Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory

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Across and within jurisdictions, debates persist as to whether and why particular grounds of discrimination warrant special constitutional protection. This article explores the contributions that relational insights might make to these debates. Relational theory calls for greater attention to relationships and constant interrogation of the categories by which people are defined—imperatives that seem to sit uneasily with the demands of legal doctrine. Exploring both the United States' "suspect classification" doctrine and Canada's "enumerated and analogous grounds" doctrine, the author proposes that relational jurisprudential strands have in fact emerged in both jurisdictions. The author further argues that doctrinal approaches to grounds and classifications can be productively understood as either relational or categorical, and that this distinction is helpful in organizing and evaluating the diverse doctrinal options that have emerged in US and Canadian case law and scholarship. As the Supreme Court of Canada's recent decision in Kahkewistahaw First Nation v Taypotat *signals a willingness to revisit this foundational element of equality doctrine, this cross-country study argues that Canada's professed commitment to substantive equality requires the continuing development of relational doctrine, including in its grounds jurisprudence.*

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Introduction

In her broad thematic study of equality laws across a range of jurisdictions, Sandra Fredman identifies questions of "which characteristics . . . ought to be protected against discrimination and why?" as central scope-limiting inquiries in laws seeking to combat discrimination.[1] Equality laws may textually prescribe a set list of protected grounds;[2] provide an "open" list, inviting judicial extension;[3] or extend a broad equality guarantee with no mention of specific grounds, with courts creating their own judicially determined lists of protected grounds.[4] Lists of constitutionally protected grounds of discrimination vary in their scope and content, from the United States' relatively narrow list of judicially determined grounds warranting "heightened scrutiny" (race, national origin, alienage, sex and non-marital parentage)[5] to South Africa's lengthy, textually prescribed list of seventeen distinct grounds of discrimination—to which the South African Constitutional Court has made further judicial

1. Sandra Fredman, *Discrimination Law*, 2nd ed (Oxford: Oxford University Press, 2011) at 109. Fredman identifies the "reach" of equality law (i.e., spheres of social life to which anti-discrimination laws apply) and "who is bound by such laws" (i.e., vertical versus horizontal application) as other core scope-limiting inquiries. *Ibid* at 109–52. See also Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) (explaining, in his multi-country survey of discrimination doctrine, that "[w]ho is entitled to the protection of discrimination law is perhaps the most vexed question in this area of law" at 47).

2. Examples include United Kingdom and European Union discrimination law. See Fredman, *supra* note 1 at 113–18.

3. Examples include equality provisions in the Canadian and South African Constitutions and the European Convention on Human Rights. See *ibid* at 125–30.

4. The United States equal protection clause is an example. See *ibid* at 118–25.

5. I will use the term "heightened scrutiny" to refer to both "suspect" and "quasi-suspect" classifications. See *infra* notes 118–22 and accompanying text.

additions.[6] In some jurisdictions, protected grounds serve to trigger a higher justificatory standard, while in others, grounds act as a threshold requirement for successful discrimination claims.[7] Across and within jurisdictions, debates arise as to whether particular grounds warrant special protections and as to the broader question of what types of questions equality analysis should ask about equality claimants. The most commonly cited factors relate to the mutability or relevancy of a defining trait, or the social history and status of the claimant group.[8]

Judicial processes of building and interpreting lists of protected grounds of discrimination have often been fraught. In the US context, for example, Kenji Yoshino has observed a tacit judicial retreat from "suspect classification" analysis, arguing that this retreat is symptomatic of "pluralism anxiety"—a judicial fear of the social consequences of endlessly proliferating groups clamouring for special protection.[9] In Canada, an early judicial focus on group disadvantage and contextual analysis in defining "grounds of discrimination" gave way for some time to a more abstract and decontextualized inquiry into whether the personal characteristics that define potential claimant groups are impossible or difficult to change.[10] As in the US, this Canadian shift was accompanied by a hesitation to name new protected grounds, or even

6. See *Constitution of the Republic of South Africa*, No 108 of 1996 ("[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth", s 9(3)). See also *Hoffmann v South African Airways*, [2000] 2 SA 628 (S Afr CC) (establishing HIV status as a protected ground).

7. Compare US tiered scrutiny (where grounds serve as a spotlight for grounds warranting heightened scrutiny) with the current Canadian approach (where grounds serve as a screen, filtering out claims where no enumerated or analogous ground is established). See Parts II.B, II.C, *below*.

8. See Fredman, *supra* note 1 (observing that the "remarkably similar tests" that have emerged across jurisdictions have included inquiries into "[i]mmutability, choice and autonomy"; "[a]ccess to the political process"; "[d]ignity" violated by "treating individuals as less valuable members of society"; and "history of disadvantage" at 130–39 [emphasis omitted]). To this list, I add the perceived "relevancy" of the trait. See Canadian and US examples, *infra* notes 129 and 193–95 and accompanying text. *Cf* Khaitan, *supra* note 1 at 56–60 (arguing that judges relying on immutability and choice in defining grounds are in fact using these criteria to identify traits that are "normatively irrelevant").

9. Kenji Yoshino, "The New Equal Protection" (2011) 124:3 Harv L Rev 747 [Yoshino, "Equal Protection"].

10. See Part II.C, *below*.

consider legal claims that new grounds ought to be recognized.[11] The Supreme Court of Canada's most recent restatement of their approach to grounds of discrimination seems to signal a willingness to return to aspects of its early focus on group disadvantage, though it is not yet clear how deep or how permanent this shift will be.[12]

In both Canada and the US, individual justices have consistently resisted the often-prevailing tendency to view the grounds and classification inquiries as decontextualized list-making exercises. In this article, I consider a range of judicial approaches that have sought to attend to the oppressive relationships that give discrimination its bite, while avoiding the spectre of a "Pandora's Box"[13] of variously labelled "groups" clamouring for inclusion on an ossified and stereotypical "list". These approaches are consistent with a broader legal theoretical paradigm that has been developed under the banner of "relational theory", a body of scholarship that will be fleshed out below. Its solutions are both simple and paradigm shifting: attend to relationships in all their complexity, interrogate the categories with which people are described and listen across difference. But, as will also be elaborated below, these relational directives have often faltered on the shoals of legal doctrine. The turn away from categorical thinking, in particular, seems to challenge traditional understandings of legal reasoning.[14] Now, as the SCC seems prepared to reconsider the focus of its grounds inquiry, the time is ripe to take stock of the doctrinal options available and the theoretical framings that might offer guidance.

In this article, I seek to explore the contributions that relational insights might make to this pervasive and persistent set of doctrinal problems: what is equality law to do with all these groups, and how is equality law to assess which grounds of distinction should also be seen as grounds of discrimination? In pursuing these questions, I will focus in particular on the application of relational theory to constitutional equality law in Canada and the US—two jurisdictions which share many common features, but whose jurisprudence is

11. See *infra* notes 225–26 and accompanying text.

12. See *infra* notes 228–40 and accompanying text.

13. See Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U Chicago Legal F 139 at 142 (for a critical discussion of one US judge's invocation of Pandora's myth in order to defeat intersectional discrimination claims brought by Black women).

14. See *infra* notes 56–58 and accompanying text.

characterized by significant differences in hospitability to relational insights.[15] While I will suggest that relational approaches to equality are possible and desirable in both jurisdictions, I will also propose that aspects of Canada's legal context make it particularly well-suited to relational analyses. I will further argue that Canada has departed from this relational potential in its grounds jurisprudence and that the SCC ought to follow through on recent signals that it may be returning to a more relational approach.

In Part I, I will set out the fundamentals of relational theory, with a particular focus on relational approaches to difference, equality, rights and legal doctrine. I will argue here for the value of relational consideration of doctrinal questions, and offer a brief sketch of the ways in which relational theory might illuminate trends and arguments surrounding grounds of discrimination. In Part II, I will begin by setting the stage for a Canada-US comparison of grounds analysis by elaborating relevant differences in the broader legal context. I will go on to describe the US "suspect classification" doctrine and the Canadian "enumerated and analogous grounds" doctrine, offering a relational analysis of prevailing and recent doctrine, along with dissenting approaches within each jurisdiction. In Part III, I will consider scholarly debates within each jurisdiction as to whether doctrinal inquiries should focus on groups/classes or grounds/classifications. I will suggest here that relational theory might help to reframe and resolve aspects of this problem as it emerges in both jurisdictions. Finally, in the Conclusion, I will propose that relational theory can be (and has been) productively employed to improve legal reasoning in both jurisdictions, and that Canada offers particularly fertile legal terrain for a more robust adoption of relational doctrine. In fact, Canada's professed commitment to substantive equality requires it.

15. On the utility of Canada-US comparison more generally, see Ran Hirschl & Christopher L Eisgruber, "Prologue: North American Constitutionalism?" (2006) 4:2 Intl J Constitutional L 203; Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010) at 234–43. On the differential hospitability of Canadian and US law to relational approaches, see Part II.A, *below*.

I. Relational Rights

Robert Leckey rightly notes that "[r]elational theory is not an officially constituted school, and its boundaries are contestable."[16] Yet common threads are discernible among relational theorists—threads comprised of common cosmological and epistemological claims, methodological prescriptions and normative commitments. Pared down to its most basic premise, relational theory calls for a "shift in emphasis"—moving relationships "from the periphery to the centre of legal and political thought and practice".[17] Importantly, this call for a "shift" acknowledges that relational theory is in important ways a *reaction* to extant framings, rather than a "grand theory" purporting to be spun from whole cloth.[18] In particular, social relations theorists take to task traditional liberal assumptions about persons as autonomous, rational and independent political actors.[19] Instead, relational theorists posit that relationships are constitutive of persons and institutions—a position which in turn gives rise to a normative demand that problems be reconceived and addressed in ways that honour this core truth. To this end, social relations theorists have worked to build up new metaphorical, rhetorical, political and legal alternatives to the paradigmatic liberal account, in order to correct this perceived failure and to adequately account for the centrality of relationships to political and legal questions.

This Part will elaborate the basic form of analysis advanced by relational theorists, as well as certain relevant points of contestation, with an eye to exhuming relational theorists' critiques and prescriptions for revising liberal theory, equality law and rights. I will emphasize two core elements of relational theory. The first is a portrait of human persons as embodied, affective and

16. Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008) at 7 [Leckey, *Contextual Subjects*]. Leckey describes relational theory as consisting of three interrelated schools: one which emphasizes differences between men and women, and the ethics of care relationships; another which analyzes rights as relational; and a third which focuses on elaborating relational conceptions of autonomy. *Ibid.* The relational theory I discuss here is primarily focused on the strand Leckey identifies with relational rights analysis.

17. Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 3. See also Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) at 15.

18. See e.g. Minow, *supra* note 17 at 15.

19. For a summary of arguments that relational theorists have oversimplified or mischaracterized liberalism, see Leckey, *Contextual Subjects*, *supra* note 16 at 9.

essentially constituted by social relationships. The second is an emphasis on the socially constructed and contested deployment of categories, and an attendant wariness of categorical thinking that may rely on apparently natural social groupings. This discussion will conclude that relational theorists have posed important critiques relevant to constitutional equality law, but will also observe that prescriptive links between these criticisms and legal equality doctrine pose special challenges. I will conclude by arguing that the application of relational theory to doctrinal questions is nonetheless possible and valuable, setting the stage for the comparative analysis that follows.

A. From Liberal Individuals to Relational Selves

Relational theorists share a common concern that traditional liberal legal theory rests on an erroneous assumption that human persons should be understood as independent, atomistic, rational units.[20] This atomistic individual of liberal theory, Martha Minow explains, "is thought to have wants, desires, and needs independent of social context, relationships with others, or historical setting".[21] Relational theorists argue that this vision of the autonomous, independent, self-actualizing rights-bearer is a fiction, and a dangerous fiction at that.[22] The critique has cosmological, political and discursive dimensions. At the level of cosmology, relational theorists hold that social relationships are constitutive of human personhood.[23] Everything about who we are, what we need, what we are capable of and what we aspire to emerges from the dense networks of social relationships in which we are not just embedded, but also generated and regenerated through ongoing and iterative interactions. These relationships are "shaped by a complex of intersecting social determinants,

20. See e.g. *ibid*; Martha Minow & Mary Lyndon Shanley, "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law" (1996) 11:1 Hypatia 4 at 12; Lorraine Code, *What Can She Know?: Feminist Theory and the Construction of Knowledge* (New York: Cornell University Press, 1991) at 78; Catriona Mackenzie & Natalie Stoljar, "Introduction: Autonomy Refigured" in Catriona Mackenzie & Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 1999) 3 at 6; Minow, *supra* note 17 at 124.

21. Minow, *supra* note 17 at 151–52.

22. See notes 23–34 and accompanying text, *below*.

23. For an extended relational account of the self, see Nedelsky, *supra* note 17 at 158–94. See also Leckey, *Contextual Subjects*, *supra* note 16 at 106; Anne Donchin, "Autonomy and Interdependence: Quandaries in Genetic Decision Making" in Mackenzie & Stoljar, *supra* note 20, 236 at 239–40.

such as race, class, gender, and ethnicity".[24] They range from the intimate and interpersonal—such as those with parents, friends or lovers—to the systemic—such as the relationship between citizen and state, or the relations entailed by "being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global warming".[25] These various levels of relationship operate concurrently and interactively to constitute human subjects[26] who, in turn, contribute to the structure and content of those same relationships.[27]

The essence of the political critique is that the atomistic liberal self is not truly ahistoric at all, but is rather a caricature of masculine and historically contingent ideals, masked by a claim to abstraction.

> The very human being who could be imagined as abstracted from context is a particular sort of person with a specific history and identity. It is a person living some time after the seventeenth century in western Europe or the United States, a person who avoided feudal bonds and lived away from any religious, ethnic, or family group whose members defined themselves through such a group.[28]

The abstract and atomistic liberal individual is charged with being particularly ill-suited to describing the lives of women, children and disabled persons,[29] while also providing the foundation for a vision of rights that excludes those who do not fit the mould.[30] The fictitious liberal rights-bearer is thus seen to replicate, perpetuate and mask oppressive power structures that marginalize those who least accord with a wealthy-white-male norm—a norm for which he serves as both guardian and exemplar.

At the level of discourse, relational theorists urge that the constrained vision of the liberal self leaves us unable to adequately describe and debate

24. Mackenzie & Stoljar, *supra* note 20 at 4.

25. Nedelsky, *supra* note 17 at 19.

26. Some relational theorists have extended the relational account to include legal approaches to non-human animals. See e.g. Maneesha Deckha, "Non-Human Animals and Human Health: A Relational Approach to the Use of Animals in Medical Research" in Jocelyn Downie & Jennifer J Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) 287; Nedelsky, *supra* note 17 at 194–99.

27. See Nedelsky, *supra* note 17 at 21.

28. Minow, *supra* note 17 at 152–53.

29. See e.g. *ibid*; Christine M Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Lanham, Md: Rowman & Littlefield, 1997) at 105, 113.

