of the Court of Appeal found that the failure to provide medically related sign language interpretation was not discriminatory. Their analyses presuppose that there is a categorical distinction to be made between state-imposed burdens and benefits, and that the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate.

[73] In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence. It has been suggested that s. 15(1) of the Charter does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality. *** Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner. In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons. ***

[74] The same principle has been applied by this Court in its interpretation of the equality provisions of provincial human rights legislation. In Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, the Court found that an employer's accident and sickness insurance plan, which disentitled pregnant women from receiving benefits for any reason during a certain period, discriminated on the basis of pregnancy and hence sex. In so holding, it resoundingly rejected the reasoning of Bliss v. Attorney General of Canada, [1979] 1 S.C.R. 183, at p. 190, which had held that the inequality resulting from a similar benefit program was "not created by legislation but by nature". ***

[78] The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. In Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd. (1985), 18 D.L.R. (4th) 93 (Sask. C.A.), leave to appeal refused, [1985] 1 S.C.R. vi, the court found that the failure of a theatre to provide a disabled person a choice of place from which to
view a film comparable to that offered to the general public was discriminatory. Similarly, in *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353, it was held that the university was obligated to provide a deaf student with a sign language interpreter for his classes. "Without interpreters", the Human Rights Council held, at p. D/358, "the complainant did not have meaningful access to the service". And in *Centre de la communauta sourde du Montreal metropolitain inc. v. Regie du logement*, [1996] R.J.Q. 1776, the Quebec Tribunal des droits de la personne determined that a rent review tribunal must accommodate a deaf litigant by providing sign language interpretation. Moreover, the principle underlying all of these cases was affirmed in *Haig, supra*, where a majority of this Court wrote, at p. 1041, that "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15".

[79] It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship". In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1).

***

[81] I acknowledge that the standard I have set is a broad one. Given the nature of the evidentiary record before this Court, however, it would not be appropriate to elaborate it in any detail. Some guidance can be provided, however (and I stress that it is guidance -- not authoritative pronouncement), by the experience in the United States under the Rehabilitation Act, 29 U.S.C. § 794 (1997), and the Americans with Disabilities Act, 42 U.S.C. §§ 12182-12189 (1997). [Under U.S. law, the Court suggests that hospitals would have to provide interpreters for deaf patients.]

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[The Court then explained that the failure to provide interpreters was not a reasonable limit under s. 1, basically finding a lack of “reasonable accommodation.”]

### III. Additional Comments and Questions

#### A. Some thoughts on causes for differing approaches to equality

Lynn Smith, former Dean at the University of British Columbia (now a Justice on the B.C. Supreme Court), has written that the Canadian equality jurisprudence is more contextual and less abstract than its American counterpart. Rather than attempting to develop one coherent over-arching theory, the more flexible approach used in Canada allows for different doctrines for different situations. Smith notes that discrimination against the disabled, and remedying such discrimination, is unique and can’t easily be reconciled with discrimination based on race. (A point recognized by American jurisprudence, which does not provide heightened scrutiny of differential treatment of people with disabilities under constitutional law, but recognizes statutory protection that requires “reasonable accommodation” of the disabled.) Smith suggests that one explanation for this difference is the Canadian culture’s greater hospitality to collective rights. *See Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees*, 55 L. & Contemp. Probs. 211 (1992). Professor Colleen Sheppard, in another commentary [39 U.N.B.L.J. 111 (1990)], suggests that American equality jurisprudence reflects “confusion and retrenchment,” which she attributes in part to a focus on equality of opportunity, not equality of condition, derived from a model of racial equality. Moreover, she argues that decisions like *Washington v. Davis* can be explained by a desire of American courts to avoid acknowledging the pervasiveness of effects-based discrimination, because to so acknowledge would suggest that the government must positively intervene in the economy in order to remedy such inequality. Indeed, the Court expressly acknowledged this point, observing:
"A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."


