EQUALITY IN CONTEXT: JUDICIAL APPROACHES IN CANADA AND THE UNITED STATES

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I. Introduction

I thought I would begin by explaining that the phrase "equality in context" reflects my belief that to understand legal concepts and developments, we must examine the social, political, economic, cultural, ideological, familial, and historical context within which they emerge. This is particularly important when engaged in comparative law. For example, yesterday, Madam Justice McLachlin spoke of the infamous *Brown v. Board of Education*[1] decision in the United States, in which Chief Justice Warren struck down the "separate but equal" doctrine and racial segregation in the schools. In the United States context, racial integration was an important component of the struggle towards racial equality. In Canada, however, we see precisely the opposite concern. The struggle for equality for francophone minorities outside of Quebec has been a struggle not for integration, which would spell assimilation, but for the right to education in separate schools.[2] This example may also illustrate a greater receptivity in Canada to collective or group rights in contrast to what I argue is a predominantly individualistic approach in the United States.[3]

Not only is it important to look at context to understand what has been, but it is also essential to inform the future development and articulation of legal concepts with an understanding of the everyday lived realities of inequality - that is, of social disadvantage, of prejudice, of exclusion, of silencing. To give another example, in the United States, a contextualized approach to racial discrimination should be informed by an appreciation of the fact that almost fifty percent of Black children live in poverty.[4] We cannot develop an adequate and fair concept of legal equality without incorporating knowledge of such social realities.

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[1]347 U.S. 483 (1954); cited by Madame Justice Beverley M. McLachlin, "The Role of the Court in the Post-*Charter* Era" published in this volume.

[2]See discussion in Joseph Magnet, "Minority-Language Educational Rights" (1982) 4 Sup. Ct. L.R. 195. See also *The Canadian Charter of Rights and Freedoms*, s. 23, and *Two Official Linguistic Communities in New Brunswick Act*, S.N.B. 1981 c. O-1.1, s. 2.

[3]For interesting discussions of comparative political culture, see Gad Horowitz, "Conservatism, Liberalism and Socialism in Canada: An Interpretation" in *Canadian Labour in Politics* (Toronto: Univ. of Toronto Press, 1968) ch. 1, and Seymour Martin Lipset, "Canada and the United States: The Cultural Dimension" in Charles Doran and John Sigler (eds.) *Canada and the United States, Enduring Friendship, Persistent Stress* (Englewood Cliffs, New Jersey: Prentice Hall, 1985) 109-160.

[4]See statistics cited in Kimberle Williams Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 Harv. L. R. 1331 at note 3. Crenshaw also discusses terminology writing: "I shall use "African-American" and "Black" interchangeably. When using "Black," I shall use an upper-case "B" to reflect my view that Blacks, like Asians, Latinos, and other "minorities," constitute a specific cultural group and, as such, require denotation as a proper noun." *Ibid.* 1332 at note 2.

In addition to appreciating the context of inequality, we must approach a discussion of equality with an awareness of the possibility of distinguishing the substantive definition of equality from the institutional mechanisms for achieving it whether they be political, legal, or educational. For underlying or entangled within debates about the constitutional meaning of equality are concerns about institutional constraints in particular, concerns with protecting a view of the rule of law as objective and neutral, and a concern with the legitimacy of judicial review. These institutional matters can constrain our vision of the substantive definition of equality. We equate the meaning of equality with what we think the judiciary can legitimately provide, without being aware of having collapsed the two inquiries. Thus, while we cannot ignore institutional concerns, we should not let them skew our understanding of the substantive meaning of equality as a constitutional ideal.

As a final preliminary observation, I think it is critical to recognize that we are at an important moment in Canadian legal history. We are still in the early years of the *Charter* era, which is widely perceived to represent a new era in Canadian law. Again, Madame Justice McLachlin clarified the dimensions of some aspects of this new era in terms of the shifting role of the courts *vis-a-vis* the legislature and the executive.[5] And yet, despite the rhetoric of a new era, I think we are still searching for a new vision of what the legal protection of human rights and freedoms should be all about; we need to develop new legal concepts that take us beyond what I would call a classical liberal, individualistic and negative rights paradigm, which views the state predominantly as a source of infringement of rights rather than as a source of potential protection or enhancement of rights and freedoms. Indeed, a negative rights paradigm seems oddly out of step with the modern reality of an advanced regulatory state and widespread government involvement in social welfare, health, education, and economic and cultural institutions. We need to develop an understanding of how to apply and elaborate constitutional rights and freedoms in an advanced regulatory state.