30. See e.g. Minow, *supra* note 17 at 105–07, 125–45 (describing the "abnormal persons" approach to law and rights).

legal questions. By ignoring the significance of relationships in defining legal and political problems, liberalism constructs a vision of rights that relies excessively on metaphors of boundary—protecting the individual from intrusions, rather than building relationships that foster values.[31] Jennifer Nedelsky explains that the "perverse quality" of political and legal projects cast in terms of protecting autonomous individuals from community intrusions "is clearest when taken to its extreme: the most perfectly autonomous man is the most perfectly isolated".[32] When political and legal problems are framed in individualistic terms, without adequate attention to the social relationships undergirding a conflict, we are left without discursive space for attending to "the true sources and consequences of the patterns of power",[33] or the extent to which "people have unequal access to resources and . . . power to control or value their own lives".[34] The discursive promise of relational theory is thus that greater attention to context, particularity and relationship will yield more constructive legal and political conversations that better illuminate the values and interests at stake.[35]

B. Categorically Different: Relational Conceptions of Difference and Identity

The relational contention that the paradigmatic, isolated individual of liberal theory is in fact particular and historical destabilizes a host of related assumptions. Once we accept the relational premise that there is no possibility of adopting an un-situated perspective, all sorts of liberal intuitions about the

31. Nedelsky, *supra* note 17 ("[a] distorted picture of the self is likely to generate a distorted understanding of autonomy [and other values], and a system of rights designed to promote and protect that vision of self and autonomy is unlikely to optimally foster and protect human capacities, needs and entitlements" at 159).

32. *Ibid* at 97.

33. *Ibid* at 108.

34. Cathi Albertyn & Beth Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14:2 SAJHR 248 at 251.

35. *Cf* Leckey, *Contextual Subjects*, *supra* note 16 (arguing that relational theorists imply that "merely undertaking a relational inquiry is likelier than not to lead to policy outcomes congenial to feminist missions" at 14). While I think this argument has some merit as it applies to the presentation of certain relational arguments, it is more helpful to think of the relationship between politics and method in relational theory as running in the opposite direction; instead of wrongly suggesting that a methodological attention to relationships will necessarily yield politically desirable results, relational theorists rightly suggest that certain emancipatory political projects cannot be adequately advanced through methods which are inattentive to relationship.

meaning of difference, the concerns relevant to adjudicating disputes and *who* exactly has produced and perpetuated these intuitions—and who has been harmed by them—are opened up to debate.

Martha Minow has explored these questions with reference to the role that categories play in legal analysis—particularly categories that describe people.[36] In Minow's view, legal analysis often seeks to "break complicated perceptions into discrete items or traits" and then sort those traits or items into categories—often without interrogating the provenance of those categories.[37] Minow's core claim is that "we make a mistake when we assume that the categories we use for analysis just exist and simply sort our experiences, perceptions, and problems through them".[38] Acts of categorization are in fact social choices that ascribe and perpetuate meanings and consequences for those traits that we choose to make significant.[39] Minow does not thereby deny that there are real differences between people, but rather emphasizes that the categories by which we describe and assign meaning to such differences are social choices that reflect and maintain power relationships.[40] When we ignore the chosen and situated nature of categories like race, sex or disability, we run the risk that "[t]he labels point to conclusions about where an item, or an individual, belongs without opening for debate the purposes for which the label will be used."[41]

In response to this problem, Minow advocates a "social relations approach", which requires "a shift from a focus on the distinctions between people to a focus on the relationships within which we notice and draw distinctions".[42] Thus, under a relational approach, questions about who has the power to describe are of central importance to understanding and overcoming the oppressive potential of categories.[43] For Minow, claims to knowledge of who or what counts as different should be "assessed in light of the power

36. Minow, *supra* note 17 (noting that the impact of legal categories like "competent" and "incompetent", which elide the reality that people "exhibit a range of capacities and abilities", and ignore "the possibility that certain kinds of incapacity could be remedied by different social practices; certain kinds, indeed, were created by them" at 8).

37. *Ibid* at 3.

38. *Ibid.*

39. See *ibid*. See also Koggel, *supra* note 29 at 27 (drawing on Wittgensteinian theory in elaborating a relational approach to language use, urging a focus on category as an *activity* rather than a structure with independent existence).

40. Minow, *supra* note 17 at 3. See also Koggel, *supra* note 29 at 28.

41. Minow, *supra* note 17 at 4.

42. *Ibid* at 15. See also Albertyn & Goldblatt, *supra* note 34 at 253.

43. See e.g. Koggel, *supra* note 29 at 37.

relationships between those assigning the labels and those receiving them" so that "the meaning of the differences may become a subject of debate rather than an observable 'fact'".[44] The political project of opening discursive space for voices traditionally marginalized from the construction of difference thus becomes crucial to relational approaches.[45]

C. Relational Values: Reconceiving Equality and Rights

The relational project is undeniably a law project—perhaps even primarily an equality law project. Despite a more sustained theoretical focus on the value of autonomy as opposed to equality,[46] relational texts consistently take up examples from constitutional equality law to elaborate their frameworks.[47] Relational theorists often share a wariness of traditional liberal constructions of rights as trumps, but also seem to share a desire to rehabilitate, rather than discard, rights as a legal mechanism. The trouble with rights, on relational accounts, is their potential to support status hierarchies, leaving open only the question of who belongs on top;[48] their potential to recast conflicts in a manner that obscures important relationships and the true nature of the interests at stake;[49] and their potential to ossify into rigid categories that disguise the social choices they represent.[50] But despite these concerns, relational theorists have generally sought to reorient rather than reject rights language. Often their concerns are pragmatic: rights are a pervasive and entrenched aspect of legal and social life,[51] they have been instrumental to successful justice movements[52] and they have a unique expressive force in asserting needs and constraining

44. Minow, *supra* note 17 at 171.

45. See e.g. Koggel, *supra* note 29 at 67–68; Minow, *supra* note 17 at 112–13.

46. For an introduction to relational autonomy, see the essays in Mackenzie & Stoljar, eds, *supra* note 20.

47. See e.g. Minow, *supra* note 17 at 114–20 (US equal protection law); Nedelsky, *supra* note 17 at 258–64 (US and Canadian equality law); Albertyn & Goldblatt, *supra* note 34 (South African equality law).

48. See e.g. Minow, *supra* note 17 (arguing that rights discourse assumes that "the status quo is natural and good, except where it has mistakenly treated people who are really the same as though they were different" at 109).

49. See e.g. Nedelsky, *supra* note 17 at 250.

50. See *ibid* at 233.

51. See *ibid* at 73.

52. See Minow, *supra* note 17 at 307.

power.[53] Perhaps most significantly, rights require that certain types of harms have a claim to attention and response—a function that well serves the relational imperative to increase consideration of the voices and perspectives of marginalized groups and individuals.[54] On relational accounts, the salutary aspects of rights can be preserved, and their dangers minimized, by recasting rights as contingent, debatable social choices and by rejecting formalist analysis in favour of approaches that focus on the actual, lived relationships engaged by rights claims.[55]

When it comes to how best to understand and reform legal reasoning, however, a divergence appears among relational theorists as to whether reforming legal doctrine is a useful enterprise. Given the abstract and categorical qualities of traditional doctrinal inquiry, Minow has argued that "the very language of legal 'tests' and 'levels of scrutiny' converts significant social choices into mechanical and conclusory rhetoric".[56] For Minow, a consciousness of the power dynamics expressed through categorization requires a preference for particularity and context over abstraction and category.[57] Minow is conscious of the radical implications of such a proposition for legal analysis, conceding that, if taken seriously, relational thinking may "threaten the very idea of law as authoritative and commanding".[58] Nonetheless, Minow is interested in pursuing the ways that legal reasoning might be transformed by relational thinking—but not through attention to doctrine. Thus, one of Minow's most fully elaborated examples in *Making All the Difference* includes a close reading of the judicial reasons in the US Supreme Court's decision in *City of Cleburne v Cleburne Living Center, Inc*,[59] wherein she expressly declines to wade into the doctrinal debates (which we will return to below); instead, Minow focuses on the "clash in world views that occurs *behind* the justices' arguments over legal doctrine".[60] Minow does not go so far as to say that the Court can do without doctrine altogether,

53. See *ibid*. *Cf* Patricia J Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22:2 Harv CR-CLL Rev 401.

54. See e.g. Koggel, *supra* note 29 at 204; Minow, *supra* note 17 at 207.

55. See e.g. Koggel, *supra* note 29 at 202–03; Nedelsky, *supra* note 17 at 249; Minow, *supra* note 17 at 307–09.

56. Minow, *supra* note 17 at 105.

57. *Ibid* (urging that a relational approach "resists solution by category" at 215).

58. *Ibid* at 224.

59. 473 US 432 (1985) [*Cleburne*].

60. Minow, *supra* note 17 at 105 [emphasis added].

but she does seem to suggest that, when it comes to relational reconstruction of equality rights, doctrine is not the best place to focus.[61]

On the other hand, relational scholars including Nedelsky,[62] Colleen Sheppard[63] and Nitya Duclos (now Iyer)[64] have pursued projects that actively explore doctrinal solutions to relational critiques of legal rights analysis. All three are clearly influenced by Minow's theoretical propositions but take on doctrinal reconstruction as a core dimension of their relational analyses. Notably, Nedelsky, Sheppard and Iyer focus in whole or in part on Canadian law, while Minow's more skeptical take on doctrine as a site of relational engagement emerged in the context of a study of US law. The divergence in approach may be explained in part by the fact that Canada's equality jurisprudence is more amenable to relational insights than the US' equal protection law, as will be discussed below.[65]

There is much to what Minow says about doctrinal analysis masking or deflecting attention from deeper debates about underlying social choices. These deeper debates, however, exist not just *behind* doctrinal forms as Minow intimates, but also *within* them. This article will consider doctrine as its own site of power, meaning-making and expression of values, and therefore as a potentially constructive site of relational reform. Alongside the many factors that give law its shape and meaning, doctrine persists as part of the language and form of legal reasoning. The present inquiry is not doctrinal in the conventional sense of seeking to discern the true or proper form of legal reasoning; it instead treats doctrine as discourse and seeks to examine the way the law talks about justice.

Another reason to focus on the doctrinal dimensions of equality law is the advancement of concrete and workable applications of relational theory. Many of the works expounding the relational dimensions of equality operate in broad strokes, focusing on general approaches to defining equality,[66] understanding

61. See e.g. Minow, *supra* note 17 at 112, 119 (offering prescriptions for infusing relational considerations into judicial reasons, none of which relate to doctrinal form).

62. Nedelsky, *supra* note 17.

63. Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal & Kingston: McGill-Queens University Press, 2010) [Sheppard, *Inclusive Equality*].

64. Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6:1 CJWL 25; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19:1 Queen's LJ 179.

65. See Part II.A, *below*.

66. See e.g. Koggel, *supra* note 29.

relational approaches to difference and diversity,[67] or exploring doctrinal problems as brief examples in elaborating the many complex "puzzles" that a relational habit of thought provokes across a range of political, social and legal contexts.[68] Perhaps because of a desire to complicate the very sort of categorical and mechanical reasoning that often dominates doctrinal debate, relational theorists have often chosen to engage in projects that do not require sustained doctrinal study.[69]

I propose that relational theory offers important insights into how we might better conceptualize persistent debates arising from competing legal approaches to equality. Many of these debates, however, take place in the language of doctrine and in the fora of legal argument and decision. A key challenge for relational theory, if it is to make itself relevant to these debates, is to translate its insights into these languages. The process of building relational habits of thought must include engagement with the languages that law speaks *now*.[70]

The puzzles surrounding doctrinal approaches to grounds of discrimination and suspect classifications are a fruitful starting point for such engagement. These particular doctrinal problems are necessarily inscribed with relational and doctrinal meanings at once: the need to identify grounds of discrimination has persistently arisen as a core question for equality doctrine,[71] and the drawing of social lines that this need has provoked practically demands attention to relationship. The doctrinal formulations seem to spill inevitably, if awkwardly, into decidedly relational territory when they ask which groups or grounds matter and why. I hope here to take this doctrinal question, as it appears in Canadian and US constitutional equality jurisprudence, as a starting point for thinking through the ways that relational framings might productively shift the terms of doctrinal debate.

67. See e.g. Minow, *supra* note 17.
68. See e.g. Nedelsky, *supra* note 17 at 4–5.
69. See e.g. text accompanying notes 56–61, *above*. But see Duclos, *supra* note 64.
70. Nedelsky, *supra* note 17 at 4.
71. See text accompanying notes 1–8, *above*.

II. Suspect Classification and Analogous Grounds: Relational Approaches to Doctrine

Having set out the general contours of relational theory and argued in support of relational consideration of doctrinal questions, we may now return to the central question of this article: what do relational insights tell us about doctrinal inquiries into grounds of discrimination? The short answer might look something like this: we should use grounds and classes in our doctrinal analyses in ways that acknowledge the social provenance and contestability of these terms, invite diverse perspectives into judicial discussions over their contestable meanings, and keep our use of these analytic frames firmly anchored in social purposes (which must themselves be contestable and solicitous of diverse perspectives); and we should not allow the drive to find and apply simple categories to prevent us from seeking out these relational dimensions of equality claims. The longer answer requires us to delve into questions about how courts have actually deployed groups and grounds, and the extent to which various doctrinal approaches have succeeded or failed in achieving the ambitions telegraphed in the short answer. In this Part, I will survey the contested and evolving doctrines of suspect classification in the US and grounds of discrimination in Canada, with special attention to the extent to which these doctrines have succeeded in relational terms.

In the preceding Part, I offered a survey of some key elements of relational theory, with a focus on the relational claims that persons are embodied, affective and constituted by their relationships, and that the categories by which people are organized are socially constructed and always contestable. I have also noted that these claims have been advanced in contrast to perceived failings of a liberal approach that tends towards deployment of abstract and naturalized notions of persons and categories. Some scholars have argued that relational theorists have wrongly caricaturized liberalism, and that liberal theory is in fact quite capable of acknowledging and responding to the particularized, social persons described by relational theory.[72]

It is not my aim here to adjudicate this dispute as it concerns any particular liberal theorists, but rather to show that the relational critique of liberalism illuminates a very real split in legal thinking, and that this split offers a useful way of conceptualizing the doctrinal choices that have been made in the law

72. See Leckey, *Contextual Subjects*, *supra* note 16 at 9.

and scholarship on US suspect classification and Canadian analogous grounds. On the one side, there is a clear drive to naturalized, abstract categorization and list-making, most evident in the narrowest versions of the claim that the focus of discrimination analysis should be on immutable traits which are personal to the claimant and apply symmetrically, regardless of realities of social advantage or disadvantage that may attach to the trait.[73] On the other side, there is a drive to take up suspect classification and analogous grounds as a doctrinal opening to consider the ways in which claimants' lives have been shaped by broader social relationships, and the mechanisms by which conceptual lines drawn around groups of people express and confirm contestable power relationships. It is these poles—the relational and the categorical—which I will rely upon in organizing the account of suspect classification and analogous grounds that follows.

