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# Realizing equality in the twentieth century: the role of the Supreme Court of Canada in comparative perspective

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*The article analyzes the equality jurisprudence of the Supreme Court of Canada over the course of the twentieth century and juxtaposes its approach with that of the United States Supreme Court. Prior to the advent of the Canadian Charter of Rights and Freedoms in 1982, the Supreme Court of Canada had no constitutional document like the American Bill of Rights to interpret and apply. Thus, early equality cases do not loom over Canadian constitutional history in the same way as a case such as Plessy v. Ferguson has in the United States. The Charter elevated equality rights to a constitutional level, broadened their measure, and extended their reach. Canadian and U.S. equality jurisprudence have diverged dramatically in the Charter era, for historical reasons, but also because of the rigidity of U.S. equal protection doctrine, the happenstance of which issues have been presented to the court, and the differing levels of political will to support equality-seekers and to implement courtroom victories.*

## 1. Introduction

This essay, based on a lecture given in the fall of 2001, is written in the spirit of fostering a useful transnational dialogue about constitutional approaches to human equality, a dialogue that eschews empty platitudes in favor of honest and constructive criticism. It both critiques and praises the work of the Supreme Court of Canada, a Court on which I have had the honor to sit, with respect to its decisions over the course of the twentieth century in the area of equality law. At various points, moreover, this essay juxtaposes the Canadian Court's approaches with that of the United States Supreme Court in related time periods on related issues. It does so because it is valuable for judges of all national courts confronted with basic questions of human rights to be aware of

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and learn from the work of their foreign counterparts. I have elsewhere argued that "the failure of the . . . [Rehnquist] Court to take part in the international dialogue among the courts of the world, particularly on human rights issues, is contributing to a growing isolation and diminished influence. The U.S. Supreme Court has failed to look with any regularity outside the borders of the United States for sources of inspiration."<sup>1</sup> In so noting, I align myself with a number of U.S. constitutional law scholars who have described the U.S. Court's isolation and its "ambivalent resistance" to discourse with other nations' constitutional jurisprudence.<sup>2</sup> Whether sitting in Canada or the United States, Germany or the United Kingdom, South Africa or Zimbabwe, Japan or Australia, Argentina or Chile, national courts are facing similar claims and problems, to which each can contribute and from which each can learn, especially where they concern such basic human rights as the right to be free from discrimination and to receive equal treatment and equal protection under the law.

In this spirit of dialogue, this essay seeks to canvass the manner in which the Supreme Court of Canada's twentieth-century experience with realizing equality rights has both drawn on and diverged from the United States model. While postwar American progress in the courts was until recently in many respects more advanced than Canadian jurisprudence, the advent of Canada's Charter of Rights and Freedoms in 1982 has enabled a quantum leap in the achievement of equality north of the border.<sup>3</sup>

Unlike the American Constitution, the Charter does not assert simply a right to "equal protection;"<sup>4</sup> it speaks of equality "without discrimination."<sup>5</sup> These two documents grew out of very different historical contexts. If American constitutional ideals were born of war and revolution, Canada's grew through evolution. Bit by bit Canada negotiated its way toward independence, from Confederation in 1867, to the recognition of autonomy from Great Britain in 1931, to the patriation of the Constitution and the adoption of the Charter in 1982.

<sup>1</sup> Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *TULSA L.J.* 15, 37 (1998).

<sup>2</sup> See *id.* at 38 (quoting Mark Tushnet's comment that "the Supreme Court has almost never treated constitutional experience anywhere else as relevant."). A year later, the constitutional law scholar Vicki Jackson wrote an article concerning "the ambivalent resistance of U.S. constitutional law to explicit learning and borrowing from other nations' constitutional decisions and traditions." Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism* 1 *U. PA. J. CONST. L.* 583, 583 (1999). Using Canada as her comparator, she advocated the relevance of "judgments reached by the constitutional courts of other nations considering similar problems."

<sup>3</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Canadian Charter].

<sup>4</sup> U.S. CONST. amend. XIV.

<sup>5</sup> § 15, Canadian Charter, *supra* note 3.

The Charter reflects the developments in human rights law of the second half of the twentieth century, as well as a Canadian vision of liberty and the state. It places less emphasis on individual rights and more on collective interests. This is seen in various provisions, which share much in common with other post-World War II constitutions but tend to surprise U.S. constitutionalists. For instance, many rights under the Charter are subject to an express limitation under section 1, which says that they are guaranteed, "subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>6</sup> Moreover, in Canada, diversity is not a debate—it is a constitutionally recognized value.<sup>7</sup> In this respect, Canada's constitution stands in both contrast to and in company with those of many other of the world's current national constitutions.<sup>8</sup> Our constitution addresses aboriginal treaty rights<sup>9</sup> and minority language education rights,<sup>10</sup> while section 27 instructs courts to interpret rights in a manner consistent with promoting and enhancing Canada's multicultural heritage.<sup>11</sup> Section 28 states that the "rights and freedoms referred to in . . . [the Charter] are guaranteed equally to male and female persons."<sup>12</sup> Most important, section 15(1) guarantees equality "without discrimination, and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."<sup>13</sup> Affirmative action is specifically permitted under Section 15(2).<sup>14</sup>

<sup>6</sup> *Id.* at § 1. Similar provisions can be found in other countries' constitutions, for example, in § 36 of the Constitution of the Republic of South Africa, Act No. 108 of 1996.

<sup>7</sup> See Canadian Charter, *supra* note 3, § 27 ("This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.").

<sup>8</sup> Compare, e.g., § 31, Interim Constitution of the Republic of South Africa, Act 200 of 1993 (diversity of language and culture to be protected) and § 31, Constitution of the Republic of South Africa 1996 (protecting cultural, religious and linguistic communities) with Art. 2, Constitution of the Republic of France 1958 (France "is an indivisible . . . Republic") asserted as basis for France's Reservation to Art. 27 (rights of ethnic, religious, or linguistic minorities to enjoy their own culture) of the International Covenant on Civil and Political Rights, December 16 1966, 1202 U.N.T.S. 395 (entered into force February 4, 1981), also available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

<sup>9</sup> See Canadian Charter, *supra* note 3, at § 25.

<sup>10</sup> *Id.* § 23.

<sup>11</sup> *Id.* § 27.

<sup>12</sup> *Id.* § 28.

<sup>13</sup> *Id.* § 15(1).

<sup>14</sup> *Id.* § 15(2); *Lovelace v. Ontario* [2000] 1 S.C.R. 950 at [100] (Iacobucci J. for a unanimous Court) ("I do not foreclose the possibility that s. 15(2) may be independently applicable to a case in the future."). All Supreme Court of Canada judgments since 1985 are available at [http://www.scc-csc.gc.ca/judgments/index\\_e.html](http://www.scc-csc.gc.ca/judgments/index_e.html).

