Equality Qua Equality: A Comparative Critique of the Tiers of U.S. Equal Protection Doctrine

Lorenzo Di Silvio
Equality Qua Equality: A Comparative Critique of the Tiers of U.S. Equal Protection Doctrine

LORENZO DI SILVIO*

On February 23, 2011, the Obama Administration announced that it would no longer defend the constitutionality of the Defense of Marriage Act. Of great significance in this announcement was the Administration’s position that classifications on the basis of sexual orientation warrant heightened judicial scrutiny. Notwithstanding this announcement, the level of review applied to sexual-orientation classifications—and the manner in which a court determines whether a particular type of classification deserves more searching review—is an open question, the answer to which typically dictates the outcome of challenges to government classifications. Apart from this outcome determinativeness, affording heightened scrutiny to some classifications but not others sends the message that, as a society, we value select groups more—or at least will treat certain classifications more skeptically than others—rather than developing a theory of equality qua equality.

Equal protection doctrine need not function this way. By looking at comparative doctrine—specifically, the equality jurisprudence of Canada, South Africa, and the European Court of Human Rights—this Article shows how equality doctrine in the United States can be improved. By engaging in a two-stage review process, these other systems effectively control the floodgates of litigation challenging government classifications and provide guidance for when government actors may permissibly differentiate in a way that does not depend on the type of classification at issue. In addition to being a more principled approach to equality doctrine, the type of review in which Canada, South Africa, and the European Court of Human Rights engage both permits modern government to function and articulates a more holistic vision of equality qua equality.

TABLE OF CONTENTS

INTRODUCTION .................................................................................................................................................. 2
I. LIMITATIONS ANALYSIS .................................................................................................................................... 5
II. THE UNITED STATES ........................................................................................................................................... 6
III. CANADA ............................................................................................................................................................ 11
   A. THE EQUALITY CLAUSE ................................................................................................................................. 11
   B. THE LIMITATIONS CLAUSE ............................................................................................................................. 15
   C. CLASSIFICATIONS ON THE BASIS OF SEXUAL ORIENTATION ........................................................................ 20
IV. SOUTH AFRICA ................................................................................................................................................ 24
   A. THE EQUALITY CLAUSE ................................................................................................................................. 24
   B. THE LIMITATIONS CLAUSE ............................................................................................................................. 30
   C. CLASSIFICATIONS ON THE BASIS OF SEXUAL ORIENTATION ........................................................................ 35

* Georgetown Law, J.D. 2011; Rice University, B.A. 2005. © 2011, Lorenzo Di Silvio. This Article was originally developed for Dean Nan Hunter’s Sexuality, Gender and the Law Seminar. I am grateful to Dean Hunter for reading and commenting on previous drafts and for her help in preparing this Article for publication. I am also grateful to President Aharon Barak and Justice Richard Goldstone for teaching me comparative constitutional law, William J. Murray for helping me develop my thesis, and Devin Heckman for his help preparing this Article for submission.
INTRODUCTION

On February 23, 2011, the Obama Administration announced that it would no longer defend challenges brought to the constitutionality of the Defense of Marriage Act (DOMA), the 1996 law that prohibits the federal government from recognizing same-sex marriages validly performed by the states. Although stories in the mainstream media led with the political significance of this noteworthy reversal in policy, less discussed were the reasons for the shift, in particular the legal significance of the move and its effect on U.S. equal protection doctrine. In a letter to the Speaker of the House of Representatives informing him that the Administration would no longer defend DOMA, Attorney General Eric Holder outlined the standard of review that should apply to classifications on the basis of sexual orientation. Based on the history of discrimination toward gay people, their immutable characteristics, the group’s political powerlessness, and the weak relationship between a gay person’s distinguishing characteristics and that individual’s ability to perform and contribute to society, the Attorney General concluded that “[e]ach of these factors counsels in favor of being suspicious of classifications based on sexual orientation” and that, therefore, “classifications based on sexual orientation warrant heightened scrutiny.” Thus, “as applied to same-sex couples legally married under state law, . . . DOMA is unconstitutional.”

In so reasoning, the Administration took a stance on the question of what level of scrutiny classifications on the basis of sexual orientation warrant. But, notwithstanding the weight that should be afforded constitutional interpretations made by the executive, this question is not a simple one to answer. The U.S. Supreme Court has never definitively ruled on whether classifications on the basis of sexual orientation are entitled to heightened scrutiny or even authoritatively laid out the test for when some classifications, but not others, deserve this more

3 Letter from Eric Holder, supra note 1.
5 Id.
6 Id.
searching review. Thus, courts are uncertain as to what standard of review applies to sexual-orientation classifications: are they subject to strict scrutiny, the same standard applied to classifications on the basis of race? Or are they subject to intermediate scrutiny, used for sex classifications? Or are they subject merely to rational basis review, the easiest standard for the government to satisfy? Courts and practitioners are unsure.

This indeterminacy has a number of implications. First, legal ramifications attach to the standard of review that classifications on the basis of sexual orientation receive. Strict scrutiny, for instance, has been labeled “strict in theory [but] fatal in fact,” and intermediate scrutiny, with a handful of exceptions, typically results in the invalidation of the government’s classification. Thus, determining what standard of review applies will frequently be outcome-determinative. Second, the indeterminacy breeds more indeterminacy as lower courts and practitioners grapple with “murky” case law meant to provide guidance as to what standard of review should apply for sexual-orientation classifications (or, for that matter, any government classification) and what factors should be used to determine if higher scrutiny is triggered. Third, from this flow political ramifications: notwithstanding the idea that we should treat likes alike, our “tiered” system of equal protection affords certain groups greater protection than others, sending the message that, as a society, we value select groups more—or at least will treat certain classifications more skeptically than others—rather than developing a theory of equality qua equality. Thus, our indeterminate equal protection doctrine fails to articulate a deeper meaning of equality in twenty-first-century society.

In this Article, I argue that process matters and that, accordingly, we should consider retooling that way we apply equal protection doctrine. By looking at comparative doctrine—specifically, the equality jurisprudence of Canada, South Africa, and the European Court of Human Rights—we may resolve some of the ambiguities found in U.S. doctrine. In particular, I will make two suggestions for improving U.S. doctrine based on the two-stage rights review adopted in other systems. On the “front” end, or rights-violation stage, I will look at ways in which other systems uniformly determine which classifications trigger the courts’ equality jurisprudence and, thus, merit any scrutiny at all—which, moreover, is the same scrutiny applied regardless of the type of classification so long as the classification meets certain threshold requirements. On the “back” end, or limitations stage, I will look at ways in which other systems have developed a unified way to determine when the government may—and when it may not—treat groups of individuals differently. Because these other systems treat all classifications the same long as certain threshold requirements are satisfied, limitations analysis is often the locus of determining when the government may permissibly differentiate.

Why look to comparative case law? Not only has the U.S. Supreme Court looked at foreign law in gay-equality cases such as *Lawrence v. Texas*, but, notwithstanding conventional

---

7 See infra note 35 and accompanying text.
9 See Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006).
10 Cf. Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 COLUM. TRANSNAT’L L. 72, 164 (2008) (“[T]he Court has assigned different standards of review to government measures, as if the underlying rights involved were arrayed on a sliding scale of importance.”).
11 See 539 U.S. 558, 572–73, 576 (2003); see also William N. Eskridge, Jr., United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism, 2 INT’L J. CONST. L. 555, 555 (2004) (“Lawrence presents the first time the Supreme Court has cited foreign case law in the process of overruling an American constitutional precedent.”).
wisdom, there are also a number of comparisons between current U.S. equal protection jurisprudence and the case law of Canada, South Africa, and the European Court of Human Rights.\textsuperscript{12} Because the question of what standard of review classifications on the basis of sexual orientation merit is the jumping-off point for a larger critique of the tiers of U.S. equal protection doctrine, this may encourage us to examine how we may refine our doctrine to develop a more normatively desirable jurisprudence.

That being said, only an exhaustive canvassing of all the world’s constitutional democracies could lay claim to being a universal study of equality doctrine. However, such a study would be extremely difficult—if not impossible—for at least two reasons. First, it would necessarily entail defining the term “constitutional democracy” or at least determining which countries to consider and which to ignore when drawing a comparison between doctrine. Second, such an exhaustive approach would be beyond the scope of any article-length piece. For these reasons, I have cabined my analysis to three legal systems. First, I chose to look at Canada under the Canadian Charter of Rights and Freedoms because of our common legal lineage and the legal and cultural similarities between Canada and the United States. Second, I chose to study South Africa under its post-apartheid constitutions, with particular focus on the 1996 Constitution, because that country’s unique history of apartheid in many ways mirrors the United States’s history of racial discrimination, which greatly informed the text and interpretation of the Equal Protection Clause of the Fourteenth Amendment, and also informed the centrality of equality to the post-apartheid constitutional scheme. And third, I chose to consider the European Convention for the Protection of Human Rights and Fundamental Freedoms, a Europe-wide human rights treaty interpreted by the European Court of Human Rights and considered one of the most successful human rights regimes in the world,\textsuperscript{13} because in many ways it represents a collection of values shared by the Old World from which the United States draws much of its heritage and in certain respects resembles the federal system over which the U.S. Supreme Court presides.

In Part I, I briefly introduce the two-stage rights review—and the limitations analysis inherent in it—practiced in nearly every legal system around the world. The two stages—a rights-violation stage and a limitations stage—represent the concepts of front end versus back end that I previously introduced. I then reflect on similarities to and differences from U.S. doctrine, which has important implications should the United States choose to more closely align equal protection law with equality doctrine elsewhere.

In Part II, I discuss the evolution of the tiers of U.S. equal protection doctrine and the problems that arise when grappling with the question of what standard of review applies to a given classification. Using the Supreme Court’s gay-equality case law as an example, I show how the high court’s precedents have offered little clarity, further underscoring the indeterminacy in this area of the law, the corresponding lack of direction but great discretion given lower courts because of it, and the legal and political ramifications of our myopic focus on standard of review.

In Parts III, IV, and V, I explore the jurisprudence of Canada, South Africa, and the European Court of Human Rights, respectively. In each Part, I begin with a discussion of each system’s equality clause, proceed to a review of the test developed by each at the limitations stage, and then conclude by summarizing each system’s sexual-orientation case law to show the ways in which the doctrine works. Throughout, I attempt to highlight the ways in which the law


\textsuperscript{13} Stone Sweet & Mathews, \textit{supra} note 10, at 146.
in these systems avoids the pitfalls of the United States’s tiered doctrine, instead developing a single test that does not depend on the type of classification at issue but yet still permits the state to permissibly classify and modern government to function.

Finally, in Part IV, I explore the normative appeal of two-stage rights review and the limitations analysis that inheres in it. I then conclude by discussing the similarities and differences across doctrine in Canada, South Africa, and the European Court of Human Rights. Should the United States wish to retool the way it does equality, this discussion highlights the range of options available to it.

I. LIMITATIONS ANALYSIS

Unlike the United States, legal systems such as those in Canada, South Africa, and the European Court of Human Rights engage in a two-stage process of judicial review when adjudicating rights—what I have previously referred to as the front end and the back end. On the front end is the rights-violation stage wherein “the judge considers whether a prima facie case has been made to the effect that a government act burdens the exercise of a right.”14 Once the claimant has made out a prima facie violation, the analysis moves to the back end, or the limitations stage (also known as the proportionality or justification stage), wherein the government is permitted to attempt to justify the limitation of a right. This stage generally comprises three distinct phases: (1) a rationality test, which ensures that the burden on the right is rationally related to a sufficiently legitimate government objective; (2) a necessity test, which asks whether there is a less restrictive means by which the government can achieve the same objective without burdening the right; and (3) proportionality strictu sensu, which analyzes whether the burden on the right outweighs the benefits of the infringement.15

This two-stage rights review has been nearly universally adopted with the partial exception of the United States.16 Besides Canada, South Africa, and the European Court of Human Rights, the two stages and limitations analysis are “arguably the most dominant doctrine in constitutional adjudication worldwide” and is practiced by courts in Germany, Ireland, Israel, Australia, New Zealand, Brazil, Korea, the United Kingdom, the European Court of Justice, and the Appellate Body of the World Trade Organization.17 According to conventional wisdom, however, rights adjudication in the United States has generally eschewed this two-stage review process, preferring instead a one-stage rights review in which the test to make out a violation of a constitutional right, and categorical exceptions to that test, is all that is considered.

This conventional wisdom, however, has not gone unchallenged. For instance, many have commented on similarities between American doctrine and limitations analysis.18 Moreover,

---

15 See id. at 802–03.
16 Stone Sweet & Mathews, supra note 10, at 74.
some have argued that limitations analysis is not so foreign to U.S. law but rather has roots in early American doctrine. This implies that if the United States were to retool its equal protection doctrine so as to more closely mirror the two-stage rights review conducted in other systems, “it would be an American creation, referencing existing [case law] and consistent with our own constitutional tradition and values.” Moreover, such a move would not necessarily entail different jurisprudential results; rather, “the Supreme Court could use [proportionality] and still replicate most of the judgments that [it has] arrived at by other means, and are worth preserving.” Thus, should the United States decide to retool existing doctrine, reforming equal protection’s tiers, doing so would be consistent with a uniquely American interpretation of our own founding document.

II. THE UNITED STATES

Despite the centrality of equality to modern constitutional systems—and the importance of equality to modern constitutional history in the United States—the Equal Protection Clause of the Fourteenth Amendment is rather terse in its command to the government:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

From this brief injunction, the U.S. Supreme Court has had to draw out what equality means in the United States. Surely, though, the Equal Protection Clause cannot stand for the proposition that the government may never treat its citizens differently: “[s]uch an approach would make government impossible, since nearly all government actions classify individuals.” Thus, the Supreme Court has had to interpret the Equal Protection Clause in such a way that gives meaning to the Clause’s text and purpose, yet also instructs the government when it may permissibly classify, a necessary component of nearly every piece of legislation. Mindful of this, the Supreme Court has interpreted the Equal Protection Clause in such a way that the Court gives legislative classifications great deference in all but exceptional circumstances.

Although the “central purpose of the Fourteenth Amendment was to eliminate racial discrimination,” the Supreme Court has developed modern equal protection doctrine to analyze balancing and proportionality notwithstanding differences in the historical development of the two practices; Justification, supra note 17, at 465 & n.16 (noting the erosion of American exceptionalism regarding proportionality and collecting U.S. cases endorsing elements of proportionality). Note also that the test Justice Breyer formulated for the Second Amendment in his Heller dissent uncannily mirrors limitations analysis. See 554 U.S. at 693.

See Mathews & Stone Sweet, supra note 14, at 800, 813.

19 Mathews & Stone Sweet, supra note 14, at 875 (emphasis added); see also Foreign Law Debate, supra note 17, at 386 (“[Justice] Breyer’s introduction of proportionality is no more than an ordering and organizing of pre-existing components of American constitutional law.”).

20 Mathews & Stone Sweet, supra note 14, at 861.

21 U.S. CONST. amend XIV, § 1; see also Bolling v. Sharpe, 347 U.S. 497, 498–500 (1954) (applying the equal protection guarantee of the Fourteenth Amendment to the federal government through the Due Process Clause of the Fifth Amendment).

22 GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 489 (6th ed. 2009); see also Kenji Yoshino, The New Equal Protection, 124 HARV. L. REV. 747, 759 (2011) (“If every legislative distinction received active scrutiny from a court, then the courts would indeed sit as countermajoritarian ‘superlegislatures.’ The courts simply cannot perform the Sisyphean task of independently testing the fairness of every governmental distinction.”).

23 McLaughlin v. Florida 379 U.S. 184, 191–92 (1964); see also The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (“We doubt very much whether any action of a State not directed by way of discrimination against the
questions pertaining to all legislative classifications on the basis of one of three “tiers.” Generally, under the first tier, a legislative classification need only satisfy “rational basis review.” So long as the classification neither burdens a fundamental right nor is based on a suspect class, the government need only show that the law is rationally related to a legitimate government interest. This standard is very easy for the government to satisfy, particularly because the burden of persuasion rests on the party challenging the classification and because the government is permitted to advance any conceivable legitimate interest the law serves even if that interest did not motivate the legislature at the time the classification was enacted. The second tier is triggered when the legislature classifies on the basis of sex or gender. Under this standard, labeled “intermediate scrutiny,” the government must show that the classification substantially relates to an important government interest and any justification the government offers must be “exceedingly persuasive.” The third tier is triggered if the government burdens a fundamental right or classifies on the basis of a “suspect class”—race, national origin, alienage, and nonmarital parentage—requiring what is called “strict scrutiny.” This exacting standard—called “strict in theory [but] fatal in fact” by one legal scholar—can only be satisfied when the government shows that the law is necessary to advance a compelling state interest and is only available for a circumscribed number of classifications. Under the three tiers of equal protection, all classifications that are not based on race, national origin, alienage, nonmarital parentage, or sex or gender are subject only to rational basis review. Although litigants continue to argue that new classifications should receive heightened scrutiny, “these negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause.]”).