A. Canada-United States Comparison

Relational scholars of Canadian and US equality law have generally observed that Canadian equality law is more receptive to relational insights.[74] As a general matter, I think that this characterization is accurate and that Canada's stated commitment to "substantive" rather than "formal" equality seems to practically demand relational analysis. In this Part, though, I hope to complicate this general account by tracing approaches and retreats from relational insights in the grounds jurisprudence of each jurisdiction, and by highlighting a common relational counter-current that has been pressed by particular justices in both jurisdictions.[75] In a related vein, I hope to complicate accounts of the Canadian jurisprudence that have cast the analogous grounds inquiry as constant or uncontested.[76] But before zooming in to grounds and

73. See Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37 (for a typology running from "narrow immutability" to "multivariable" approaches to analogous grounds).

74. See e.g. Nedelsky, *supra* note 17 at 262; Sheppard, *Inclusive Equality*, *supra* note 63 at 30–31.

75. *Cf* Vicki C Jackson & Jamal Greene, "Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?" in Tom Ginsburg & Rosalind Dixon, eds, *Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar, 2011) 599 ("[i]n those countries that permit separate opinions and thereby facilitate the development of competing interpretive approaches within a single system, differences among individual judges may be as striking as differences across courts" at 599).

76. *Cf* Hon Lynn Smith & William Black, "The Equality Rights" (2013) 62 SCLR (2d) 301 (maintaining that, "[i]n contrast with dramatic variations in equality analysis in other respects,

classifications, I want to first zoom out to suggest two more general and interrelated features of Canadian law that make it relatively more hospitable to relational analysis: proportionality analysis and dialogic constitutionalism.

First, Canada's constitutional text and jurisprudence have embraced proportionality analysis—an analytic form that prompts courts to consider the extent to which rights infringements may be justifiable by governments pursuing reasonable means of achieving compelling interests.[77] In Canada, proportionality analysis is invited by the *Canadian Charter of Rights and Freedoms*' Limitations Clause, which provides that rights—including equality rights—are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[78] Proportionality analysis requires, *inter alia*, that the governments seeking to justify rights infringements adduce "legislative facts" relating to an impugned law's purpose and impact, and that courts balance the law's salutary effects and deleterious consequences.[79] While proportionality-like considerations have arguably been included in US constitutional interpretation as well, proportionality has not

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the requirement for a section 15 claim to be based on an enumerated or analogous ground has remained constant" at 335–36 [footnote omitted]); Lillianne Cadieux-Shaw, "A Web of Instinct: Kahkewistahaw First Nation v Taypotat" *TheCourt.ca* (7 September 2015), online: <www.thecourt.ca/a-web-of-instinct-kahkewistahaw-first-nation-v-taypotat/> (asserting that the *Taypotat* decision "does not alter the law of section 15 of the *Charter* in any substantial way").

77. For a detailed introduction to proportionality analysis, drawing on Canadian examples and considering the application of proportionality principles in the US context, see Vicki C Jackson, "Constitutional Law in an Age of Proportionality" (2015) 124:8 Yale LJ 3094 [Jackson, "Proportionality"].

78. *Canadian Charter of Rights and Freedoms*, s 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

79. Generally, limitations analysis has followed the test set out in *R v Oakes*, [1986] 1 SCR 103 at 104, 26 DLR (4th) 200. The *Oakes* test holds that laws infringing *Charter* rights are justifiable only where the government proves that they are sufficiently precise and clear as to be "prescribed by law"; pursue a pressing and substantial governmental objective; use means rationally connected to that purpose; minimally impair *Charter* rights; and, overall, have salutary effects which outweigh their deleterious consequences. Although the Court has generally followed this framework fairly consistently, there have been significant differences within the Court and between cases as to the nature of the burden on government at each stage and as to which factors are properly considered in defining the scope of a right as opposed to permissible limitations on a right. See e.g. Sujit Choudhry, "So What is the Real Legacy of *Oakes*?: Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501 [Choudhry, "Decades"]; Claire Truesdale, "Section 15 and the *Oakes* Test: The Slippery Slope of Contextual Analysis" (2012) 43:3 Ottawa L Rev 511. Note also that in some areas of *Charter* jurisprudence, the Court has

been embraced in the US as a foundational principle of constitutional analysis as it has been in Canada.[80] Instead, US law and scholarship has often been characterized by a suspicion of judicial balancing and a preference for "bright line rules".[81]

Second, Canada's Constitution includes an "override" provision, section 33, which allows the legislature to enact laws that would otherwise be found to violate certain *Charter* rights, including equality rights, by expressly declaring that the laws operate "notwithstanding" those rights.[82] Laws created pursuant to the Notwithstanding Clause expire after five years, but are renewable by the legislature.[83] The Notwithstanding Clause has not been frequently invoked[84] but, together with the Limitations Clause, contributes to the overall structure of Canada's legal rights framework as one of "dialogic judicial review", rather than judicial supremacy.[85] As with proportionality analysis, dialogue between courts and legislatures is, of course, represented in the US tradition as well;[86]

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adopted alternatives to the *Oakes* framework for proportionality analysis. See e.g. *R v Clayton*, 2007 SCC 32, [2007] 2 SCR 725 (common law police powers); *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 126 DLR (4th) 129 (private common law); *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 (administrative law).

80. For a discussion of the role proportionality analysis has in fact played in US law and a more nuanced treatment of the supposed US preference for bright line rules, see Jackson, "Proportionality", *supra* note 77.

81. *Ibid.*

82. *Supra* note 78, s 33(1) ("Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter", s 33(1)).

83. See *ibid*, ("[a] declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration," but "Parliament or the legislature of a province may re-enact a declaration made under subsection (1)", ss 33(3)–(4)).

84. For a history of the Notwithstanding Clause, tracing a brief period of high invocation in Quebec prior to 1985 to its rare use in subsequent years, see Canada, Library of Parliament, *The Notwithstanding Clause of the Charter*, by David Johansen & Philip Rosen, Publication No BP-194-E (Ottawa: Library of Parliament, 2008), online: <www.parl.gc.ca/content/lop/researchpublications/bp194-e.pdf>.

85. For a review of literature on Canadian *Charter* dialogue, see Kent Roach, "Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States" (2006) 4:2 Intl J Constitutional L 347 (arguing also that "the Canadian Constitution can facilitate dialogue between courts and legislatures more easily than can the U.S. Constitution" at 369).

86. See generally Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (New Haven, Conn: Yale University Press, 1986).

but, also as with proportionality, legislative-judicial dialogue does not play the same foundational role in US constitutional theory, interpretation or practice as it does in Canada.[87]

Both proportionality analysis and constitutional dialogue presuppose that courts interpreting constitutional rights are engaged in tasks that share important similarities with legislative choices. These frameworks eschew a vision of law as detached or distinct from social and political life, and embrace a vision of law as a field of action that affects lives and includes social negotiation. By asking questions about the gravity of felt harms (deleterious consequences) and the magnitude of material benefits (salutary effects), proportionality analysis directs our attention to actual relationships. And by formulating constitutional interpretation in a manner that invites legislative fact evidence, government justification and legislative response up to the point of democratic "override", constitutional dialogue comports with the relational premise that rights are social choices that should invite deliberation.[88]

At the level of equality law, these gestalt-like differences in embrace of proportionality and dialogue are evident. A recent Canadian expression of the test for equality violations, now embraced by a unanimous Court, asks whether the claimant has shown that "the government has made a distinction [in purpose or effect] based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage".[89]

87. See Roach, *supra* note 85.

88. Although my purpose here is to show the ways in which Canada's constitutional structure invites relational dialogue, it must also be noted that proportionality analysis and the Court's stance towards government justification have both been harshly criticized for failing to adequately hold governments to account, particularly in the equality law context. See Choudhry, "Decades" *supra* note 79; Truesdale, *supra* note 79.

89. *Quebec (AG) v A*, 2013 SCC 5 at para 323, [2013] 1 SCR 61 [*Quebec v A*]. Justice Abella dissented in the result, but her section 15 analysis was endorsed by a majority of the Court. See *ibid* at para 385, Deschamps, Cromwell and Karakatsanis JJ, 416, McLachlin CJ. In *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 16, [2015] 2 SCR 548 [*Taypotat*], the unanimous Court endorses this test, but seems also to layer in a focus on whether the impugned distinction is "arbitrary". The focus of the present inquiry is grounds of discrimination, so I will not dwell on this shift except to say that a relational approach ought to recognize that arbitrariness evokes a sense of randomness that does not well describe the persistent, concerted and power-laden relationships that characterize discrimination and inequality experienced by disadvantaged groups. *Cf* Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2015) 19:2 Rev Const Stud 191 at 230–31.

From there, the burden of justification falls to the government under the Limitations Clause—which, as addressed above, includes inquiry into the law's relational impact. Under this approach, "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[90] Setting aside the question of how grounds are defined (a point which will be addressed more extensively below), we see that Canadian constitutional equality analysis asks about social relationships at several key doctrinal moments, including directives to attend to disadvantage, history, groups and social gaps, even prior to any formal proportionality analysis and its attendant inquiry into ameliorative impact and deleterious effects. And the distinct proportionality inquiry (and background availability of the legislative override) allows the legislature to meaningfully engage with the Court's process and its ultimate decision.

The SCC has, moreover, consistently affirmed a commitment to substantive equality, which it describes as "an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages".[91] Many scholars have endeavoured to flesh out the precise requirements of substantive equality, including such elements as focus on outcomes and the effects of law and government action; concern with power differentials and socially disadvantaged groups; adoption of the claimant's perspective; a nuanced understanding of choice and constraint; attention to context, including institutional and structural inequalities; and a commitment to positive state obligations and distributive justice.[92] Generally, though, it is agreed that the SCC has not always met these standards, either in its disposition of particular cases or in its development of doctrine, and the extent to which the Court actually endorses the broadest forms of these definitions is debatable.[93]

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90. *Quebec v A*, *supra* note 89 at para 332, Abella J, dissenting.

91. *Taypotat*, *supra* note 89 at para 17.

92. See e.g. Margot Young, "Unequal to the Task: '*Kapp'ing* the Substantive Potential of Section 15" (2010) 50 SCLR (2d) 183 at 193–99 [Young, "Unequal"]; Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queen's University Press, 2009) at 16–23; Robin Elliot & Michael Elliot, "The Addition of an Interest-Based Route into Section 15 of the Charter: Why It's Necessary and How It Can Be Justified" (2014) 64 SCLR (2d) 461 at para 119.

93. See e.g. Young, "Unequal", *supra* note 92; Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 Rev Const Stud 31; Jennifer

The Court has, however, been clear that substantive equality stands in contrast to formal approaches which treat equality as an abstract commitment to treat "likes alike", and that it requires some degree of attention to social positions of advantage and disadvantage (i.e., hierarchy) and the effects of law with reference to these hierarchies.[94] While the Court's elaboration of these commitments has been sketchy and occasionally contradictory, I think that it is evident that even these most minimal requirements of substantive equality cannot be adequately analyzed without some examination of the ways in which persons and their experiences are constituted by dense networks of social relationships, or the ways in which law and other social processes organize people into categories that express the power relationships that inhere in those relationships. In other words, substantive equality not only invites relational analysis—it requires it.

By contrast, the US equal protection inquiry does not readily invite consideration of a law's relational consequences. Without regard to actual harm experienced or the social position of the group harmed, equal protection analysis begins by asking whether the law draws an explicit or intentional distinction[95] which implicates a "fundamental right" or which distinguishes on the basis of a "suspect classification".[96] As will be detailed below, the suspect classification inquiry is symmetrical, protecting both privileged and disadvantaged groups

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Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 UNBLJ 19 ("[A]lthough the Court continually describes its goal as one of substantive equality, it has yet to develop an approach that truly embraces that notion" at 21). The Court's practical commitment to positive state obligation and distributive justice are perhaps the most dubious. *Cf* Hester A Lessard, "'Dollars Versus [Equality] Rights': Money and the Limits on Distributive Justice" (2012) 58 SCLR (2d) 299.

94. See Elliot & Elliot, *supra* note 92 at 521–22. *Cf* Catharine A MacKinnon, "Substantive Equality Revisited: A Reply to Sandra Fredman" (2016) 14:3 Intl J Constitutional L 739.

95. See *Washington v Davis*, 426 US 229 (1976) (holding that laws which do not draw an explicit distinction on the basis of a suspect classification will only be found to violate the US equal protection guarantee in cases of intentional discrimination).

96. While the focus of this article is the suspect classification strand of equal protection analysis, the "fundamental rights" strand is equally susceptible of varying degrees of relational interpretation. *Cf* Kenji Yoshino, "A New Birth of Freedom?: *Obergefell v. Hodges*" (2015) 129:1 Harv L Rev 147. Canada's constitutional equality provision has not been interpreted to include an analogue to the fundamental rights branch of the American Equal Protection Clause. For an argument that Canada ought to adopt a fundamental rights branch in its equality jurisprudence, see Elliot & Elliot, *supra* note 92.

and individuals.[97] The extent to which a suspect classification or fundamental right is engaged provokes varying stringency of rationality review—inquiring into the gravity of the government purpose and the extent to which the measure is likely to advance its objective.[98] While this framework may allow for some relational analysis of the purposes and effectiveness of the law, there is no doctrinal directive requiring relational inquiry into the nature of the law's harms or the social position of the groups and individuals that may suffer those harms.[99] (Again, the extent to which the suspect classification inquiry can or does provide such space is bracketed here and addressed more fully below.)

Of course, these are highly schematic descriptions of US and Canadian equality doctrine and of the divergences between these jurisdictions' more general approaches to constitutional analysis. I maintain that prevailing US doctrine does not *require* relational analysis, but this does not mean that US justices have refused relational approaches; as Minow's analysis makes clear, formal doctrine is not the only place where relational insights can thrive or falter.[100] In terms of the mythic boundary between the "letter" and "spirit" of law, both sides of the divide are better represented as waves than as objects: interrelated yet in possession of their own distinct force and comprised of innumerable particles seeking their own paths. Constraints of space and focus require that I keep this caveat general in respect of Canadian and US constitutionalism and equality law more generally. But the following accounts of suspect classification and grounds of discrimination offer a small glimpse into the nuances that inhabit these broader claims. In both jurisdictions, equality jurisprudence has been, and continues to be, contested, both in terms

97. See *infra* notes 145–53, 166–67 and accompanying text.

98. See *infra* notes 118–22 and accompanying text.

99. The development of "rational basis with bite"—wherein courts are doctrinally required to apply the rational basis standard but in practice seem to employ more stringent review—may in some cases be explained by judges' desires to account for relational context. *Cf* Raphael Holoszyc-Pimentel, "Reconciling Rational-Basis Review: When Does Rational Basis Bite?" (2015) 90:6 NYUL Rev 2070. But this is more fairly viewed as a relational work-around to a categorical doctrine than a feature of the doctrine itself. Similarly, inquiries into legislative "animus" (which is sufficient to vindicate an equal protection challenge even on a rational basis standard) may be taken up as an opportunity to infuse relational considerations into a decision, but the explicit doctrinal focus remains on the narrow question of intent, not broader consideration of the claimant's social position or the relationships underpinning the claim. *Cf* Susannah W Pollvogt, "Unconstitutional Animus" (2012) 81:2 Fordham L Rev 887.