## 2. Equality's early history

These Charter protections have only recently been available to Canadians. Sketching the history of equality jurisprudence in Canada will help make the present more vivid. The terrorist attacks of September 11, 2001, have led to some pernicious discrimination, prejudice, and hate crimes against Arab and Muslim citizens of both the U.S. and Canada. Cautionary analogies are made to the treatment of Japanese Americans and Canadians during World War II. Less well known than the *Korematsu*<sup>15</sup> decision of the U.S. Supreme Court is a decision rendered by the Supreme Court of Canada commonly known as the *Reference Re: Persons of Japanese Race*.<sup>16</sup> Canada evacuated and detained nearly twenty-one thousand people of Japanese origin during the war, three-quarters of whom were citizens.<sup>17</sup> A legal challenge came after hostilities ceased, when the government moved, by arrangement with General Douglas MacArthur, to deport those, including citizens, who had not revoked their requests for repatriation prior to Japan's official surrender, among others.<sup>18</sup> The Prime Minister referred the case to the Supreme Court, where lawyers argued that the deportations were a crime against humanity or, in the alternative, that citizens could not be deported from their own country. It was the first case heard in the new Supreme Court building, in January 1946. Of the justices, three found the orders completely valid, with two more assenting to all but the provisions' inclusion of wives and children as threats to national security. Justices Ivan Rand and Roy Kellock objected to more than the inclusion of family members, positing that naturalization could not be revoked in this manner and accepting the argument that it was beyond the Cabinet's powers to remove Canadian-born citizens. They decried the process by which the deportations would take place without the commission of an offence and without charge, trial, or

<sup>15</sup> *Korematsu v. U.S.*, 323 U.S. 214 (1944). In this case, *Korematsu*, an American citizen of Japanese descent, was tried and convicted for remaining in his home contrary to an exclusion order requiring all persons of Japanese descent to leave their homes on the West Coast and report to "assembly centers." A majority of the Supreme Court held that the exclusion order was justified by the war and the threat to national security.

<sup>16</sup> *In re References as to the validity of orders in council of the 15th Day of December, 1945* (P.C. 7355, 7356 and 7357, in relations to persons of the Japanese race) [1946] S.C.R. 248.

<sup>17</sup> This section draws on KEN ADACHI, *THE ENEMY THAT NEVER WAS: A HISTORY OF THE JAPANESE CANADIANS* (McClelland and Stewart 1976). Many citizens of Japanese descent applied for repatriation only to avoid resettlement outside British Columbia, not because they desired to be repatriated to Japan. *Id.* at 300. Orders from the Department of Labour not only offered financial incentives for Japanese Canadians to resettle east of the Rockies, but also warned that, for those who wanted to remain in Canada, failure to adhere to these "incentives" could be regarded as noncooperation and disloyalty. *Id.* at 298.

<sup>18</sup> The central order, no. 7355, set out four major categories of deportable people. See [1946] S.C.R. at 248–49. Of note is the last category, which included the wives and children of people deportable under the other three categories.

conviction. An appeal to the Privy Council failed, with the following judgment rendered in December 1946: "It is not pertinent to the judiciary to consider the wisdom or propriety of the particular policy which is embodied in the emergency legislation."<sup>19</sup> In the event, the deportation orders were repealed in 1947 before being implemented. Nevertheless, four thousand persons returned to Japan voluntarily; many found the idea of remaining in Canada intolerable.

Two legal aspects of this sad history are pertinent. First, the Supreme Court of Canada had nothing like the American Bill of Rights to interpret and apply at this time. Thus, the 1982 Charter of Rights that we have today presented the Court with a *tabula rasa* for fundamental rights protection. Whereas *Korematsu* has never been overruled—leading commentators in the U.S. to speculate about the extent to which new American antiterrorism legislation will be found constitutional—the 1946 Canadian case I described is a poignant memory, but one that has no place in the changed landscape of human rights after 1982. The second feature to emphasize is the fact that an appeal was heard by the Privy Council in London. Until 1949, the Supreme Court of Canada was not a court of last resort. This led to a famous statement two years later by Professor Bora Laskin, of the University of Toronto, later Chief Justice of Canada, who wrote, of the Court's subordination to the Privy Council: "It has for too long been a captive court so that it is difficult, indeed, to ascribe any body of doctrine to it which is distinctively its own, save, perhaps, in the field of criminal law [in which the Privy Council's jurisdiction ended in 1933]."<sup>20</sup>

The Privy Council had at least one notable success in the history of Canadian equality rights, however. In 1929, the *Persons Case*<sup>21</sup> reversed a Supreme Court of Canada decision<sup>22</sup> and established that women were "persons" for the purposes of the Canadian Constitution and its provision on appointments to the Senate.<sup>23</sup> It is important to underline, however, that Lord Sankey's reasons made virtually no mention of what was really at issue: discrimination against women. In fact, he took care to note: "[T]heir Lordships [are not] deciding any question as to the rights of women but only a question as to their eligibility for a particular position."<sup>24</sup> Moreover, Lord Sankey

<sup>19</sup> *Co-operative Committee on Japanese Canadians v. Attorney-General of Canada* [1947] D.L.R. 577.

<sup>20</sup> Bora Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians* 29 CAN. BAR REV. 1038 (1951), quoted in IAN BUSHNELL, *THE CAPTIVE COURT: A STUDY OF THE SUPREME COURT OF CANADA* xii (1992).

<sup>21</sup> *Edwards v. Canada (Attorney-General)* [1930] A.C. 124.

<sup>22</sup> *In re Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867* [1928] S.C.R. 276.

<sup>23</sup> See Claire L'Heureux-Dubé, *The Legacy of the "Persons Case": Cultivating the Living Tree's Equality Leaves*, 63 SASKATCHEWAN L. R. 389 (2000).

<sup>24</sup> *Edwards*, *supra* note 21, at 137.

stated: "No doubt in any code where women were expressly excluded from public office the problem would present no difficulty."<sup>25</sup> In other words, if the discrimination were express, there would be no need or means to strike it down. Again, I emphasize that the less than admirable role of the Supreme Court of Canada in this controversy does not loom over our constitutional history in the same way as a case such as *Plessy v. Ferguson* has in the United States.<sup>26</sup> The simple reason is that the Charter was in this epoch not even in contemplation, much less existence.