25 See STONE, supra note 23.
26 See id.
28 See, e.g., Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487 (1955); Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949); see also Yoshino, supra note 23, at 760 (“[E]ven if the legislature had provided no rationale or an inadequate rationale, the state action would be upheld so long as the Court could supply one. Because judges could imagine many things, ordinary rational basis review was tantamount to a free pass for legislation.” (footnote omitted)).
37 See supra notes 31–34 and accompanying text.
38 See Yoshino, supra note 23, at 756.
39 Id. at 757 & n.71.
attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was . . . in 1977.\footnote{Id. at 757 (footnote omitted); see also id. ("At least with respect to federal equal protection jurisprudence, this canon has closed.").}

Which tier applies has enormous significance because the three tiers are generally outcome-determinative.\footnote{See Stone, supra note 23, at 489; see also Mathews & Stone Sweet, supra note 14, at 837 (noting that the Supreme Court developed the doctrine such that “the outcome of rational basis review, and strict scrutiny, became practically a foregone conclusion”); Yoshino, supra note 23, at 755–56 (noting the outcome-determinative nature of the tiered scrutiny framework and observing that “[t]he words ‘scrutiny’ and ‘review’ suggest an examination rather than a result[,] [y]et in this jurisprudence, looks can kill”).} So under what circumstances does a classification warrant some form of heightened scrutiny? Professor Kenji Yoshino points to two tests the Supreme Court has used to identify suspect classifications deserving of heightened scrutiny: the “discrete and insular" minority test from \textit{Caroleine Products}’s famous footnote four\footnote{See Yoshino, supra note 23, at 762 n.104.} and \textit{Bowen v. Gilliard}'s factor-based test that looks to historical discrimination, political powerlessness, and the “obvious, immutable, or distinguishing characteristics” of a group.\footnote{United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).} These tests, however, have been subjected to both skepticism from the bench and continued academic criticism.\footnote{483 U.S. 587, 602 (1987) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)); see also supra notes 3–6 and accompanying text.} As to “discrete and insular” minorities, then-Justice Rehnquist once observed that “[i]t would hardly take extraordinary ingenuity for a lawyer to find ‘insular and discrete’ minorities at every turn in the road”\footnote{But see Yoshino, supra note 23, at 762 n.104 (describing Bowen’s history-of-discrimination prong as “unimpeachable”).} and Professor Bruce Ackerman has reasoned that “anonymous and diffuse” groups may suffer more from political disabilities than “discrete and insular” groups do.\footnote{Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).} As for political powerlessness, many commentators have noted the paradoxical nature of this factor in \textit{Bowen}—a group must have a modicum of political power in order to convince a court that it is politically powerless\footnote{Bruce A. Ackerman, \textit{Beyond Caroleine Products}, 98 HARV. L. REV. 713, 724 (1985).}—which has led some to conclude that political powerlessness should play no critical role in equal protection doctrine.\footnote{See Yoshino, supra note 23, at 755–56 (noting that the outcome-determinative nature of the tiered scrutiny framework and observing that “[t]he words ‘scrutiny’ and ‘review’ suggest an examination rather than a result[,] [y]et in this jurisprudence, looks can kill”).} And as for immutability, as a concept it is difficult to settle on a single definition and, as a result, in many instances references to immutability may generate deeper confusion.\footnote{See, e.g., William N. Eskridge, Jr., \textit{Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?}, 50 WASHBURN L.J. 1, 10–29 (2011).} Consequently, the question of precisely when, if ever, classifications other than those previously held to be suspect may enjoy more searching review has gone unanswered.

The Supreme Court’s gay rights case law is no more helpful in instructing lower courts and litigants whether sexual orientation is entitled to heightened scrutiny. In 2003, for instance, the
Supreme Court struck down a Texas criminal statute prohibiting same-sex sodomy and did so using sweeping language. However, the Court, in striking down the law, nowhere declared a new fundamental right to be gay, leaving open the question of what standard of review applies and providing little guidance—but great discretion—to lower courts. Nor did the Court accept the invitation to strike down the Texas law on equal protection grounds, which could have unclouded the waters muddied by the Court in Romer v. Evans.

Seven years before Lawrence, the Court in Romer struck down Colorado’s Amendment 2, a sweeping referendum that prohibited the enactment of any protection for gay people in the state, as a violation of the Equal Protection Clause. Although the Court stated that animus alone was not a sufficient government interest to satisfy rational basis review, the Court also underscored the sheer breadth of Amendment 2 in concluding that it lacked any rational basis. Some looked positively on the ruling and took the Court’s holding regarding animus to suggest that non-suspect classifications may sometimes be subject to rational basis review “with bite.” However, because the Court in Romer highlighted the sweeping nature of Amendment 2, many lower courts have interpreted this to mean that the decision is tied to its unique facts and, therefore, cannot stand for the proposition that sexual-orientation classifications warrant more searching review. Moreover, even if the Court has adopted rational-basis-with-bite review for classifications on the basis of sexual orientation, this is not the same as awarding heightened scrutiny. And even rational basis review with bite may further muddy the waters because, as

52 See id. at 578 (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).
53 See id. 586 (Scalia, J., dissenting).
54 See William N. Eskridge, Jr. & Nan D. Hunter, Sexuality, Gender, and the Law __ (3d. ed. 2011); compare Lofton v. Sec’y of Dep’t of Children & Soc. Servs., 358 F.3d 804, 815–17 (11th Cir. 2004) (noting that the Lawrence Court did not recognize a new fundamental right and that therefore “the Lawrence decision cannot be extrapolated to create a right to adopt for homosexual persons”), with Witt v. Dep’t of Air Force, 527 F.3d 806, 818–21 (9th Cir. 2008) (concluding that Lawrence demands “heightened scrutiny” for sexual-orientation classifications).
55 Lawrence, 539 U.S. at 574–75; see also Yoshino, supra note 23, at 778 (arguing that Lawrence was not decided on equal protection grounds because then the Court “would have had to clarify the nature of the scrutiny drawn by orientation-based classifications” (footnote omitted)).
56 517 U.S. 620 (1996)
57 See id. at 624 (noting that Amendment 2 “prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class”).
58 Id. at 636–36 (1996).
59 See id. at 634–35; see also Lawrence, 539 U.S. at 580 (O’Connor, J., concurring) (“We have consistently held . . . that some objectives, such as ‘a bare . . . desire to harm a politically unpopular group,’ are not legitimate state interests.” (citing, among others, Romer, 517 U.S. at 632)).
60 See Romer, 517 U.S. at 629–30, 632.
61 See Lawrence, 539 U.S. at 580 (O’Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”); see also Gayle Lynn Pettinga, Note, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 IND. L.J. 779 (1987). See generally Jeremy B. Smith, Note, The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation, 73 FORDHAM L. REV. 2769 (2005).
63 Yoshino, supra note 23, at 761.
the *Romer* Court conceived it, it “depends on the idea that governmental ‘animus’ alone is never enough to sustain legislation. [But] because one person’s prejudice is another’s principle, this form of rational basis review will still require the Court to privilege some groups over others.”

Unsurprisingly, then, lower courts have been unsure what to make of *Lawrence*, *Romer*, and the Court’s cryptic signals regarding when a group is entitled to heightened scrutiny. Mostly, though, these courts have not afforded sexual-orientation classifications any form of heightened scrutiny: with the exception of the Ninth Circuit, all thirteen federal circuits have held that classifications on the basis of sexual orientation are entitled only to rational basis review and apart from California, Connecticut, Hawaii, and Iowa, the highest courts of each state to consider the issue under their respective constitutions have concluded the same.

How, then, to determine under what circumstances classifications other than those already protected are entitled to heightened scrutiny and, further, what mechanism may courts use to determine whether classifications on the basis of sexual orientation fit into the category of classes protected by more searching review? Maybe, though, these questions need not be answered. Rather, by looking at comparative law, it becomes possible to see how doctrine could be reoriented to put less emphasis on the front end—which focuses on the *type* of the classification and, therefore, the level of scrutiny to which the classification is entitled—and instead focus on the back end—identifying the interest the classification serves and how closely the classification is tailored to serve that interest based on considerations such as the nature of the right affected, the extent to which the right is affected, and the proportionality between the infringement and the benefits of the classification. Doctrine under the respective equality

---

64 *Id.* at 763.
provisions of Canada, South Africa, and the European Convention on Human Rights shows that it is possible to have a workable equality doctrine that focuses less on what type the classification is and more on the justification for the classification, both permitting modern government to function and articulating a more holistic vision of equality qua equality.

III. CANADA

A. THE EQUALITY CLAUSE

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

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.67

After a three-year delay68 designed to permit the federal government and provinces to bring their laws into compliance with the new equality provision,69 Section 15 came into force in Canada. Unlike the Equality Clause under the Canadian Bill of Rights, the Charter’s precursor, the Charter was meant to be different. First, it applied to both Parliament and provincial legislatures.70 Second, expressing equality in four ways—equality before the law, equality under the law, equal protection of the law, and equal benefit of the law—Section 15(1) was intended to reverse restrictive interpretations put on the phrase “equality before the law” under the Canadian Bill of Rights71 and to prohibit discrimination.

However, the foregoing notwithstanding, Section 15 does not guarantee absolute equality such that everyone must be treated the same.72 As one commentator noted, “every statute or regulation employs classifications of one kind or another for the imposition of burdens or the grant of benefits[,] [l]aws never provide the same treatment for everyone.”73 Thus, before Section 15 could have meaningful application, the Supreme Court had to determine when the government could, and when it could not, permissibly treat people differently.74

Before the Canadian Supreme Court articulated a test for Section 15, Canadian courts had applied a “similarly situated” test wherein “a denial of equality was made out if it could be shown that the law accorded the complainant worse treatment than others who were similarly situated.”75 However, the Court in Andrews v. Law Society—the first case to lay down a test for the Charter’s equality guarantee—called this approach “seriously deficient” and held that it could

68 See id. § 32(2).
69 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 55-10 (5th ed. 2009).
70 See id. at 55-4; see also Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 32 (U.K.) (Application of Charter).
71 HOGG, supra note 69, at 55-13. For a discussion of how the Equality Clause under the Canadian Bill of Rights was generally considered weak and ineffectual as well as very deferential to legislatures, see id. at 55-4 to -6.
72 See id. at 55-13 to -14.
73 Id. at 55-14.
74 Id. at 55-14 to -15.
75 Id. at 55-15.
no longer be used “as a fixed rule or formula for the resolution of equality questions.”76 Andrews was meant to delineate when the government could permissibly classify, but in a way that controlled the floodgates of equality litigation under the Charter. Accordingly, the Supreme Court held that Section 15 prohibited discrimination based on a listed or analogous ground, thus excluding from review challenges to classifications other than on those grounds.77 With a focus on discrimination as the operative concept,78 the Court in Andrews outlined the following test:

(1) The challenged law imposed (directly or indirectly) on the claimant a disadvantage (in the form of a burden or withheld benefit) in comparison to other comparable persons;

(2) The disadvantage is based on a ground listed in or analogous to a ground listed in [Section] 15; and

(3) The disadvantage also constitutes an impairment of the human dignity of the claimant.79

Thus, a claimant could only challenge a law under Section 15 if there was a differentiation on a listed or analogous ground.80 Although not exhaustive, the listed grounds “point[ed] to personal characteristics of individuals that cannot easily be changed and which have often been the target of prejudice or stereotyping.”81 Restricting the scope of Section 15 to reviewing only those grounds that are either listed or analogous cabined courts’ power to review legislation under Section 15 while at the same time focusing the inquiry on the correction of discrimination against disadvantaged individuals or groups.82 And unlike the tiers of U.S. equal protection doctrine in which any classification may be challenged, the Andrews test reserves its attention for classifications based on the eight grounds listed in Section 15 and those grounds that are closely analogous; not every legislative classification warrants any scrutiny at all. The Andrews test, then, serves judicial economy: unlike U.S. doctrine in which all classifications must satisfy rational basis review and are thus entitled to at least a modicum of judicial review, Section 15 requires that a putative Equality Clause claimant be turned away if he cannot make out a differentiation on a listed or analogous ground.83

Understandably, then, Canadian courts have focused on when a litigant may make out a claim on an analogous ground. To do this, a claimant must show that the ground is “similar in

---

76 [1989] 1 S.C.R. 143, 166, 168 (Can.). But see HOGG, supra note 69, at 55-15 (reasoning that the similarly situated test is not wrong in principle, but rather deficient in that it does not identify the criteria for determining when individuals are similarly situated and what differentiation is then permissible).
77 See HOGG, supra note 69, at 55-18.
78 See id. at 55-18.
79 See id. at 55-19 (citations omitted).
80 See id. at 55-25.
81 Id. at 55-20.
82 See id. (“[The] features of [Section] 15 suggested that the proper role of [Section] 15 was not to eliminate all unfairness from our laws, let alone all classifications that could not be rationally defended, but rather to eliminate discrimination based on immutable personal characteristics.”).
83 See also CANADIAN CONSTITUTIONAL LAW, supra note 84, at 1297 (“The grounds limitation on the reach of [Section] 15(1) has been criticized by those who believe that equality rights should protect individuals from all arbitrary or irrational laws.”).
some important way to the grounds listed in” Section 15.\(^84\) Although “[t]here is no single touchstone,”\(^85\) the inquiry has often focused on whether the law is based on some behavior of the individual or instead is based on some inherent attribute over which the claimant has no control\(^86\) and “whether there is a history of discrimination or animosity against persons with that characteristic.”\(^87\) As one commentator has noted:

>[The grounds listed in Section 15] are all personal characteristics of individuals that are unchangeable (or immutable), or at least unchangeable by the individual except with great difficulty or cost. They are not voluntarily chosen . . . , but are an involuntary inheritance. They describe what a person is rather than what a person does. What is objectionable about using such characteristics as legislative distinctions is that consequences should normally follow what people do rather than what they are. It is morally wrong to impose a disadvantage on a person by reason of a characteristic that is outside the person’s control. [Otherwise,] forces of prejudice may well have distorted the democratic political process, and it is appropriate for judges to review the law.\(^88\)

Using this as a foundation, the Supreme Court of Canada has recognized three—and only three—analogous grounds\(^89\)—citizenship,\(^90\) marital status,\(^91\) and sexual orientation\(^92\)—while denying a number of putative analogous grounds—place of residence,\(^93\) occupation,\(^94\) substance orientation,\(^95\) or holding a claim against the government.\(^96\) This limited use of the analogous grounds prong of the Andrews test, by no means hugely activist, may allay concerns about uncontrolled discretion given to courts to review legislative classifications. Only if a claimant can make out a differentiation based on one of the eight listed grounds or on an analogous ground—which currently number three—will a court entertain a challenge under Section 15. Interestingly, although a majority of the Supreme Court did not settle on why sexual orientation was an analogous ground,\(^97\) when recognizing citizenship and marital status as analogous grounds, the Court focused on a range of considerations, including immutability,\(^98\) political powerlessness,\(^99\) historical discrimination,\(^100\) and personal dignity.\(^101\)

\(^84\) Hogg, supra note 69, at 55-22; Canadian Constitutional Law 1243 (Patrick Macklem et al. eds., 4th ed. 2010); see also supra note 81 and accompanying text.


\(^87\) Canadian Charter of Rights and Freedoms, supra note 85.

\(^88\) Hogg, supra note 69, at 55-22 (citing Corbiere v. Canada, [1999] 2 S.C.R. 203, para. 13 (Can.)).

\(^89\) See id. at 55-25.


\(^92\) See Egan v. Canada, [1995] 2 S.C.R. 513, para. 5, 175 (Can.).


\(^94\) See Delisle v. Canada, [1999] 2 S.C.R. 989, para. 44 (Can.).


\(^96\) See Rudolf Wolff & Co. v. Canada, [1990] 1 S.C.R. 695, para. 18 (Can.).

\(^97\) See infra note 172–174 and accompanying text.


\(^99\) Id.

Although the Supreme Court announced a new interpretation of Section 15 in *Law v. Canada*, the focus of the test did not shift dramatically for purposes of determining when classifications may be subject to judicial review. The *Law* Court reformulated the test from *Andrews*, saying:

1. Section 15 applied only to legislative distinctions based on a listed or analogous ground.
2. Discrimination in [Section] 15 involved an element additional to a distinction based on a listed or analogous ground.
3. That additional element was an impairment of “human dignity.”

Adding dignity as a component to the test for Section 15 was not an uncontroversial move. The Court did not precisely define human dignity, but rather listed four contextual, non-exhaustive factors that would be helpful in the inquiry: (1) the existence of “pre-existing disadvantage, stereotyping, prejudice or vulnerability”; (2) the correspondence between the distinction and the claimant’s characteristics or circumstances; (3) the existence of ameliorative purposes or effects on other groups; and (4) the nature of the interest affected.

Notwithstanding these factors, human dignity as a concept in the Section 15 analysis has been greatly criticized. It is vague (because both lower courts and the Supreme Court disagree on it as a concept), confusing (because it blurs the lines between analysis under Section 15 and analysis under Section 1), and burdensome (because it adds a new requirement that equality claimants must prove).

Subsequently (and perhaps unsurprisingly), the Supreme Court seemed to eliminate the human dignity requirement in *R v. Kapp*. The Court said that “as a legal test” human dignity was “confusing and difficult to apply” and was “an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.” However, the focus on discrimination and the factors the *Law* Court outlined to determine whether human dignity was impaired—in particular, the “perpetuation of disadvantage and prejudice” and “stereotyping”—were still relevant to Section 15 analysis, according to the Court. Thus, after *Kapp*, “it is still necessary for an equality claimant to establish something in addition to disadvantage based on a

---

102 [1999] 1 S.C.R. 497 (Can.).
103 See id. at para. 88; see also Can. Fdn. for Children, Youth & Canada, [2004] 1 S.C.R. 76, para. 53 (Can.) (noting that impairment of human dignity must be considered from the viewpoint of a reasonable person, but one who shares the attributes and circumstances of claimant); *HOOG, supra* note 69, at 55-31 (noting that the second factor—the correspondence between the distinction and the claimant’s characteristics or circumstances—is the most important).
104 *HOOG, supra* note 69, at 55-29 n.147 (“Commentators have been nearly unanimous in their criticism of the new element . . . .”)
105 Id. at 55-29.
106 [2008] 2 S.C.R. 483 (Can.). But see *HOOG, supra* note 51, at 55-33 (noting that because *Kapp* was decided on Section 15(2) grounds, the Court’s discussion of human dignity was all dicta; thus, it would be odd if the Court intended a significant change in direction on this basis).
108 Id. at para. 23–24.
listed or analogous ground. That additional element (‘discrimination’) is no longer an impairment of human dignity; it is now the perpetuation of disadvantage or stereotyping.”