100. See *supra* notes 60–61, 99 and accompanying text.

of doctrinal form and in terms of the "spiritual" inflection different judges bring to bear in their analyses.

B. US Suspect Classification

The US Equal Protection Clause[101] was born in a nation recovering from a bloody civil war and facing the very immediate and material concerns of a large population of newly emancipated slaves whose legal status was deeply contested and uncertain. By all accounts, the Equal Protection Clause was, at its inception, aimed primarily at protecting that particular social group. In its first case considering the Reconstruction Amendments—including the Equal Protection Clause of the Fourteenth Amendment—the US Supreme Court described the amendments as being united by "one pervading purpose": "[t]he freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him".[102] But beyond such rhetorical affirmations of the Fourteenth Amendment's historical and political purpose, the early years of judicial interpretation have generally been cast as embodying a retrenchment from the aspirations of the Reconstruction Amendments.[103] From the early equal protection cases through the *Lochner* era, the Equal Protection Clause was generally treated as a pure rationality test, often relied upon to strike economic regulation.[104] Though there were jurisprudential strands that appeared to reject the constitutionality of some racial classifications[105] and laws aimed at racial

101. US Const amend XIV, § 1.

102. *Slaughterhouse Cases*, 83 US 36 at 71 (1872).

103. See e.g. Joseph Tussman & Jacobus tenBroek, "The Equal Protection of the Laws" (1949) 37:3 Cal L Rev 341 at 381; Robert M Cover, "The Origins of Judicial Activisim in the Protection of Minorities" (1982) 91:7 Yale LJ 1287 at 1295; Frank J Scaturro, *The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence* (Westport, Conn: Greenwood Press, 2000) at 1–158. But see William M Wiecek, "Synoptic of United States Supreme Court Decisions Affecting the Rights of African-Americans, 1873–1940" (2003) 4:1 Barry L Rev 21 (arguing that the Court's early jurisprudence on the rights of African Americans was in fact more mixed than conventional accounts suggest).

104. See *Lochner v New York*, 198 US 45 (1905); Michael Klarman, "An Interpretive History of Modern Equal Protection" (1991) 90:2 Mich L Rev 213 at 216.

105. See *Strauder v West Virginia*, 100 US 303 at 306–07 (1879); *Virginia v Rives*, 100 US 313 (1880); *Ex parte Virginia*, 100 US 339 (1879); *Neal v Delaware*, 103 US 370 at 386 (1880); *Bush v Kentucky*, 107 US 110 at 116 (1883); *Gibson v Mississippi*, 162 US 565 (1896).

subordination,[106] the Equal Protection Clause was not generally interpreted to require judicial suspicion of racial or other similar classifications.[107] Michael Klarman describes the early equal protection cases as "reveal[ing] a Court intuiting that racial classifications were different from others, yet unable to articulate or fully comprehend why".[108]

In 1938, the Supreme Court issued a decision that would come to reawaken and transform the Court's equal protection jurisprudence—and point to one possible answer to the question of why racial classifications matter. Footnote four of the *Carolene Products* decision suggested that the rational basis standard upon which the case—a challenge to economic regulation—was decided may not apply in all circumstances; instead, the footnote reflected tentatively[109] that, "[t]here may be narrower scope for operation of the presumption of constitutionality" in certain cases, such as those engaging the fundamental rights set out in the first ten amendments.[110] The footnote went on even more cautiously, claiming that it was "unnecessary to consider" two other circumstances that might warrant special constitutional scrutiny: those that engage restrictions on the political process and those that engage the rights of certain minorities.[111] These two concerns were linked, with the protection of minorities being supported by a political-process rationale:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . .: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[112]

106. See e.g. *Yick Wo v Hopkins*, 118 US 356 at 374 (1886).

107. See e.g. *Plessy v Ferguson*, 163 US 537 (1896) (assessing a rule which racially classified and segregated rail passengers to be permissible on rational basis review). See also Klarman, *supra* note 104 at 226–45 (arguing that no doctrinal requirement of heightened justification for racial classifications was articulated until the late 1960s).

108. Klarman, *supra* note 104 at 231.

109. For a discussion of the tentative tone of footnote four, see Jack M Balkin, "The Footnote" (1989) 83:1 Nw UL Rev 275 at 284.

110. *United States v Carolene Products Co*, 304 US 144 at 152, n 4 (1938).

111. *Ibid.*

112. *Ibid* [citations omitted].

This footnote is widely credited as the opening salvo of "tiered scrutiny", a doctrine requiring that laws engaging certain kinds of rights, or targeting certain kinds of populations, be held to a higher justificatory standard.[113]

The process by which class-based scrutiny fitfully migrated from an *obiter* footnote to a controlling doctrinal rule in equal protection law is debated.[114] But there is no doubt that by the end of the 1970s, tiered scrutiny on the basis of variably suspect classifications had become the law of the land.[115] The 1970s were marked by a cluster of newly recognized suspect classifications[116] and, by the 1980s, the Court had expressly established three distinct "tiers" of classifications, with attendant levels of judicial scrutiny.[117]

The basic doctrinal structure and the recognized list of suspect classes have remained essentially unchanged since that time. Unless a petitioner can show that an impugned distinction discriminates against a "suspect" or "quasi-suspect" class, the Court will subject legislation to the lowest standard of "rational basis review", requiring only that the classification be "rationally related to furthering a legitimate state interest".[118] Distinctions on the basis of wealth, age and disability have all been determined to be non-suspect, warranting this lowest level of scrutiny.[119] The most rigorously scrutinized of all classifications, those which discriminate on the basis of a "suspect classification", are only upheld in cases where the state is able to satisfy the

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113. See Yoshino, "Equal Protection", *supra* note 9 at 758; Leslie Friedman Goldstein, "Between the Tiers: The New[est] Equal Protection and *Bush v. Gore*" (2002) 4:2 U Pa J Const L 372 at 372–73. But see also Daniel A Farber & Philip P Frickey, "Is *Carolene Products* Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation" (1991) 79:3 Cal L Rev 685 (arguing that the narrow political-process rationale expressed in the footnote does not in fact capture the Court's reasoning in striking discriminatory legislation).

114. See e.g. Klarman, *supra* note 104 at 216.

115. See generally Suzanne B Goldberg, "Equality Without Tiers" (2004) 77:3 S Cal L Rev 481.

116. *Ibid* at 498–99 (linking the advocacy for recognition of new suspect classifications in this period to the "fertile period of social change in the 1960s and 1970s").

117. See e.g. *Clark v Jeter*, 486 US 456 (1988) (affirming that "[i]n considering whether state legislation violates the Equal Protection Clause . . . we apply different levels of scrutiny to different types of classifications" and summarizing the three tiers at 461).

118. *Massachusetts Board of Retirement v Murgia*, 427 US 307 at 312 (1976) [*Murgia*].

119. See *ibid*; *Cleburne*, *supra* note 59; *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973) [*Rodriguez*]. But see Henry Rose, "The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question" (2010) 34:2 Nova L Rev 407 (arguing that, contrary to received wisdom, "the issue of whether the poor are a suspect or quasi-suspect class under traditional Equal Protection jurisprudence has not been decided by the Supreme Court" at 408).

Court that the classification has been "drawn with 'precision', . . . 'tailored' to serve their legitimate objectives . . . [and is the] 'less drastic means'".[120] This highest degree of scrutiny is reserved for cases involving classifications on the basis of race and (in certain cases) alienage.[121] Between these extremes, classifications on the basis of gender and illegitimacy are "quasi-suspect", engaging an intermediate level of scrutiny, which requires the law to be "substantially related" to "important" or "significant" government objectives.[122] These classifications, and the attendant level of scrutiny assigned to them between the 1970s and the 1990s, continue to control equal protection doctrine today. And although the Court has occasionally been described as sporadically or covertly deploying "rational basis with bite",[123] or otherwise applying a level of scrutiny more or less demanding than it declares,[124] commentators have generally concluded that the assigned levels of scrutiny are strongly associated with outcomes.[125]

120. *Dunn v Blumstein*, 405 US 330 at 343 (1972).

121. See *Loving v Virginia*, 388 US 1 (1967); *Adarand Constructors, Inc v Peña*, 515 US 200 (1995) [*Adarand*]; *Graham v Richardson*, 403 US 365, at 371–72 (1971). For a summary of the restrictions on the scope of suspect classification in cases where discrimination is alleged on the basis of alienage, see Yoshino, "Equal Protection", *supra* note 9 at 756, n 65. See also *Oyama v California*, 332 US 633 at 645–46 (1948) (decided before the tiers of scrutiny had been clearly established, but seemingly applying heightened scrutiny on the basis of national origin).

122. See *Clark v Jeter*, *supra* note 117 at 461; *Craig v Boren*, 429 US 190 (1976); *Trimble v Gordon*, 430 US 762 (1977). Note that strands of earlier case law, since superseded, have suggested that gender classifications might be subject to strict rather than intermediate scrutiny (*Frontiero v Richardson*, 411 US 677 at 688 (1973)), and that some "benign" racial classifications might subject to intermediate rather than strict scrutiny (*Metro Broadcasting, Inc v FCC*, 497 US 547 at 564–65 (1990)).

123. See e.g. Gayle Lynn Pettinga, "Rational Basis with Bite: Intermediate Scrutiny by Any Other Name" (1987) 62:3 Ind LJ 779; Holoszyc-Pimentel, *supra* note 99.

124. See e.g. Jeremy B Smith, "The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation" (2005) 73:6 Fordham L Rev 2769; Richard H Fallon, Jr, "Strict Judicial Scrutiny" (2007) 54:5 UCLA L Rev 1267 (arguing that "strict scrutiny" in fact embraces a range of justificatory standards and would best be articulated as a proportionality inquiry).

125. See e.g. Yoshino, "Equal Protection", *supra* note 9 at 756; Gerald Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" (1972) 86:1 Harv L Rev 1 at 8; Jed Rubenfeld, "Affirmative Action" (1997) 107:2 Yale LJ 427 at 433 [Rubenfeld, "Affirmative Action"]; Robert C Farrell, "Successful Rational Basis Claims in the Supreme Court from the 1971 Term through *Romer v. Evans*" (1999) 32:2 Ind L Rev 357.

Yet despite the analytic significance of the level of scrutiny applied, the Court's assignment of various classifications to the three tiers of scrutiny appears to have been piecemeal and unprincipled.[126] The Court initially emphasized the "discrete and insular minority" rationale set out in the *Carolene Products* footnote, extending special protection to groups likely to face difficulties expressing their will through ordinary democratic politics.[127] In such analyses, the Court has occasionally embraced a deeply relational assessment of political powerlessness. In *Frontiero v Richardson*, for example, the Court attributed heightened scrutiny to classifications disadvantaging women, grounding its decision in a broad canvass of social attitudes towards women, historical legal disabilities faced by women and the under-representation of women in professional and political elites.[128] At the other end of the spectrum, the Court has sometimes focused on less clearly relational factors such as the "mutability" or generalized "relevancy" of the characteristic forming the basis for a legislative distinction—although these factors have generally been considered alongside attention to the social position of the groups and individuals involved.[129] After attributing heightened scrutiny to classifications on the basis of race, alienage, sex and illegitimacy in the 1970s, the Court has not since declared any new suspect classifications, despite much clamouring

126. See e.g. Thomas W Simon, "Suspect Class Democracy: A Social Theory" (1990) 45:1 U Miami L Rev 107 at 141 (describing the Court's approach to defining heightened scrutiny as "haphazard" and "an analytical muddle"); J Harvie Wilkinson III, "The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality" (1975) 61:5 Va L Rev 945 at 983; Gunther, *supra* note 125 at 16.

127. See e.g. *Graham v Richardson*, *supra* note 121 (finding that alienage is "like" race and that "[a]liens as a class are a prime example of a 'discrete and insular' minority" as described in *Carolene Products* at 372).

128. *Supra* note 122. Note that the Court subsequently clarified that gender classifications would be subject to intermediate, rather than strict, scrutiny. See also *Craig v Boren*, *supra* note 122.

129. See e.g. *Mathews v Lucas*, 427 US 495 (1976) (holding that distinctions on the basis of "illegitimacy" warrant heightened scrutiny because it is "a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society", but not the strictest scrutiny because "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes" at 505–06); *Murgia*, *supra* note 118 (holding that distinctions on the basis of age do not warrant heightened scrutiny because "the aged" have not "been subjected to unique disabilities on the basis of stereotyped characteristics *not truly indicative of their abilities*", and because "unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment'" at 427 [emphasis added]).

at the gates.[130] And the Court has yet to make any clear or comprehensive statement on the test for "suspect-ness", beyond the sometimes vague and inconsistent reasons offered for extending or rejecting suspect classification in particular cases.[131]

Of particular significance are two cases in which the Court has rejected claims to suspect class status on the part of claimant groups who quite clearly suffered from political powerlessness and social marginalization: *San Antonio Independent School District v Rodriguez*[132] and *Cleburne*.[133] The majority judgments in these cases reveal a preoccupation with the ease of defining membership in proposed classes and a fear of proliferating claims to suspect classification—both of which evince a categorical mode of analysis that precludes attention to the relational dimensions of the claims.

In *Rodriguez*, the US Supreme Court upheld a property-tax-based public school funding scheme that resulted in substantially lower quality of education for students living in property-poor districts.[134] In his majority reasons, Powell J remarked that the petitioners' case lacked a "definitive description of the classifying facts or delineation of the disfavored class",[135] suggesting that this left the Court with "serious unanswered questions" about "whether a class of this size and diversity could ever claim the special protection accorded 'suspect' classes".[136] Justice Powell spent several pages of his reasons parsing the difficulties in defining with precision the circumstances of such possible suspect classes as "'poor' persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally 'indigent'", "those who are relatively poorer than others", or "those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts".[137] He rejects the proposition that heightened scrutiny should be afforded to

130. See Yoshino, "Equal Protection", *supra* note 9 at 757, n 71 and accompanying text; Goldberg, *supra* note 115 at 485.

131. See Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence" [2003] 3 U Ill L Rev 615 at 636; Marcy Strauss, "Reevaluating Suspect Classifications" (2011) 35:1 Seattle UL Rev 135 at 138–39. See also Pettinga, *supra* note 123 and accompanying text.

132. *Supra* note 119.

133. *Supra* note 59.

134. *Supra* note 119.

135. *Ibid* at para 19.

136. *Ibid* at para 26.

137. *Ibid* at paras 19–20.

"a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts",[138] then offers a perfunctory and conclusory assessment that

> [t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[139]

The Court's concentration on group definition in *Rodriguez* worked to crowd out consideration of the actual social circumstances of the claimants—children in underfunded school districts.[140] Moreover, Powell J's exacting scrutiny of who exactly "counts" in a suspect class—and the ease of drawing a precise border around who is "in" and who is "out"—betrays an underlying assumption that some social groupings *do* reflect precise and naturalized boundaries between groups of people. It further assumes the differences that are the most "obvious" or easily discernible from the vantage point of the judiciary are the differences that matter most for the purposes of equal protection analysis. Notably, even race, presumptively demarcating the paradigmatic "discrete and insular minority", does not always create the kind of clean lines that Powell J seems to require here: in the case that enshrined America's most notorious judicial approval of racial segregation, Mr. Plessy's first line of argument was that he was wrongly sent to the "colored" carriage—not because racial segregation was illegal, but because Mr. Plessy should have been considered white.[141]

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138. *Ibid* at para 28. In a concurring opinion, Stewart J endorsed this focus on the ease of delineating the proposed suspect class: "First, as the Court points out, the Texas system has hardly created the kind of objectively identifiable classes that are cognizable under the Equal Protection Clause." *Ibid* at para 62.