This issue is integral to equality. In Canada, in the wake of the Supreme Court of Canada's decision in *Andrews v. Law Society of British Columbia*[6], we are standing on the threshold of a "post liberal" conceptualization of equality. By "post-liberal" I mean a notion of equality that encompasses substantive equality of condition, acknowledges group identity and the retention of cultural and/or other differences, and goes beyond individual equal treatment to require differential treatment in some circumstances.[7] Nevertheless, we must decide whether to step inside and fully explore the implications and content of this alternative vision.

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[5]*Supra*, note 1.

[6][1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719 [hereinafter cited to S.C.R.].

[7]See discussion of law in post-liberal society in Roberto Mangabeira Unger, *Law in Modern Society* (New York: The Free Press, 1976) at 192-216; see also N. Colleen Sheppard, "Equality, Ideology and Oppression: Women and the *Canadian Charter of Rights and Freedoms*" in Christine Boyle et al. (eds.) *Charterwatch - Reflections on Equality* (Toronto: Carswell, 1986) 195 at 198-200.

II. Constitutional Equality in the United States

In developing the legal principle of equality in Canada, it is helpful to learn from the U.S. experience.[8] There, rather than finding a model of legal equality deserving of emulation in application of the equal protection doctrine,[9] we find confusion and retrenchment. A deeply divided U.S. Supreme Court reflects the disarray of a doctrinal paradigm in crisis. This appears to be an area of constitutional law where we can learn from the mistakes of our neighbours, and in so doing pursue an alternative course in Canada. What is the dominant approach to equality in the United States? Why and how is it in crisis? I shall explore these questions and then turn to the Canadian context.

In my view, U.S. constitutional law takes as its starting premise the idea that equality means "sameness of treatment." To be treated equally is to be treated the same. It asserts that all *individuals* should be treated the same and not treated differently because of unfair or discriminatory attitudes or stereotypes about the abilities or talents of the groups to which individuals belong. This is presented as the "neutral" starting point of legal equality. Integral to the sameness of treatment premise is a focus on equality as a process or procedure as opposed to a result or a condition. The legal requirement of equality is a requirement of sameness of treatment in terms of process, which translates into the notion of equality of opportunity, as opposed to equality of condition.[10] To understand why this emerged as the underlying premise or informing principle of U.S. equal protection doctrine, it is important to appreciate two important historical contexts within which constitutional equality guarantees were shaped.

The first was the severe and invidious history of subordination of Blacks. From the institution of slavery, to overt segregation laws and outright denials of civil and political rights even after the abolition of slavery, discrimination took the form of harmful or disadvantaging differential treatment. In this context, an understanding of equality as sameness of treatment responded to the problem of

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[8]By focussing on the U.S. experience, I do not mean to undermine in any way the importance of examining international human rights developments and the European experience, both of which influenced the shape and content of the *Charter*. I should also note here that I resist using the term "American" because in my view it is an inaccurate and unjustified appropriation of a generic word by a particular and partial group. It would be like males appropriating the use of the word "humans" or "persons," which has occurred in Canadian legal history (see *Reference Re the Meaning Of the Word "Persons" in Section 24 of the British North America Act, 1867*, [1928] S.C.R. 276.).

[9]The major source of constitutional protection for equality is contained in the equal protection clause of the fourteenth amendment which provides: "No State shall... deny to any person within its jurisdiction the equal protection of the laws." (U.S. Constitutional amend. XIV, s. 1) An equal protection clause has been read into the due process clause of the fifth amendment to provide for protection *vis-a-vis* the federal government. See *Bolling v. Sharpe*, 347 U.S. 497 at 499 (1954).

[10]For an overview of the dominant approach to the equal protection clause in the United States, see Laurence H. Tribe, *American Constitutional Law* (2d.) (New York: Foundation Press, 1988) ch. 16. See also Owen Fiss, "Groups and the Equal Protection Clause" (1976) 5 Phil. & Pub. Affairs 107 and Catharine MacKinnon, "The Legal Context" in *Sexual Harassment of Working Women* (New York: Yale Univ. Press, 1979) at 101-141.

widespread injustices in the form of differential treatment. As Justice Harlan put it in his famous dissent in *Plessy v. Ferguson*:

> Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[11]

What emerged doctrinally from this context, in the era following the Second World War, was the "strict scrutiny test," which was rooted in the idea that race was a suspect class and virtually never a legitimate basis of legislative classification. It was only in the face of a compelling government objective and means narrowly tailored to achieve that objective that a race-based classification could withstand constitutional scrutiny.[12]