We should nevertheless celebrate Canadian judicial dissenters who challenged prevailing orthodoxies in the manner of the first Justice John Marshall Harlan in *Plessy*. I will give two examples.<sup>27</sup> The first takes us back to 1912, when the province of Saskatchewan's legislature passed an act to prevent "Chinamen" from hiring or managing white females. There were about five hundred thousand people in Saskatchewan then, of which 957 were of Chinese origin. Quong Wing, a naturalized British citizen—there was no such thing as Canadian citizenship yet—employed two white waitresses and claimed that his rights under the federal Naturalization Act were violated by the provincial enactment. At the Supreme Court, the Chief Justice and three of his colleagues found against him, declaring the legislation to be "in the interest of the morals of women and girls in Saskatchewan."<sup>28</sup> Dissenting Justice John Idington wrote:

The Act, by its title, refers to female labour and then proceeds to deal only with the case of white women. In truth, its evident purpose is to curtail or restrict the rights of Chinamen . . . This legislation is but a piece of the product of the mode of thought that begot and maintained slavery; not so long ago fiercely claimed to be a laudable system of governing those incapable of governing themselves.<sup>29</sup>

A second example of brave dissent occurred in 1940, when the equality-seeker was Fred Christie, a Jamaican-born Canadian who had lived in Montreal for more than twenty years. A season ticket holder for the Canadiens hockey team, he and two friends—one a Texas-born African American named Emile King who had spent nineteen years in the city—were denied service in a tavern at the rink based on a "no serving of Negroes" policy. He called the police, who refused to intervene. Christie sued the tavern, claiming a right to

<sup>25</sup> *Id.* at 133.

<sup>26</sup> 163 U.S. 537 (1896).

<sup>27</sup> My discussion of these examples draws on JAMES W. ST. G. WALKER, "RACE," RIGHTS AND THE LAW IN THE SUPREME COURT OF CANADA: HISTORICAL CASE STUDIES (Wilfred Laurier Univ. Press 1997).

<sup>28</sup> *Quong Wing v. The King* [1914] 49 S.C.R. 440, 444.

<sup>29</sup> *Id.* at 451–52.

be served equally in a public establishment. He and King won at trial, but lost four to one on appeal. The Supreme Court affirmed, also four to one.<sup>30</sup> The majority opinion was based on the principle that complete freedom of commerce should apply because “it cannot be argued that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order.”<sup>31</sup> Dissenting Justice Henry Davis objected because

[i]n the changed and changing social and economic conditions, different principles must necessarily be applied to the new conditions . . . the old doctrine of the freedom of the merchant to do as he likes has in my view no application to a person to whom the state has given a special privilege to sell to the public.<sup>32</sup>

A few months after the decision, Fred Christie moved to Vermont.

Some Canadian judges were more modern in their reasoning than these Supreme Court majorities, however. A remarkable legal victory came in October 1945 for a Canadian Jewish Congress legal team that included future Chief Justice Laskin. At trial, the Ontario High Court found a restrictive covenant prohibiting property sales to persons “of the Jewish, Hebrew, Semitic, Negro or coloured race or blood” to be contrary to public policy.<sup>33</sup> Justice Mackay referred to Ontario’s 1944 Racial Discrimination Act, concerning discriminatory signs, notices, and symbols, as well as the principles of the Atlantic and U.N. Charters. In the Michigan litigation that led to one of the cases decided with *Shelley v. Kraemer*<sup>34</sup> by the U.S. Supreme Court, this Ontario decision was invoked as a basis for invalidating a covenant against African Americans in 1948—an argument rejected, however, by the Michigan Supreme Court.<sup>35</sup>

As a second counterexample to dated judicial thinking, the opinions of Supreme Court Justice Rand, whom I mentioned as one of the dissenters in the Japanese deportation case, merit attention. Rand had been appointed to the Court in 1943, after studying at Harvard before World War I. There, he

<sup>30</sup> *Christie v. York Corp.* [1940] S.C.R. 139.

<sup>31</sup> *Id.* at 144.

<sup>32</sup> *Id.* at 152.

<sup>33</sup> *In re Drummond Wren* [1945] O.R. 778. This rationale was unfortunately not accepted by the Supreme Court. See *Noble and Wolf v. Alley* [1951] S.C.R. 64.

<sup>34</sup> 334 U.S. 1 (1948).

<sup>35</sup> *Sipes v. McGhee*, 316 Mich. 614, 622 (1947) (acknowledging but distinguishing *In re Drummond Wren*, *supra* note 33) on the grounds that Justice Mackay’s decision rested on the vagueness of a prohibition on sale of land to “Jews or persons of objectionable nationality” that was not present in the Michigan covenant’s exclusion of persons not “of the Caucasian race” because, according to the Michigan court, it was clear that members of the “Mongoloid” or “Negroid” races were not Caucasians, *rev’d*, 334 U.S. 1 (1948).



became friends with Felix Frankfurter and was under the tutelage of Louis Brandeis. Of his many contributions to Canadian law, Justice Rand is perhaps best remembered for his opinions concerning the rights of Jehovah's Witnesses in the province of Quebec.<sup>36</sup>

The background to these decisions includes a federal government ban on Jehovah's Witnesses in 1940, a prohibition that lasted until October 1943. In June 1943, the High Court of Australia struck down a similar ban.<sup>37</sup> This was the same month as the U.S. Supreme Court's decision concerning Jehovah's Witnesses' allegiance in *West Virginia State Board of Education v. Barnette*,<sup>38</sup> which was applied in Canada by the Ontario Court of Appeal in 1945.<sup>39</sup> Litigant Robert Donald was the second Jehovah's Witness student to be suspended from an Ontario school for refusing to sing the national anthem or salute the flag. The court reversed a trial judgment finding this acceptable, reasoning that it was not a judicial matter to classify singing and saluting as secular exercises, as opposed to religious ones, for which there was statutory provision for abstention.

Nevertheless, after the war, the powerful premier of Quebec, Maurice Duplessis, began a campaign against the Witnesses, which he called a "war without mercy." There were about ten thousand Witnesses in Canada, but

<sup>36</sup>This discussion draws on WILLIAM KAPLAN, *STATE AND SALVATION: THE JEHOVAH'S WITNESSES AND THEIR FIGHT FOR CIVIL RIGHTS* (Univ. of Toronto Press 1989).

<sup>37</sup>*Adelaide Company of Jehovah's Witness Inc. v. The Commonwealth* (1943) 67 C.L.R. 116.