139. *Ibid* at para 28.

140. *Ibid* at paras 20–28.

141. Mr. Plessy's writ pled

> [t]hat petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws.

Plessy v Ferguson, *supra* note 107 at 538.

In the 1985 *Cleburne* decision, White J led a majority of the Court in practically announcing the closing of the list of suspect classes. In declining to extend heightened scrutiny to "mentally retarded" persons, White J cautioned:

> If the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[142]

Here, we see a *Rodriguez*-style concern with recognition of an "amorphous" class coupled with a fear of proliferating groups—a version of the "pluralism anxiety" Yoshino has observed.[143] Suzanne Goldberg has suggested that given the strong correlation between the ostensible indicia of suspect-ness, and the refusal of protection in cases like *Cleburne*, the Court has proceeded with a "first in time is first in right" approach: "it appears that a central reason for heightened scrutiny's restriction to five traits is temporal, in that those traits received the Court's protection before slippery slope-type fears about the potential reach of rigorous review set in".[144]

This combination of pluralism anxiety and desire for easy categorization is also evident in the Court's jurisprudence on affirmative action. In its 1978 decision in *Regents of the University of California v Bakke*, the Court found in favour of a white male medical school applicant who claimed that the use of affirmative action in the admissions process (an effective reservation of sixteen percent of seats for racial minority students) was unconstitutionally discriminatory on the basis of race.[145] Justice Powell's opinion, which has since been endorsed by a majority of the Court,[146] accepted the claimant's position that since the program drew distinctions on the basis of race, it should be subject to heightened scrutiny. In answer to the state's argument that heightened scrutiny "should be reserved for classifications that disadvantage 'discrete and insular minorities'",[147] Powell J held that discrete and insular minority status "may

142. *Cleburne*, *supra* note 59 at 445–46.
143. *Supra* note 9. See also note 137 and accompanying text.
144. Goldberg, *supra* note 115 at 503.
145. 438 US 265 (1978) [*Bakke*].
146. *Richmond (City of) v JA Croson Co*, 488 US 469 (1989); *Adarand*, *supra* note 121.
147. *Bakke*, *supra* note 145 at 288.

be relevant in deciding whether or not to add *new types of classifications* to the list of 'suspect' categories", but that "[r]acial and ethnic classifications . . . are subject to stringent examination *without regard to these additional characteristics*."[148] In Powell J's view, the equal protection clause's historical purpose of alleviating discrimination against African Americans must be reassessed in light of the fact that the United States had become a "nation of minorities" for which such targeted protection was no longer possible or desirable.[149] In the contemporary context, Powell J argued, it is "too late" to posit a form of equal protection that "permits the recognition of special wards entitled to a degree of protection greater than that accorded others".[150] Given that even "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination", Powell J concluded that "[t]here is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not."[151] The task, he observes, would also require the Court to constantly re-evaluate which groups, in a given social and historical moment, achieve a "societal injury . . . thought to exceed some arbitrary level of tolerability" warranting "preferential classification".[152] Such "variable sociological and political analysis" was said to exceed the proper role of the Court, thus anchoring the Court's drive to easy categorization, and its pluralism anxiety, in a vision of judicial competence hostile to relational analyses.[153]

Notably, this drive to hive equality claims into a brief, clean list of categorically protected classifications has been resisted from within the Court. Justice Stevens, for example, rejected tiered scrutiny altogether, asserting that "there is only one Equal Protection Clause", and called on the Court to adopt a single standard of review.[154] Justice Stevens advocated a universal standard of rationality, while "[loosening] the phrase 'rational basis' from its diluted, technical use".[155] In particular, Stevens J cautioned that groups suffering a

148. *Ibid* at 290 [emphasis added].

149. *Ibid* (noting that, by the time the Equal Protection Clause came to take on "a genuine measure of vitality", after the fall of *Lochner*, "it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority" at 292).

150. *Ibid* at 295.

151. *Ibid* at 295–96.

152. *Ibid* at 297.

153. *Ibid.*

154. *Craig v Boren*, *supra* note 122 at 211–12.

155. "Justice Stevens' Equal Protection Jurisprudence", Note, (1987) 100:5 Harv L Rev 1146 at 1146 ["Stevens Note"].

"tradition of disfavour" are likely to be subject to classification on the basis of "[h]abit, rather than analysis".[156] Justice Stevens thus anchored his brand of universally applicable rational basis analysis in relational history and context, proposing that

> [i]n every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases, the answer to these questions will tell us whether the statute has a "rational basis."[157]

Justice Stevens' version of relevance was thus "given direction through the incorporation of normative premises that reflect a social vision of equality".[158] The focus of this analysis is on the circumstances of disadvantaged groups, not on categorical assertions about whether or not particular kinds of classifications are irrational as a matter of abstract logic.[159]

Justice Marshall similarly objected to the Court's rigid approach to tiered scrutiny, but offered a different proposal: a sliding scale of review, which he referred to as a "spectrum of standards".[160] Justice Marshall charged the majority approach with "focusing obsessively on the appropriate label to give its standard of review" and questioned the validity of the bases relied upon to determine suspect classification.[161] He cautioned that a formalistic understanding of the political-process rationale may fail to account for the invidious nature of discrimination and that a decontextualized immutability analysis may improperly emphasize grounds such as height.[162] Rather than focus on any "single talisman", Marshall J called for a relational focus on the actual, lived experiences of groups, noting that "[t]he political powerlessness of a group and the immutability of its defining trait are relevant only insofar as they point to a *social and cultural isolation* that gives the majority little reason to

156. *Mathews v Lucas*, *supra* note 129 at 520–21. See also *New York Transit Authority v Beazer*, 440 US 568 at 593 (1979); *Cleburne*, *supra* note 59 at 438, n 6.

157. *Cleburne*, *supra* note 59 at 453.

158. "Stevens Note", *supra* note 155 at 1154. See also James E Fleming, "'There is Only One Equal Protection Clause': An Appreciation of Justice Stevens's Equal Protection Jurisprudence" (2006) 74:4 Fordham L Rev 2301 at 2301–302.

159. See "Stevens Note", *supra* note 155 at 1162.

160. *Rodriguez, supra* note 119 at para 99.

161. *Cleburne*, *supra* note 59 at 478.

162. *Ibid* at 472, n 24.

respect or be concerned with the group's interests and needs."[163] Rather than following a mechanical process of assigning scrutiny with reference to abstract classifications, Marshall J prescribed an open-textured balancing approach, in which "concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification".[164] In this analysis, Marshall J directed, "experience, not abstract logic, must be the primary guide", and "a page of history is worth a volume of logic".[165]

A similar relationally inflected protest was advanced by justices resisting the Court's dominant affirmative action analysis in *Adarand Constructors, Inc v Peña (Adarand)*, a case where a majority of the Court endorsed Powell J's reasons in *Bakke*: that all racial classifications—by any government actor and regardless of purposes or effects—should be subjected to the highest scrutiny.[166] Justice Stevens charged that "[t]he consistency that the Court espouses" in treating all racial classifications with the same heightened suspicion, "would disregard the difference between a 'No Trespassing' sign and a welcome mat".[167]

The Court's prevailing approach to tiered scrutiny blends a symmetrical suspicion of certain classifications with an unwillingness to extend heightened protections to new suspect classes. Both trends are grounded in a categorical logic that rejects the possibility or desirability of judicial attention to the

163. *Ibid* [emphasis added].

164. *Dandridge v Williams*, 397 US 471 at 520–21 (1970).

165. *Cleburne*, *supra* note 59 at 472–73, n 24, citing *New York Trust Co v Eisner*, 256 US 345 at 349 (1921).

166. *Adarand*, *supra* note 121. Note that the US Supreme Court's hostility to affirmative government action designed to ameliorate conditions of disadvantage on the basis of suspect classes is also evident in its increasingly restrictive interpretation of the congressional power to enforce the Fourteenth Amendment. See e.g. *City of Boerne v Flores*, 521 US 507 (1997) [*Flores*].

167. *Adarand*, *supra* note 121 at 245. Now, all members of the Court seem to have acquiesced to symmetrical application of heightened scrutiny, and judicial debate in affirmative action cases hinges on the extent to which particular affirmative action plans have met the narrow tailoring requirement. See e.g. *Fisher v Texas University of Texas at Austin*, 133 S Ct 2411 (2013). A vast critical commentary has addressed the apparent inconsistency and injustice of the current approach. See e.g. Rubenfeld, "Affirmative Action", *supra* note 125; Jed Rubenfeld, "The Anti-Antidiscrimination Agenda" (2002) 111:5 Yale LJ 1141 [Rubenfeld, "Agenda"]; Reginald C Oh, "A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class" (2004) 13:2 Temp Pol & Civ Rts L Rev 583; Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action" (1997) 49:5 Stan L Rev 1111.

broader social relationships animating particular claims—a logic which is consistent with the Court's wariness of standards over rules and hesitancy to embrace proportionality and dialogue as proper foundations for the judicial role. Nonetheless, we have also seen that this picture is not monolithic. There are moments in time where a majority of the Court has seemed to endorse a relational version of the discrete and insular minority inquiry,[168] and there are dissenting voices throughout the Court's history who have pressed for more relational doctrinal forms.[169]

In recent years, debates over the identification of suspect classes have stagnated in the US Supreme Court's jurisprudence. While some scholarly literature and lower court judgments continue to advance and consider proposed suspect classes, the Court has declined to engage with these claims. Most notably, the Court has consistently sidestepped suspect class analyses in its landmark gay rights and same-sex marriage cases, preferring instead to strike laws on a rational basis standard—such that the tiered scrutiny analysis became unnecessary—or to consider these cases primarily through the lens of liberty rather than equality rights.[170] For our purposes, this perhaps now stale US debate over suspect classification is useful in illuminating aspects of the Canadian analogous grounds inquiry, which remains a live doctrinal concern.[171] In the following subsection, we will see that Canada's analogous grounds jurisprudence, though generally more hospitable to relational analysis than its

168. See *Frontiero v Richardson*, *supra* note 122.

169. The present inquiry is focused on debates over doctrinal form, but it is notable that American justices have also placed more or less relational glosses on shared doctrinal formulae. See e.g. Nedelsky, *supra* note 17 at 262 (describing Ginsburg J's dissent in *Ricci v DeStefano*, 557 US 557 (2009) as "working within precedent" while embracing a more relational analysis than does Kennedy J's majority opinion). *Cf* Minow, *supra* note 17 at 101–19 (analyzing the differing relational emphases of the judicial opinions in *Cleburne*, *supra* note 59, without emphasizing doctrinal differences).

170. *Cf* Laurence H Tribe, "Equal Dignity: Speaking its Name" (2015) 129:1 Harvard L Rev Forum 16. Notably, there is evidence that the Canadian courts may similarly be preferring to decide claims on grounds other than equality when possible. *Cf* Maneesha Deckha, "A Missed Opportunity: Affirming the Section 15 Equality Argument against Physician-Assisted Death" (2016) 10:1 McGill JL & Health S69; Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown" (2013) 22:1 Const Forum Const 31.

171. See e.g. *Taypotat*, *supra* note 89 (revising the test for analogous grounds and striking a claim on the basis of its failure to establish an analogous ground).

US suspect class counterpart, also has currents running in both relational and categorical directions.

C. Canadian Grounds of Discrimination

Canada's constitutional equality provision emerged in very different circumstances from those that gave rise to the US Equal Protection Clause. The *Charter* was adopted in the 1980s, crafted in consultation with independent advisory groups, following the solicitation and submission of briefs from members of the public and three months of hearings before a joint committee of the House of Commons and the Senate.[172] Women's groups and other social movement actors seized on the *Charter* drafting process as a focal point, engaging in "concerted and effective lobbying" that materially influenced the final constitutional text.[173] The resultant equality provision was therefore "shaped in large part by women, as well as by advocates for the disabled and other disadvantaged groups in Canadian society".[174] Canada's constitutional equality provision was also drafted and interpreted after much of the US constitutional history set out above had already unfurled—the famous footnote, the adoption of tiered scrutiny and the striking of affirmative action provisions under strict scrutiny. In text and interpretation, Canada's constitutional equality law has taken the US equal protection experience as both a model and a cautionary tale.[175]

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172. See Doris Anderson, "The Adoption of Section 15: Origins and Aspirations" (2006) 5:1 JL & Equality 39 at 40.

173. See Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23:1 Windsor YB Access Just 145 at 149.

174. The Honorable Claire L'Heureux-Dubé, "It Takes a Vision: The Constitutionalization of Equality in Canada" (2002) 14:2 Yale JL & Feminism 363 at 366.

175. Contrast the Canadian Supreme Court's adoption of the US' "discrete and insular minority" standard with the repudiation of *Bakke* in the drafting of the Canadian *Charter* (both of which are addressed below). The US constitutional experience has affected Canadian constitutional drafting and jurisprudence in other areas as well. See e.g. Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2:1 Intl J Constitutional L 1; "Forty-Ninth Parallel Constitutionalism: How Canadians Invoke American Constitutional Traditions", Note, (2007) 120:7 Harv L Rev 1936. Alongside the US experience, the history of Canada's own pre-*Charter* Bill of Rights stood as an important aversive precedent in the *Charter*'s drafting. See Denise G Réaume, "Discrimination and Dignity" (2003) 63:3 La L Rev 645 at 647.

Section 15 of the *Charter* provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[176]

As with other rights enumerated in the *Charter*, section 15 equality rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", pursuant to the Limitations Clause set out in section 1 of the *Charter*.[177]

The textual differences between Canada's equality provision and the terse US guarantee of "equal protection of the laws" are apparent. First, the Canadian protection expressly provides a lengthy list of grounds, including grounds such as age and mental disability, which have been denied heightened scrutiny under US equal protection analysis.[178] The list of grounds is also prefaced by the phrase "and, in particular"—a grammatical invitation to consider claims that do not specifically engage any of the listed grounds. Second, the Limitations Clause opens up a possibility (arguably not adequately taken up by the courts)[179] of separating the identification of a rights violation from consideration of whether that violation was justifiable.[180]

176. *Supra* note 78, s 15.

177. See *supra* notes 77–79 and accompanying text.

178. See *Murgia*, *supra* note 118 at 312–13; *Cleburne*, *supra* note 59.

179. Courts and commentators have debated the extent to which justificatory concerns may properly be considered under section 15, as opposed to section 1. See e.g. competing judicial approaches adopted by the justices in *Quebec v A*, *supra* note 89; Truesdale, *supra* note 79.