The second historical context important to the elaboration of equal protection doctrine was the emergence of the modern regulatory state in the aftermath of the depression. Inherent in the task of legislating was classification and differential treatment. This came into tension, however, with the constitutional guarantee of equal protection of the laws, creating what Professors Tussman and tenBroek called the "paradox" of constitutional law in their famous article of 1949.[13]

Given this dilemma, which rendered an absolute sameness standard problematic, the doctrinal approach to the equal protection clause was refined. It was interpreted not to provide an absolute right to sameness of treatment; rather, it only provided protection against arbitrary or unreasonable differences in treatment. This of course is most commonly measured by the application of the "similarly situated" test. The equal protection clause thus came to be regarded as requiring that all those who were similarly situated, with respect to the purpose of the law, be treated similarly.[14] While allowing for a deviation from strict sameness of treatment, the underlying premise that equality means sameness remained in place.

These two contexts lay the groundwork for understanding developments over the past two decades. For it was in the 1970s and 1980s that the fundamental inadequacies of the traditional formulation of equal protection doctrine, with its un-

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[11]See *Plessy v. Ferguson*, 163 U.S. 537 at 559 (1896).

[12]The strict scrutiny test was first articulated in *Korematsu v. United States*, 323 U.S. 214 (1944), in a case where the forcible relocation of persons of Japanese ancestry from the West Coast during the Second World War was upheld. Despite the result in this case, the strict scrutiny test was increasingly interpreted to prohibit race-based classifications in virtually all circumstances: see Tribe, *supra*, note 10 at 1451-1452.

[13]J.S. Tussman and J. tenBroek, "The Equal Protection of the Laws" (1949) 37 Calif. L. Rev. 341 at 344.

[14]*Ibid*, at 346.

derlying premise of equality as sameness of treatment, began to surface. This occurred when the Court was faced with new problems and issues of equality that did not lend themselves to the straightforward sameness of treatment approach or its variation, the similarly-situated" approach. The three examples I want to explore include: (i) disparate impact or effects-based discrimination; (ii) affirmative action; and (iii) gender discrimination. Each reveals the inadequacy of a formulation of equality as sameness.

The Court's response to these new issues has been threefold, as the splintered judgments reveal. One response has been to deny and resist change by clinging to the traditional paradigm, while denying relief. A second response has been to create exceptions to the traditional paradigm rather than challenging its underlying premises, which has generated considerable confusion. Finally, there have been some attempts to articulate a new approach or to develop a new paradigm.

(i) Disparate Impact Discrimination

The first area where we can see the paradigm of equality as sameness of treatment running into difficulties is disparate impact discrimination. The essence of disparate impact discrimination is recognition that the application of a "facially neutral" law or policy, or sameness of treatment, can generate unequal results.[15] Some laws or policies have disproportionately negative effects on certain groups, depending on differences in social, economic or cultural realities. And this can occur even and often in the absence of any intent to discriminate. Although this type of discrimination has been acknowledged in the interpretation of human rights legislation in the United States, it has been rejected by the courts in constitutional cases. A majority of the U.S. Supreme Court has held consistently that there must be overt differential treatment or evidence of an intent to discriminate for there to be a violation of the constitutional guarantee of equality.[16]

Why has the Court been so resistant to acknowledging effects-based or disparate impact discrimination in the constitutional context? One difficulty associated with the recognition of disparate impact discrimination is its implicit and fundamental challenge to the sameness premise of existing constitutional equality doctrine. No longer is sameness of treatment the sole measure of equality, since sameness of treatment can generate inequality. Secondly, what formerly appeared as "neutral" legislation (understood as sameness of treatment) is revealed as containing an unstated bias in favour of individuals from the dominant group(s) in society.[17] Thirdly, disparate impact discrimination challenges the no-

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[15]This concept was first recognized in the United States in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a case arising under the federal human rights legislation, *The Civil Rights Act of 1964, Title VII*, 42 U.S.C. s. 2000e *et seq.*

[16]See for *e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator of Massachussetts v. Feeney*, 442 U.S. 256 (1979); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

[17]See Martha Minow, "The Supreme Court 1986 Term - Foreword: Justice Engendered" (1987) 101 Harv.L.Rev. 10, for a discussion of the way in which equal protection doctrine adopts implicitly an unstated norm that corresponds to the characteristics of the dominant groups in society.