<sup>38</sup>319 U.S. 624 (1943). For a rather different deployment of *Barnette*, namely a use of its dissent, see *R v. Robertson* [1963] S.C.R. 651. This case dismissed (4-1) a challenge to the Lord's Day Act under the 1960 Canadian Bill of Rights (see below Part 3). The appellants were convicted of operating a bowling alley on Sunday. Justice Ritchie's majority opinion delivered a blow to general hopes that the Bill of Rights would be effective in furthering the progress of equality:

It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted.... It is therefore the "religious freedom" then existing in this country that is safe-guarded...

*Id.* at 654. With regard to the issue at hand, Ritchie J. added:

Although there are many differences between the constitution of this country and that of the United States of America, I would adopt the following sentences from the dissenting opinion of Frankfurter J. in *Board of Education v. Barnette*, as directly applicable to the "freedom of religion" existing in this country both before and after the enactment of the Canadian Bill of Rights:

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.

*Id.* at 656.

<sup>39</sup>*Donald v. The Board of Education for the City of Hamilton* [1945] O.R. 518.

fewer than five hundred in Quebec. Between 1946 and 1953, Duplessis instigated 1,665 prosecutions against them. As recounted by a historian,

Prayer meetings in private homes were broken up by the police, and Jehovah's Witnesses were taken into custody in the middle of the night and later released. Arrests were made and charges filed and then withdrawn. . . . Witness literature was burned and Witness members beaten. It was the most extensive campaign of state-sponsored religious persecution ever undertaken in Canada.<sup>40</sup>

I will mention only the best known of the cases in which Justice Rand led the Supreme Court in protecting the Witnesses. In *Roncarelli v. Duplessis*,<sup>41</sup> Justice Rand addressed the plight of a Montreal café owner who in 1946 arranged bail for four hundred Witnesses. Duplessis warned Roncarelli to desist. After he failed to, the premier instructed the head of the provincial Liquor Commission to cancel the café's license, leading to the seizure of its stock. Roncarelli sued Duplessis in his personal capacity.

In 1951, the trial judge, remarkably, condemned the premier, finding that he had lied on the witness stand. At the Supreme Court, Justice Rand's decision found an abuse of administrative discretion, which:

necessarily implies good faith in discharging public duty. . . . Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? . . . To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred.<sup>42</sup>

This passage and the decision as a whole illustrate how the common law served to safeguard civil liberties in the absence of direct constitutional protections and continues to be cited by Canadian courts as a classic exemplar of the rule of law. Today, however, judges have new resources to address denials of equality. In October 2000, a Quebec municipality enacted a regulation prohibiting door-to-door solicitation before 9 a.m. and after 7 p.m. and established a permit requirement, with a two-month per year limit.<sup>43</sup> Jehovah's Witnesses challenged the regulation as a violation of the Charter freedoms of expression and religion and won at trial.

<sup>40</sup> KAPLAN, *supra* note 36, at 247.

<sup>41</sup> [1959] S.C.R. 121.

<sup>42</sup> *Id.* at 140–41.

<sup>43</sup> See Jean-Paul Charbonneau, *Les Témoins de Jéhovah craignent un retour au Duplessisme* [Jehovah's Witnesses fear a return to the Duplessis era], LA PRESSE [MONTRÉAL], October 10, 2000, at E2.

### 3. The Canadian Bill of Rights

There was an interim period between the *Roncarelli* era and the Charter, one that should not be skipped over. In 1960, the federal Parliament enacted an equality guarantee in the Canadian Bill of Rights.<sup>44</sup> The Bill of Rights was simply a statute like any other. It lacked the authority of a constitutional document and did not apply to provincial laws. There was some hope for equality rights generated in 1970, when the Supreme Court decided, in *R v. Drybones*,<sup>45</sup> that a provision of the Indian Act punishing intoxication off a reserve was invalid. Comparable federal law imposed a milder penalty for non-Indians and required the intoxication to be in a public place. The concurrence of Justice Emmett Hall is of special interest in the comparative context. He rejected the appeal court's narrow definition of equality in *R v. Gonzales*,<sup>46</sup> which applied its protections only within the class of persons "to whom a law relates or extends."<sup>47</sup> Hall wrote:

[This] is analogous to the position taken by the Supreme Court of the United States in *Plessy v. Ferguson* and which was wholly rejected by the same Court in its historic desegregation judgment *Brown v. Board of Education*. . . . The social situations in *Brown v. Board of Education* and in the instant case are, of course, very different, but the basic philosophic concept is the same. The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law . . .<sup>48</sup>

Despite its promise, *Drybones* ended up being the only case in which the Court struck down a statute under the Bill of Rights. From an equality perspective, the problem was doctrinal, as well as numerical. In the 1973 *Canada (Attorney General) v. Lavell* decision,<sup>49</sup> no violation of the Bill of Rights was found in a challenge to differential treatment of Indian men and women who married non-Indians (she lost her status and band membership). The Court held that "equality before the law" in the Bill of Rights meant the "equal subjection of all classes to the ordinary law of the land *as administered by the ordinary courts*."<sup>50</sup> *Drybones* was distinguished because it concerned a penal law; in *Lavell* what was being upheld was a legislative classification, which could be discriminatory as long as there was a valid federal objective behind it. Between 1960 and 1982, only five of thirty-five rights claimants under the Bill

<sup>44</sup> Canadian Bill of Rights, S.C. 1960, c 44 *reprinted in* RSC 1985 (App III).

<sup>45</sup> [1970] S.C.R. 282.

<sup>46</sup> [1962] 37 W.W.R. 257 (BCCA).

<sup>47</sup> *Id.* at 264.

<sup>48</sup> *Drybones*, *supra* note 45, at 300.

<sup>49</sup> [1974] S.C.R. 1349.

<sup>50</sup> *Id.* at 1366.

of Rights won their Supreme Court cases.<sup>51</sup> By way of comparison, under the Charter from 1982 to 1998, the Court ruled in favor of rights claimants in 125 of 373 Charter cases and struck down fifty-eight statutes (thirty-one federal and twenty-seven provincial).<sup>52</sup>

#### 4. The Charter era

In the Charter era, the Supreme Court has self-consciously repudiated its equality jurisprudence, or lack thereof, under the Bill of Rights. In a 1999 judgment striking down a requirement for Indian band members to be “ordinarily resident” on a reserve to vote in elections, my opinion noted the legacy of cases such as *Lavell*. Alongside other status-depriving policies, “[t]his history . . . helps show why the interest in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament is an important one for all band members.”<sup>53</sup> When Canada replaced the Bill of Rights with the Charter, there were three very important changes. First, Canada elevated equality rights to a constitutional level. Second, Canada broadened the measure of equality rights, going from requiring that laws be applied in the same way to everyone (formal equality) to the stage of requiring that the laws, themselves, treat individuals as “substantive equals.”<sup>54</sup> Third, Canada extended the reach of equality rights, by including a broader and nonexhaustive list of protected groups than was present in the statutory Bill of Rights and by extending the rights to apply to both provincial and federal levels of government (in contrast to the Bill of Rights, which applied only to the federal government).