Despite confusion over the additional element an Equality Clause claimant must show, the Court’s focus on the front end has remained largely the same. To make out a claim, a litigant must show differentiation on a listed or analogous ground and the true work of the Section 15 test takes place later, when the Court analyzes whether the differentiation amounts to discrimination and whether the limitation is justified. Interestingly, showing group disadvantage—or what might be termed political powerlessness under U.S. doctrine—has never been a requirement to show a violation of Section 15. Particularly as the court may be ill-suited “to measure the relative power of groups within society,” a Section 15 claimant need only show that he is disadvantaged by the particular legal distinction he is challenging and that the disadvantage is based on a listed on analogous ground. Courts in Canada, then, do not engage in discussions of political powerlessness, historical discrimination, or immutable characteristics to determine the stringency of the test that should be applied. Rather these considerations comprise the test for making out an equality claim, in other words whether Section 15 even applies. Thus, absent a classification that falls outside a listed or analogous ground, the success or failure of an Equality Clause claimant depends little on the type of classification challenged. Admittedly, some may note the similarities between the considerations involved in the analogous grounds analysis and the factors enumerated by the Supreme Court in Bowen v. Gilliard. However, whereas these factors may help determine the level of scrutiny—and thus the stringency of the test—that will be applied to a given classification in U.S. doctrine, in Canada, these factors inform the threshold analysis a court must perform to decide whether an equality challenge gets in the door. After this step, the same test is applied, regardless of the genus of the classification.

B. THE LIMITATIONS CLAUSE

Section 1 of the Canadian Charter of Rights and Freedoms states:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
Section 1 makes clear that the rights guaranteed under the Canadian Charter are not absolute and, as in South Africa, envisions a two-stage review process: first, does the challenged law limit a Charter right and if yes, two, is the limitation reasonable and can it be demonstrably justified in a free and democratic society? Under this two-stage approach, the burden of proving the limitation of a Charter right rests on the party asserting the limitation. If the claimant is successful, the burden shifts to the party seeking to uphold the limitation (often the government) at stage two.

As one commentator points out, Section 1 “has probably had the effect of strengthening the guaranteed rights” because it “has been interpreted as imposing stringent requirements of justification[, which] may be more difficult for the government to discharge than the requirements that would have been imposed by the courts in the absence of a limitation clause.” Although a larger scope could be given to rights at the first stage of the inquiry, and therefore a relaxed standard of justification given at the second, the Supreme Court of Canada in R v. Oakes, the seminal case construing Section 1, “decided to prescribe a single standard of justification for all rights, and to make that standard a high one, and to cast the burden of satisfying it on the government.” Consequently, this suggests that the Court will be cautious in the way it defines the guaranteed right.

In R v. Oakes, a unanimous Canadian Supreme Court took its first opportunity to interpret Section 1. First, the Court noted that Section 1 not only provides for the limitation of rights, but also expressly guarantees that these rights be followed. The Court reasoned that Section 1 established the “[p]rimacy” of rights by its requirement that any limitation be “demonstrably” justified. Section 1, the Court concluded, required a “stringent standard of justification” before a limitation could be accepted. Next, focusing on the phrase “free and democratic society” in Section 1, the Court reasoned that “[o]nly the values of a free and democratic society would suffice to limit the guaranteed rights.” Therefore, implicitly, some considerations will never be sufficient to justify a limitation.

---

116 See infra notes 272–278 and accompanying text.
117 HOGG, supra note 69 at 38-2.
118 Id. at 38-7.
119 Id.
120 Id. at 38-3.
121 Id. at 83-6.
122 Id.; see also id. at 38-7 (arguing that a stricter standard under Section 1 is normatively desirable because without it “[t]he result would be that judicial review would become even more pervasive, even more policy-laden, and even more unpredictable than it is now”).
123 See [1986] 1 S.C.R. 103 (Can.).
124 Id. at 135.
125 See HOGG, supra note 69, at 38-5 to -6.
127 See id.
128 HOGG, supra note 69, at 38-5; see also Oakes, [1986] 1 S.C.R. at 136 (noting the values of a free and democratic society: “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society”).
129 HOGG, supra note 69, at 38-5; see also Ruth Colker, Section 1, Contextuality, and the Anti-disadvantage Principle, 42 U. TORONTO L.J. 77, 83 (1992) (noting that Section 1’s reference to democracy “does not easily resolve the issue of which values the court should use when they choose not to defer to legislative judgment,” particularly because the reference could be a reminder to courts to respect the wisdom of legislative policymaking).
In articulating the test for justification, the Oakes Court assumed that “reasonable” and “demonstrably justified” articulated a single standard.\(^{130}\) On this basis, the Court proceeded to lay down a four-part test: \(^{131}\) (1) the law must pursue an objective that is sufficiently important to justify limiting a Charter right; (2) the limiting law must be rationally connected to that objective; (3) the law must impair the right no more than necessary to accomplish the objective; and (4) the law must not have a disproportionately severe effect on the people to whom it applies. I will consider each of the four parts in turn.

The Canadian Supreme Court has held that an objective is sufficiently important to satisfy the Oakes test only if it is consistent with the values of a free and democratic society,\(^{132}\) relates to concerns that are pressing and substantial, rather than merely trivial,\(^{133}\) and is directed at the “realization of collective goals of fundamental importance.”\(^{134}\) Although it is difficult to know the objectives of the legislature in enacting laws, courts will look at legislative history or make an inference from the statute’s language to determine whether the law is supported by a sufficiently important objective.\(^{135}\) Additionally, the objective should relate to the reason for the Charter right infringement\(^{136}\) and an objective that did not in fact cause the enactment of the challenged law cannot be the basis of a justification.\(^{137}\) Generally, an appeal to ease of administration is rarely sufficient to satisfy this prong.\(^{138}\) However, even though courts engage in “rigorous scrutiny” of the objective put forward, this prong of the Oakes test has been satisfied in nearly every case.\(^{139}\) That being said, although an objective stated at a higher level of generality will typically be found to be sufficiently important, this may lead to problems at the least drastic means inquiry because it will be easier at that stage to identify ways in which the objective, stated at this higher level, could be served by a lesser infringement (the converse is also true).\(^{140}\)

The rational connection prong of the Oakes test protects against arbitrary, irrational classifications, assuming they meet the requirements of Section 15, in much the same way that all classifications under U.S. equal protection doctrine must satisfy rational basis review.\(^{141}\) But,

---

\(^{130}\) See id. at 38-17.


\(^{132}\) HOGG, supra note 69, at 38-22; see also id. at 38-26 (“[A]n objective cannot provide the basis for [Section] 1 justification if the objective is incompatible with the values entrenched by the Charter of Rights.”).


\(^{134}\) Id. at 136; see also Colker, supra note 129, at 93–94 (reasoning that a sufficiently important objective depends on the substantive right being interpreted (citing Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 518 (Can.))).

\(^{135}\) HOGG, supra note 69, at 38-19.

\(^{136}\) Id. at 38-20; see, e.g., Vriend v. Alberta, [1998] 1 S.C.R. 493, para. 110 (Can.).

\(^{137}\) See R v. Big M Drug Mart, [1985] 1 S.C.R. 295, 335 (Can.) (“Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.”)

\(^{138}\) See, e.g., Singh v. Minister of Emp’t & Immigration, [1985] 1 S.C.R. 177, 281–19 (Can.) (“Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so.”); Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. at 518 (noting that “administrative expediency” would be relevant under Section 1 “only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like”); R v. Schwartz, [1988] 2 S.C.R. 443, 472 (Can.) (“[A]dministrative convenience . . . is rarely if ever an objective of sufficient importance.”). But see Figueroa v. Canada, [2003] 1 S.C.R. 912, para. 66 (noting that cost of “sufficient magnitude” might justify limiting the right to vote).

\(^{139}\) See HOGG, supra note 69, at 38-23; see also id. at 38-25 (noting that there has been “only one case in which the Supreme Court of Canada has unequivocally rejected the legislative objective”).

\(^{140}\) Id. at 38-19.

\(^{141}\) Note, however, that because of the listed or analogous grounds prong of the test for Section 15, an equality claimant in Canada cannot test allegedly arbitrary laws against the Equality Clause, unlike an equality claimant in the United States, absent satisfying Section 15’s threshold requirements. See supra note 83 and accompanying text.
in a few key ways, this prong of the Oakes test differs from U.S. doctrine. The Oakes Court noted that a limiting law must be “carefully designed to achieve the objective in question” and should not be “arbitrary, unfair, or based on irrational considerations.”\(^\text{142}\) Although one commentator has posited that “the requirement of rational connection has very little work to do,”\(^\text{143}\) this rationality test represents a higher bar than that used under rational basis review in the United States. In U.S. equal protection doctrine, overinclusive or underinclusive classifications pose no bar under rational basis review, whereas that is not the case in Canada under the rational connection test.\(^\text{144}\) Thus, Oakes’s rational connection requirement may require a slightly more closely tailored connection between the classification and the aim sought to be achieved than would rational basis review.

Described as the “centre”\(^\text{145}\) and “heart and soul”\(^\text{146}\) of Section 1 analysis, the least drastic means requirement requires that the limiting law impair a Charter right no more than is necessary to accomplish the stated objective.\(^\text{147}\) However, “[i]t is rarely self-evident that a law limiting a Charter right does so by the least drastic means,” particularly because “judges are unaware of the practicalities of designing and administering a regulatory regime, and are indifferent to considerations of cost.”\(^\text{148}\) Thus, for any real prospect of successful justification, judges must pay some deference to the legislative choices made.\(^\text{149}\) Recognizing this tension, the Supreme Court of Canada seems to require a reasonable legislative effort to minimize the infringement of a Charter right rather than the least possible infringement.\(^\text{150}\) Thus, like the European Court of Human Rights,\(^\text{151}\) the Canadian Supreme Court has endorsed the idea of a margin of appreciation afforded to lawmakers so long as the law “is designed to protect a vulnerable group[,] . . . is premised on complex social-science evidence[,] . . . deals with a ‘complex social issue[,]’ . . . reconciles the interests of competing groups[,] . . . [or] allocates scarce resources.”\(^\text{152}\)

Finally, the proportionate effect prong (or proportionality \textit{strictu sensu}) requires “proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient

\(^{142}\) R v. Oakes, [1986] 1 S.C.R. 103, 139 (Can.); see also Colker, supra note 129, at 98 (reasoning that the importance of the infringed right affects the Court’s conclusion about rational connection (citing Oakes, [1986] 1 S.C.R. at 142)).

\(^{143}\) HOGG, supra note 69, at 38-34.

\(^{144}\) Compare N.Y. Transit Auth. v. Beazer, 440 U.S. 568, 588–94 (1979) (upholding a city regulation that prevented those in methadone maintenance programs from holding positions with the Transit Authority even though the restriction was overinclusive because the vast majority in the programs posed no safety risk and underinclusive because the restriction did not cover other drug users who were a safety threat), with Greater Vancouver Transp. Auth. v. Can. Fed. of Students, [2009] 2 S.C.R. 295, para. 77 (Can.) (holding that a ban on political messages on side of buses was not rationally connected to the goal of creating “safe, welcoming transit system”), and Benner v. Canada, [1997] 1 S.C.R. 358 (Can.) (holding that a security check requirement applicable to persons born outside Canada prior to 1977 to a Canadian mother, but not to a Canadian father, was not rationally connected to the goal of keeping out dangerous persons).

\(^{145}\) HOGG, supra note 69, at 38-18 (noting that nearly all Section 1 cases have turned on the least drastic means inquiry).

\(^{146}\) Id. at 38-36. For a list of limitations that failed the least drastic means requirement, see id. at 38-37 to -38.

\(^{147}\) Id.

\(^{148}\) Id. at 38-38 to -39.

\(^{149}\) Id.


\(^{151}\) See infra notes 374–377 and accompanying text.

\(^{152}\) See HOGG, supra note 69, at 38-43.
importance.’” However, despite its putative importance, one commentator posits that “this step has never had any influence on the outcome of any case.”

Having established the requirements of the *Oakes* test, it becomes important to look at its application to limitations of Section 15’s equality guarantee. That being said, though, the Court in *Andrews* left the question whether the *Oakes* test applies universally in some doubt. Justice McIntyre expressed doubts about the universal application of the *Oakes* test, at least as to challenges under the Equality Clause. Justice McIntyre noted that “[t]here is no single test under [Section 1]; rather, the Court must carefully engage in the balancing of many factors in determining whether an infringement is reasonable and demonstrably justified.” He reasoned that legislatures have to make “innumerable distinctions” between groups and individuals to pursue “desirable social goals.” Thus, Justice McIntyre concluded that it would be unreasonable for the Court to demand that “the standard of perfection” announced in *Oakes* apply to legislatures making these kinds of distinctions on a daily basis. However, a plurality of justices responded that “[g]iven that [Section 15] is designed to protect those groups that suffer social, political and legal disadvantage in our society, the burden resting on government is appropriately an onerous one.”

Based on the vote count in the case, the Court divided evenly on whether the *Oakes* test is appropriate in a case under Section 1. However, one commentator reasoned that “[g]iven the restrictions on the scope of [Section 15], an infringement calls for the same stringent standard of justification as does the infringement of any other Charter right[;] [t]he *Oakes* test ought to apply to [Section 15] cases” and observed that this has been implicitly assumed by the Court in Equality Clause cases since *Andrews*.

That being said, the Court’s experiment with human dignity as a requirement to prove a Section 15 violation may have affected the way Section 1 is considered in relation to challenges under Section 15. After *Law*, only one violation of Section 15 has been found to have been justified. Even after the Supreme Court in *Kapp* pulled back on *Law*’s human dignity requirement, it is difficult to see how a law that either impairs human dignity or is discriminatory by perpetuating disadvantage or stereotype could properly be justified.

---

153 R v. Oakes, [1986] 1 S.C.R. 103, 139 (Can.); see also Dagenais v. CBC, [1994] 3 S.C.R. 835, 889 (Can.) (a court must take into account the “proportionality between the deleterious and the salutary effects of the measures”); R v. Edwards Books & Art, [1986] 2 S.C.R. 713, 768 (Can.) (“[T]heir effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.”); HOGG, supra note 69, at 38-43 (“[The proportionate effect requirement] asks whether the Charter infringement is too high a price to pay for the benefit of the law.”).

154 HOGG, supra note 69, at 38-44 (reasoning that the proportionate effect requirement does little work because it is a restatement of the sufficiently important objective requirement). But see Alberta v. Hutterian Brethren of Wilson Cnty., [2009] 2 S.C.R. 567, para. 75-76 (Can.) (defending the discrete value of the proportionate effect requirement).

155 See Andrews v. Law Soc’y, [1989] 1 S.C.R. 143, 184 (McIntyre, J., dissenting) (noting that the *Oakes* test is “too stringent for application in all cases”). But see HOGG, supra note 69, at 55-52 (“Section 1 applies to laws that infringe [Section] 15 no less than to laws that infringe other rights.”).


157 Id.

158 Id.

159 Id. at 154 (plurality opinion).

160 See HOGG, supra note 69, at 38-45.

161 Id. (reasoning that Justice McIntyre’s views have been implicitly overruled).

162 Id. at 55-52.

163 See id. at 55-53
In laying down the test for Section 1, the *Oakes* Court “has attempted to lay down rules that will preserve the guaranteed rights against much legislative encroachment, but will permit the enactment of limits where the is a strong demonstration that the exercise of the rights ‘would be inimical to the realization of collective goals of fundamental importance.’”\(^\text{164}\) Thus, an Equality Clause litigant must make out a differentiation based on at least one listed or analogous ground and must prove that the differentiation amounts to discrimination. Then the government is permitted to attempt to justify the limitation on the basis of the test laid out in *Oakes*. However, other than satisfying the listed or analogous ground prong of *Andrews* and *Law* as a threshold matter, little significance is attached to the type of classification under equality and limitations doctrine in Canada. Even when the type of classification is considered, it determines whether the threshold requirements of Section 15 have been satisfied rather than, by announcing a standard of review, dictating the outcome of the challenge. Rather, to determine when the government may permissibly classify, the discrimination prong under *Andrews/Law* and the four-part test under *Oakes* do the heavy lifting.

C. CLASSIFICATIONS ON THE BASIS OF SEXUAL ORIENTATION

Canada has been called “one of the leading countries in the world” on gay equality;\(^\text{165}\) Section 15 has been used to equalize the age of consent, tackle employment discrimination, and provide same-sex couples with marriage rights and equal benefits.\(^\text{166}\) Most importantly, Section 15 and the Charter have created a dialogue in which litigation and judicial decisions have prompted policy changes beyond issues before the courts.\(^\text{167}\)

First, and necessary to the work subsequently performed by Section 15, the Canadian Supreme Court ruled that sexual orientation was an analogous ground under Section 15(1)—even though it was not included in the Charter\(^\text{168}\) and despite the rejection of a 1981 amendment that would have included sexual orientation because “discrimination against LGB persons was not yet considered sufficiently serious to warrant express inclusion in [S]ection 15(1). . . .”\(^\text{169}\) After *Andrews* acknowledged the possibility of recognizing “analogous” grounds under Section 15(1),\(^\text{170}\) “[m]ost lower courts found that [sexual orientation] was [an analogous ground.] but often did not give any reasons for their conclusion because the . . . government . . . conceded the point.”\(^\text{171}\)

In *Egan v. Canada*, though, all nine judges of the Supreme Court held that sexual orientation was an analogous ground under Section 15, although the justices split into two groups as to their reasons for doing so.\(^\text{172}\) On the one hand, Justices Cory and Iacobucci, writing for five of the justices, determined that gay people were an “identifiable minority who have suffered and

---

\(^{164}\) Id. at 38-6 (footnote omitted) (citing R v. Oakes, [1986] 1 S.C.R. 103, 136 (Can.)).


\(^{166}\) Id.

\(^{167}\) See id.; see also id. at 1180 (noting that the Charter “has served to crystallize as constitutional principle the anti-discrimination rules adopted voluntarily by legislatures in the late 1980s and early 1990s”).


\(^{169}\) Wintemute, supra note 165, at 1146.


\(^{171}\) Wintemute, supra note 165, at 1147.