tion that society is basically fair, equal, just, and neutral, except for aberrant acts of discrimination. To acknowledge effects-based discrimination brings to light the pervasiveness of inequality and the ways in which inequality is institutionalized in the policies, procedures, laws and organizations of society. Accordingly, extensive institutional change is needed for its amelioration - change that demands positive intervention by government. The recognition of, but resistance to this latter point is clear in Justice White's comment in *Washington v. Davis*:

> 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 affluent white.[18]

Finally, to require an intent to discriminate and thereby not acknowledge the felt experience of inequality or the disparate effects of a sameness standard is to adopt what Alan Freeman has called the "perpetrator perspective."[19] Discrimination only exists when the perpetrator intends it; it is not enough for the victim to experience it. The majority approach on this issue, therefore, has been one of resistance and denial. Rather than upset the premises of the existing paradigm of equality, the Court refuses to acknowledge the source of the challenge - that is the reality of disparate impact discrimination.

The dissenting voices on the Court focus on the victims of discrimination and recognize the possibility of effects-based discrimination. For example, in *McCleskey v. Kemp*,[20] there was an allegation of racial inequality in the imposition of the death penalty based on statistical evidence showing a greater likelihood of being sentenced to death if the murder victim were white and the accused Black. the majority rejected the claim of disparate impact discrimination. In dissent, Justice Brennan wrote:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether the jury was likely to sentence him to die. A candid reply to this question would have been disturbing. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died. . . .
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> The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. . . . McCleskey's evidence

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[18] *Supra*, note 16, at 248.

[19] Alan D. Freeman, "Antidiscrimination Law: A Critical Review" in David Kairys (ed.) *The Politics of Law - A Progressive Critique* (New York: Pantheon Books, 1982) at 96-116.

[20] *Supra*, note 16: see dissenting reasons of Justice Brennan, with whom Justices Marshall, Blackmun and Stevens joined; and dissenting reasons of Justice Stevens, with whom Justice Blackmun joined.

> will not have attained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.[21]

The dissenting judgments in disparate impact cases also reveal a greater willingness to infer a discriminatory purpose on the basis of evidence of the unequal effects of a law or policy, thus blurring the line between purposive and effects-based discrimination.[22] Furthermore, there has been a refusal to deny substantive rights because of the remedial challenges they create, which is a strong undercurrent in the majority approach.[23]

(ii) Affirmative Action

The second area where the sameness premise has encountered serious difficulties is in affirmative action cases. A conceptualization of equality that mandates equal treatment of individuals regardless of their group affiliations runs directly contrary to the idea of affirmative action, which potentially includes differential treatment of individuals according to their group. The U.S. Supreme Court's response to this tension has been divided. At one end of the spectrum we find Justice Scalia. Relying on Justice Harlan's dissent in the *Plessy* case,[24] with its emphasis on the colour blind nature of the Constitution, Justice Scalia rejects the idea of affirmative action in virtually all cases. His rationale is encapsulated in this excerpt from his opinion in *City of Richmond v. J.A. Croson Co.*:

> It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial prejudices can help to "even the score" display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. . . .
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> Racial prejudices appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discrimination against a white.[25]

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[21] *Ibid*, at 321. The judgments in this case no doubt also reflected judicial concerns or lack thereof regarding the imposition of the death penalty.

[22] See, for example, *Personnel Administrator of Massachussetts v. Feeney*, *supra*, note 16. If intent can be inferred from the evidence, it is not necessary to overrule or directly challenge the ruling in *Washington v. Davis*, *supra*, note 16.

[23] See discussion in Tribe, *supra*, note 10 at 1502-1514.

[24] *Supra*, note 11.

[25] 57 U.S.L.W. 4132 at 4148, 109 S. Ct. 706 (1989) [hereinafter cited to U.S.L.W.].

Justice Scalia thus insists that it is wrong to try to redress past racial or gender discrimination by using race-based or sex-based classifications, since to do so would be to discriminate against individual members of historically privileged groups.