An excellent example of the transition from the Bill of Rights to the Charter is the Supreme Court’s treatment of pregnancy discrimination. In 1979, it upheld a provision denying pregnancy and childbirth benefits to women who did not engage in insurable employment, despite being capable of work. The unanimous judgment adopted the following reasoning:

Any inequality between the sexes in this area is not created by legislation but by nature. . . . Assuming the [appellant] to have been “discriminated against,” it would not have been by reason of her sex. [The law] applies to women, it has no application to women who are not pregnant, and it

<sup>51</sup> See F. L. MORTON & RAINIER KNOPFF, *THE CHARTER REVOLUTION AND THE COURT PARTY* 14 (Broadview Press 2000).

<sup>52</sup> *Id.*

<sup>53</sup> *Corbière v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 at [89] (L’Heureux-Dubé, J., concurring).

<sup>54</sup> The Court now describes its approach to equality analysis using this very term. See *Law v. Canada* [1999] 1 S.C.R. 497, 548. For the first use of “substantive equality” in a Supreme Court decision, see *Symes v. Canada* [1993] 4 S.C.R. 695, 786 (L’Heureux-Dubé J., dissenting).

has no application, of course, to men. If [the law] treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is . . . because they are pregnant and not because they are women.<sup>55</sup>

Ten years later, with the benefit of the Charter, which had not existed to be tainted by this judgment—and after the first two women were appointed to the Court—the decision was unanimously overruled. Chief Justice Brian Dickson, a member of the original panel, wrote:

That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant . . . it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex. . . . It is difficult to accept that the inequality . . . was created by nature and therefore there was no discrimination; the better view, I now venture to think, is that the inequality was created by legislation.<sup>56</sup>

He declined to follow American constitutional case law, which had in any event been overruled by Congress in 1978:

In both *General Electric* and *Geduldig* the United States Supreme Court held that distinctions involving pregnancy were constitutionally permissible if made on a reasonable basis, unless the distinctions were designed to effect invidious discrimination against members of one sex or another. In Canada . . . discrimination does not depend on a finding of invidious intent.<sup>57</sup>

Chief Justice Dickson's doctrinal analysis drew on a Canadian case decided earlier in 1989, *Andrews v. Law Society of British Columbia*.<sup>58</sup> This decision, striking down a bar against noncitizen lawyers in British Columbia, was the Court's first explication of the approach to be taken to claims under the Charter's equality provision, Section 15(1). The American experience loomed large. Justice William McIntyre's lead opinion quickly established a key difference between the two countries' foundational legal texts, however:

[T]he 14th Amendment to the American Constitution . . . contains no limiting provisions similar to s 1 of the Charter. As a result, judicial

<sup>55</sup> *Bliss v. Canada (Attorney-General)* [1979] 1 S.C.R. 183, 190–91.

<sup>56</sup> *Brooks v. Canada Safeway Ltd.* [1989] 1 S.C.R. 1219 [40].

<sup>57</sup> *Id.* at [34].

<sup>58</sup> [1989] 1 S.C.R. 143.

consideration has led to the development of varying standards of scrutiny of alleged violations of the equal protection provision which restrict or limit the equality guarantee within the concept of equal protection itself.<sup>59</sup>

Based on section 1's caveat that equality rights are "subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,"<sup>60</sup> the Court thus held that the United States Supreme Court's models of strict, intermediate, and rational basis review were inapplicable in the Charter context.

As a second fundamental holding, *Andrews* found fault with the appeal court's application of the following definition of equality: "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'." Using the strongest language, Justice McIntyre made clear that this test was:

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*.<sup>61</sup>

Throughout *Andrews*, the judges of the Supreme Court of Canada showed an awareness of and engagement with the history and theoretical complexity of American equality jurisprudence. The Court discussed the famous footnote four of *United States v. Carolene Products Co.*,<sup>62</sup> as well as Ely's interpretation of "discrete and insular minorities."<sup>63</sup> The most important component of the judgment was a realization that the Charter mandated comprehensive and nuanced equality analysis. Ten years after *Andrews*, the Court unanimously agreed on this objective, stating that

[i]t is inappropriate to attempt to confine analysis under s 15(1) of the Charter to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.<sup>64</sup>

<sup>59</sup> *Id.* at 177.

<sup>60</sup> *See supra* note 6.

<sup>61</sup> *Andrews*, *supra* note 58, at [28].

<sup>62</sup> 304 U.S. 144, 152–53 n. 4 (1938).

<sup>63</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 151 (Harvard Univ. Press 1980).

<sup>64</sup> *Law*, *supra* note 54, at 548.

In this respect, the Court's analysis resonates with analyses by other constitutional courts and their justices. First, there is an affinity with Justice Thurgood Marshall's consistently dissenting position on American equal protection doctrine. For example, in *San Antonio v. Rodriguez*,<sup>65</sup> he deplored "the Court's rigidified approach to equal protection analysis."<sup>66</sup> More recently, Justice Albie Sachs of the South African Constitutional Court described the challenge that court faced when deciding the first cases under the right-to-equality provision of their Constitution, section 8.<sup>67</sup> He wrote:

For me, the *Andrews* case provided more illumination than any other I had read from any jurisdiction . . . a forceful guiding principle emerged. As I understood it, the decision centred equality law on the need to overcome discrimination against groups historically subject to disadvantage. I thought, "Hooray, the Canadians have found the magic bullet that cures all equality-related infirmity."<sup>68</sup>

To this the author can only sigh, "Albie, if it were only so easy in practice!" He added that an opinion of mine in a subsequent case was also of use: "In . . . one paragraph she articulated much that seemed to capture the underlying thrust of our equality provisions. The emphasis, she said, is on the extent to which dignity as a human being is being assailed because of membership of a particular group."<sup>69</sup> The Constitutional Court of South Africa quoted from that Canadian Supreme Court decision in *President of the Republic of South Africa and Another v. Hugo*,<sup>70</sup> finding that a male prisoner's dignity was not oppressed by the release of only female prisoners with children under the age of twelve.

Consider now a case study of the direct application of Section 15. The Individual's Rights Protection Act of Alberta (IRPA), that province's human rights legislation, did not include sexual orientation as a prohibited basis of discrimination, despite recommendations from the responsible agency and a government-appointed review panel. Delwin Vriend was dismissed as a laboratory coordinator by a college with a policy on "homosexual practice" after responding to an inquiry by the President and stating that he was homosexual. The Alberta Human Rights Commission rejected Vriend's complaint because sexual orientation was not a protected ground.<sup>71</sup>

<sup>65</sup> 411 U.S. 1 (1973).