Another possibility is the fact that American equality jurisprudence developed before the insights of feminist jurisprudence. One "school" of this jurisprudence argues that women speak in a different "voice" than men, and tend to approach problems more contextually than abstractly. The validity of this explanation is heightened by the significant impact on Canadian jurisprudence of Justice Bertha Wilson, who returns to many feminist themes in her opinions. In contrast, American equality jurisprudence, and especially doctrines concerning sex discrimination, were formed by an all-male Supreme Court. Even now, the two women who have served on the U.S. Supreme Court, Sandra Day O'Connor and Ruth Bader Ginsburg, are wary of feminist insights that suggest fundamental differences between women and men, for fear that men will use these ideas to justify a return to laws and practices that purported to protect women but instead oppressed them.

On this question, here is an extract from ch 7 of Helen Irving’s Gender and the Constitution: Equity and Agency in Comparative Constitution Design (2008)

The judicial “voice”

There is a long and intense epistemological and psychological debate in feminist literature over whether women and men have different ways of knowing, thinking, and speaking,¹ and if so, whether this makes a difference in institutional and legal decision making.² With respect to judicial roles specifically, the question of whether women “perform” differently from male judges, remains without a conclusive answer, although women judges themselves tend to suggest that some degree of difference is evident.

Justice Wilson, for example, asks whether “women judges really make a difference.”³ She concludes that there are some areas of law “on which there is no uniquely feminine perspective” and others – in particular, criminal law – where a distinctly male perspective is evident.⁴ She finds merit in the view that women are more attuned to context, relationships, and complexity, and suggests that evidence for this can be found in the judicial records of U.S. Supreme Court Justices Sandra Day O’Connor and Ruth Bader Ginsberg. The woman’s perspective, Wilson concludes, is particularly relevant to “the universalistic doctrine of human rights,” which “must include a realistic concept of masculine and feminine humanity

¹ The theory of difference in “voice” is associated in particular with the writings of Carol Gilligan, who identifies an ethic of care as its defining quality: In a Different Voice: Psychological Theory and Women’s Development (Cambridge, MA: Harvard University Press, 1982).
³ Wilson, “Will Women Judges Really Make a Difference?,” at 511.
⁴ Ibid., at 515.
regarded as a whole.”5 Women may thus be able to “bring a new humanity to bear on the decision-making process.”6

Some 14 years after Wilson’s appointment, Elizabeth Halka found that Wilson’s own judicial record supported this conclusion. In Halka’s view, Wilson’s judgment in the landmark case R v. Morgentaler …was the clearest example of a “different epistemological voice” in Canadian jurisprudence.7 The male members of the Supreme Court majority struck down impugned legislative restrictions on access to abortion on the grounds that these were procedurally offensive to the rights to life, liberty, and security of the person guaranteed by Section 7 of the Charter of Rights and Freedoms. In contrast, Justice Wilson, although concurring with the decision, held that the restrictions substantively breached women’s rights. They did not only restrict a woman’s liberty in decision making, but also interfered with her personhood by treating her as “as a means to an end which she does not desire but over which she has no control,” thus violating “human dignity and self-respect.”8 In reaching this conclusion, Halka observes, Wilson placed the moral dilemmas surrounding abortion in the context of the pregnant woman’s subjective experience. In this, as well as in other judgments, she “inject[ed] a new humanism and contextualism to the decision-making process of the Supreme Court of Canada.”9

Claire L’Heureux-Dubé, the second woman appointed to the Supreme Court of Canada, finds that women “have certainly made a difference on the bench: especially in areas such as family law, children’s law and sexual assault.”10 Justice Ruth Bader Ginsberg, delivering her U.S. Supreme Court inauguration speech, also questioned whether “women judges decide cases differently by virtue of being women”; she concluded that they contribute to “a distinctive medley of views influenced by difference in biology, cultural impact, and life experience.”11 Kathryn Mickle Werdegar, Justice of the Supreme Court of California, also finds that the “different voice” theory of judging is borne out by her experience in the context of cases that especially affect women: sexual assault, domestic violence, and family relationships.12 Whether this difference in women’s life experience will lead women judges to a particular result, she comments, is a separate question.