In the middle of the spectrum, we see some members of the Court struggling to accept affirmative action in instances where it seems clearly needed to redress past and current discrimination and obvious racial and gender imbalances in workplaces or educational institutions, while not upsetting the basic paradigm of equal protection doctrine.[26] This is a difficult task, conducive to the generation of confusion. The unwillingness to revise doctrinal concepts or contextualize problems of inequality has also resulted in the inappropriate and upsidedown application of principles of equality against individuals from groups that have suffered the most from discrimination in the past. Thus, pursuant to this middle position, affirmative action is accepted, tolerated, and justified as an exception to equality, rather than conceptualized as an integral dimension of it. As an exception to the rule of sameness of treatment of all individuals regardless of their group affiliation(s), affirmative action is characterized as a remedy for past discrimination, a temporary measure that will bring everyone up to the same starting line, or as a necessary means to achieve a compelling, substantial or legitimate state objective. The Court's conceptualization of affirmative action as exceptional and its uneasiness with the concept is revealed in two doctrinal debates. First, should strict scrutiny review apply in cases where a white plaintiff is claiming discrimination on the basis of race? Secondly, what state purposes are sufficiently compelling to justify departing from a sameness approach and allowing affirmative action?[27]

The first issue regarding the level of scrutiny to be applied in cases where an individual from an historically privileged group is challenging an affirmative action plan, has recently been resolved in the majority opinion in the *City of Richmond* case.[28] Justice O'Connor confirmed the applicability of the strict scrutiny test regardless of the race of the individual plaintiff or the "benign" or "remedial" purpose of the racial classification.[29] The justification for adopting strict scrutiny is rooted in an understanding of the constitutional protection of equality as an *individual* right and a deep belief in the need for symmetrical treatment of the races to comply with the exigencies of the apparent neutrality and objectivity of the rule

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[26]See. for *e.g.*, Powell J. in *Regents of California v. Bakke*, 438 U.S. 265 (1978); Powell and O'Connor J.J. in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); O'Connor J. in *City of Richmond v. J.A. Croson Co.*, *ibid*; O'Connor J. in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (Title VII case).

[27]There has also been considerable litigation regarding the use of hiring and promotion quotas. This has been analyzed in terms of whether quotas are a "necessary" or "closely tailored" means for achieving a compelling state purpose. I do not explore this debate in this paper. See also Kathleen M. Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases" (1986) 100 Harv. L. Rev. 78.

[28]*Supra*, note 25.

[29]*Ibid.* at 4138-4140. O'Connor J. cites with approval the plurality opinion in *Wygant*, *supra*, note 26 and Powell J.'s opinion in *Bakke*, *supra*, note 26.

of law. As Justice Powell insisted in *Regents of the University of California v. Bakke*, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[30]

Having endorsed the relevance of strict scrutiny, the Court must therefore justify race-based affirmative action as necessary and carefully tailored to achieve a *compelling* state purpose. Ironically, according to the logic of the *City of Richmond* case, affirmative action aimed at redressing gender-based discrimination would only have to satisfy an intermediate level of scrutiny and affirmative action for persons with disabilities would be judged pursuant to the rational basis test.[31] The skewed doctrinal result is apparent from these comparisons. The reason race-based classifications were accorded strict scrutiny in the first place was linked to the particularly severe and invidious history of discrimination against Blacks, and yet that same group must justify affirmative action programs for their benefit pursuant to the more rigorous strict scrutiny standard. The illogic of such a situation should give rise to doubts about equating sameness with equality and a questioning of the doctrinal paradigm of equal protection. However, rather than revise its underlying approach, the majority of the Court has tried to fit affirmative action into existing doctrinal categories.

This brings us to a second doctrinal issue which reveals the inability of the Court to confront the issue of affirmative action directly. What state purposes are sufficiently compelling to justify affirmative action? In answering this question, the U.S. Supreme Court has consistently rejected the objective of remedying societal discrimination generally and insisted on a more institutionally specific goal.[32] The Court has accepted, therefore, the objective of remedying the ongoing effects of historical discrimination within a *particular* insititution where there is clear evidence or at least a *prima facie* case of past discrimination, thereby signalling its view of affirmative action as an exceptional remedy to specific instances of historical discrimination.[33] The Court has also accepted institutional diversity as a compelling interest in a way which seems to mask the real underlying concerns and convey a misleading, abstracted and neutral notion of diversity.[34]

At the other end of the spectrum are the views of Justices Marshall, Brennan and Blackmun. On the two doctrinal issues discussed above, these members of

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[30]*Supra*, note 26 at 289-290; cited with approval in *City of Richmond*, *supra*, note 25 at 4139.

[31]This follows from the Court's earlier decisions to scrutinize gender-based classifications pursuant to an intermediate level of scrutiny, see discussion, *infra*, note 48, and accompanying text, and its review of classifications based on disabilities according to the rational basis test: see, for *e.g.*, *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249 (1985).

[32]This state objective was rejected, for example, in *Regents of the University of California v. Bakke*, *supra*, note 26, and in *Johnson v. San Antonio Transit Authority*, *supra*, note 26; and in *City of Richmond v. J.A. Croson Co.*, *supra*, note 25.