\(^{172}\) See id.
continue to suffer serous social, political and economic disadvantage.” On the other hand, Justice La Forest, writing for the other four judges noted that “whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs . . . .” Thus, having recognized that sexual orientation is an analogous ground—and assuming that the claimant can prove that differentiation on this ground amounts to discrimination—Section 15’s work is done and any heavy lifting for challenges brought to classifications on the basis of sexual orientation will take place via the Limitations Clause. By comparison, making out a classification on the basis of sexual orientation is only the beginning under U.S. doctrine. Whereas a claim based on a listed or analogous ground gets a claimant’s foot in the door in Canada, in the United States, the question must still be answered, depending on the type of classification at issue, what test should apply in the first instance.

Although Canada followed, in the words of Kees Waaldijk, the “standard sequence[]” of “recognition of homosexuality”—(1) decriminalization, (2) anti-discrimination legislation, and (3) same-sex partnership recognition—it was not via judicial branch that this recognition was first achieved. Unlike the European Court of Human Rights, the Constitutional Court of South Africa, and the United States Supreme Court, Parliament was responsible for decriminalizing sodomy in 1969 and equalizing the age of consent in 1987, thus permitting the Canadian Supreme Court to entertain equality challenges rather than hearing challenges to anti-sodomy laws based on liberty and privacy. Similarly, “the Charter [was] not . . . the main source of protection against . . . discrimination in employment,” because Section 15 only applies to public employers and because most complainants preferred bringing their claims under federal or provincial human rights legislation, which created bodies to hear such complaints that were empowered to award costs and cover legal fees. Thus, the main source of protection for gay employees was instead amendments to anti-discrimination legislation that included sexual orientation. In fact, in 1995, when Egan was decided, that eight out of Canada’s then-thirteen jurisdictions had gay-inclusive anti-discrimination legislation was a significant factor for Justices Cory and Iacobucci, who concluded that sexual orientation was an analogous ground under Section 15.

That being said, Section 15 did have a role to play in nudging the “legislative consensus” along. In Vriend v. Alberta, for example, the Supreme Court held that Alberta’s human rights

---

174 Id. at para. 5.
175 See Wintemute, supra note 165, at 1148.
177 See Wintemute, supra note 165, at 1148.
179 See Nat’l Gay & Lesbian Coal. for Equal. v. Minister of Justice 1999 (1) SA 6 (CC) (S. Afr.).
181 Wintemute, supra note 165, at 1149. But see id. (arguing that a facially neutral age of consent for anal intercourse—eighteen, as opposed to fourteen for other types of sexual activity unless the parties are married—could be challenged under an indirect discrimination theory).
182 Id.
183 See id.
184 Id. at 1150.
The code violated Section 15 by failing to include sexual orientation as a prohibited ground of discrimination. The Court concluded that the human rights legislation distinguished between gay people and straight people because of the disparate impact the exclusion of sexual orientation had on gay people and noted that this exclusion had the effect of sending a message that sexual-orientation discrimination was not as serious as other forms of discrimination and could be viewed as “tantamount to condoning or even encouraging discrimination against lesbians and gay men.” The Vriend decision thus stands for two propositions: (1) the Charter may impose positive obligations on the provinces to legislate to protect sexual orientation and (2) the case highlights the dialogue that takes place between legislatures, courts, and Charter litigants. In anticipation of or following Vriend, the three provinces and territories that had not yet enacted gay-inclusive anti-discrimination legislation complied with the Vriend decision, thus creating “coast-to-coast” gay-inclusive anti-discrimination legislation.

Challenges demanding equal benefits for unmarried same-sex couples were next and have represented the most litigation under the Charter since 1985. In Egan, the Court recognized sexual orientation as an analogous ground and a majority of the court found the denial of a “spouse’s allowance” to same-sex partners constituted a violation of Section 15(1). However, a majority also found the discrimination to be justified under the limitations analysis of Section 1. Thus, even though Justice Sopinka agreed with the dissenters that there was a Section 15 violation, he reasoned that “the legislation was addressing itself to those in greatest need” and that “equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept.”

However, within four years, the concept of equality of benefits between same-sex and opposite-sex couples ceased to be so novel. In M v. H, the Supreme Court held that Ontario’s family law legislation violated Section 15 by excluding same-sex couples from spousal support obligations and could not be justified. Writing for the majority, Justices Cory and Iacobucci reasoned that the differentiation was discriminatory because

[i]t implies that [same-sex] couples are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples . . . . [S]uch exclusion perpetuates the disadvantages [they suffer] and contributes to the erasure of their existence . . . . Therefore . . . the human dignity of individuals in same-sex relationships . . . is violated by the impugned legislation.

At the limitations stage, the Court rejected the government’s argument that the exclusion was rationally connected to the state’s two purported interests: “improving the economic

---

187 Id. at para. 82.
188 Id. at para. 100.
189 See supra note 165, at 1152.
190 Id. at 1153.
191 See supra notes 172–174 and accompanying text.
192 See Wintemute, supra note 165, at 1154.
193 See id.
195 See Wintemute, supra note 165, at 1154.
197 Id. at para. 73–74.
circumstances of heterosexual women” and “the protection of children.” As to the former, the Court noted that men were entitled to apply for support benefits and as to the latter the Court observed both that straight couples could apply for support benefits regardless of whether they had children and that an increasing number of gay couples were raising children, who in turn were also in need of protection by the state.\footnote{Id. at para. 109–12, 113–14.} The Court, however, did not feel the need to overrule \textit{Egan}, distinguishing it on the basis that mandating equal treatment would have required the government to spend money whereas in \textit{M v. H} requiring equal treatment would actually save the government money.\footnote{See \textit{id.} at para. 130.}

\textit{M v. H} is also another example of dialogue between the courts and legislatures: after the decision, “[t]he federal and most provincial governments . . . took up the Court’s invitation to conduct comprehensive reviews of all their legislative definitions of ‘spouse,’ and thereby avoid the expensive judicial review alluded to by Justices Cory and Iacobucci.”\footnote{Wintemute, supra note 165, at 1156.} Since then, “the rights and obligations of unmarried same-sex and opposite-sex couples have been equalized in hundreds of federal, provincial, and territorial statutes . . . .”\footnote{Id. at 1156 & n.58.}

Finally, Canadian courts entertained challenges to the exclusion of same-sex couples from the institution of marriage, albeit chiefly at the provincial level. In 2003, the British Columbia Court of Appeals became the first provincial high court to strike down a ban on same-sex marriage, ruling that even if promoting procreation were a “pressing and substantial” objective under \textit{Oakes}, the means used to achieve it—the exclusion of gay couples from civil marriage—was disproportionate.\footnote{See \textit{EAGLE Canada Inc. v. Canada}, [2003] 225 D.L.R. 4th 472, para. 125–26 (Can. B.C.C.A.).} Additionally, the appeals court rejected the idea that affording civil marriage to same-sex couples would “in any way inhibit[], dissuade[] or impede[] the formation of heterosexual unions.”\footnote{Id. at para. 127 (quoting \textit{Egan v. Canada}, [1995] 2 S.C.R. 513, para. 211 (Can.)).} One month later, the Ontario Court of Appeals followed suit in \textit{Halpern v. Canada}, unanimously holding that excluding same-sex couples from civil marriage was an unjustifiable violation of Section 15(1).\footnote{[2003] 65 O.R. 3d 161 (Can. Ont. C.A.).} The appeals court noted that “[e]xclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships[ and ][i]n so doing, . . . offends the dignity of persons in same-sex relationships.”\footnote{Id. at para. 117.} The court rejected the government’s attempted justification on the grounds of procreation or any speculative threat to the institution of marriage.\footnote{See \textit{Wintemute}, supra note 165, at 1168.}

By March 2004, courts in British Columbia, Ontario, and Quebec—three provinces that represent seventy-five percent of Canada’s population—had ruled in favor of same-sex marriage.\footnote{Id. at para. 121, 129.}

Importantly, the judicial advances in gay equality took place in large measure thanks to the recognition of sexual orientation as an analogous ground in \textit{Egan}. Thereafter, challenges to classifications on the basis of sexual orientation were largely addressed under the Supreme Court’s \textit{Oakes} test. Thus, very little work was done on the front end; that a challenge was based on sexual orientation, as opposed to another type of classification, played a narrow role in the courts’ analyses. Rather, the heavy lifting in these challenges took place on the back end when the government was given an opportunity to justify the limitation of Section 15. Put another way,
apart from in *Egan*, gay rights proponents won each case to make its way to the Supreme Court, an achievement that did not depend on the type of classification being challenged, which under U.S. doctrine would have dictated the standard of review and, effectively, the outcome of the case. Instead, that the classifications failed judicial scrutiny was due to an unsuccessful limitations argument. Canadian equality litigants, then, focus their energies on the limitations analysis rather than on the test to be applied, which for U.S. litigants often makes or breaks a case.

IV. SOUTH AFRICA

A. THE EQUALITY CLAUSE

The Equality Clause in the 1996 Constitution—the first right listed in the Bill of Rights—is noteworthy for both its breadth and its scope relative to the U.S. Equal Protection Clause. The Equality Clause states:

9. **Equality.**—(l) Everyone is equal before the law and has the right to equal protection and benefit of the law.

   (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

   (3) The 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.

   [(4)] No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

   (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.208

It is important to note that the Equality Clause is not alone in professing the centrality of equality in South Africa’s post-apartheid regime. Section 1 of the 1996 Constitution declares that “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms” is one of the state’s founding values.209 Section 7, introducing the Bill of Rights, notes that the Bill of Rights “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”210 And Section 39, the Interpretation Clause, requires courts, when interpreting the Bill of Rights, to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”211

---

209 Id. § 1(a).
210 Id. § 7(1).
211 Id. § 39(1)(a).
Limitations Clause provides that a limitation must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” As two commentators noted, the “achievement of equality . . . a constitutional imperative of the first order” and part of a “broader project aimed at the transformation of South African society.”

Despite the importance of equality to post-apartheid South Africa, the test under the Equality Clause was slow to develop. In one of the first cases under the Equality Clause in the 1993 Constitution, a male prisoner with a child under twelve challenged a presidential pardon that granted a reprieve to all female, but not all male, prisoners with children under twelve. Although the Constitutional Court denied the challenge, the Court took its first steps in outlining the contours of the post-apartheid guarantee of equality. Writing for the majority, Justice Goldstone declared that “[a]t the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.” To determine whether equal dignity has been denied, the Court advised that the inquiry should focus on the impact of the discriminatory action looked at in its specific context, the group the discriminatory action disadvantaged, the nature of the state action, and the interests affected by the action.

In a later case, Prinsloo v. Van der Linde, the Constitutional Court considered whether the presumption of negligence for fires started outside designated “fire control areas” by Section 84 of the Forest Act violated the Equality Clause in the 1993 Constitution. The Court noted that all law classifies and that if all such classifications amounted to unequal treatment that were then required to be justified according to the Limitations Clause, all legislative and executive acts would be reviewable by the judicial branch. Thus, the Court considered it necessary to determine what criteria would be used to distinguish legitimate from impermissible differentiation. First, the Court advised against sweeping interpretations of the Equality Clause, instead reasoning that equality doctrine should developslowly, incrementally, contextually, and on a case-by-case basis. Second, the Court highlighted another case, Brink v. Kitshoff.
which reviewed the equality provisions in Canada, the United States, and India. That case emphasized that the South African Equality Clause was the product of South Africa’s unique history more so than any other provision in the Constitution and that any interpretation must reflect its own language, history, and a South African conception of equality. Third, the Court concluded that, to separate the permissible from the impermissible, the Equality Clause meant to draw a line between differentiation that amounts to unfair discrimination and is thus prohibited and differentiation that does not and is thus allowed. The Court noted that regulation is necessary to govern a modern country like South Africa, which inevitably entails differentiation. Thus, the Court concluded, mere differentiation will seldom fall into the verboten category of unfair discrimination. Although the Court denied the claimant’s Equality Clause challenge, the Court’s declaration that unfair discrimination was the central focus in delineating between prohibited and permitted differentiation was an important step in defining the commands of the Equality Clause. Thus, Section 9(3) has rightly been called the “functional centre of the equality right” and the crux of the analysis is whether the governmental differentiation amounts to “unfair discrimination,” with a focus on the impact of discrimination on the complainant and the complainant’s position in society.

In Harksen v. Lane, the Constitutional Court summarized its Equality Clause jurisprudence and stated a definitive test that continues in operation under the 1996 Constitution. The Court first asks whether the differentiation a claimant challenges bears a rational connection to a legitimate government interest under Section 9(1). To show a violation of Section 9(1), the claimant must show the absence of a legitimate government purpose or that there is no rational connection between a legitimate government purpose and the differentiation. Although this test closely resembles the rational basis review that, at minimum, all classifications in the United States must satisfy, unlike rational basis review, under South African doctrine it is insufficient to identify the “generic” purpose of a government action; rather, the court must determine the “specific” purpose of the provision, a more exacting standard.

That being said, Section 9(1) will likely do very little work in any Equality Clause challenge. First, the court will find a legitimate government purpose so long as the purpose is neither arbitrary nor irrational, with no requirement that the government justify its purpose.
against some substantive constitutional value or any notion of the “generic good.” Second, the test is “extremely deferential” to Parliament. Third, if a court finds differentiation on a ground prohibited by Section 9(3), the court may proceed directly to the inquiry under that provision; thus, Section 9(1) is not “a necessary step” to bring an equality challenge.

After considering Section 9(1), a court must next examine Section 9(3)’s injunction against unfair discrimination. The Constitutional Court asks:

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(b)(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section [9(3)].

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause . . . .

Justice Goldstone, writing for the majority, made some observations intended to help in determining when differentiation amounted to “mere” differentiation and when it amounted to “unfair discrimination.” First, he noted that discrimination can exist on the basis of grounds not listed in the Equality Clause, particularly because the word “including” indicates that the specified grounds are not exhaustive. He was cautious in ascribing to the phrase “attributes and characteristics,” necessary to determine whether differentiation on a non-specified ground amounts to discrimination, a narrow definition. He noted, instead, that what unified the specified grounds listed in the Equality Clause were that they were often used to marginalize or demean humanity dignity and that they may relate to immutable, biological characteristics, the associational life of people, or even to intellectual, expressive, or religious dimensions of

---

238 Albertyn & Goldblatt, supra note 213, at 35-20 (noting that Van der Merwe was a “rare finding of an illegitimate purpose”).
239 Id. at 35-21.
240 Id. at 35-19. But see also Geldenhuyx v. Nat’l Director of Pub. Prosecutions 2009 (2) SA 310 (CC) at 320 para. 34–35 (S. Afr.) (finding a violation of Section 9(1) but proceeding to an analysis under Section 9(3) anyway).
241 Harksen, 1998 (1) SA at 324 para. 53.
242 See S. Afr. Const., 1996 § 9(3); S. Afr. (Interim) Const., 1993 § 8(3); see also S. Afr. Const., 1996 § 9(5) (presuming discrimination on a ground specified in Section 9(3) is unfair, thus suggesting there can be discrimination on non-specified grounds).
humanity and were therefore not “neatly self-contained” categories.\textsuperscript{243} Thus, although Justice Goldstone eschewed a narrow interpretation of this requirement, he acknowledged that the Constitutional Court, like the Canadian Supreme Court in \textit{Andrews} and \textit{Law}, would recognize that differentiation could amount to discrimination even if the differentiation was not on the basis of a ground listed in the Equality Clause, but only so long as the “the ground [the basis of the differentiation] is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.”\textsuperscript{244} The Court’s analysis thus recognizes that not all classifications rise to a level that requires judicial review.

Second, he noted that “[t]he prohibition against unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner.”\textsuperscript{245} To aid in determining whether the differentiation amounts to unfair discrimination, but is not based on a ground listed in Section 9(3)—in which case unfair discrimination will not be presumed by operation of Section 9(5)—the Court outlined a number of non-exhaustive factors courts must look at, including:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.\textsuperscript{246}

Thus, the Equality Clause prohibits \textit{all} unfair discrimination. Admittedly, a claimant alleging differentiation on a ground listed in Section 9(3) has an easier case to make because differentiation on one or more of these grounds by definition amounts to discrimination and, moreover, is presumed unfair by operation of Section 9(5).\textsuperscript{247} However, a claimant alleging

\textsuperscript{243} Harksen, 1998 (1) SA at 322 para. 49; see also Titia Loenen, \textit{The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective}, 13 SAJHR 401, 406 (1997) (“The grounds mentioned [in Section 9(3)] should be viewed as an indication of the types of classifications which are potentially suspect.”).

\textsuperscript{244} See Harksen, 1998 (1) SA at 322 para. 49.

\textsuperscript{245} Id. at 322–23 para. 50.

\textsuperscript{246} Id. at 523 para. 51.