Empirical studies in the United States have produced mixed results, but have tended to support Werdegar’s perspective. They reveal little gender-based difference in case outcomes in many areas of law. However, a correlation between the gender of the judge and outcomes in employment discrimination cases is “fairly well documented,” Theresa Beiner notes, and women’s experience plays a direct role in recognizing such discrimination.13

Not all feminists embrace such conclusions. Heather Elliot challenges the “feminine voice” theory as itself resting on gender stereotypes. She emphasizes, instead, gender difference in experience.14 Sandra Berns also rejects the application of the theory to the act of judging. The language of the law, Berns writes, “is explicitly the language of justice rather than care.”15 Drawing on the work of Martha Fineman,16 Berns also emphasizes experience

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5 Ibid., at 521.
6 Ibid., at 522.
8 Wilson quoted in Ibid., at 255.
9 Ibid., at 265.
11 Ginsburg quoted in Berns, To Speak as a Judge: Difference, Voice and Power, at 199.
14 Elliot, “The Difference Women Judges Make,”
15 Berns, To Speak as a Judge: Difference, Voice and Power, at 197.
(potential and actual) as the differentiator between women and men and the source of different perspectives, rather than a difference of essence.

A jurisprudence of context\(^{17}\) fits with this emphasis on difference in experience. Susan Williams argues that much of the U.S. Supreme Court’s jurisprudence embodies a (white, male) “universalist assumption” of knowledge and truth, unaltered by context.\(^{1}\) The feminist challenge to this view, Williams writes, involves recognition that knowledge is socially created and shaped by cultural context. Legal doctrine and legal categories have often failed to acknowledge these aspects of experience and forms of knowledge. The law assumes unattainable epistemological neutrality and a single interpretive perspective. Questions of constitutional validity, Williams concludes, should not be answered with a decontextualized standard or rule, but require an examination of the context in which the impugned law operated.

... 

*Justice* does not automatically require that women applicants should be vindicated and their grievances remedied. Nor does it require the test of reasonableness to be abandoned. It does, however, rest on a full understanding in light of the constitution’s own purpose, of the context and circumstances – subjective and objective – in which the purported breach of the constitution was experienced.

**B. Abortion as sex discrimination**

(1) Recall Justice Bertha Wilson’s opinion in *Morgentaler II*, *supra* Chapter 2 (and above), with regard to this problem:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, Lecturer in European Law, University of Glasgow, has pointed out in her essay on “International Law and Human Rights: the Case of Women’s Rights”, in *Human Rights: From Rhetoric to Reality*, the history of the struggle for human rights from the 18th century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women’s rights has been a struggle to eliminate discrimination, to achieve a place for women in a man’s world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-2). It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women’s needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived [*246*] as an integral part of modern woman’s struggle to assert her dignity and worth as a human being.


(2) In a portion of Justice Blackmun’s opinion in Planned Parenthood v. Casey, supra Chapter 2, he wrote:

A State’s restrictions on a woman’s right to terminate her pregnancy also implicates constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the state conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption -- that women can simply be forced to accept the “natural” status and incidents of motherhood -- appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause. The [plurality opinion by O’Connor, Kennedy, and Souter, J.J.] recognizes that these assumptions about women’s place in society ‘are no longer consistent with our understanding of the family, the individual, or the Constitution.” 505 U.S. 833, 929-930.

This point was made explicit by Justice Ginsburg’s dissent in Gonzales v. Carhart, supra, where she argued that women’s “ability to realize their full potential” is intimately connected to “their ability to control their reproductive lives." Thus, undue restrictions on abortion procedures “center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.” She cited Reva Siegel, Reasoning form the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Sta. L. Rev. 261, 350-380 (1992). In that article, Siegel argues that because “legislatures adopting abortion-restrictive regulation intend such policies to apply to women and not men, and because such regulation affects women as it does not men, abortion-restrictive regulation presents all the risks of gender bias and imposition which equal protection analysis is intended to preclude.” Id. at 354 n.373. She argues that historically “abortion-restrictive regulation is caste legislation, a traditional mode of regulating women's conduct, concerned with compelling them to perform the work that has traditionally defined their subordinate social role and status.”