180. See e.g. Raj Anand, "Ethnic Equality" in Anne F Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 81 (noting that in the absence of a limitations provision, "the US Supreme Court was forced to incorporate general welfare interests into the definition of the right itself and into the analysis of what constitutes an infringement of that right" at 108).

Finally, subsection 15(2), which provides express constitutional sanction to affirmative measures aimed at ameliorating conditions of group disadvantage, was included as a direct response to the US experience with judicial review of affirmative action programs.[181] In stark contrast to the US jurisprudence, subsection 15(2) has been interpreted to insulate from subsection 15(1) review any laws or programs that are rationally connected to the objective of ameliorating conditions of group disadvantage.[182]

In *Andrews v Law Society of British Columbia*, the SCC's first section 15 decision, all members of the Court endorsed the "enumerated and analogous grounds approach" as the basic interpretive framework for discrimination analysis.[183] Under this approach, the listed grounds, and grounds determined to be analogous thereto, would serve the function of "screening out . . . the obviously trivial and vexatious claim", while leaving "any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment" to be advanced by the government under section 1.[184] The Court was unambiguous that "[q]uestions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus" of the grounds analysis.[185]

In *Andrews*, the SCC adopted the US discrete and insular minority formulation in concluding that citizenship was sufficiently analogous to the listed grounds to warrant section 15 protection.[186] In the cases following *Andrews*, the Court continued to deploy the term "discrete and insular minority"

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181. See M David Lepofsky & Jerome Birchenback, "Equality Rights and the Physically Handicapped" in Bayefsky & Eberts, *supra* note 180, 323 at 354; *Lovelace v Ontario* (1997), 33 OR (3d) 735 at para 51, 148 DLR (4th) 126 (CA).

182. See *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483. For an argument that the SCC's prevailing approach may be too permissive of ameliorative schemes that harm or exclude disadvantaged groups, see Jess Eisen, "Rethinking Affirmative Action Analysis in the Wake of *Kapp*: A Limitations Interpretation Approach" (2008) 6:1 JL & Equality 1.

183. [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews* cited to SCR]. Although McIntyre J dissented in the result, the "enumerated and analogous grounds approach" set out in his reasons were endorsed by all members of the Court. *Ibid.*

184. *Ibid* at 182–83.

185. *Ibid* at 180, citing *Smith, Kline & French Laboratories v Canada (AG)* (1986), 2 FC 359 at 367–69, 34 DLR (4th) 584 (FCA).

186. *Supra* note 183 at 183, McIntyre J. Writing for the majority, Wilson J noted that "[r]elative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated." *Ibid* at 152.

in defining analogous grounds, emphasizing social and historical disadvantage when assessing proposed grounds of discrimination.[187] Disadvantage was the analytic cornerstone, even where factors like "immutability" were referred to by members of the Court.[188] The Court consistently urged and practiced consideration of "the larger social, political and legal context" in this "search for disadvantage",[189] and suggested that a rejected claim of analogousness would not foreclose future claims where stronger evidence of disadvantage on the basis of that ground may exist.[190]

In 1995, the Court released a trilogy of decisions that revealed the emergence of a tripartite split in the Court as to the proper interpretation of section 15. Each of the trilogy cases involved proposed analogous grounds,[191] and each of the judicial approaches advanced differed on the question of how these claims to analogousness should be assessed.[192] I will term the three distinct approaches to defining analogous grounds in these cases as the "Relevancy Approach", the "Stereotyping Approach" and the "Group Disadvantage Approach".

The Relevancy Approach, endorsed by Lamer CJC and La Forest, Major and Gonthier JJ, focused the analogous grounds inquiry on whether proposed grounds were "irrelevant personal characteristics".[193] The enumerated grounds, on this account, exemplified personal characteristics that have often formed

187. See e.g. *R v Turpin*, [1989] 1 SCR 1296 at 1331–333, 96 NR 115.

188. See e.g. *Andrews*, *supra* note 183 at 195, La Forest J. See also Dale Gibson, "Analogous Grounds of Discrimination Under the Canadian *Charter:* Too Much Ado About Next to Nothing" (1991) 29:4 Alta L Rev 772 at 791 (surveying the various factors cited by the Court in its early grounds jurisprudence, and noting that group disadvantage was a core factor in all of the analogous grounds recognized by the Court up to the time of writing) [Gibson, "Analogous"].

189. *R v Turpin*, *supra* note 187 at 1331–332.

190. See e.g. *R v Généreux*, [1992] 1 SCR 259, 88 DLR (4th) 110 [cited to SCR] (holding that military personnel were not disadvantaged on the facts of the case, but if, "for instance . . . after a period of massive demobilization at the end of hostilities, returning military personnel . . . suffer from disadvantages and discrimination peculiar to their status . . . [they] might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances" at 311). See also *R v Turpin*, *supra* note 187 at 1333.

191. See *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 [cited to SCR] (sexual orientation); *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693 [cited to SCR] (marital status); *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449 [cited to SCR] (divorced custodial parents).

192. For a more detailed survey of the differing judicial approaches to section 15 set out in the trilogy cases, see Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*" (2013) 2:2 Can J Poverty L 1 [Eisen, "Poverty"].

193. See *Thibaudeau v Canada*, *supra* note 191 at 682; *Miron v Trudel*, *supra* note 191 at 435.

the basis of irrelevant distinctions. Analogous grounds would be defined on a case-by-case basis with reference to the relevancy of the proposed ground to particular legislative objectives.[194] Consideration of group disadvantage "may be useful" in this inquiry, but only insofar as it assists in illuminating the presence of an irrelevant distinction.[195] The Relevancy Approach coalition also emphasized that the irrelevant characteristic must be a "personal characteristic", holding that groups should not be "subdivided" by income level since income is not, in their view, a "characteristic attaching to the individual".[196] Thus, on this account, social context and group disadvantage were subordinate considerations, and constitutionally relevant differences were thought to inhere in the individual person rather than in social relationships. Moreover, since the analytic focus was anchored in the legislative objective rather than examination of broader social relationships and hierarchies, legislative objectives informed by discriminatory attitudes were effectively placed beyond review.[197]

The Stereotyping Approach, advanced by McLachlin J (as she then was), Sopinka, Cory and Iacobucci JJ, advocated a relatively more relational grounds doctrine. These Justices posited that the enumerated grounds represented historical bases for stereotypical decision making; analogous grounds should thus be determined with reference to their likelihood as a basis for stereotypical decision making.[198] Despite apparent similarities between a prescribed focus on "irrelevant" or "stereotypical" decision making,[199] advocates of the Stereotyping Approach defined stereotyping in decidedly more relational terms than the Relevancy Approach. Rather than considering relevancy in the abstract, the Stereotyping Approach called for consideration of an extensive list of factors in determining whether a proposed ground is likely to attract stereotypical decision making: whether the group suffers from historical disadvantage; whether the group constitutes a "discrete and insular minority" vulnerable to being overlooked by majoritarian politics; whether the distinction is made

194. See *Miron v Trudel*, *supra* note 191 at 435–36. See also *ibid* (stating that marital status may be sufficiently irrelevant to be analogous in some cases, but that it "cannot be so with respect to those attributes and effects which serve to define marriage itself" at 442).

195. *Ibid* at 455.

196. *Thibaudeau v Canada*, *supra* note 191 at 687.

197. Réaume, *supra* note 175 at 659–60.

198. See *Miron v Trudel*, *supra* note 191 at 487.

199. See *ibid* (Gonthier J's assessment that the two approaches share a common goal: "a criterion defined in terms of stereotype based on presumed group characteristics, rather than on the basis of merit, capacity or circumstances, is but an elaboration of the concept of relevance" at 443).

on the basis of a "personal characteristic" and "[b]y extension" whether the distinction is based on "personal and immutable characteristics"; whether the proposed ground is comparable to any particular listed ground; and whether the ground had been granted protected status by other judges or in human rights legislation.[200] These factors were to be understood as "analytical tools", and a proposed analogous ground need not prove the presence of every listed factor.[201] The Stereotyping coalition's "unifying principle" in the analogous grounds assessment was the desire to avoid distinctions "on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual".[202]

Both the Relevancy and the Stereotyping Approaches represented departures from the decidedly disadvantage-oriented focus of the *Andrews* era. The Relevancy Approach could be deployed without ever inquiring into the social and political power of the groups affected by impugned legislation. While the Stereotyping Approach did include some social contextual concerns (in particular, historical disadvantage and discrete and insular minority status), these stood on equal footing with more abstract considerations (personal characteristics, immutability and generalized analogy to other particular grounds). Attention to disadvantage did not, under this approach, operate with the same decisive force as it did under *Andrews*. This receding doctrinal focus on social context, moreover, was accompanied by another doctrinal shift—common to both the Relevancy and Stereotyping Approaches—that further insulated the grounds analysis from relational concerns: the grounds assessment shifted its shape from that of an analytical tool to that of a freestanding "test" that could defeat a discrimination claim at the outset.[203]

200. See *ibid* at 496 [emphasis omitted].

201. See *ibid*.

202. *Ibid* at 497. But see Réaume, *supra* note 175 at 661–62 (arguing that the link between these factors and their supposed "unifying principle" is not in fact made clear).

203. See *Symes v Canada*, [1993] 4 SCR 695, 110 DLR (4th) 470 [cited to SCR] (where the majority observed that under *Andrews*, the enumerated and analogous grounds inquiry "may be less a requirement of s. 15(1), and more of an analytical trend" at 756). Note that this shift solidified another important difference between Canadian analogous grounds and US suspect classifications; even non-suspect classes are protected against distinctions that fail the US rational basis test, whereas a Canadian equality claim cannot proceed at all where no enumerated or analogous ground is established.

Only L'Heureux-Dubé J advocated for a Group Disadvantage Approach, proposing that discrimination should be assessed in context, with reference to the circumstances of the actual group(s) affected and the nature of the interest impacted by the impugned differential treatment. She cast this inquiry as being concerned with "groups rather than grounds, and discriminatory impact rather than discriminatory potential".[204] Discrimination, under this approach, should be found more readily in cases where serious interests are engaged, or where a "socially vulnerable" group is disadvantaged by a legislative distinction.[205] Throughout the trilogy, L'Heureux-Dubé J concurred with the Stereotyping coalition's conclusions on the merits, but emphasized that she rejected a talismanic focus on grounds, which she saw as encouraging "too much analysis at the wrong level".[206] Justice L'Heureux-Dubé warned that by "looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences".[207] She cautioned that reliance on "appropriate categories" gave rise to a risk of "relying on conventions and stereotypes . . . [that] further entrench a discriminatory *status quo*".[208] Rejecting an approach that was overly focused on the characteristics of claimants, L'Heureux-Dubé J offered the distinctly relational insight that, "[m]ore often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals."[209]

The Court sought to resolve the conflicting trilogy approaches and offer its first unified "test" to be applied in constitutional equality claims in *Law v Canada (Minister of Employment and Immigration)*.[210] In *Law*, the Court directed a three-part test for section 15 analysis, incorporating elements from all three of the trilogy approaches. The *Law* inquiry directed courts to consider:

204. *Egan v Canada*, *supra* note 191 at 552.

205. *Ibid* at 520.

206. *Ibid* at 551.

207. *Ibid* at 552 [emphasis omitted].

208. *Ibid* [emphasis in original].

209. *Ibid.*

210. [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR]. The *Andrews* era Court was relatively unified, but expressly refused to pronounce "exhaustive definitions" of protected equality rights in those "early days" of section 15 interpretation. See *R v Turpin*, *supra* note 187 at 1326. The *Law* consensus was arguably illusory. See Daphne Gilbert, "Unequaled: Justice Claire L'Heureux-Dubé's Vision of Equality and Section 15 of the *Charter*" (2003) 15:1 CJWL 1 ("*Law*'s tentative cohesion only superficially addresses the divergent views" at 18) [Gilbert, "Unequaled"].

(a) whether the impugned law produced differential treatment on the basis of one or more personal characteristics;

(b) whether that differential treatment was based on one or more enumerated or analogous grounds; and

(c) whether that differential treatment was discriminatory—an inquiry engaging a multi-part analysis of an open list of "contextual factors", including:

    (1) pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group in issue;

    (2) the correspondence between the ground(s) on which the claim is based and the actual needs, capacities or circumstances of the claimant;

    (3) the ameliorative purpose or effect of the law; and

    (4) the nature and scope of the interest affected.[211]

Shortly after *Law*, the Court decided *Corbiere v Canada (Minister of Indian and Northern Affairs)*, a case concerning the equality rights of Aboriginal band members living off-reserve.[212] Together, *Law* and *Corbiere* conclusively reshaped the Court's approach to defining analogous grounds. First, the Court confirmed the trend towards a threshold grounds inquiry emergent in the approaches proposed by the Relevancy and Stereotyping cohorts under the trilogy. The Court in *Corbiere* held that the analogous grounds inquiry would now serve a "screening out" function, whereby claims that failed to make out a distinction on the basis of an approved ground would merit no further inquiry.[213]

Second, the Court in *Corbiere* emphasized that this threshold inquiry was to be conducted in the abstract, rather than in the particular context of the case before the Court. The grounds were found to represent "a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case".[214] Analogousness was no longer to be determined, as the *Andrews* Court had suggested, with reference to the particular social relationships giving rise to a given claim. According to the *Cobiere* majority, "we should not speak of analogous grounds existing in one circumstance and not another".[215]

211. *Supra* note 210 at 548–52.
212. [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere* cited to SCR].
213. *Ibid* at 218.
214. *Ibid* at 216.
215. *Ibid* at 217.

The Court further elaborated that this analogous grounds analysis—now an abstract, threshold test—should hinge on an inquiry into whether the proposed ground constituted an immutable or "constructively immutable" personal characteristic: "the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law".[216] The government has no legitimate interest, on this view, in requiring people to alter those personal characteristics that are "changeable only at unacceptable cost to personal identity".[217] The Court emphasized that this test was rooted in analogy to the listed grounds: race was offered as an example of a listed ground that is "actually immutable", and religion served as an example of a "constructively immutable personal [characteristic]".[218] Strikingly, the Court argued that the immutability inquiry displaced any need for distinct inquiry into social or political disadvantage:

> Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.[219]

There is no basis for the Court's assertion that attention to historical disadvantage "may be seen to flow from" (constructive) immutability and, in practice, the lower courts have often taken this doctrinal directive as an invitation to ignore disadvantage.[220] Whether or not (constructively) immutable personal characteristics such as race and religion in fact characterize disadvantaged groups, there is no question that such characteristics are symmetrical: if race is immutable, it is equally so for black and white; if religion is constructively immutable, it is equally so for Christianity and Islam. As Sebastién Grammond

216. *Ibid* at 219.

217. *Ibid.*

218. *Ibid.*

219. *Ibid* at 219–20.