<sup>66</sup> *Id.* at 98.

<sup>67</sup> Justice Albie Sachs, *Equality Jurisprudence: The Origin of Doctrine in the South African Constitutional Court* 5 REV OF CONSTITUTIONAL STUDIES 76 (1999).

<sup>68</sup> *Id.* at 80.

<sup>69</sup> *Id.* at 84–85.

<sup>70</sup> 1997 (4) SA 1, quoting *Egan v. Canada* [1995] 2 S.C.R. 513 (L'Heureux-Dubé J., dissenting).

<sup>71</sup> I understand from statements by the American Civil Liberties Union that there is a parallel situation for employment discrimination in thirty-eight American states. See <http://www.aclu.org/news/2002/n042402f.html>.

All the judges of the Supreme Court of Canada found that:

[t]he “silence” of the *IRPA* with respect to discrimination on the ground of sexual orientation is not “neutral.” Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.<sup>72</sup>

The ruling continued with a reference to developments in our neighboring jurisdiction:

It may at first be difficult to recognize the significance of being excluded from the protection of human rights legislation. However it imposes a heavy and disabling burden on those excluded. In *Romer v. Evans* [517 U.S. 620] (1996), the U.S. Supreme Court observed, at p. 1627:

... the [exclusion] imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint... These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

While that case concerned an explicit exclusion and prohibition of protection from discrimination, the effect produced by the legislation in this case is similar. The denial by legislative omission of protection to individuals who may well be in need of it is just as serious and the consequences just as grave as that resulting from explicit exclusion.<sup>73</sup>

The Court, over a lone dissent confined to the remedy, ordered Alberta to include or “read in” sexual orientation in its legislation.

Section 15 has also influenced Charter interpretation more generally. In a decision mandating the province of New Brunswick to fund counsel for indigent parents facing the loss of child custody, my opinion noted:

This Court has recognized the important influence of the equality guarantee on the other rights in the *Charter*. As McIntyre J. wrote in *Andrews*... “The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.” All *Charter* rights strengthen and support each other... and s. 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable.<sup>74</sup>

<sup>72</sup> *Vriend v. Alberta* [1998] 1 S.C.R. 493 at [86].

<sup>73</sup> *Id.* at [98] (ellipses and brackets in original).

<sup>74</sup> *New Brunswick (Minister of Health and Community Services) v. G.(J.)* [1999] 3 S.C.R. 46 at [112].



I went on to cite the U.S. Supreme Court in *Santosky v. Kramer*,<sup>75</sup> which emphasized that "[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias."<sup>76</sup>

The best example of section 15's wider impact came in the Court's 1990 judgment on hate speech. Jim Keegstra was a high school teacher charged with unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. In a four to three decision, a majority (including me) upheld the constitutionality of the Criminal Code provision at issue.<sup>77</sup> Chief Justice Dickson wrote for the majority and in one section addressed "The Use of American Constitutional Jurisprudence." He observed:

Those who attack the constitutionality of [the provision] draw heavily on the tenor of First Amendment jurisprudence in weighing the competing freedoms and interests in this appeal, a reliance which is understandable given the prevalent opinion that the criminalization of hate propaganda violates the Bill of Rights [citing Professors Laurence Tribe and R. Kent Greenawalt].<sup>78</sup>

Chief Justice Dickson also pointed out, however, that "a growing body of academic writing," including Professors Richard Delgado and Mari Matsuda, had challenged that position:<sup>79</sup>

What was conclusive in the Court's view was that the Charter's [s]ection 1 has no equivalent in the United States, a fact previously alluded to by this Court in selectively utilizing American constitutional jurisprudence. . . . Of course, American experience should never be rejected simply because the Charter contains a balancing provision, for it is well known that American courts have fashioned compromises between conflicting interests despite what appears to be the absolute guarantee of constitutional rights. Where s 1 operates to accentuate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken in the United States. Far from requiring a less solicitous protection of Charter rights and freedoms, such independence of vision protects these rights and freedoms in a different way . . . the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the

<sup>75</sup> 455 U.S. 745 (1982).

<sup>76</sup> *Id.* at 763 (ellipsis in original).

<sup>77</sup> *R v. Keegstra* [1990] 3 S.C.R. 697.

<sup>78</sup> *Id.* at 738.

<sup>79</sup> *Id.* at 741.

Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.<sup>80</sup>

A trenchant comparative analysis of *Keegstra* has come from Professor Vicki Jackson. I would like to quote her appraisal:

Both the majority and the dissent in *Keegstra*, as in other Canadian cases applying the . . . [section 1] proportionality test, demonstrate the influence of a context-specific approach. . . . In *R.A.V. v. St Paul*, by contrast, both majority and dissenting opinions rely almost entirely on past U.S. case precedents in resolving the difficult constitutional questions presented. Another interesting feature of Canadian cases is the degree to which the justices explicitly identify competing constitutional values and make comparative normative assessments about those values, and in so doing consider the relevance of comparative materials. In *R v. Keegstra*, an[ ] area of disagreement concerned the relative weight of the constitutional values that, all of the Justices agreed, were important under the Canadian constitution. For the majority, the constitutional value of promoting Charter commitments to equality and to a multicultural society by giving equal respect to different linguistic, racial and religious groups provided strong reason to uphold the hate statute. . . . By contrast, in *R.A.V.*, the majority opinion says little about the possible value of governmental opposition to hate speech and what it does say comes late in its opinion. And in *Keegstra*, both the majority and the dissent discuss international and comparative materials, while the opinions in *R.A.V.* mention neither.<sup>81</sup>

Mayo Moran, of the University of Toronto, writing approvingly of the majority view in *Keegstra*, has intriguingly suggested that *Keegstra* reflects the Canadian polity's difference from the American, because the former's ethos includes:

both the centrality of equal citizenship as well as the responsibility of the state to ensure that this kind of equality can be realized. It is to make this point that the [*Keegstra*] opinions emphasize the equality-seeking and the freedom-enhancing nature of official action. And it is in part this possibility of benevolent state action that makes the dissent's slippery slope arguments ring hollow. Culturally, even if Canadians do not particularly like the government, we do not tend to see it as dangerous—foolish and bumbling, yes, but rarely dangerous.<sup>82</sup>

<sup>80</sup> *Id.* at 743.

<sup>81</sup> Jackson, *supra* note 2, at 612–13.

<sup>82</sup> Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 Wis. L. Rev. 1425, 1506–07.