\textsuperscript{247} The Constitutional Court has on occasion found discrimination on a ground listed in Section 9(3), which, by operation of Section 9(5), is presumed unfair, but also found that the presumption of discrimination was rebutted. \textit{See, e.g.}, \textit{Pretoria City Council v. Walker} 1998 (2) SA 363 (CC) at __ para. 68 (S. Afr.) (finding a flat utilities rate charged to minority neighborhoods, but not white neighborhoods, and a policy of cross-subsidization to be indirect discrimination on the basis of race, but not unfair); \textit{President of the Rep. of S. Afr. v. Hugo} 1997 (4) SA 1 (CC) at __
differentiation on an unlisted ground may still succeed so long as she shows both that the ground on which the differentiation is based is itself “based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings” or affects people in a “comparably serious manner.”\textsuperscript{248} and that, based on the impact of the differentiation, it amounts to unfair discrimination.\textsuperscript{249}

So when has the Constitutional Court entertained a challenge on a ground not listed in Section 9? In \textit{Hoffman v. South African Airways}, the Court resisted the invitation to find discrimination on the basis of a flight attendant’s HIV-positive status to be differentiation on a listed ground—disability—and instead found the differentiation amounted to unfair discrimination on an analogous ground—HIV status.\textsuperscript{250} The Court reasoned that people living with HIV are a minority in South Africa and are treated with “intense prejudice,” systematically disadvantaged, and discriminated against, stigmatized, and marginalized by society.\textsuperscript{251} Later, in \textit{Larbi-Odam v. Member of the Executive Council for Education (North-West Province)}, the Constitutional Court, citing \textit{Andrews v. Law Society}, recognized citizenship as an analogous ground and reasoned that non-citizens, as a political minority in all countries, lack “political muscle.”\textsuperscript{252} However, in \textit{Prinsloo v. Van der Linde}, the Constitutional Court was unmoved that the challenged act amounted to unfair discrimination on the basis of an analogous ground. The Forest Act differentiated between landowners in fire control areas and those outside these areas but the Court concluded that there was no basis to consider this differentiation capable of impairing the human dignity of the landowners or working an injustice in a comparably similar manner.\textsuperscript{253}

Given the factors South African courts are required to consider in determining whether there has been unfair discrimination on a ground not listed in Section 9(3), the \textit{Harksen} test may somewhat resemble the factors courts in the United States look to in order to determine whether a classification warrants heightened scrutiny, at least as to the first factor Justice Goldstone outlined—the position of the complainant in society.\textsuperscript{254} However, the inquiry in South Africa is more open-ended and courts there are enjoined to look to other factors, such as the purpose of the classification and the extent of the impact on the complainant, considerations more typically reserved for analysis at the limitations stage. And, notwithstanding any similarities, the \textit{Harksen} test is unlike the tiers of review in U.S. equal protection jurisprudence because the type of classification in U.S. doctrine determines the scrutiny the classification enjoys whereas the context of the classification in South African doctrine is what determines \textit{whether the complainant gets in at all}, rather than what level of review a court will engage in. Put another way, although classification on a ground listed in Section 9(3) is presumed to be unfair discrimination, a litigant claiming unfair discrimination on an unlisted ground is not precluded from going through the same steps to prove his case; all challengers therefore face the same test. Compare this to the United States where \textit{group}, rather than \textit{individual}, circumstances determine whether a classification warrants more searching review and thus the application of a different,

\textsuperscript{248} See \textit{Harksen}, 1998 (1) SA at 324 para. 53.
\textsuperscript{249} See \textit{id}.
\textsuperscript{250} 2001 (1) SA 1 (CC) at __ para. 28 (S. Afr.).
\textsuperscript{251} \textit{Id}.
\textsuperscript{252} See 1998 (1) SA 745 (CC) at __ para. 19 (S. Afr.).
\textsuperscript{253} 1997 (3) SA 1012 (CC) at __ para. 41 (S. Afr.).
\textsuperscript{254} See supra note 246 and accompanying text.
more stringent test. Finally, precisely because unfair discrimination is presumed if the
differentiation is on a ground listed in Section 9(3)—a list that includes seventeen different
grounds—courts will often spend little time analyzing the challenge at the “front” end, but will
instead focus on the “back” end—the question of justification—thus differentiating the analysis
from U.S. doctrine, where most of the parties’ energy is focused on the question of the standard
of review. This is particularly the case because the listed grounds in Section 9(3), though not
exhaustive, are extensive. In fact, when the Constitutional Court recognized three analogous
grounds under the 1993 Constitution—pregnancy, marital status, and birth—these were
included in the Equality Clause in the 1996 Constitution, bringing the number of analogous
grounds to seventeen. Therefore, although the type of classification may have some bearing on
the analysis under the South African Equality Clause, it does not affect the test that is applied
or its stringency, unlike tiered doctrine in the United States.

B. THE LIMITATIONS CLAUSE

The Limitations Clause in the 1996 Constitution echoes the document’s concern for equality
in providing the circumstances under which the government may permissibly limit a right. The
Clause states:

36. Limitation of rights.—(1) The rights in the Bill of Rights may be limited only
in terms of law of general application to the extent that the limitation is reasonable and
justifiable in an open and democratic society based on human dignity, equality and
freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

The Limitations Clause helps courts determine which infringements of rights are
constitutional and which are not and has a four-fold purpose. First, the presence of the
Limitations Clauses in both the 1993 and 1996 Constitutions acknowledges that the rights in the
post-apartheid constitutions are not absolute, but may be limited by the rights of others or to
further important societal goals, so long as the requirements of the Limitations Clause are
observed. Second, “rights may only be limited where and when the stated objective behind the

255 See S. AFR. Const., 1996 § 9(3).
256 See supra note 242 and accompanying text.
257 Harksen, 1998 (1) SA at ___ para. 92 (O’Regan, J., dissenting); see also Brink v. Kitshoff 1996 (4) SA 197 (CC) at
___ para. 43 (S. Afr.) (recognizing the analogous ground of marital status but deciding the case on the basis of sex).
258 Compare S. AFR. Const. § 9(3), with S. AFR. (INTERIM) Const., 1993 § 8(3).
259 S. AFR. Const., 1996 § 36; see also S v. Makwanyane 1995 (3) SA 391 (CC) at 436 para. 104 (S. Afr.) (listing
the factors a court should consider when determining if a limitation is “reasonable and justifiable,” later incorporated
into the 1996 Constitution’s Limitations Clause).
260 See CURRIE & DE WAAL, supra note 218, § 7.1(a), at 164.
261 Stu Woolman & Henk Botha, Limitations, in CONSTITUTIONAL LAW OF SOUTH AFRICA 34-i, 34-1 to -2 (Stuart
Woolman et al. eds., 2d ed. 2009); CURRIE & DE WAAL, supra note 218, § 7.1(a), at 163; compare id. § 7.1(b), at
restriction is designed to reinforce the values that animate this constitutional project.”

Third, the Limitations Clause permits balancing private rights with the public good. And fourth, the Limitations Clause addresses separation of powers concerns by outlining a test the executive and legislative branches must follow when they seek to limit a right and that the unelected judiciary must comply with when passing judgment on the laws passed by the elected branches. Thus, limitations analysis is part of “ongoing dialogue about [the] meaning of fundamental rights” that requires courts to provide guidance to other political actors and also encourages, as part of a project of shared constitutional interpretation, these other actors “to place their own gloss on constitutional norms and to experiment with different policy options consistent with the basic law.”

A great foreign influence—both affirmative and negative—can be felt on the Limitations Clause and analysis under it. On the one hand, there is a strong influence from the Canadian Charter’s Limitations Clause. Both require that a challenged law have a “sufficiently pressing and substantial import to warrant overriding a constitutionally protected right” and both require proportionality between any limitation and its purpose, requiring a rational connection, necessity, and proportionality strictu sensu. On the other hand, the Limitations Clause in the 1996 Constitution is unlike equal protection doctrine in the United States. The Limitations Clause in the 1993 Constitution distinguished between rights whose limitations had to be “reasonable” and “necessary” and rights whose limitations could be merely “reasonable,” a “distinction, clearly inspired by the doctrines of strict scrutiny, intermediate scrutiny and rationality review found in” the United States. This language was omitted in favor of a Limitations Clause in the 1996 Constitution that did “not pre-judge the importance of the fundamental rights found in [the Bill of Rights].” Finally, as in Canada, the Limitations Clause also sets up a two-stage rights analysis. At the first stage, the burden rests with the applicant to show the violation of a right. At the second stage, the justification stage—which depends on the applicant successfully proving the limitation of a right—the burden shifts to the government or party seeking to justify the limitation of a right. The rationale for this shift is justified in part because the “state will often possess unique, if not privileged, access to the information a court requires when attempting to determine whether a limitation is

165 & n.6 (noting that under the U.S. Constitution, “[l]imitations are [implied.] established by means of interpretation of the right by the courts”).

262 Woolman & Botha, supra note 261, at 34-2.

263 Id.

264 Id.; see also id. (noting that the Limitations Clause reminds us “that the counter-majoritarian dilemma is neither a paradox nor a problem, but an ineluctable consequence of our commitment to living in a constitutional democracy”).

265 Id. at 34-7.

266 Kevin Iles, A Fresh Look at Limitations: Unpacking Section 36, 23 SAJHR 68, 69 (2007); Woolman & Botha, supra note 261, at 34-12 n.3 (noting two important shared characteristics: (1) the presence of a general limitations clause and (2) “strikingly similar” language);

267 Woolman & Botha, supra note 261, at 34-12.

268 Id. at 34-13 to -14.

269 See id. at 34-16.

270 See id. But see infra note 283 and accompany text.

271 See supra notes 117–119 and accompanying text.

272 See S v. Zuma 1995 (2) SA 642 (CC) at 654 para. 21 (S. Afr.).

273 See, e.g., Ferreira v. Levin 1996 (1) SA 984 (CC) at 1012 para. 44 (S. Afr.).

274 See Woolman & Botha, supra note 261, at 34-4 to -5.

275 CURRIE & DE WAAL, supra note 218, § 7.1(b), at 166.

justified.”²⁷⁷ It should be noted that relative to the interpretation stage, the justification stage is generally more fact-specific.²⁷⁸

To determine whether a limitation is justified under the Limitations Clause, a court must determine whether the rights limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”²⁷⁹ In a nutshell:

[Rights] may be infringed, but only when the infringement is for a compellingly good reason. A compellingly good reason is that the infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy that values human dignity, equality and freedom above all other considerations. The infringement must however not impose costs that are disproportionate to the benefits that it obtains. This will be the case where a law infringes rights that are of great importance in the constitutional scheme in the name of achieving benefits that are of comparatively less importance. It will also be the case where the law does unnecessary damage to fundamental rights, damage which could be avoided or minimised by using other means to achieve the same purpose.²⁸⁰

First, looking to the non-exhaustive factors listed in Section 36(1),²⁸¹ a court must consider the nature of the right, which is a “nuanced” analysis designed to permit a court “to tighten or loosen several of the clause’s justificatory requirements according to the importance . . . of the right,” so that more “core” rights—such as the rights to life, dignity, equality, and similar rights²⁸²—require more compelling objectives, more narrow tailoring, or benefits of infringement that overwhelmingly outweigh the costs.²⁸³ For instance, in S v. Makwanyane, compelling reasons were required to justify the limitation on the rights to life and dignity via capital

²⁷⁷ Woolman & Botha, supra note 261, at 34-44. Even if the government fails to offer any justification, a court is not relieved from performing a limitations analysis, see Du Toit v. Minister for Welfare & Population Dev. 2003 (2) SA 198 (CC) at 210–11 para. 31 (S. Afr.) (noting that because it was a “matter of public importance,” the Court should decide whether restricting a gay couple’s right to adopt was a justifiable limitation), but failure to justify often tips the scales against the state, Moise v. Transitional Local Council of Greater Germiston 2001 (4) SA 491 (CC) at 498 para. 19 (S. Afr.).
²⁷⁸ See Currie & De Waal, supra note 218, § 7.1(b), at 167.
²⁷⁹ See S. Afr. Const., 1996 § 36(1); see also Woolman & Botha, supra note 261, at 34-67 (noting that the Limitations Clause is “couched in broad terms” making interpretation difficult and reiterating the tension it is meant to resolve between rights and democracy and equality and freedom).
²⁸⁰ Currie & De Waal, supra note 218, § 7.2(c), at 185; see also S v. Bhuwana 1996 (1) SA 388 (CC) at 395 para. 18 (S. Afr.) (summing up the balancing inherent in limitations analysis between “the purpose, effects and importance of the infringing legislation” and “the effect of the infringement caused by the legislation”); Albertyn & Goldblatt, supra note 213, at 35-81 (“The limitations enquiry looks more widely at the broader social interests implicated in the case and may involve a balancing of rights.”).
²⁸² Woolman & Botha, supra note 261, at 34-71 & n.2.
²⁸³ See Currie & De Waal, supra note 218, § 7.2(b)(ii), at 178; Woolman & Botha, supra note 261, at 34-70; see also id. at 34-71 (reasoning that this factor is not so dissimilar from the tiered system of rights in U.S. constitutional law). But see Halton Cheadle, Limitation of Rights, in SOUTH AFRICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS 693, 706–07 (Halton Cheadle et al. eds., 2002) (reasoning that this factor was meant as a threshold requirement that any limitation may not negate essential character of the right and that the factor entails no requirement to find some rights more important than others); but see also Christian Educ. S. Afr. v. Minister of Educ. 2000 (4) SA 757 (CC) at 775–77 para. 29–31 (rejecting the United States’s tiered approach to rights).
punishment because these rights “are the most important of all human rights, and the source of all other persons rights in . . . [the Bill of Rights].”284

Second, a court must consider the purpose of the limitation, both determining what the purpose is and assessing whether it is sufficiently important,285 or “worthwhile and important in a constitutional democracy”286 such that “all reasonable citizens would agree [the purpose was] compPELLingly important.”287 For instance, in Makwanyane, the Constitutional Court found general and specific deterrence of crime to be worthwhile and important purposes, but rejected retribution as a sufficient justification because the 1993 Constitution envisioned reconciliation, not vengeance, for post-apartheid South Africa.288 Furthermore, because the objective of an act is often not explicit, a court must reconstruct the act’s purpose from its overall purpose, legislative history, and the mischief it was meant to cure.289 However, as under the test in R v. Oakes,290 although the higher the level of generality at which the purpose is expressed, the more likely it will be found to be sufficiently important,291 the higher the level of generality, the more likely the limitation will fail to satisfy the least restrictive means requirement.292

Third, a court must consider the nature and extent of the limitation. This involves considering that “[t]he more invasive the infringement, the more powerful the justification must be,”293 determining whether the limitation affects “core” values underlying the limited right,294 and assessing the actual impact of the infringement295 and the social position or vulnerability of the group or individual affected.296 For instance, in Makwanyane, the Court noted the grave and irreparable effect on the rights to life and dignity from the death penalty to conclude that the extent of the limitation was severe.297

Fourth, a court must assess the relation between the limitation and its purpose.298 This requires both a casual, or rational, connection between the limitation and its purpose and that the connection be more than marginal.299 For instance, in Makwanyane, although there was a rational connection between the death penalty and specific deterrence because ending someone’s life

---

284 1995 (3) SA 391 (CC) at 451 para. 144 (S. Afr.).
285 Woolman & Botha, supra note 261, at 34-73.
286 CURRIE & DE WAAL, supra note 218, § 7.2(b)(ii), at 179.
287 Id. § 7.2(b)(iii), at 180–81 (noting that sufficiently compelling justifications may include protecting the administration of justice; preventing, detecting, investigating, and prosecuting crime; reducing unemployment; regulating health; protecting others’ rights; complying with constitutional obligations; promoting healing and building a united society; complying with international obligations; and preventing illegal entry into the country); see also Woolman & Botha, supra note 261, at 34-74 to -75 (noting that a law’s purpose will be found to be sufficiently important if it is meant to serve a value animating the post-apartheid constitutions, but that the farther afield the purpose is, the less likely it will be found to be sufficient).
288 1995 (3) SA at 442 para. 117; id. at 467 para. 185 (Dicott, J., concurring).
289 Woolman & Botha, supra note 261, at 34-74.
290 See supra notes 140 and accompanying text.
291 Woolman & Botha, supra note 261, at 34-74 (citing Peter Hogg, Section 1 Revisited, 1 NAT’L J. CONST. L. 1, 5 (1992)).
292 Id.
293 S v. Manamela 2000 (3) SA 1 (CC) at 25–26 para. 53 (S. Afr.); see also CURRIE & DE WAAL, supra note 218, § 7.2(b)(iv), at 181–82 (“A law that limits rights should not use a sledgehammer to crack a nut.”).
294 Woolman & Botha, supra note 261, at 34-79.
295 Id. at 34-81.
296 Id.
297 1995 (3) SA 391 (CC) at 483 para. 236 (S. Afr.) (Madala, J., concurring).
298 CURRIE & DE WAAL, supra note 218, § 7.2(b), at 176.
299 Id. § 7.2(b)(v), at 183.
prevents that person from committing further crime, there was insufficient evidence to show that the death penalty furthered, or had a rational connection to, the aim of general deterrence. 300

Finally, the court must consider whether there is a less restrictive means that would achieve the limitation’s purpose while infringing the right less; in other words, is the limitation reasonable in that it invades the right no more than is necessary to achieve the purpose of the limitation? 301 The government fails the limitations analysis if “other means could be employed to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent. If a less restrictive (but equally effective) alternative method exists to achieve the purpose of the limitation, then that less restrictive method must be preferred.” 302 For instance, in Makwanyane, the Court determined that life imprisonment was relatively as effective at deterring crime, but without the drastic effect on the rights to life and dignity. 303 Although courts do grant a measure of deference to legislative choices, not wishing to second-guess the decision making of the elected branch, 304 this is not an unrestricted license. Nevertheless, as one commentator notes, this factor is where limitations arguments will stand or fall. 305

The limitations analysis is not a “rigid” or “mechanical” test, 306 but rather is a “flexible[ and] context-sensitive” 307 test to be performed on a case-by-case basis. 308 Moreover, unlike the Oakes test in Canadian jurisprudence, 309 the limitations analysis in South Africa is not sequential, but rather is performed after considering all the factors, 310 which are neither exhaustive 311 nor a checklist. 312 Lastly, balancing can mean either than one right trumps or that a balance is struck between competing rights so that one right is not asked to sacrifice everything in service of another. 313

Some commentators have questioned whether the Limitations Clause will have meaningful application in the context of the Equality Clause. 314 As to limitations analysis under Section 9(1),

300 1995 (3) SA at 466–67 para. 184 (Didcott, J., concurring).
301 CURRIE & DE WAAL, supra note 218, § 7.2(b), at 176.
302 Id. § 7.2(b)(vi), at 183–84. For the danger, for the purposes of less restrictive alternative, of stating the purpose of the limitation at too high a level of generality, see supra notes 291–292 and accompanying text.
304 Id. at 437–38 para. 107; CURRIE & DE WAAL, supra note 218, § 7.2(b)(vi), at 184; see also S v. Manemela 2000 (3) SA 1 (CC) at 41 para. 95 (S. Afr.) (O’Regan & Cameron, JJ., concurring) (“The problem for the Court is to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature in a specific area.”).
305 CURRIE & DE WAAL, supra note 218, § 7.2(b)(vi), at 184.
306 For counterarguments to this approach, see id. at 34-15 n.2 (reasoning that “the absence of clearly articulated rules undermines rational political discourse” and gives little guidance to litigants to know what arguments will or will not satisfy the test and that too loose a test undermines the integrity of the judicial system because no coherent jurisprudence can exist without rules and reasons explaining the decision), and Colker, supra note 129, at 104 (reasoning that if the limitations analysis is too loose of a test, it will lead to “indiscriminate judicial deference”).
308 See S v. Makwanyane 1995 (3) SA 391 (CC) at 436 para. 104 (S. Afr.).
309 See supra section II.B.
310 See Woolman & Botha, supra note 261, at 34-93 to -94.
311 See S. AFR. CONST., 1996 § 36(1).
312 See CURRIE & DE WAAL, supra note 218, § 7.2(b)(i), at 178.
313 Woolman & Botha, supra note 261, at 34-95; compare Makwanyane, 1995 (3) SA at 447 para. 133 (the rights to life and dignity trump the severe limitation on those rights the death penalty represents), with Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 558–63 para. 88–98 (S. Afr.) (balancing a gay person’s right to same-sex marriage with an individual’s right to religious freedom).
314 See, e.g., Albertyn & Goldblatt, supra note 213, at 35-15, 35-23; Woolman & Botha, supra note 261, at 34-31 to -32.
there are two problems. First, government action is rarely found to be irrational under Section 9(2). Second, assuming some government action is found to violate Section 9(1) and is therefore irrational, it cannot be saved by the Limitations Clause because the standard of justification is higher than Section 9(1)’s mere rationality test. Regarding the application of the Limitations Clause to Section 9(3),

[i]t is . . . difficult to see how discrimination that has already been characterised as ‘unfair’ because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings can ever be acceptable in an open and democratic society based on human dignity, freedom and equality.