220. See e.g. Rosalind Dixon, "The Supreme Court of Canada and Constitutional (Equality) Baselines" (2013) 50:3 Osgoode Hall LJ 637 ("[t]he actual or constructive immutability of an individual characteristic will, at best, be only tangentially relevant to these criteria of political power" at 653); Eisen, "Poverty", *supra* note 192 at 111–13.

described the reasoning in *Corbiere*: "the focus is on the ground of distinction, rather than on the vulnerable group delineated by that ground".[221]

The *Corbiere* standard marked a retreat from the more relational doctrine that characterized the Court's *Andrews*-era grounds analysis, and the analyses proposed by the Group Disadvantage and Stereotyping coalitions in the trilogy era. First, the prescribed analytic focus is at the level of the defining trait, rather than on the social relationships that have made this trait socially relevant. By presuming a hard line may be drawn between what is chosen and what is unchosen,[222] and what is "conduct" and what is "status", the Court evokes a notion of inequality that is "grounded in biological and inherent differences . . . rather than a more pervasive social process in which the very notion of difference is created and regulated by systems of subordination".[223] Second, as Rosalind Dixon has observed, the *Corbiere* decision represents a shift in analogical reasoning towards a greater level of abstraction. Among the dangers Dixon associates with such abstraction, she observes that it is likely to prompt a "form of 'lofty' reasoning with little or no connection to underlying constitutional commitments or concerns".[224] This higher level of abstraction has also been associated with an increased resistance to recognition of new analogous grounds.[225] Under *Corbiere*, the Court repeatedly rejected

221. Grammond, *supra* note 92 at 103.

222. See Jennifer Koshan, "Inequality and Identity at Work" (2015) 38:2 Dal LJ 473 at 486; Robert Leckey, "Chosen Discrimination" (2002) 18 SCLR (2d) 445. On the role of choice in Canadian equality jurisprudence more generally, see Sonia Lawrence, "Harsh, Perhaps Even Misguided: Developments in *Law*, 2002" (2003) 20 SCLR (2d) 93; Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" in Sheila McIntyre & Sandra Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont: LexisNexis Butterworths, 2006) 115; Margot Young, "Social Justice and the *Charter*: Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669.

223. Kerri Froc, "Immutability Hauntings: Socio-economic Status and Women's Right to Just Conditions of Work Under Section 15 of the *Charter*" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 187 at 215. See also Douglas Kropp, "'Categorial' Failure: Canada's Equality Jurisprudence: Changing Notions of Identity and the Legal Subject" (1997) 23:1 Queen's LJ 201.

224. Dixon, *supra* note 220 at 662. See also Eisen, "Poverty", *supra* note 192 at 24; Réaume, *supra* note 175 at 652 (describing an immutability-focused approach as a "purely conceptual analysis" that ill-fits the equality inquiry, "as the search for conceptual solutions to normative questions" often does).

225. See Dixon, *supra* note 220 at 646–55. See also Eisen, "Poverty", *supra* note 192 at 15–23.

leave applications relating to the most persistently proposed new grounds—particularly those related to economic disadvantage—and the lower courts continued to apply the restrictive and abstract (constructive) immutability standard directed by the SCC in *Corbiere*.[226]

The Court's recent decision in *Kahkawistahaw First Nation v Taypotat*[227] appears to articulate a substantially different approach to analogous grounds than that which was announced in *Corbiere*. Without fanfare, and purporting to simply apply the rule from *Corbiere*, this brief, unanimous SCC decision seems to have dropped the immutability standard in favour of a more relational, disadvantage-focused inquiry. The claimant in *Taypotat* challenged a provision of an election code adopted by the Kahkewistahaw First Nation requiring that the roles of Chief and Band Councillor may only be held by persons with a grade twelve education or equivalent. Among the proffered challenges to the election code, the claimant argued that the educational requirement was discriminatory on the ground of "educational attainment", which he argued was "analogous to race and age".[228] The claim was dismissed by the Federal Court for lack of evidence that "educational attainment" was an analogous ground, and on appeal the claimant instead argued that residential school survivors without a grade twelve education constituted an analogous ground.[229] The Federal Court of Appeal declined to rule explicitly on this proposed ground, but did find the impugned provision discriminatory on the basis of the enumerated ground of age and the analogous ground of "residence on a reserve".[230] Following the FCA's lead, in argument before the SCC, the claimant grounded his equality claim on the proposed analogous ground of "older community members who live on a reserve".[231] The SCC chided the FCA for raising a distinct theory of

226. See Bruce Ryder & Taufiq Hashmani, "Managing *Charter* Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989–2010" (2010) 51 SCLR (2d) 505 at 527. See also Eisen, "Poverty", *supra* note 192 at 22–23; Dixon, *supra* note 220 at 646–55. In the two cases during the *Corbiere* era where the SCC elected to hear cases in which a new analogous ground was advanced, the Court chose to sidestep the analogous grounds inquiry, deciding the cases on other grounds. See *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3; *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016.

227. *Supra* note 89.

228. *Ibid* at para 10.

229. *Ibid* at para 12.

230. *Ibid* at para 13.

231. *Ibid* at para 14.

the appropriate analogous ground without sufficient evidence on the record, and ultimately rejected the constitutional claim on the basis that the record offered "virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation" to demonstrate that the provision burdened a disadvantaged group.[232]

The doctrinal approach to grounds sketched in *Taypotat* revealed a striking vacillation between relational and categorical thinking. On the relational side of the ledger, the Court made no mention of immutability, instead focussing its description of the purpose and focus of the analogous grounds inquiry squarely on social disadvantage:

> Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336.[233]

Those unfamiliar with *Corbiere*'s relegation of disadvantage to one of many "factors" flowing from the "central concept" of immutability might be forgiven for thinking that the second quotation in this paragraph (referencing disadvantage and context) came from *Corbiere* itself, rather than from Lynn Smith and William Black's law review article. Unlike in *R v Kapp*[234] and *Withler v Canada (Attorney General)*,[235] the Court in *Taypotat* did not offer extensive citations to scholarly criticism or announce a restatement of the law, but this articulation of the purpose of the grounds analysis nonetheless seems to promise a significant shift away from *Corbiere*'s immutability standard.

Of particular note, the Court was unwilling to simply infer from *Corbiere*'s finding that *off-reserve* band members constituted an analogous ground that *on-reserve* band members constituted an analogous ground as well. Instead, the Court required evidence that analogous disadvantages were suffered by on-reserve band members.

232. *Ibid* at para 24.
233. *Ibid* at para 19.
234. *Supra* note 182 at para 22.
235. 2011 SCC 12 at paras 55–60, [2011] 1 SCR 396 [*Withler*].

> The Court's recognition of off-reserve residence as an analogous ground in *Corbiere* relied in part on the argument that First Nations people living off-reserve have experienced unique disadvantages relative to community members living on a reserve and that, for many, the decision to live off-reserve was either forced or heavily constrained. With respect, I would be reluctant to impose a simple mirror inference without argument or evidence from the parties.[236]

While there is reason to be concerned about the evidentiary burden this may put on claimants advancing new analogous grounds, the Court's shift from requiring evidence of immutability or constructive immutability to requiring evidence of "unique disadvantages" and constrained choices moves the doctrine in a decidedly more relational direction.[237]

On the categorical side, the SCC appeared to be extremely preoccupied with the particulars of the ground advanced. Although the judges disapproved of the FCA's decision to revise the claimant's proposed ground without adequate evidence in support, the SCC did not address the claimant's own original proposed grounds of educational attainment or residential school survivors without grade twelve education. The SCC also focused a great deal on ensuring the evidence advanced in support of the proposed ground be pitched at the appropriate level of generality, saying that evidence of lower educational attainment in older Canadians more generally, or even of older Aboriginal Canadians, was insufficient to draw inferences about the relationship between age, educational attainment and disadvantage in the Kahkewistahaw First Nation.[238] This uncomfortable search for the precise group by which to define the claim raises many of the same concerns that animated criticism and the Court's ultimate retreat from, mirror comparators.[239] The Court's manoeuvering between various aspects of the proposed analogous ground is also reminiscent of the US Supreme Court in *Rodriguez*. By jumping between various proposed

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236. *Taypotat*, *supra* note 89 at para 26.

237. While there may be some conceptual overlap between constructive immutability and constrained choice, the SCC's choice of the former language in *Corbiere* has been associated with inattention to disadvantage and relational context in the lower courts. *Cf* Eisen, "Poverty", *supra* note 192.

238. See *Taypotat*, *supra* note 89 at paras 30–32.

239. See e.g. Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24:1 Windsor YB Access Just 111; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror on the Wall, What's the Fairest of Them All?" in McIntyre & Rodgers, *supra* note 222, 135 [Pothier, "Equality"]; *Withler*, *supra* note 235 at paras 55–60.

classes and concluding that it was simply too difficult to pin down a ground, the *Rodriguez* Court managed to reject the presence of a suspect class even though the group in issue—children in a poor school district—were quite obviously disadvantaged. Similarly, the SCC's focus in *Taypotat* on calibrating the evidence to particular levels of generality allows it to defeat the claim at the grounds stage without making the patently absurd contention that elderly residential school survivors without high school education are not a disadvantaged group. This is a particularly troubling use of grounds as a "screen", since the tone of the SCC's reasons suggest that the ruling may in fact have been motivated by considerations that ought properly to have been considered at other stages of the analysis.[240]

It remains to be seen in future cases whether the evidentiary threshold surrounding the advancement of new claims, and the precision with which new grounds are pleaded, will prove to be obstacles to future claims. Nonetheless, the grounds doctrine articulated in *Taypotat* brings the Canadian jurisprudence closer to its relational promise than the *Corbiere* immutability standard. As with the US jurisprudence, though, we can observe tensions over time and within the SCC at any given point, as between attention to relationship and ease of categorization. It is possible that the unanimity of *Taypotat* was bought at the expense of its ambivalence between categorical and relational doctrine.

III. Rethinking Class(ification): Relational Approaches to Doctrinal Scholarship

In the preceding Part, we have seen that both the Canadian and US courts have moved towards increasingly categorical approaches to "grounds of discrimination" and "suspect classification", respectively—though certain justices within each jurisdiction have pressed for more relational doctrinal forms, and the most recent Canadian equality jurisprudence suggests that a more relational tack may be underway. Conceptualizing equality doctrine as embracing more relational or categorical analytic forms offers us a lens through which to describe these shifts and tensions and a means of identifying

240. For example, the SCC emphasized that the claimant, who was Chief at the time, oversaw the process by which the election code was debated and adopted, and that the code was a product of many years of democratic deliberation within the Kahkewistahaw First Nation—the latter of which seems especially like a question of section 1 justification. See *Taypotat*, *supra* note 89.

thematically similar debates across jurisdictions with substantially different equality laws.[241] Relational theory also helps us to see what courts might miss when they follow more categorical doctrinal paths: attention to social context, the capacity to hear diverse perspectives and the ability to moor categories in their social purposes. In this Part, I will look more closely at a pair of conceptual distinctions telegraphed in the jurisdictional surveys above: US *classes* versus *classifications*, and Canadian *groups* versus *grounds*. In both jurisdictions these linguistic/conceptual distinctions have attracted scholarly debates that I propose can be more clearly articulated through the lens of relational analysis.

In US equal protection scholarship, the distinction between suspect classes and classifications has taken on a special significance. In his foundational 1976 article, "Groups and the Equal Protection Clause", Owen Fiss articulated two competing strands of equal protection theory: anti-subordination and anti-classification. Fiss argued that the US Supreme Court had been applying an anti-classification principle (originally termed by Fiss an "anti-discrimination principle") whose "foundational concept" was one of "means-ends rationality".[242] Fiss offered a relational-inflected critique of classification: "[t]he antidiscrimination principle does not formally acknowledge social groups, such as blacks; nor does it offer any special dispensation for conduct that benefits a disadvantaged group"—a special concern given then-nascent arguments that the clause might be deployed (as it since has been) to dismantle affirmative action programs.[243] Instead, Fiss urged an approach grounded in a "group disadvantaging principle", which recognizes the significance of "natural classes, or social groups, in American society".[244] For Fiss, the Equal Protection Clause was best understood as a safeguard for disadvantaged groups or classes who experience "perpetual subordination" and "severely circumscribed" political power—an analytic framework which would require the Court to examine

241. *Cf* Jackson & Greene, *supra* note 75.

242. Owen M Fiss, "Groups and the Equal Protection Clause" (1976) 5:2 Phil & Publ Aff 107 at 111–12 [Fiss, "Equal Protection Clause"].

243. *Ibid* at 129.

244. *Ibid* at 148. Fiss intended the phrase "natural classes" to describe groups with real social significance, as opposed to "artificial classes" that are created purely by legislative distinctions (for example tax brackets). *Ibid* at 156. For example, African Americans constitute a "natural class" because "Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group". *Ibid* at 148.

social realities rather than abstract classifications.[245] The distinction between doctrinal approaches grounded in *classes* versus *classifications* has since figured in other prominent equal protection analyses as well.[246]

But Fiss' solution to the problems of anti-classification—a focus on "natural classes"—has attracted criticism from those who share his ambition of a jurisprudence attentive to social history and vulnerability. Iris Marion Young, for example, agrees with Fiss' proposition that "[i]f we care about the ways that many individuals have restricted opportunities and suffer various forms of stigmatization and marginalization, we must pay attention to groups", but worries that the language of "natural classes" introduces "reifying language" that elides the reality that "[g]roups are entirely constituted by social norms and interaction."[247] Richard Thompson Ford has similarly cautioned that Fiss' term "natural classes" risks obscuring the role that law plays in constructing and reinforcing particular racial identities—for example, that "blacks were *produced* as a discrete social group so that they could be treated badly".[248]

Fiss has responded that he did not intend the phrase "natural groups" to import these essentializing connotations or to entrench particular social groupings. Fiss maintains that anti-subordination "does not create group identification", but rather "acknowledges this reality, and seeks to provide a legal principle capable of eradicating the injustice that arises when group identification is turned into a system of subjugation".[249] While labelling groups may cause problems on this account, the alternative is to ignore relational context.

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245. *Ibid* at 155. Fiss specifically cites the jurisprudence of Marshall J, discussed above, as an example of such a socially responsive approach.

246. See e.g. Rubenfeld, "Agenda", *supra* note 167 (observing an "important doctrinal shift, finally realized in [*Adarand*] but insufficiently discussed in the literature, from *suspect classes* to *suspect classifications* as the linchpin of strict scrutiny in equal protection law" at 1167 [emphasis in original]); Oh, *supra* note 167 at 606; Siegel, *supra* note 167 (arguing that, "by abstracting the history of racial status regulation into a narrative of 'racial classifications,' the Court obscures the multiple and mutable forms of racial status regulation that have subordinated African-Americans since the Founding" at 1142).

247. Iris Marion Young, "Status Inequality and Social Groups" (2002) 2:1 Issues in Leg Scholarship 1019 at 4–5.

248. Richard Thompson Ford, "Unnatural Groups: A Reaction to Owen Fiss's 'Groups and the Equal Protection Clause'" (2003) 2:1 Issues in Leg Scholarship 1007 at 4 [emphasis in original].