[33]*Ibid.* See also, *United States v. Paradise*, 480 U.S. 92 (1987) and *Local 28, Sheet Metal Workers Int'l. Assn. v. EEOC*, 478 U.S. 421 (1986) (Title VII case).

[34]See *Bakke*, *supra*, note 26.

the Court disagree with the majority. In *City of Richmond*, Justice Marshall described the majority's acceptance of the strict scrutiny test as "an unwelcome development"[35] which ignores the difference between racist government actions and government actions that seek to remedy racism:

> racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race-based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society.[36]

Moreover, he reminds the Court of the "traditional indicia of suspectness," which focus on "whether a *group* has been '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'."[37] For these reasons, the dissenting justices would apply an asymmetrical approach to the degree of scrutiny. In cases of "benign discrimination," as opposed to "invidious discrimination" on the basis of race, the intermediate level of scutiny instead of the strict scrutiny test would apply.[38]

On the question of what state objectives are sufficiently important to justify affirmative action, the remedying of societal discrimination has been repeatedly accepted by these dissenting justices.[39] This, in my view, attests to their desire to encourage the development of affirmative action programs not only as remedial exceptions, but as proactive and integral components of the struggle for equality.

Beyond these specific issues, the major focus of the decisions of Justices Marshall, Brennan and Blackmun in particular, has been a questioning of the idea that sameness of treatment will suffice in the face of the pervasive disadvantaging of the past, still evident in the present. In the *Bakke* case, for example, Justice Marshall revealed his frustration with an abstract, decontextualized approach to affirmative action issues.

> [I]t is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years, Negroes have been dis-

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[35] *Supra*, note 25 at 4155.

[36] *Ibid.*

[37] *Ibid*, citing from *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 at 28 (1973).

[38] The justifications for such an approach are also articulated by Brennan J. in *Regents of the University of California v. Bakke*, *supra*, note 26. While this approach appears more appropriate to the purposes of the equal protection clause, I think we can still see how even the dissenting justices are trapped in a methodology of sameness. Rather than revise the doctrine, they make exceptions more readily justifiable by adhering to intermediate rather than strict scrutiny.

[39] For examples, see opinions of Justices Brennan, Marshall and Blackmun in cases cited in note 26.

> criminated against, not as individuals, but rather solely because of the color of their skin. It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society is so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.[40]

In the same case, Justice Blackmun stated:

> I suspect it would be impossible to arrange an affirmative action plan in a racially neutral way and have it successful. To ask that is to ask the impossible. In order to get beyond racism, we must first take race into account. And in order to treat some persons equally, we must treat them differently. We cannot - we dare not - let the Equal Protection Clause perpetuate racial supremacy.[41]

(iii) Gender Discrimination

The final area of analysis is gender discrimination. In contrast to race, where it is widely believed that no relevant differences exist and that the sameness standard thus makes sense, there has never been a similar consensus in the area of sex discrimination. In the face of seemingly obvious and relevant biological gender differences, a paradigm of equality premised on sameness of treatment creates conceptual difficulties. Indeed, the failure of the Equal Rights Amendment in the U.S. was due in part to concerns that it would mandate absolute sameness of treatment of the sexes.[42] Rather than confront the inadequacy of a definition of equality as sameness, rendered even more problematic given its acceptance of a male norm, again we witnessed the emergence of doctrinal exceptions which, in this context, entailed exceptions to address so-called "physical characteristics unique to one sex."[43]

Thus, the sameness standard applies except where there are real biological differences. This formula fits in neatly with the "similarly situated" test. Women are to be treated like men to the extent that they are like men. Women can be

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[40] *Supra*, note 26 at 400.

[41] *Ibid.* at 407. Similar statements can be found in the *City of Richmond* case, *supra*, note 25.

[42] See Brown, Emerson, Falk and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women" (1971) 80 Yale L.J. 871.