In many ways, a one-stage analysis for the Equality Clause may make sense because “the considerations that would be raised to demonstrate fairness under [Section] 9(3) would be virtually identical to the considerations raised to demonstrate reasonableness and justifiability under [the Limitations Clause].” But even if this were the case, it should be noted that the analysis is performed at some stage in the two-stage analysis. Because of the generally flexible and context-sensitive approach South Africa uses to consider challenges under the Equality Clause, moreover, very little work will be done when it comes to determining what level of scrutiny the type of classification warrants, but instead whether the government may classify on any particular basis will depend on the impact on the complainant, the extent of the limitation, the interests the limitation seeks to serve, and how precisely the limitations is tailored.

C. CLASSIFICATIONS ON THE BASIS OF SEXUAL ORIENTATION

Notwithstanding South Africa’s history of apartheid and the extent to which this informed the drafting of the post-apartheid constitutions, there has been “more jurisprudence interpreting [sexual orientation] than any other [ground in Section 9(3)]” because sexual orientation “has been relied on so frequently in litigation.” In a powerful statement about the nature of equality for gay people in post-apartheid South Africa, the Constitutional Court in Fourie noted that Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the

C. CLASSIFICATIONS ON THE BASIS OF SEXUAL ORIENTATION

Notwithstanding South Africa’s history of apartheid and the extent to which this informed the drafting of the post-apartheid constitutions, there has been “more jurisprudence interpreting [sexual orientation] than any other [ground in Section 9(3)]” because sexual orientation “has been relied on so frequently in litigation.” In a powerful statement about the nature of equality for gay people in post-apartheid South Africa, the Constitutional Court in Fourie noted that Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the
right to be acknowledged as equals and to be embraced with dignity by the law. Their love that was once forced to be clandestine, may now dare openly to speak its name.320

This robust commitment to gay equality is perhaps unsurprising given that South Africa was the first country in the world to constitutionalize equality on the basis of sexual orientation.321 Since then, the Constitutional Court of South Africa has granted material benefits to partners in same-sex relationships,322 struck down a criminal prohibition on sodomy between consenting male adults,323 ruled in favor of equality in immigration on the basis of sexual orientation,324 struck down a ban on same-sex adoption,325 and held that the exclusion of same-sex couples from the common law definition of marriage is unconstitutional.326

In many respects, the concern that Section 9(3)’s unfair discrimination analysis and the test under the Limitations Clause might elide is often real in gay equality cases. In terms of the Harsken test,327 the Constitutional Court typically has had little trouble addressing classifications on the basis of sexual orientation, deemed “discrimination”—because the differentiation is based on a ground specified in Section 9(3)—and “unfair”—because of the presumption of unfairness triggered by Section 9(5).328 Thus, absent the government’s attempt to rebut the presumption of unfairness, the Constitutional Court has typically proceeded swiftly to the limitations stage.329 Notwithstanding this, the Court has on occasion paused to highlight the discriminatory impact of laws that exclude gay people.330 For instance, in the immigration case,331 the Court noted that discrimination on the basis of sexual orientation denies gay people their inherent dignity, which “insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways.”332 Similarly, in Geldenhuys, the Constitutional Court first noted the harm to gay people, particularly young gay people contemplating coming out, of an unequal age of consent, which the Court said sent a message that there was something deviant about both gay

---

320 Ministry of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 555–56 para. 78 (S. Afr.).
324 See Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs 2000 (2) SA 1 (CC) at 26 para. 40 (S. Afr.).
325 See Du Toit v. Minister of Welfare & Population Dev. 2003 (2) SA 198 (CC) at 210 para. 30 (S. Afr.).
326 See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 586 para. 162 (S. Afr.).
327 See supra notes 241–246 and accompanying text.
329 See, e.g., Geldenhuys, 2009 (2) SA at 320 para. 36 (government conceded that unfair discrimination was not justified); Satchwell, 2002 (6) SA at 12 para. 26 (same).
330 However, the impact of discrimination may also be considered under the “extent of the limitation” prong under the Limitations Clause. See S. Afr. Const., 1996 § 36(1)(c); supra notes 294–296 and accompanying text.
332 Id. at 28 para. 42.
sex acts and the people who engaged in them. The Court went on to reason that the different age of consent perpetuated the stereotype that sexual conduct between gay people is disgraceful or at least of less value than sexual conduct between straight people. Finally, several cases have referred to the history of discrimination against gay people in South Africa at the limitations stage.

At the limitations stage, the government has been unsuccessful in attempting to justify exclusionary laws. For example, when considering whether there were less restrictive alternatives to an outright ban on adoption by same-sex couples, the Court in Du Toit rejected the argument that a gay couple seeking to adopt might split without there being a provision in the law for the dissolution of their relationship and the care for the adopted child. The Court noted that adequate mechanisms were available in the law in the event of this circumstance, implicitly recognizing that there were less restrictive means to address the putative justification rather than a total exclusion of gay people adopting.

Important to note, however, is that even if analyses under the Equality Clause and the Limitations Clause have a tendency to elide, the considerations a South African court must consider do not generally relate to the type of classification in any way that would be different from any other type of classification that is permitted to be challenged under the Equality Clause. Rather, the level of scrutiny a court affords an equality claimant depends not on the fact that he may be challenging a law that excludes gay people, but instead focuses chiefly on the impact of the differentiation, the purposes it serves, and the tailoring of means to ends to determine whether the classification is permissible. This context-heavy, case-specific analysis permits the courts to evaluate, and the government to attempt to justify, a challenged classification without first setting a bar tied to the type of classification at issue. Under U.S. doctrine, by comparison, the classification sets the bar, and the bar tells the parties in advance who will win.

V. THE EUROPEAN COURT OF HUMAN RIGHTS

A. ARTICLE 14

Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

---

333 Geldenhuys, 2009 (2) SA at 320 para. 36.
334 Id. at 320–21 para. 37.
335 See, e.g., Du Toit v. Minister for Welfare & Population Dev. 2003 (2) SA 198 (CC) at 211 para. 32 (S. Afr.).
336 See id. at 211–212 para. 33–37.
337 See id.
Equality as a right is of such importance that it was placed at the beginning of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the German Basic Law and is found in the constitutions of many countries throughout the world.\textsuperscript{339} Yet the Equality Clause in the European Convention is in many ways not as powerful;\textsuperscript{340} Article 14 is “parasitic” in that “[t]he ‘reach’ of Article 14 is restricted to discrimination only with respect to the rights and freedoms set out elsewhere in the Convention.”\textsuperscript{341} Thus, Article 14 prohibits discrimination in the enjoyment of one or more Convention rights rather than rendering impermissible discrimination as such.\textsuperscript{342} In this regard, Article 14 is narrower in scope than Section 15 of the Canadian Charter, Section 9 of South Africa’s 1996 Constitution, and even the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{343}

Nonetheless, perhaps recognizing these shortcomings and not wanting to render Article 14 ineffective or read it out of the Convention, the European Court of Human Rights has held that Article 14 is “autonomous”\textsuperscript{344} in that there can be a breach of Article 14 even though there has been no breach of another Convention right so long as the alleged violation falls “within the ambit” of a substantive right guaranteed by the Convention.\textsuperscript{345}

Establishing a violation of Article 14 involves a four-step process: first, the applicant must show that he falls within the ambit of a substantive right protected by the Convention; second, the applicant must show a difference of treatment on a ground prohibited by Article 14; third, the applicant must show that he is in an analogous situation to the preferred group; and fourth, if the applicant is successful in steps one through three, the government must show that there is an objective and reasonable justification for the violation.\textsuperscript{346} Thus, a kind of limitations analysis has been read into Article 14 rather than stemming from the Court’s interpretation of a general limitations clause in the Convention.

The “within the ambit” requirement was meant to ensure the “effective” interpretation and application of Article 14.\textsuperscript{347} Thus, doctrine permits the applicant to establish an Article 14 violation without having to show a violation of another Convention right so long as the claim

\textsuperscript{339} JACOBS, WHITE, AND OVEY, supra note 338, at 546.

\textsuperscript{340} See Rory O’Connell, Cinderella Comes to the Ball: Art 14 and the Right to Non-discrimination in the ECHR, J. LEGAL. STUD. 211, ___ (2009).

\textsuperscript{341} HARRIS, O’BOYLE & WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 578, 580 (D.J. Harris et al. eds., 2d ed. 2009); see also Belgian Linguistics Case, 6 Eur. Ct. H.R. (ser. A) at 33 (1968) (noting that Article 14 has “no independent existence”). But see also KAREN REID, A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 272 & n.5 (3d ed. 2007) (noting that “extreme discrimination has been held by the Convention organs to constitute degrading treatment contrary to Art.3.”).

\textsuperscript{342} IAIN CAMERON, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 117 (3d ed. 1998); see also Aziz v. Cyprus, 2002-V Eur. Ct. H.R. 201, 214 (2004) (noting that if the Court finds a substantive right violation, it is not necessary to consider any alleged violation of Article 14 unless “clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case”); JACOB, WHITE, AND OVEY, supra note 338, at 551 (noting that, traditionally, the Court, having found a violation of a substantive right, would for “reasons of procedural economy,” not consider the rights provision in conjunction with Article 14 (citation omitted)).

\textsuperscript{343} See O’Connell, supra note 340, at __.

\textsuperscript{344} See CAMERON, supra note 342.


\textsuperscript{346} See, e.g., Rasmussen v. Denmark, ___ Eur. Ct. H.R. (ser. A) at __ (1984); see also HARRIS, O’BOYLE & WARBRICK, supra note 341, at 579 (noting that the first and second step are used to determine whether Article 14 applies in the first instance).

\textsuperscript{347} HARRIS, O’BOYLE & WARBRICK, supra note 341, at 580.
falls within the ambit of a Convention right. The European Court of Human Rights has generally given a wide interpretation to the ambit of substantive rights in the Convention reflecting the need for Article 14 to have an independent application. Consequently, “a state which goes beyond its obligations under a Convention right [must] do so in a non-discriminatory way.”

Having established that he falls within the ambit of a Convention right, an applicant must then show a difference in treatment on a ground prohibited by Article 14. The list of prohibited grounds in Article 14—at eleven, larger than the list in the Canadian Charter, but smaller than that in the South African Constitution—is not exhaustive given the words “such as” and the more specific inclusion of “other status” in the list. Thus, as in Canada and South Africa, unlisted, analogous grounds may be recognized. However, the European Court of Human Rights has attached a particular interpretation to the term “other status,” so that an applicant may successfully rely on that term so long as the difference in treatment is based on a “personal characteristic . . . by which persons or groups of persons are distinguishable from each other.”

On the one hand, may cabin the discretion the Court has to entertain challenges under Article 14. But on the other hand, the line the Court has drawn between permissible and impermissible classification is not as narrowly circumscribed as it is in Canada, which generally requires unlisted grounds to be more closely analogous to those that are listed, rather than that they merely relate to a personal characteristic. That very few grounds do not relate to personal characteristics and that the Court has not dwelled extensively on Article 14’s analogous grounds component may explain why, as compared to the Limitations Clauses in the Canadian Charter and the South African Constitution, Article 14’s built-in limitations analysis represents a relatively lower bar for the government: if many more things are Article 14 violations on the front end, the Court has perhaps understandably given the government more leeway on the back end so as not to void all government classifications.

That being said, though, not all grounds of differentiation are equal in the eyes of the Court. For instance, “[w]here (potentially) serious discrimination is at stake, usually the margin of appreciation owing to a state will be narrower[,] . . . the disproportionality of the state’s chosen means more easily condemned by evidence of practical alternatives,” and “very weighty reasons” demanded for the classification. Thus, Article 14’s built-in limitations analysis, though more easily satisfied by the government in most circumstances, is not in all cases a slam-dunk. Moreover, an Article 14 complainant must also show that he is in an analogous situation


349 See JACOBS, WHITE, AND OVEY, supra note 338, at 556.

350 But see supra note 342.

351 JACOBS, WHITE, AND OVEY, supra note 338, at 581.


353 Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser. A) at 29 (1976); see also O’Connell, supra note 340, at 222 (noting that Article 14’s “other status” language is “[o]ften interpreted very widely” and that “almost any distinction within the ambit of a Convention right can trigger” Article 14).

354 See HARRIS, O’BOYLE & WARBICK, supra note 338, at 585 (noting that being a fisherman and a former KGB agent has been recognized as personal status for the purposes of Article 14).

355 HARRIS, O’BOYLE & WARBICK, supra note 341, at 587, 590; see also O’Connell, supra note 340, at 224 (comparing this to the U.S. “suspect classifications” doctrine).
with the group favored by the challenged act. Showing analogous situations involves asking “whether the applicants can properly compare themselves with a class of persons who are treated more favourably.” Although the test is designed to help the Court determine whether the differential treatment is based on one of the grounds prohibited by Article 14 rather than on some other consideration, there is no single statement that the Court repeats. In this part of the Article 14 test, there may be some blurring between the rights-violation stage and the limitations stage: “the issue of whether the compared groups are truly in analogous situations can sometimes only be answered by considering whether their differential treatment can be justified.”

Finally, the Court must engage in a limitations analysis. Unlike the Canadian Charter and the South African Bill of Rights, the European Convention on Human Rights contains no general limitations clause. Rather, like limitations implied in U.S. constitutional law, one has been impliedly read into Article 14 by the Court. Recognizing that not every form of differential treatment violates Article 14 and that there may be good reasons for different legislative and administrative regimes that treat individuals differently, the European Court of Human Rights has devised a test to distinguish between permissible distinction and impermissible differentiation. Based on the Belgian Linguistics Case, the Court (1) asks the government to identify a legitimate aim furthered by the differentiation and (2) determines, depending on the circumstances of the case, whether there is proportionality between the differential treatment and the stated aim.

To satisfy the legitimate aim prong, the government must assert some legitimate justification. Interestingly, unlike South African courts, which conduct an independent limitations analysis even where the government concedes lack of justification, and U.S. courts under rational basis review, which look to any conceivable interest the legislature might have sought to advance, the European Court of Human Rights will not on its own search for a

---

356 JACOBS, WHITE, AND OVEY, supra note 338, at 558; see, e.g., Schalk & Kopf v. Austria, 2010-__ Eur. Ct. H.R. __, [para. 99] (noting that because gay couples are as capable as straight couples of entering stable, committed relationships, the gay couple applicants were in a relevantly similar situation to straight couples permitted to marry); see also Thlimmenos v. Greece 2000-IV Eur. Ct. H.R. 263, 279 (noting that failure to treat dissimilar groups differently may violate Article 14).

357 See JACOBS, WHITE, AND OVEY, supra note 338, at 558–59.


359 JACOBS, WHITE, AND OVEY, supra note 338, at 559; accord HARRIS, O’BOYLE & WARBRICK, supra note 341, at 579, 583 n.52; REID, supra note 341, at 273; O’Connell, supra note 340, at 218.

360 See European Convention on Human Rights, supra note 338.

361 See supra section I.B.

362 See REID, supra note 341, at 274.


364 HARRIS, O’BOYLE & WARBRICK, supra note 341, at 586.


366 REID, supra note 341, at 275.

367 HARRIS, O’BOYLE & WARBRICK, supra note 341, at 586.

368 Id. at 586–87; see also REID, supra note 341, at 275 (noting that rights violations may not be derived “purely from negative attitudes, varying from hostility or unease, that a particular minority might arouse”).