Whether or not one finds this to be a cultural over-generalization, the narrow point I take from *Keegstra* is that it accorded equality rights prominence in what could have been a “pure” speech controversy. Two years later, the Court upheld a Criminal Code provision on pornography, to the subsequently expressed horror of civil libertarians like Nadine Strossen, President of the American Civil Liberties Union, who prefers the American *Hudnut*<sup>83</sup> approach.<sup>84</sup> The Canadian Supreme Court in *R v. Butler*<sup>85</sup> was careful to put its reasoning in precedential context:

[I]t should be recalled that in *Keegstra* . . . this Court unanimously accepted that the prevention of the influence of hate propaganda on society at large was a legitimate objective . . . the harm sought to be avoided in the case of the dissemination of obscene materials is similar . . . [T]here is a growing concern that the exploitation of women and children, depicted in publications and films, can, in certain circumstances, lead to “abject and servile victimization” . . . [I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material.<sup>86</sup>

With the United States so geographically proximate and the U.S. Court’s constitutional jurisprudence so substantially developed, an intriguing question for those in Canada and elsewhere interested in comparative constitutional study is what factors contribute to the fact that these two countries’ equality jurisprudence in the Charter era have so diverged. In addition to the reasons of history concerning when these two constitutional documents were adopted to which I referred in my introduction, I would note three additional factors.

First, I have alluded to what Justice John Marshall called the rigidity of United States equal protection doctrine. I was struck by the recent Supreme Court decision in *Tuan Anh Nguyen v. I.N.S.*,<sup>87</sup> upholding differential requirements for a child’s acquisition of citizenship depending upon whether the citizen parent is the mother or the father. Because of the accumulation of “levels of scrutiny” jurisprudence, much of the debate between the majority and the

<sup>83</sup> *American Booksellers Association Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

<sup>84</sup> Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?* 46 CASE W. RES. L. REV. 449 (1996). The *Hudnut* approach sets out the “viewpoint-neutrality principle,” which “holds that government may never limit speech just because any listener—or even the majority of the community—disagrees with or is offended by its content or the viewpoint it conveys.” *Id.* at 455.

<sup>85</sup> [1992] 1 S.C.R. 452.

<sup>86</sup> *Id.* at 497.

<sup>87</sup> 533 U.S. 53 (2001).

dissent turned on the accuracy of the test applied. Justice O'Connor's dissent argued that "the majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require."<sup>88</sup> This, in my view, somewhat obscures the dignitary considerations involved. In Canada, where we separate justification under section 1 from finding section 15 violations, our conscious suppression of formalism in equality rights adjudication has made assessments of claims more purpose-driven. This furthers the goal of preventing, in the Court's words, "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."<sup>89</sup> Thus, we have established flexible guidelines for achieving equality.

In this context, the Supreme Court of Canada unanimously invalidated a similar provision to that at issue in *Nguyen*. In *Benner v. Canada (Secretary of State)*,<sup>90</sup> the appeal challenged provisions of the Citizenship Act that provided for differential treatment of certain persons wishing to become citizens of Canada. A child born abroad before 1977 to a Canadian father could claim citizenship upon registration, while a similar child of a Canadian mother had to apply for citizenship. The basis of the distinction was stereotypical; women had once been deemed incapable of passing on citizenship to their children unless there was no legitimate father from whom the child could acquire citizenship. In an uncomplicated opinion, we found that:

[t]his legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen. In fact, it suggests that children of Canadian mothers may be more dangerous than those of Canadian fathers, since only the former are required to undergo an oath and security check.<sup>91</sup>

An American commentary written afterward, with reference to the swing vote of Justice John Paul Stevens, in the prior case of *Miller v. Albright*,<sup>92</sup> noted that:

[t]he provisions were not defensible in constructing the Canadian nation in large part because, unlike Justice Stevens . . . the Canadian Supreme Court rejected a differential construction of women as mothers and men as fathers. . . . Although the same biological differences exist between men and women in Canada as in the United States, Bangladesh, and

<sup>88</sup> *Id.* at 2069.

<sup>89</sup> *Law, supra* note 54, at 549.

<sup>90</sup> [1997] 1 S.C.R. 358.

<sup>91</sup> *Id.* at [90].

<sup>92</sup> 523 U.S. 420 (1998).

Japan [countries in which courts upheld differential treatment of citizenship], the Canadian Supreme Court in *Benner* did not attribute to those biological differences the same social meaning. Consistent with the Botswana Court of Appeal . . . the Canadian Supreme Court did not refer to mothers as natural and fathers as legal or social.<sup>93</sup>

A second factor in the distinct contemporary positions of our Supreme Courts on equality is the universal phenomenon that judges cannot entirely choose the cases that come before them; neither the issues nor the facts presented are of the judges' creation. A subject matter on point is sex discrimination in prisons. The manner in which this issue was raised before the Supreme Court of Canada in 1993 was entirely dissimilar to the posture behind the leading case in the United States.

In Canada's *Weatherall v. Canada (Attorney General)*,<sup>94</sup> the male appellant challenged the fact that male prisoners in penitentiaries were searched and patrolled by female guards, but female prisoners were supervised only by women. In summary fashion, the Court would have none of this argument, declaring that:

[t]he jurisprudence of this Court is clear: equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality. Given the historical, biological and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors.<sup>95</sup>

In the 1977 American decision *Dothard v. Rawlinson*,<sup>96</sup> by contrast, the issue was whether female guards could be kept out of male prison units by the state of Alabama. It was the female guards who challenged their exclusion from such employment, an exclusion that the Court upheld. My sympathies lie with Justice Marshall's ringing dissent, which excoriated the majority's paternalism in allowing the practice:

The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual

<sup>93</sup> Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93, 132-33 (2000).

<sup>94</sup> [1993] 2 S.C.R. 872.

<sup>95</sup> *Id.* at 877.

<sup>96</sup> 433 U.S. 321 (1977).

assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, "[t]he pedestal upon which women have been placed has . . . upon closer inspection, been revealed as a cage." It is particularly ironic that the cage is erected here in response to feared misbehavior by imprisoned criminals.<sup>97</sup>

Although in both cases the respective Court upheld the government's existing position with respect to the presence of female guards in male prisons, the results—and effects on women—were quite different because of differences in the underlying posture of the case as well as the different doctrinal approaches taken by the two Courts. *Weatherall*'s facts make it an easy case for substantive equality doctrine. Women should not be punished for the historical trend of violence against them that led to male guards being forbidden in female jails. The state has acted in an equality-promoting manner and the formalistic equality position is rejected because it would harm women's equality (and perhaps put male guards in women's jails). The Court, endorsing the existence of positive state action, refuses to take women out of an unequal situation for which they are not responsible.