249. Owen Fiss, "Another Equality" (2004) 2:1 Issues in Leg Scholarship 1051 at 9.

Canadian discussions of the demands of constitutional equality have relied on a distinction that is related, but not identical, to Fiss' distinction between anti-subordination and anti-classification. In Canada, approaches to constitutional equality law are generally assessed with reference to a distinction between *substantive* and *formal* equality. Substantive equality is associated with attention to power differentials, context and the effects of law, while formal equality is grounded in a principle of treating likes alike (i.e., the "similarly situated" test) as a matter of "process or procedure", rather than attending to "outcomes or distributional results".[250] Like anti-classification, formal equality is concerned with the perceived relevancy of the lines used to divide people; substantive equality, like anti-subordination, is directly concerned with actual conditions of social, political and material inequality. Substantive equality, however, does not necessarily import Fiss' anti-subordination concern with identifying particular *groups* in need of special protection. Instead, substantive equality casts the concern more broadly in terms of attending to power relations and deploying contextual analysis.[251]

Canadian equality scholars have debated whether *grounds* of discrimination or the identification of *groups* warranting protection offer the better doctrinal vehicle for promoting substantive equality. As we saw in our review of Canadian equality doctrine, this debate played out in the trilogy era jurisprudence, wherein the majority of the Court moved towards a grounds-based approach, while L'Heureux-Dubé J advocated for a focus on groups.[252] Dianne Pothier describes the Canadian debate as follows: "The essence of the critique of grounds is the claim that they are an artificial compartmentalization which obscures the complex reality of real life. In contrast, the defense of grounds is based on the contention that they serve to focus attention on the real sources of discrimination."[253] Colleen Sheppard, in her call for expansive definitions

250. Young, "Unequal", *supra* note 92 at 190–99. See also Grammond, *supra* note 92 at 16–23.

251. Compare Young, "Unequal", *supra* note 92 at 193–99, with Fiss, "Equal Protection Clause", *supra* note 242.

252. See *supra* notes 191–209 and accompanying text.

253. Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13:1 CJWL 37 at 44–45 [Pothier, "Connecting Grounds"]. For examples of arguments for doctrines based on *groups* not *grounds*, see Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48:4 McGill LJ 627 (contending that "[l]ooking at the group does not require contextual abandonment. Looking at the ground, however, may require just that" at 648); Gilbert, "Unequaled", *supra* note 210; *Miron v Trudel*, *supra* note 191, L'Heureux-Dubé J. For arguments in favor of an equality analysis based on *grounds*, not *groups*, see

of grounds, nicely casts the contest between group-based and grounds-based approaches to equality as a "feminist post-modern dilemma" since "[i]t may be politically, strategically or rhetorically important to name a social phenomenon sexism, classism or racism, while acknowledging the limits of such categories in the same breath."[254]

In my view, there is no essential disagreement between the groups and grounds camps in this Canadian debate.[255] Just as Fiss, Young and Ford share an underlying concern with building a jurisprudence attentive to relational context, both sides of the Canadian groups/grounds debate argue that the proper purposes of the disputed doctrinal inquiry are the identification of oppressive power relationships, attention to the nuances of intersectional discrimination and illumination of the claimant's perspective. The ostensible choice between groups and grounds, or classes and classifications, does not adequately explain what is at stake in these US and Canadian scholarly debates. Neither side of either the Canadian or US debates described argues that attention to power differentials should be abandoned in favour of a formalist analysis that would produce the sorts of outcomes we have seen in the classification-focused US affirmative action cases,[256] or the decontextualized immutability analysis adopted by the SCC in *Corbiere*. This conceptual confusion—particularly stark in the Canadian debate over what attention to groups or grounds might entail—distracts from a more significant analytical division.[257] The analytic

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Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 99 at 72 (endorsing an analytic focus on grounds as "historic markers of the dynamics of power relationships"); Pothier, "Connecting Grounds", *supra*.

254. Colleen Sheppard, "Grounds of Discrimination: Toward an Inclusive and Contextual Approach" (2001) 80:3 Can Bar Rev 893 at 915.

255. See Eisen, "Poverty", *supra* note 192 at 26–28.

256. For a rare Canadian argument that grounds should be abandoned for reasons along these lines, see Gibson, "Analagous", *supra* note 188; Dale Gibson, "Equality for Some" (1991) 40 UNBLJ 2 at 5–6.

257. This confusion is exacerbated by the fact that the SCC's use of the terms "groups" and "grounds" is not faithful to the meanings attributed to these words in the academic debate set out above. For example, the Court's jurisprudence in the *Andrews* era frequently deployed the language of "grounds" (in fact terming its framework the "enumerated and analogous grounds approach") while clearly attending to the relational concerns that L'Heureux-Dubé J would later associate with a focus on groups.

imperative, shared by all the US and Canadian authors surveyed here, is to build a jurisprudence attentive to relational concerns and to resist categorical analyses that may frustrate such efforts. As I will suggest in the conclusion, groups (classes) and grounds (classifications) may equally work to advance or obstruct attention to relationship and may equally fall into the sorts of categorical list-making exercises that obscure attention to relationship.

Conclusion: Comparative Reflections on Relational Promise

The groups/grounds and class(ification) inquiries serve in their respective jurisdictions as the first step in framing equality problems. This initial framing has the potential to embody the insights of relational theory by creating doctrinal space for attention to social relationships. This initial framing also, however, has the potential to produce categorical approaches to difference that ignore or mask those relationships. In sketching the grounds jurisprudence and scholarly debates of Canada and the US, we can begin to see the contours of two contrasting approaches—relational or categorical—to the doctrinal framing of equality problems.

A relational framing focuses on the social relationships relevant to assessing an equality claim. These may be multiple and may engage the social and legal significance of either particular classes *or* particular classifications. Such a focus considers the actual histories and solicits the diverse perspectives of the groups and individuals involved. The word "groups" in this description is to be understood not as connoting naturalized or necessary cohorts, but rather as embracing a more fluid conception of interpersonal and structural associations. On the broad account of relational context that I invoke here, any associational matrix relevant to a claim may constitute the kind of group relevant to this analysis. Children living in a particular San Antonio school district with a low property-tax base may be a relevant group.[258] The fact that these children are largely members of other relevant social groupings that we might refer to variously as "poor" or "minority" or "school children" may also

258. See *Rodriguez*, *supra* note 119.

be important elements of the relational context of a claim.[259] So too might be the significance that categories like "race" and "age" have played in structuring social hierarchies. It may also be relevant to identify the potential for complex or intersectional discrimination arising from these facts.[260] Judicial precedents may assist in these inquiries, but each claim must be assessed on its own merits, not with regard to its *fit* with established categories. The precise boundaries of groups, and the ease of identifying membership in groups, are not important to assessing relational context. Relational context, rather, is concerned with unearthing and understanding social relationships, which may or may not be easily described with reference to popularly or judicially recognized categories.

Conversely, a categorical framing zeroes in on the classes or classifications relevant to a claim, seeking to label and sort those groups or grounds. A categorical framing is inattentive to the social dynamics that define the individuals or groups involved, and focuses instead on whether these individuals and groups can be described with reference to categories which have been used before, or will be easy to use again. Because ease of defining and sorting the groups or grounds is essential, recourse to abstract reasoning is more important than examination of the unique social matrices that are engaged by a claim. What matters about the children living in a San Antonio school district with low property taxes is whether there is a label that can accurately and abstractly describe the group in a manner consistent with other abstract labels. Factors like "immutability" and abstract conceptions of "relevancy" are attractive to a categorical approach to the extent that they strip away particularities that are unique to the claim or claimants. A category, once recognized, is hardened; a label, once affixed, is permanent.

In both Canada and the US, the dominant grounds/classification jurisprudence has evolved into a list-making process that invites categorical framings, though the *Taypotat* case suggests the SCC may be shifting back

259. Justice Powell describes the children on whose behalf the *Rodriguez* claim was brought as "school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base". *Ibid* at 4–5.

260. See Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stan L Rev 1241; Iyer, *supra* note 64; Duclos, *supra* note 64 (arguing that "[f]or racial minority women and for others who straddle the current categories of difference, [relational grounds analysis] . . . is not one of several options for reform. It is the only way not to disappear" at 51).

toward a more relational approach.[261] The previous *Corbiere* analysis, hinging on an abstract grounds inquiry that will hold in all future cases, seemed to follow the US in creating an essentially fixed list of characteristics warranting special constitutional protection.[262] It is unclear whether and how *Taypotat*'s call to focus on the specific community in issue will play out in cases with stronger evidentiary records—and whether this attention to particularity will yield more nuanced relational assessments of disadvantage or devolve into an undue focus on defining clearly identifiable grounds of distinction. The pluralism anxiety Yoshino identifies is in part animated by a categorical stance towards the framing of equality claims. Concerns about proliferating groups, as expressed by the majority of the US Supreme Court in *Cleburne*, arise from the fact that the inquiry is focused on general rules for sorting and classification, not on analyzing the instant claim in light of its relational context.

The alternative approaches advocated by Canada's L'Heureux-Dubé J and the US' Marshall and Stevens JJ each offer possible means of introducing greater doctrinal space for relational framing. While their precise focuses differ, all three Justices eschewed the list-making qualities that dominated the prevailing approaches in their respective courts. In all three approaches, the initial framing of equality claims is not about naming groups or identifying grounds, but is rather on identifying a constellation of factors that illuminate the relationships at stake in a claim. Justice L'Heureux-Dubé's inquiry into the nature of the groups and interests affected attends to the social position of the claimant. Justice Marshall's focus on the character of the classification in question, and the relative importance of the benefit to those discriminated against, again requires attention to the actual relational context of the particular claim. Justice Stevens foregoes the initial "framing" moment evident in the other approaches discussed, but incorporates relational considerations into the substance of his analysis by introducing a proportionality-style rationality

261. Some scholars have observed a tendency for "standards" to develop into firm "rules" over time, as a logical consequence of proliferating case-by-case application of the standard to specific facts over time. See e.g. Mark D Rosen, "Modeling Constitutional Doctrine" (2005) 49:3 Saint Louis ULJ 691 at 696; Mark Tushnet, "The First Amendment and Political Risk" (2012) 4:1 J Leg Analysis 103 at 106; Frederick Schauer, "The Convergence of Rules and Standards" [2003] 3 NZLR 303. What I have suggested here is not just that the existing standards for suspect classification and analogous grounds have rulified, but that the standards themselves have been entirely displaced by rules which no longer effectively express the underlying standards.

262. See *supra* note 128 and accompanying text.

assessment, considering the severity of the impact on those affected in light of their relational circumstances. Under all three approaches, the more relational framing is unencumbered by fears of a growing "list" of classes or classifications that will have to be applied categorically in future cases regardless of the actual relational context of those cases. Similarly, all three approaches adopted a flexible approach to grounds and classification that focused on describing the relationships at play, rather than the ease with which a clear line might be drawn around the claimant group.

It may be objected that doctrinal approaches lacking clear lists and rules make equality jurisprudence unacceptably indeterminate. Versions of this criticism have frequently been associated with the *rules* side of the classic US debate over the relative utility of "rules" and "standards".[263] One might conclude that a relational approach will always align with the *standards* side of the debate, but I will not go so far here. I believe that there are contexts where a close look at the relationships produced by different statements of a legal rule would yield a conclusion that bright line rules actually produce the most desirable relationships.[264] Constitutional equality, however, represents a field of law that must engage in an ongoing basis with social norms and attitudes and must both *convince* and *respond* to public and legislative audiences.[265] In the

263. See e.g. Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175. For a classic articulation of the rules/standards debate, see Kathleen M Sullivan, "The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards" (1992) 106:1 Harv L Rev 22.

264. See e.g. Albert W Alschuler, "Bright Line Fever and the Fourth Amendment" (1984) 45:2 U Pitt L Rev 227 at 227–28. *Cf* Jackson, "Proportionality", *supra* note 77 at 3168–169; Michael Coenen, "Rules Against Rulification" (2014) 124:3 Yale LJ 644. My argument here is limited to the constitutional equality context. Even in respect of statutory anti-discrimination laws in the employment context, where laws are intended to govern the behaviour of diffuse private actors without ready access to legal counsel, the arguments for more categorical rules may be stronger. *Cf* Sujit Choudhry, "Distribution vs. Recognition: The Case of Antidiscrimination Laws" (2000) 9:1 Geo Mason L Rev 145 (describing reliance on defined "social groups" as "both indispensable and problematic" in anti-discrimination laws, since "[s]ocial policy is a world of imperfect solutions—a world of trade-offs and a world of double-edged swords" at 178).

265. See Fredman, *supra* note 1 (explaining that decisions as to which grounds of discrimination ought to be protected are not adequately described by either "unifying principle" or "political" choice: "In reality, the determination of protected grounds operates as a result of a creative tension between several different sources: constitutional instruments, statutes, judicial interpretation, and international or regional instruments" at 111).

US, a bare guarantee of "equal protection of the laws" must necessarily be infused with "mediating" principles and values informed by social facts and public debate.[266] In Canada, constitutional commitments to proportionality analysis and dialogic constitutionalism provide a particularly friendly juridical environment for these conversations—so much so that the categorical nature of the *Corbiere* immutability standard may be seen not only as inappropriate from a relational perspective, but also from the perspective of Canada's constitutional structure and self-image.[267] As the Court clarifies the shift away from *Corbiere*, tacitly announced in *Taypotat*, a focus on doctrinal forms that invite relational rather than categorical thinking should be a priority.

Writing in the South African context, Cathi Albertyn and Beth Goldblatt have explained that relational scholars have called for "an equality jurisprudence which places difference and disadvantage at the centre of the concept".[268] They point to the importance of the relationship of the individual to the group and the often complicated and intersectional nature of inequalities that are found in reality. They "insist on the remedial purpose of the right and the contextual nature of its determination".[269]

Among the greatest challenges facing relational theorists is the difficult work of translating these aspirations into prescriptions—a task which in many cases requires an initial act of translation between theory and doctrine. This article has been an effort towards such a project—untangling the linguistic and conceptual confusion surrounding groups and grounds, and the relational aspirations that might be expressed in a doctrinal moment that is common to many jurisdictions. It is one small piece of a relational project that must necessarily be comprised of small pieces: "to shift habits of thought so that people routinely attend to the relations of interconnection that shape human experience, create problems, and constitute solutions . . . in everyday conversation, in scholarship, in policy making, and in legal interpretation".[270]

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266. Fiss, "Equal Protection Clause", *supra* note 242 at 107–08.

267. See Part II.C, *above*. See also Jackson, "Proportionality", *supra* note 77 at 3172–183, for an argument that US equality analysis might benefit from more express integration of proportionality considerations.

268. Albertyn & Goldblatt, s*upra* note 34 at 253. Albertyn and Goldblatt refer to the same group of scholars that I have described as "relational" theorists, but use the term "critical" theorists. *Ibid* at 251.

269. *Ibid* at 253.

270. Nedelsky, *supra* note 17 at 4.

As the SCC considers and reconsiders its approach to analogous grounds and to constitutional equality more generally, it should take up the insights of relational theory as a valuable tool. And as both the US and Canadian courts increasingly turn to alternative doctrinal avenues through which to adjudicate problems of inequality,[271] questions about how to revise those doctrines in ways that attend to relationship should be taken as a crucial collective project for judges, advocates and commentators.

271. See *supra* note 168 and accompanying text.