(3) As we bring to a close our discussion of abortion, it must be noted that the most significant differences between the U.S. and Canada on this issue are in the practical availability of abortions in each country. For many American women, abortions are difficult to obtain due to the government’s unwillingness to pay for abortions for poor people and the fact that many private insurance plans will not cover that procedure. In most of Canada, abortions remain not only available but free of charge as part of universal health care. In the United States, even governmental efforts to fund medical care through childbirth for women who choose that option, but not an abortion, have been upheld against equal protection challenge. See, e.g., Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671 (1977). The Court reasoned that poor women who find themselves unable to afford an abortion are not being denied an abortion by direct government action but as a consequence of their own lack of financial resources, and that although the government could not bar abortions, it could legitimately encourage women to carry a fetus to term.

In Australia, abortion is constitutionally a matter for State laws (although the importation of, or interstate trade in, abortifacient drugs comes under Commonwealth power. The Commonwealth also has some indirect control over medical abortions through its power, derived from s. 51 (xxiiiA), to set limits on access to the Medicare national health insurance scheme). In most cases, State abortion laws do not permit unrestricted access to abortion but have, in practice, allowed relatively easy access to early-term abortions, and the moral questions surrounding abortion have not been a significant political issues in Australia for many years. However, recent moves in Victoria to de-criminalise abortion, and a pending criminal prosecution of a young woman for procuring an
abortion in Queensland have brought the issue into the legal (and potentially political) spotlight in a manner not seen for some time.

C. Gay marriage

In Lawrence v. Texas, supra (Chapter 3), the U.S. Supreme Court side-stepped the question whether sexual orientation was a suspect classification. A recent lower court decision, upholding an amendment to Nebraska’s state constitution banning gay marriage, was upheld by the court of appeals, which found (without analysis) that heightened scrutiny appropriate for suspect classifications did not apply. Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006). Several state supreme courts have held that sexual orientation discrimination will be closely reviewed and that laws limiting marriage to opposite-sex couples violated equality provisions of state constitutions. See, e.g., In re Marriage Cases, 43 Cal. 4th 757 (2008); Goodridge v. Department of Pub. Health, 440 Mass. 309 (2003).

In the wake of Supreme Court of Canada decisions holding sexual orientation to be an analogous ground under s. 15, a number of lower Canadian courts held that the federal law (recall that, under s. 91(26), marriage and divorce are matters of federal legislation in Canada) limiting marriage to opposite-sex couples violated the Charter. Parliament responded by amending the statute to permit gay marriages. (A discussion of the history is summarized in Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698.)

In Australia, same-sex marriage has also emerged as an issue in recent years, although it has not generated major political debate. The Commonwealth exercises constitutional power over marriage and divorce, ss 51 (xxi) & (xxii). Although this is a concurrent, not an exclusive power, Commonwealth laws have applied (though the force of the inconsistency - or supremacy - section, s 109), since the first Commonwealth Marriage Act in 1961. The 1961 Act did not make any reference to the gender of married persons (heterosexual marriage was assumed). In 2004, it was amended to state expressly that ‘marriage means the union of a man and a woman ...’ The amendment also stated that same-sex marriages recognised under the law of another country must not be recognised in Australian law. Although these amendments were made by a conservative (Liberal Party) government, they have not been altered or repealed by the current non-conservative Labor government (elected in November 2007). However, in 2008, the Commonwealth passed laws recognising the legal rights of same-sex couples, similar to the rights of unmarried heterosexual couples, in areas such as taxation, social security and health, aged care and employment. (This law was welcomed by Justice Michael Kirby of the High Court of Australia, an openly gay judge, who – it is said – waited for its passage before retiring from the Court, ahead of his constitutionally required retirement age of 70.) In 2006, the Commonwealth government also used its constitutional ‘Territories power’ (s 122) to disallow the Civil Unions Act passed by the Australian Capital Territory, an Act purporting to recognise same-sex partnerships. The Commonwealth was, however, constitutionally unable to prevent such laws in the States. Tasmania was the first State to legislate, in 2003 to recognise same-sex unions. Discrimination on the ground of sexuality had been prohibited by the previous Labor government in 1994, with the passage of the Human Rights (Sexual Conduct) Act Cth (see above). This Act relies on the right to privacy provision of the United Nations ICCPR, and does not extend to marriage rights.