[43] *Ibid.* at 909. This phrase is problematic to the extent that it makes physical differences seem objective and scientific, and focuses our attention on biological differences themselves, rather than on the social construction and implications of such biological differences. It is also problematic in its implicit acceptance of the male as the norm and the female as different or other. See also, MacKinnon, *Sexual Harassment of Working Women*, *supra*, note 10 and MacKinnon, "Difference and Dominance: On Sex Discrimination (1984)" in *Feminism Unmodified Discourses on Life and Law* (Cambridge: Harv. Univ. Press, 1987) at 32-45.

treated differently to the extent that they are different. In a legal world where the measure of equality is reduced to the accurate tracking of differences as opposed to the elimination of subordination, such a formula provides doctrinal justification for subjecting women to disadvantaging differential treatment in relation to matters that affect only women. In such cases, women are declared not similarly situated and thus there is no legally recognized problem of inequality.[44] U.S. constitutional jurisprudence confirms the rationalization of inequality through the affirmation of gender differences.[45] The recognition of gender differences has been relied on to justify special protective measures for women, but this has usually entailed the perpetuation of patronizing gender stereotypes.[46] Finally, gender differences have been denied pursuant to a sameness of treatment emphasis, resulting in tangible denials for women in the name of abstract gender equality.[47]

In doctrinal terms, cases of gender discrimination gave rise to an "intermediate" level of scrutiny under the equal protection clause, more stringent than the "rational basis" test, but less stringent than the "strict scrutiny" test.[48] By carving out a middle tier of scrutiny, the U.S. Supreme Court could endorse the view that protection against sex discrimination required gender neutral statutes and policies except in the face of "real" or "relevant" sex differences. It is only when one's definition of equality is premised on sameness that such a doctrinal exception becomes necessary. Otherwise it is possible to maintain that strict scrutiny should apply in cases involving discrimination against women, and that integral to the definition of equality is the need for differential treatment to accomodate the specific needs and interests of women.[49]

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[44]See discussions in articles by MacKinnon, *ibid.*

[45]See, for *e.g.*, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (finding pregnancy dicrimination does not constitute sex discrimination); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding prohibition on women practicing law); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding law prohibiting woman from working as bartender unless she was the wife or daughter of the male owner); *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding jury selection system that excluded women who did not affirmatively indicate a desire to participate).

[46]See, for *e.g.*, *Muller v. Oregon*, 208 U.S. 551 (1908) (upholding maximum hours of work legislation), *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981) (upholding statutory rape statute). For a feminist analysis of the *Michael M.* case, see Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 Texas Law Rev. 387. There have been a few cases in which the social and economic realities of gender differences as opposed to patronizing gender stereotypes have been relied on to uphold beneficial differential treatment: see, for *e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage laws); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding federal statute granting women in navy longer qualifying period for promotion); *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding property tax exemption for widows).

[47]This has most often occurred in cases where men have successfully challenged special benefits for women: see, for *e.g.*, *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating laws imposing alimony obligations on men only).

[48]See *Craig v. Boren*, 429 U.S. 190 (1976).

[49]Brennan J.'s decision in *Frontiero v. Richardson*, 411 U.S. 677 (1973) endorsed the applicability of a strict scrutiny approach to gender discrimination. For an example of a U.S. Supreme Court decision that recognizes the need for differential treatment in some contexts to ensure equality of outcomes, see *California Fed. Savings and Loan Ass'n v. Guerra*, 107 S.Ct. 683 (1987), *per* Marshall J. (interpreting federal civil rights statute, Title VII).

III. The Canadian Approach to Equality

In Canada, courts are faced with the task of developing a fair and workable approach to equality under the *Charter*.[50] The Supreme Court of Canada's recent articulation of an approach to constitutional equality, coupled with its commitment to develop consistent approaches in the statutory and constitutional contexts, lay the groundwork in Canada for a constitutional conception of equality that significantly differs from the U.S. view. This can be demonstrated by briefly reviewing some of the major components of the Supreme Court of Canada's discussion of constitutional equality in *Andrews v. Law Society of British Columbia*[51]

In *Andrews*, the Supreme Court of Canada refused to accept the idea that equality simply means sameness of treatment. Justice McIntyre stated unequivocally: "It must be recognized at once. . . 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."[52] Integral to this initial insight was acceptance of the possibility and reality of effects-based discrimination. Rather than reject the extension of jurisprudential developments in statutory human rights cases, which the United States Supreme Court chose to do, the Supreme Court of Canada expressly endorsed an effects-based approach to the equality provisions of the Charter and the relevance of precedents in statutory human rights law.[53] In addition to rejecting an absolute sameness of treatment approach to a constitutional guarantee of equality, the Supreme Court of Canada rejected the "similarly situated" test, so central to constitutional thinking and doctrine in the U.S..[54]

Instead, the Supreme Court of Canada adopted a purposive approach,[55] and endorsed the idea that the equality guarantees were designed to protect individuals and groups from disadvantage and harm.[56] The protection against discrimina-

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[50]The main source of protection for equality rights is in s. 15 of the *Canadian Charter of Rights and Freedoms*, which provides: "15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[51]*Andrews v. Law Society of British Columbia*, *supra*, note 6; see also *R. v. Turpin*, [1989] 1 S.C.R. 1296, 96 N.R. 115 [hereinafter cited to S.C.R.]. For further commentary on these cases, see N. Colleen Sheppard, "Recognition of the Disadvantaging of Women: The Promise of *Andrews v. Law Society of British Columbia*" (1989) 35 McGill L.J. 207.