369 See supra note 28 and accompanying text.

- 40 -
legitimate aim.370 Notwithstanding this unique feature, this step of the proportionality test is often “relatively easily satisfied.”371

Secondly, the state must satisfy Article 14’s proportionality requirement. To do so, the state must show by “convincing evidence” a link between a legitimate aim and the challenged differential treatment.372 However, in many areas, “this is not generally a difficult hurdle for the respondent State to clear, particularly since the Court has held that the purpose of saving money can be a legitimate aim under Article 14.”373 This will especially be the case where the Court, motivated by a concern about second-guessing lawmakers, gives member states a wide margin of appreciation in determining whether there is any objective and reasonable justification for the differentiation.374 The margin of appreciation given “will vary according to the circumstances, the subject matter and its background”375 and arises where the Court “feels it is ill-placed to second guess the national judgment.”376 Specific policy realms where this concern is particularly acute include “national security, public morality, planning decisions and areas where there is no common European standard[].”377 Accordingly, if there is no common or emerging European standard, the Court shifts its focus and it is more likely that differential treatment that is small in scope will be easily outweighed by even less hefty public interest.378 Conversely, a departure from such a consensus will tip the scale in favor of the applicant.379

Notwithstanding the ease with which Article 14’s proportionality requirement is satisfied, particularly where the Court grants the state a wide margin of appreciation, there are circumstances where the Court’s limitations analysis is conducted with a heightened degree of scrutiny. Echoing U.S. equal protection doctrine,380 the Court has held that “[c]ertain grounds of discrimination”—sexual orientation, for instance—are inherently suspect and will be subject to particularly careful scrutiny where there is recognition that discrimination on such grounds is especially demeaning for those affected.381 In this way, the Court has discretion to either afford the state a degree of latitude, depending on any consensus among member states, or subject the state to more rigorous scrutiny when a distinction is based on certain grounds.

371 Id. at 587.
372 JACOBS, WHITE, AND OVEY, supra note 338, at 560.
373 Id.; see also HARRIS, O’BOYLE & WARBRICK, supra note 588 (noting that there is no proportionality if there is no reasonable relationship between the means chosen and the ends sought, which rings of the low bar of rational basis review). But see REID, supra note 341, at 275 (noting that administrative burden is typically not a sufficiently legitimate aim).
374 See Belgian Linguistics Case, 6 Eur. Ct. H.R. (ser A.) at 34 (1968); see also HARRIS, O’BOYLE & WARBRICK, supra note 341, at 589 (noting that even where an applicant identifies a less restrictive alternative, this is not dispositive because the Court is reluctant to superimpose itself and second guess the legislatures of member states). In service of this prudential deference, “the Court’s judgments have been also criticized, at least in the past, for being too favourable to states.” HARRIS, O’BOYLE & WARBRICK, supra note 341, at 614.
375 JACOBS, WHITE, AND OVEY, supra note 338, at 561;
376 O’Connell, supra note 340, at 224.
377 Id.
378 HARRIS, O’BOYLE & WARBRICK, supra note 341, at 589; see also HARRIS, O’BOYLE & WARBRICK, supra note 341, at 588 (“As a general rule the less evidence there is that the state’s differential treatment departs from a common standard in the Convention states, the less likely the Court is to condemn it.”).
379 See, e.g., L & V v. Austria, 2003-I Eur. Ct. H.R. 29, 41 (noting that “a number of members States . . . had recently introduced equal ages of consent”).
380 JACOBS, WHITE, AND OVEY, supra note 338, at 561.
381 Id.
Thus, Article 14 analysis is distinct from analysis under either Section 15 of the Canadian Charter or Section 9 of the South African Constitution. The test on the front end is less well-developed, keeping fewer complainants out; an applicant before the Court need only show some differentiation based on a listed ground or personal characteristic. Although the complainant is not free to complain of discrimination as such but must instead identify discrimination that falls within the ambit of a right guaranteed by the Convention and although the complainant must also show the differentiation is drawn between similarly situated groups, the Court’s focus will chiefly be on the government’s purported justification and the limitations analysis. Consequently, it is perhaps unsurprising that the proportionality test that States Parties to the Convention must satisfy is correspondingly lax and, absent a more “suspect” classification, demands only a reasonable relationship of proportionality, taking into account any applicable margin of appreciation. In this regard, then, it seems safe to say that Article 14 represents the most lenient of the equality clauses analyzed.

B. PROTOCOL NO. 12

Article 1 of Protocol No. 12 to the European Convention on Human Rights has the potential to strengthen the equality right Article 14 protects. Protocol No. 12 reads:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1. 382

Drafted in recognition of Article 14’s “deficiencies,” 383 Protocol No. 12 holds great promise. First, based on the preamble, 384 the emphasis has shifted from a prohibition of discrimination to a recognition of equality. 385 Second, the guarantee of equality is no longer linked solely to a substantive right in the Convention. 386

That being said, Protocol No. 12 was not drafted as a replacement to Article 14, but rather was written in a way that was meant to be read in harmony with interpretations given to Article 14. 387 First, as in Article 14, the list of specified grounds is the same. 388 Because the listed grounds are not exhaustive, 389 it was thought unnecessary to list new grounds and the drafters wanted to avoid raising concerns that including new grounds would have implication for any...
ground not included. Second, as of 2010, there has been no case law on the meaning of Protocol No. 12. Moreover, because Protocol No. 12 is meant to be read in harmony with Article 14, it is unlikely that the European Court of Human Rights would strengthen either the requirements necessary to make out a complaint or the standard of justification imposed on the government to show proportionality. Finally, only a handful of member states have ratified the Protocol, making it “unlikely to play a significant role in the development of equality law under the Convention.”

C. CLASSIFICATIONS ON THE BASIS OF SEXUAL ORIENTATION

Perhaps reflecting some of the ways in which the European Court of Human Rights is, relative to the Canadian Supreme Court and the Constitutional Court of South Africa, more circumspect in its approach to classifications on the basis of sexual orientation, one commentator has noted the

limited contribution to tackling the problems of stigmatisation and discrimination facing persons who are homosexual. While [the Court] made an early and important step in rejecting the criminalisation of adult homosexual acts[ under Article 8’s right to respect for private life], there have been somewhat slow and conservative responses to claims in the realm of family life, differing ages of consent and discrimination generally.

On closer inspection, though, the Court’s Article 14 jurisprudence regarding sexual-orientation challenges is more of a mixed bag. In *Salgueiro da Silva Mouta v. Portugal*, the European Court of Human Rights for the first time found a violation of Article 14 (in conjunction with Article 8) in a case involving sexual orientation. There, the Court found that there had been a difference of treatment based on sexual orientation when an appeals court awarded custody of the applicant’s child by introducing a new factor into its determination—the applicant’s sexual orientation and that he was living with another man. Although the Court accepted that protecting the health and rights of children was a legitimate aim, the Court reasoned that the appeals court’s “decisive” use of the applicant’s sexual orientation to deny custody did not create “a reasonable relationship of proportionality . . . between the means employed and the aim pursued,” in violation of Article 8 taken in conjunction with Article 14.

In a later case, *L & V v. Austria*, the Court noted that “[j]ust like differences based on sex . . . differences based on sexual orientation require particularly serious reasons by way of

---

390 See HARRIS, O’BOYLE & WARBRICK, supra note 341, at 612. Interestingly the drafters of Protocol No. 12 proposed adding sexual orientation to the list of prohibited grounds, but that the proposal was not taken up. *Id.* at 595.
391 JACOBS, WHITE, AND OVEY, supra note 338, at 567.
392 *Id.* at 568.
393 REID, supra note 341, at 389.
395 HARRIS, O’BOYLE & WARBRICK, supra note 338, at 596.
396 *Id.* at 327.
397 See id. at 328 (“[T]he Court of Appeal, when ruling on the applicant’s right to contact, warned him not to adopt conduct which might make the child realise that her father was living with another man ‘in conditions resembling those of man and wife.’”).
398 *Id.* at 329.
justification” for purposes of Article 14, equating for the first time sexual orientation with the Court’s previously identified suspect classifications. The Court accepted without detailed examination the government’s submission that the unequal age of consent provision, challenged in the case, was aimed at protecting adolescent males and therefore had a legitimate purpose. But the Court rejected “predisposed bias” by the straight majority against the gay minority as a legitimate aim and determined that the government had not advanced “convincing and weighty reasons” to justify the unequal ages of consent, in violation of Article 14 taken in conjunction with Article 8.

The Court further elaborated on the implications of the “very weighty reasons” a government must muster when classifying on the basis of sexual orientation in Karner v. Austria. There, the Court stated that

[i]n cases in which the margin of appreciation afforded to member states is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people—in this instance persons living in a homosexual relationship—from the scope of application of [the act].

Thus, although the Court in Karner accepted that protection of the family was a legitimate aim, it concluded that the government had offered no argument that could satisfy the stringent necessity-like standard the Court had laid out and that, therefore, there had been violation of Article 14 taken in conjunction with Article 8. Later, in E.B. v. France, when the Court addressed the government’s justification for denying a gay woman the right to adopt, the majority decision made no mention of the term “margin of appreciation.” Rather, the Court determined that the applicant’s homosexuality was “decisive” to the decision to deny the applicant the right to adopt and proceeded to the limitations analysis. The Court concluded that given that French law permitted single persons to adopt, the reasons the government put forward for why the gay applicant was denied the same opportunity were insufficient to justify the violation of Article 14.

That being said, although the language from Karner may seem to suggest a necessity standard with which a state must comply when attempting to classify on the basis of sexual orientation and although the Court, in evaluating challenges to such classifications, has alluded

---

402 Id. at 44 (citing Smith & Grady v. United Kingdom, 1999-VI Eur. Ct. H.R. 45, 85).
403 Id.
405 Id. at 213 (emphasis added).
406 Id. at 212.
407 Id. at 213.
409 Id. at [para. 89].
410 See id. at [para. 94].
to the “living” nature of the European Convention on Human Rights, the Court seemed to walk back its earlier pronouncements in Schalk and Kopf v. Austria. In that case, the Court rejected a challenge brought by a gay couple in Austria disputing the state’s refusal to permit them to marry. The Court, making little use of the “very weighty reasons” previously required for classifications on the basis of sexual orientation, started by noting that there was no European consensus with regard to same-sex marriage and that “marriage has deep-rooted social and cultural connotations which may differ largely from one society to another.”

On the one hand, the Court ruled that the applicant’s complaint fell within the ambit of Article 8’s protection of both private life and, for the first time, family life. The Court also noted that there had been “a rapid evolution of social attitudes towards same-sex couples” among member states and that there was “an emerging European consensus toward legal recognition of same-sex couples,” which had “developed rapidly over the past decade.” On the other hand, though, even though the Court repeated its discussion of precedent that requires “particularly serious reasons” to justify classifications based on sexual orientation, it noted the “wide margin” allowed states for “general measures of economic or social strategy.” The Court then concluded that the provisions of the Convention should be read in harmony and reasoned that because Article 12’s use of the words “men and women” in describing the right to marry precluded the recognition of same-sex marriage under that provision, Article 8’s more general provision could not be read to require same-sex marriage. Because a majority of states had not yet provided legal recognition for same-sex couples, the Court reasoned that there was “no established consensus” and that therefore states enjoyed a margin of appreciation as to the timing of introducing such legal changes and how to protect same-sex partnerships.

The Court, it seems, was prepared to recognize that gay couples are entitled to respect for their family life and to encourage some form of recognition of same-sex partnerships. However, it was not yet ready to mandate same-sex marriage for all States Parties to the Convention. Although “very weighty reasons” have typically been required for sexual-orientation classifications, the Court has perhaps recognized its status as a supranational human rights body that should carefully circumscribe its review of member states’ policies and acknowledged that a Europe-wide consensus at least as to same-sex marriage has yet to emerge. Thus, the Court has been more pragmatic in its approach to sensitive areas such as partnership recognition, affording members states a wider margin of appreciation and thus greater discretion to legislate.

Article 14 makes for an interesting comparison with the Equal Protection Clause. On the one hand, as with similar provisions in the Canadian Charter and the South African Constitution, the test an Article 14 claimant must satisfy is largely independent of the type of classification at issue (this is especially true given that an applicant need only show differentiation on the basis of

---

411 See id. at [para. 92] (“[T]he Convention is a living instrument, to be interpreted in the light of present-day conditions.”).
412 See 2010-__ Eur. Ct. H.R. __.
413 See id. at [para. 64, 110].
414 Id. at [para. 58].
415 Id. at [para. 62].
416 Id. at [para. 90, 94–95].
417 Id. at [para. 93].
418 Id. at [para. 105] (emphasis added).
419 Id. at [para. 97].
420 Id. at [para. 55].
421 Id. at [para. 101].
422 Id. at [para. 105, 108–09].

- 45 -
some personal characteristic). On the other hand, the Court, at least in the realm of sexual-orientation law, has seemingly engaged in a give-and-take exercise. Classifications on the basis of sexual orientation generally warrant “particularly serious reasons” to be justified, invoking more stringent scrutiny for those classifications or at least a review with an added level of “bite.”\footnote{See supra note 61 and accompanying text.} However, the type of classification may be important at the justification stage: whether and the extent to which member states have classified on a particular basis will inform the margin of appreciation the Court is willing to allow policymakers. Thus, Article 14 jurisprudence may represent a kind of middle ground between U.S. equal protection doctrine and the analyses under the equality clauses in Canada and South Africa.

VI. ANALYSIS

What to make of this review of Canadian, South African, and European Court of Human Rights doctrine? First, I highlight normatively desirable benefits to the limitations analysis that inheres in the two-stage rights review practiced in these legal systems, ones with important implications for changing U.S. equal protection doctrine to make it more principled, holistic, and less outcome-determinative. Second, there are a number of similarities and differences across the systems I have studied such that the United States, should it wish to retool equality doctrine, may choose from a range of options to best fit its doctrinal, structural, and practical needs.

A. THE BENEFITS OF LIMITATIONS ANALYSIS

There are normatively desirable benefits should the United States retool equal protection doctrine to more closely resemble two-stage rights review and the limitations analysis that inheres in it. Chief among them, as I have argued, is the desire to formulate a more principled, holistic, and non-outcome-determinative jurisprudence. For this reason, two-stage rights review is a step in the right direction because, as a procedural doctrine, it does not guarantee outcomes.\footnote{See Foreign Law Debate, supra note 17, at 371, 382; see Mathews & Stone Sweet, supra note 14, at 820, 868; see also Peter J. Rubin, Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw, 149 U. PA. L. REV. 1, 3 n.1 (2000) (“In the courts, strict scrutiny is essentially invoked, not employed. Despite its name—strict ‘scrutiny’—it ordinarily amounts to a finding of invalidity, not a tool of analysis.”).} Moreover, because the two stages avoid the hierarchization of classifications into more suspect and less suspect—and therefore more important and less important—tiers, the make-it-or-break-it question of what level of scrutiny should apply is avoided.

Additionally, there are other benefits to a shift in doctrine toward the limitations analysis that comes with two-stage rights review, ones that avoid the pitfalls of the current tiered doctrine. First, limitations analysis is both sufficiently structured and formalized and yet flexible enough to deal with some of the most complex issues a court may face in adjudicating rights.\footnote{See Foreign Law Debate, supra note 17, at 380; Mathews & Stone Sweet, supra note 14, at 800, 806; Stone Sweet & Mathews, supra note 10, at 88.} Because limitations analysis focuses on the facts of a particular case, the doctrine maximizes flexibility vis-à-vis potential litigants in future cases.\footnote{Mathews & Stone Sweet, supra note 14, at 807.} This flexibility can often help a court diffuse tensions inherent in a case. For instance, limitations analysis acknowledges the equal legitimacy of competing norms, highlights that a determination of who wins is not a mechanical exercise,
but rather a difficult judicial task, and underscores that future cases in which the same values are 
in conflict may come out differently depending on the unique facts of that dispute.\textsuperscript{427} 
Second, limitations analysis is not in tension with the separation of powers concerns that 
animate many theories of judicial review, especially those most popular in the United States. 
Instead, limitations analysis merely “subjects the balancing that inheres in policy making to 
judicial supervision.”\textsuperscript{428} It does not, however, inexorably lead to greater judicial intrusion into 
realms traditionally the province of executive and legislative actors.\textsuperscript{429} And because it focuses on 
the facts of a particular case, limitations analysis lessens the risk of judicial subjectivity.\textsuperscript{430} It also 
accords with doctrines of avoidance, which provide that a court, out of respect for its limited role 
in a democracy, should structure its rulings as narrowly as possible, thus avoiding encroachment 
into democratic policymaking prerogatives. Under limitations analysis, “the tests are sequenced 
in order of increasing stringency, so that courts insert themselves into the legislative process no 
more than is necessary to defend rights.”\textsuperscript{431} But because courts must do some policing in a 
constitutional democracy, limitations analysis also avoids the judicial abdication inherent in the 
current doctrinal dichotomy between deferential rational basis review on the one hand and 
stringent judicial scrutiny on the other—providing, in effect, that a right is either deemed 
absolute or without any force and thus excised it from the constitutional canon.\textsuperscript{432} 
Finally, limitations analysis provides for greater judicial transparency and increased 
predictability for all actors in a legal system.\textsuperscript{433} It permits courts, and litigants, to know in 
advance what arguments will be made and how a court will reason its way to a decision.\textsuperscript{434} And 
because limitations analysis is a constitutional commitment exercised by all organs of the state, 
“[w]here the move to [proportionality] is successful, a court induces all other relevant actors in 
the system—future litigants and their lawyers, governmental officials, legal scholars—to think of 
their roles in terms of proportionality.”\textsuperscript{435} This in turn helps buttress the commitment of political 
actors in a system to uphold and give effect to the constitution’s commands. Because they know 
that their actions may be reviewed for compliance with the constitution, political actors “have an 
incentive to consider the proportionality of their policymaking, and to build a record of their 
deliberations, in order to” ensure their policies pass constitutional scrutiny.\textsuperscript{436} By way of 
example, some have argued that the Canadian Supreme Court’s \textit{Oakes} analysis has become more—perhaps too—deferential to Parliament.\textsuperscript{437} However, the opposite could be argued—that

\begin{footnotesize}
\begin{enumerate}
\item Stone Sweet & Mathews, supra note 10, at 89.
\item Mathews & Stone Sweet, supra note 14, at 804–05.
\item Stone Sweet & Mathews, supra note 10, at 163 (“A court, in processing a stream of cases in the same policy 
domain, may choose to accord more deference to legislative choices, over time, to the extent that lawmakers 
demonstrate that they are taking seriously proportionality requirements when they legislate.”).
\item American Balancing, supra note 18, at 269; see also Heller, 554 U.S. at 719 (reasoning that limitations analysis 
in fact cabins judicial discretion).
\item Id. at 805. But see infra notes 310–312 and accompanying text.
\item Mathews & Stone Sweet, supra note 14, at 838.
\item Stone Sweet & Mathews, supra note 10, at 78, 89; see Mathews & Stone Sweet, supra note 14, at 806; see also 
Heller, 554 U.S. at 719 (arguing that limitations analysis’s “necessary transparency lays bare the judge’s reasoning 
for all to see and to criticize”).
\item Stone Sweet & Mathews, supra note 10, at 90.
\item Id. at 112, 161–62.
\item Id. at 111, 119; accord Aharon Barak, Human Rights in Israel, 39 ISR. L. REV. 12. 19 (2006); see, e.g., Attorney 
evidence in support of its contention that where the new legislation posted limits on free expression, those limits 
were demonstrably justified under [Section] 1 of the Charter.”).
\item Stone Sweet & Mathews, supra note 10, at 122 & n.160.
\end{enumerate}
\end{footnotesize}
there has been a decreased need to conduct Oakes’s limitations analysis de novo because Parliament has become adept at conducting the same analysis for themselves.\footnote{438} This predictability may both point to the lessened democratic tension inherent in this form of judicial review and underscore one of the most important attributes of a move to limitations analysis—providing clear background principles when legislating.\footnote{439}

Not only are there strategic benefits to two-stage rights review and the limitations analysis that inheres in it, but this review also avoids the pitfalls of equal protection’s tiers. Like a jurisprudential Goldilocks, the tiers often end up being too hot or too cold. Limitations analysis avoids the “too hot” problem of strict scrutiny by avoiding the latter’s ironclad rigidity. Although the Supreme Court, in developing the strict scrutiny doctrine, was motivated by a desire to protect itself from accusations of bald judicial lawmaking, the balancing that inheres in limitations analysis is typically less intrusive of legislative prerogatives than the over- and underinclusiveness analyses under strict scrutiny.\footnote{440} Moreover, a strict rule is just as bald an assertion of judicial lawmaking, or worse, because it sets a bar over which the legislature can never leap.\footnote{441}

Limitations analysis also avoids the “too cold” problem of the equal protection’s tiers by providing a level of review that rises above the more-often-than-not toothless rational basis review U.S. courts conduct. Furthermore, there is a certain irony that two-staged rights review may better serve the judicial deference rational basis review is meant to further. Although “the Supreme Court often portrays and uses rational basis as a kind of deference doctrine—it covers policy domains in which legislators, not courts, are to do the balancing,”\footnote{442} a two-stage approach may better insulate legislative policymaking from judicial prying. For example, Canadian equality doctrine does a better job of keeping certain equality claimants out of the courts and thus reserving certain policy debates for the realm of legislative action.