*Dothard*'s facts allow an intrusion of paternalism that was impossible in *Weatherall* for two reasons. First, given its facts, this option is foreclosed and, second, paternalism is ruled out doctrinally if the state is conceptualized, as it is in Canada, as responsible for "promot[ing] equality." The *Dothard* majority also refers to the historical trend of violence against women but deploys it not to justify differential treatment but to add a further disadvantage. This burden is placed on women as an equality-claiming group despite (or because of) the fact that they have been targets of violence.

As a result of the intertwining of the different factual scenarios and the absence of substantive equality doctrine, the state in *Dothard* is allowed to perpetuate conditions of "rampant violence" and a "jungle atmosphere" to the detriment of women.<sup>98</sup> From my perspective, the U.S. Court misapplies equality principles as a protective measure in endorsing the state's exploitation of a dire situation hostile to women's job opportunities. It refuses to allow women to enter as equals into a situation for which they are not responsible.

My last observation concerns a matter entirely beyond the purview of the judiciary, namely political will to support equality-seekers and to implement their courtroom victories. Depending on the wishes of elected and appointed officials, progress toward equality can be hastened or delayed. In Canada, legislatures responded to a Supreme Court decision<sup>99</sup> mandating the inclusion of same-sex spousal support in family laws by passing omnibus revisions of rights and benefits once limited to traditional families. Administrations bent

<sup>97</sup> *Id.* at 345 (brackets and ellipsis in original).

<sup>98</sup> *Id.* at 334.

<sup>99</sup> *M v. H* [1999] 2 S.C.R. 3.

on stalling equality could have litigated each item piecemeal. One of the last few frontiers of classification, the bar on same-sex marriage, is now being challenged in three provinces. The discourse and legacy of American school segregation was invoked in July 2001 at trial in Vancouver, where an attorney representing five same-sex couples loosely compared their situation to what African American children of that era endured. She assailed "separate but equal" treatment, foregrounding *Brown v. Board of Education's*<sup>100</sup> conclusion that such classification "hurt in a way that cannot be undone."<sup>101</sup> On October 3, 2001, these claimants lost at first instance, with the judge writing:

The objective of limiting marriage to opposite sex couples is sufficiently important to warrant infringing the rights of the petitioners. . . . The gain to society from the preservation of the deep-rooted and fundamental legal institution of opposite-sex marriage outweighs the detrimental effect of the law on the petitioners.<sup>102</sup>

A news report quoted a fifty-nine-year-old litigant, speaking of his fifty-four-year-old partner: "We are into our 34th year now. . . . It is a very long time to be engaged and I guess now it's going to be a little longer. . . . Of all the struggles we've been through, I am surprised at just how disappointed I am. However, I still believe that we will eventually win in the Supreme Court of Canada."<sup>103</sup>

I mention political will because of an American lawsuit mentioned in the *Washington Post* in October 2001. To put my reaction in context, I will introduce Tawney Meiorin, a British Columbia firefighter who by 1995 had performed her work satisfactorily for more than three years. But she lost her job after running 2.5 kilometers in forty-nine seconds longer than required under a new series of fitness tests. The Supreme Court accepted Meiorin's claim, holding that under the *BC Human Rights Code*, the minimum fitness standard discriminated against women and could not be justified as a bona fide occupational requirement.<sup>104</sup> In other words, a lower standard could still provide sufficient protection to the public, while also having a less discriminatory impact on women. Now to the *Post* story on this exact issue of minimum qualifications, from which I quote:

The Bush administration is dropping [its support for a plaintiffs' appeal in] a Clinton administration civil rights action that charged that an aerobics test used by the Southeastern Pennsylvania Transportation

<sup>100</sup> 347 U.S. 483 (1954).

<sup>101</sup> E. Yearwood, *Gay marriages not against law, attorney argues*, CANADIAN PRESS, July 26, 2001.

<sup>102</sup> *EGALE Canada Inc v. Canada (Attorney General)* [2001] BCJ No 1995, BCSC 1365, at [188], [191].

<sup>103</sup> Tom Arnold, *B.C. court says no to gay marriage: Disheartening decision: Judges conclude ban is an acceptable form of discrimination*, NATIONAL POST, October 4, 2001.

<sup>104</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3.

Authority (SEPTA), which was failed by 93 percent of female applicants, was overly rigorous. The test required all applicants for the SEPTA police force to run 1.5 miles in 12 minutes. . . . We feel it is critical to public safety that police and firefighters be able to run, climb up and down stairs to rescue people quickly under the most trying of circumstances,” said . . . a Justice Department spokesman. . . . Two of the women who failed the test have gone on to become police officers with the Philadelphia Police Department. The lead plaintiff . . . is with the tactical bike control unit at the University of Pennsylvania and provides back-up assistance to SEPTA officers. . . . No other police force in the country uses such a restrictive test—not the FBI, not the New York Police Department, not the Washington transit police . . . SEPTA[’s] attorney . . . said that “it was about time” the Justice Department endorsed the position SEPTA has taken since 1992. He said [that] since 1992, major crime in the subway system has dropped 70 percent. About 5 percent of the 200-member force are women.<sup>105</sup>

There’s a textbook correlation/causation fallacy to be pondered!

## 5. Conclusion

Formal equality is an incomplete and impoverished social condition. What we call substantive equality in Canada is a contextual and empathetic approach to ensuring human dignity. In this sense, equality is the conscience of our law. The isms and phobias—racism, sexism, homophobia, and the malevolent rest—are all fountainheads of discrimination and harassment. They have no place in this era of human rights, in a world where each and every individual has the right to be treated with the same respect and consideration. The words of Cesar Chavez apply to every corner of our vast global village: “Once social change begins, it cannot be reversed. You cannot uneducate the person who has learned to read. You cannot humiliate the person who feels pride. You cannot oppress the people who are not afraid anymore.”<sup>106</sup> Equality will be the battle of the millennium. At times, equality’s standard bearers will feel like they are standing alone and will be harshly criticized for their positions. But, for those who do what is right, affirmation and solidarity come in due course. For it is my firm belief that justice without equality is no justice at all.

<sup>105</sup> Ellen Nakashima, *Justice Dept. Bows Out of a Civil Rights Case; Suit Charged Male Bias in Police Test* WASHINGTON POST, October 2, 2001, at A23.

<sup>106</sup> Cesar Chavez (President of the United Farm Workers of America, AFL-CIO), Address at the Commonwealth Club of California, San Francisco (November 9, 1984), available at <http://www.ufw.org/commonwealth.htm>.