[52]*Ibid.* at 164.

[53]*Ibid.* at 173-174.

[54]*Ibid.* at 168.

[55]*Ibid.* at 169.

[56]*Ibid.* at 180-181 *per* McIntyre J. and 154 *per* Wilson J.; see also *R. v. Turpin*, *supra*, note 51 at 1333 and discussion in Sheppard, *supra*, note 51 at 222-229.

tion is not a simple prescription of non-differential treatment (sameness approach) or rational differential treatment (modified sameness or similarly situated approach). Rather, anti-discrimination provisions should provide protection against disadvantaging, subordinating, or harmful treatment or effects, regardless of whether the law or policy is considered rational.

One final important dimension of the *Andrews* case was the shift towards a group-based approach to problems of discrimination, away from the individualistic focus implicit in the sameness approach. While this was perhaps underemphasized in McIntyre J.'s judgment, it is integral to the coherence of his enumerated or analogous grounds approach, which focusses on identifying groups that are subject to "socially destructive and historically practised"[57] discrimination. The inclusion of s. 15(2) in the *Charter*, which provides explicit protection for programs designed to ameliorate the conditions of disadvantaged groups, further attests to a greater consensus in Canada regarding the need for group-based approaches to overcoming inequality.[58]

To conclude this discussion of the Canadian situation, the institutional implications of the approach to equality developing in Canada must be examined. First, we must confront the fact that an approach based on the identification of harm and disadvantaging makes the value judgments implicit in judging more explicit. To identify the concrete and particularized manifestations and experiences of harm and disadvantage, a contextualized, non-formalistic, non-abstract methodology is essential.[59]

Secondly, an approach to equality that attempts to grapple with the realities of inequality and enhance substantive equality requires creative and far-reaching remedies. In some cases, a fair and just result may lead us in the direction of the recognition of positive rights. More rather than less government intervention may be needed. Judicial hesitation to develop positive rights remedies, given the significant resource allocation implications they might entail, in addition to the serious problem of inadequate access to courts, and the ineffectiveness of individual retroactive complaints as the major vehicle for enforcing human rights norms, should prompt questioning about alternative ways to use the *Charter*.[60]

In light of these difficulties, I do not think use of the *Charter* should be limited to litigation, despite the importance of this function. We also need to use

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[57] *Ibid*, at 175.

[58] *Supra*, note 50.

[59] Wilson J. has endorsed such an approach: see, for *e.g.*, *R. v. Turpin*, *supra*, note 51 at 1331-2.

[60] For a discussion of the ineffectiveness of individual retroactive cases, see Shelagh Day, "Impediments to Achieving Equality" in Sheilah Martin and Kathleen Mahoney (eds.), *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 402. Recent legislative developments, including the federal *Employment Equity Act*, S.C. 1986, c. 31 and pay equity legislation in Ontario and Manitoba, *Pay Equity Act, 1987*, S.O. 1987, c. 34 and *Pay Equity Act*, S.M. 1985, c. 21, exemplify more proactive approaches. For a discussion of the problem of inadequate access to courts to vindicate Charter rights, see Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

the *Charter* as a tool for legislative reform, to encourage the positive government action needed to secure greater social, economic, familial, and political equality, and to demand such action even in the absence of litigation. Emphasizing the continued responsibility upon legislators to create the conditions for equality also helps to counter the myth that equality exists once constitutionally proclaimed. We cannot afford to be lulled into complacency by the quiet words of the *Charter*.

IV. Conclusion

The U.S. experience demonstrates the inability of an individualistic, sameness approach to constitutional equality, rooted in classical liberal ideology, to deal with current problems arising in equal protection law. The result appears to be constitutional doctrine out of touch with the modern realities of inequality and unable to respond in a consistent or principled way to policy initiatives aimed at ameliorating inequality. There are exceptions to this critique, but in most cases, they are voices in dissent, using ill-fitting doctrine to reach just results. In Canada, the potential exists to develop a legal approach to equality informed by an appreciation of the contexts of inequality, and clear in its direction and purposes. In a world of deepening inequalities, the challenge to make legal equality meaningful awaits us.