Finally, tiered review, because of its outcome determinacy, undermines the stability of rights adjudication due to the common confusion over which standard to apply to most classifications.\footnote{443} This has led to “unpredictability and instability,” which “are partly to blame for the fact that so much of the analytic firepower in our constitutional [case law] is aimed at the standard of review, rather than the substance of the claim.”\footnote{444} Because tiered review often forces courts to either uphold or strike down every challenged classification—vacillating between extreme poles of stringency and deference—a two-stage rights review and limitations analysis are arguably more principled because they “allow[] a court to tailor the stringency of review to the particulars of each claim, [sidestepping] the conflict and confusion surrounding the choice of a standard of review.”\footnote{445} This circumvents the frequent alternative to limitations analysis: the creation of categorical rules, arranged in a hierarchy, constitutionalizing winners and losers based on the standard of review that is applied.\footnote{446}

\footnotetext{438}{Id. at 122.}  
\footnotetext{440}{Mathews & Stone Sweet, supra note 14, at 836.}  
\footnotetext{441}{Id.}  
\footnotetext{442}{Id. at 838.}  
\footnotetext{443}{Id. at 847.}  
\footnotetext{444}{Id.}  
\footnotetext{445}{Id. at 860.}  
\footnotetext{446}{See Stone Sweet & Mathews, supra note 10, at 88.
B. DOCTRINAL SIMILARITIES AND DIFFERENCES

There are a variety of similarities between Canada, South Africa, and the European Convention on Human Rights when it comes to their respective equality provisions. At most, this may point to the “universal” nature of some features of equality doctrine in other countries, counseling in favor of the United States taking a look. At least, the existence of alternative methods of adjudicating equality challenges shows that the tiered approach to equal protection is not the only means available to respect judicial economy and defer to permissible legislative line-drawing and yet also give life to the Constitution’s command of equality.

There are also several distinctions between the different systems. These differences show the variation between each system’s approach to the guarantee of equality and provide the United States, should it wish to look beyond its borders to reframe equality doctrine, a litany of options from which to choose, some of which may better serve the goals equal protection doctrine seeks to serve while minimizing judicial intrusion into legitimate legislative policymaking.

1. Similarities at the Rights-Violation Stage

Each system shares similarities at the front end, or the rights-interpretation stage of the two-stage approach to constitutional adjudication. First, each of the three systems I study, recognizing that the modern state must engage in line-drawing on a regular basis, distinguishes between permissible and impermissible classifications. In Canada, to control the floodgates of equality litigation, a complainant must show differentiation on the basis of a listed or analogous ground. In South Africa, an equality challenger must show differentiation on the basis of a listed or analogous ground. In the European Court of Human Rights, an applicant must show differentiation on a ground listed in Section 9(3) or “with the potential to impair the fundamental human dignity of persons as human beings or with a comparably serious adverse effect.” And in the European Court of Human Rights, an applicant must show differentiation on the basis of a ground listed in Article 14 or some personal status (although this is perhaps the broadest sluice among the systems).

In none of these systems, however, does the type of classification trigger greater or lesser scrutiny. Rather, these threshold requirements describe whether a claimant is entitled to the full protection of the equality clause instead of detailing what level of review the judiciary will afford. Moreover, it is important to note that unlike the U.S. Equal Protection Clause, against which any legislative classification may be tested, in Canada and South Africa at least, an equality claimant may only ask a court to scrutinize a legislative classification under the equality clause if the differentiation is based on a listed or analogous ground and the claimant can show discrimination. And even before the European Court of Human Rights, a claimant may only ask the Court to consider Article 14 if the complained-of conduct falls within the ambit of another Convention right and the claimant satisfies Article 14’s comparator requirement. In certain ways, then, these systems, in which the equality clause often requires a more exacting standard when triggered, provide for less judicial intrusion into legislative policymaking generally.

These systems do, however, run the gamut when it comes to the threshold requirements a claimant must satisfy. On one end of the spectrum, motivated by the need to control the equality floodgates, Canada requires putative equality claimants to show a differentiation on one of the eight listed grounds or on one of only three unlisted grounds that have been recognized in case law. Absent a challenge alleging differentiation on one of these eleven grounds, as a threshold matter, Canadian courts will turn away a challenge under Section 15. On the other end of the

447 But see section V.C.
spectrum, an equality challenger before the European Court of Human Rights—although he needs to show that the complained-of conduct falls within the ambit of a Convention right and that he is similarly situated to those the conduct favors—need only show a differentiation on the basis of some personal status, a relatively low bar to satisfy. South Africa arguably lies somewhere in the middle. Notwithstanding the seventeen grounds listed in Section 9(3), the Equality Clause outlaws all unfair discrimination so long as an equality claimant can show the classification is based on attributes and characteristics “with the potential to impair the fundamental human dignity of persons as human beings or with a comparably serious adverse effect” and amounts to unfair discrimination. Although more generous than the three unlisted grounds recognized in Canada, the Constitutional Court of South Africa, in turning away challenges to certain classifications under Section 9(3), has shown that mere personal status is not enough.

Second, each system has, either expressly or implicitly, determined sexual orientation to be a ground protected by their respective equality clauses. However, although South Africa expressly proscribes discrimination on the basis of sexual orientation—like the United States, Canada, and the European Convention on Human Rights—it would be wrong to conclude that the South African gay equality cases were dictated only by the language of Section 9(3).448 First, Edwin Cameron, now a Constitutional Court justice, notes that the Equality Clause prohibits all unfair discrimination, regardless of whether the discrimination is on the basis of a listed ground.449 Second, the Constitutional Court, like the Canadian Supreme Court and the European Court of Human Rights, has recognized that there can be analogous grounds based on the language of the Equality Clause, suggesting that even if sexual orientation were not expressly included, that would not necessarily have barred recognizing gay equality claims.450 Third, Cameron highlights that the values of the Constitution, rather than its precise wording, animate the Constitutional Court’s approach to sexual orientation discrimination.451 Equality, then, is a function of the country’s apartheid legacy and the South African conception of ubuntu.453 Cameron argues that because constitutionalism is designed to protect minorities,454 courts would be incorrect to assume that gay equality cases turn on the express protection of sexual orientation in an equality provision. Thus, an explicit mention of sexual orientation is not necessary to determine which classifications warrant scrutiny under an equality guarantee; rather, other parts of the test determine where to draw the line and what classifications get scrutiny at all, in contradistinction to the United States’s tiered approach to equal protection.

2. Similarities at the Limitations-Analysis Stage

Each system also shares similarities at the back end, or the rights limitation stage of the two-stage process of constitutional adjudication. First, each system requires that the government identify some, at least legitimate interest served by the classification. Only the European Court of

---

449 See id.
450 See id. (noting that protection on the basis of sexual orientation has been recognized in the United States, Canada, and by the European Court of Human Rights despite no express constitutional protection for sexual orientation).
451 See id. at 647.
452 Id. at 644–45, 648.
453 Id. at 645–46.
454 See id. at 646–47, 650.
Human Rights requires that the interest be merely legitimate. Although the importance of the interest may not have had a dramatic impact in very many cases, both Canada and South Africa incorporate a sliding scale whereby, depending on the nature of the right and the extent of the impact, the government may be required to identify a more important interest. However, the level of the importance of the interest, it should be noted, does not relate to the type of classification at issue, but rather depends on other factors and the circumstances of the challenge.

Second, each system requires, at bare minimum, a rational connection between the putative interest and the classification. In Canada, this is the first part of the Oakes test. In the European Court of Human Rights, the Court’s implied limitations test for Article 14 requires a rational connection between the classification and the interest advanced. In South Africa, though, this step is handled at the first, or rights interpretation, stage of the Harksen test under Section 9(1). However, so long as a claimant satisfies the threshold requirements of the Equality Clause, in one form or another, all systems protect against arbitrary and irrational classifications much as rational basis review in U.S. doctrine does. Thus, adopting some features from other systems’ jurisprudence does not remove the requirement that the government may not legislate in an arbitrary manner.

Third, each system includes the requirement that the classification be no more than necessary to serve the purpose the government has advanced, with one possible caveat relating to the European Court of Human Rights. In Canada and South Africa, this requirement has been described as the heart of the limitations analysis and may depend on the level of generality at which the government interest is described. In the European Court of Human Rights, the Court has held in at least some cases that because of “very weighty reasons” required for classifications on the basis of sexual orientation, the Court may require a more close tailoring of means to ends bordering on necessity. However, the Court’s decision in Schalk and Kopf may have muddied the waters by suggesting that this requirement need not be satisfied where there is a great diversity between the ways in which the member states approach an important contemporary social issue.

Fourth, all systems require proportionality between the means pursued and the effects of the classification. This is the fourth and final step in the Oakes test in Canada and the penultimate factor listed in Section 36(1) of South Africa’s 1996 Constitution. For the European Court of Human Rights, though, the requirement of proportionality may be weaker and more closely approximate a reasonableness requirement.

Thus, based on similarities across systems at both the front end and the back end, the United States has a number of options from which to select should it decide to change the way it does equality.

3. Doctrinal Differences

There are, however, a number of differences between each of the systems studied. First, there is Canada. On the front end, stage one of the analysis under the Canadian Charter, unlike the South African Constitution or the European Convention on Human Rights, focuses more on...
whether the challenged differentiation stereotypes or perpetuates disadvantage, arguably having rejected the Supreme Court of Canada’s experimentation with human dignity as a requirement in *Law v. Canada*. On the back end, unlike the contextual, all-things-considered, balancing-at-the-end approach to proportionality engaged in by the Constitutional Court of South Africa under Section 36, the Supreme Court of Canada has articulated a universal and strictly structured test under *R v. Oakes*. This has the benefit of predictability and notice to litigants, including both challengers and the government, which may matter to American audiences who often prefer rules to standards and guidance to cabin the discretion of lower courts.

Second, there is South Africa. Arguably, South Africa, more than Canada or the European Court on Human Rights, has a jurisprudence greatly influenced by the country’s recent history, particularly when it comes to the transformation from a racist, apartheid regime to one that respects human rights and the equality of each individual. This may explain both equality’s central place in the 1993 and 1996 Constitutions and the robust protection the Constitutional Court has afforded the Equality Clause under *Harksen v. Lane*. On the one hand, South Africa’s example may inspire the United States to place greater prominence on the values of equality. On the other hand, the robust protection equality is afforded may be too aggressive for the United States, which generally prefers greater discretion to legislatures in how they carry out their lawmaking functions and the executive in how it executes the law.456 However, the more aggressive scrutiny of Section 9(3)’s unfair discrimination test requires that a claimant make out a classification on a listed ground or show that the classification impairs the claimant’s dignity or exacts a comparably serious injury and that it amounts to unfair discrimination. Furthermore, even when unfair discrimination is presumed from a combination of Section 9(3) and 9(5), the government has on occasion been able to rebut the presumption at which point the Court has found no violation of the Equality Clause.457

Finally, there is the European Court of Human Rights. Perhaps reflecting its status as a supranational body imposing its views on an increasingly diverse array of forty-plus states, the Court has articulated the most circumspect approach to equality relative to Canada, South Africa, and even the United States. First, Article 14 has no independent existence but rather depends on the existence of other rights in the European Convention. Although the ambit requirement and broad interpretations given the ambit of most rights have avoided rendering Article 14 superfluous, an equality complainant must still show how the complained-of discrimination relates to one of the rights guaranteed elsewhere in the Convention. Second, an applicant must not only show differentiation, but must also satisfy Article 14’s comparator requirement, proving that the applicant is similarly situated to those who receive favored treatment. Third, in areas of national security, social policy, and contentious areas where no consensus has emerged across Europe, the Court is increasingly likely to afford a state a margin of appreciation giving greater deference to the policy choices the state has made. Although this may cohere with the reluctance the U.S. Supreme Court has at times felt toward striking down state laws in the absence of a trend in a certain direction, there is also a distinctly counter-countermajoritarian feel to the device wherein the Court only rules to protect a minority if a majority is ready to protect that

---

456 Compare President of the Rep. of S. Afr. v. Hugo 1997 (4) SA 1 (CC) at __ para. 13 (holding that the president’s prerogative pardon power is subject to the Equality Clause).

457 See supra note 247.
Nonetheless, this discretion provides an option for those who would like to see a change in equal protection law away from the tiered approach but without ceding too great authority to the Supreme Court to sit in judgment over legislative policymaking, especially of the states.

**Conclusion**

The experiences of Canada, South Africa, and the European Court of Human Rights show the ways in which equality doctrine could be done. Currently, the tiered approach to equal protection is outcome-determinative because the level of review a particular type of classification enjoys will more likely than not determine the outcome of the case. Hence, so much energy is focused on whether classifications on the basis of sexual orientation, for instance, merit heightened scrutiny or mere rational basis review. Thus, rather than permitting other parts of the doctrine to do the work—thereby determining whether the government may or may not permissibly classify—U.S. courts considering sexual-orientation classifications are perhaps right to focus on the circumstances under which a classification is entitled to heightened scrutiny.

But the doctrine need not work this way. Rather, by looking to Canada, South Africa, and the European Court of Human Rights, we may start to see the ways in which the doctrine could be different. On the front end, sexual orientation has been expressly or impliedly recognized as a ground on which the state may not generally differentiate by each of these three systems. This relates to the threshold requirements that must be satisfied before the courts will entertain any equality challenge. Once satisfied, however, the test the court then uses is generally the same. Thus, determining how to analyze an equality challenge must take place in some other part of the doctrine. So long as an equality claimant meets certain threshold requirements that vary slightly from system to system, that a challenge alleges a sexual-orientation classification, as opposed to some other type, does little work.

Instead, the back end is often the focus of a successful equality challenge. By adopting limitations analysis, these other systems are able to permit judicial review while also allowing government to justify certain classifications so long as a sufficiently important interest is identified and, depending on the circumstances, that interest is more or less closely served by the classification. It is not inherently true that abandoning the tiered approach to equal protection means all legislative line-drawing is subject to onerous judicial review, particularly because these other systems may actually provide for less judicial intrusion into legislative policymaking.\(^\text{459}\)

If the two-stage rights review in which Canada, South Africa, and the European Court of Human Rights engage is less outcome-determinative than the United States’s current tiered approach, then U.S. equality doctrine may be improved by adopting a more principled approach to equality across types—equality qua equality. Canadian, South African, and European doctrine is not outcome-determinative like equal protection’s tiers because all types of classifications, so long as they meet certain threshold requirements, are protected under the equality clause. Moreover, proving an equality violation does not end the analysis; instead, the government is permitted to justify its use of a particular classification depending on the circumstances of the

\(^{458}\) But see Mathews & Stone Sweet, supra note 10, at 150 (reasoning that when the Court relies on a growing consensus among members states to rule in favor of a rights claimant, its decision is arguably objective, majoritarian, and transnational).

\(^{459}\) See supra section VI.B.1.
case. Thus, even if the type of classification were to dictate the outcome of a case, the context-sensitive approach to the limitations stage shows that a given classification is not “strict in theory [but] fatal in fact” absent reference to the specific facts and circumstances of the dispute.

If, however, adopting any of the models used by other countries is no less outcome-determinative than current doctrine (perhaps because adopting the approach of one of these others systems will subject many more classifications to the same, perhaps stricter, standard of review across types), then there is still reason to consider jettisoning our tiered system. In addition to its legal ramifications—which classifications win the tiered lottery and which do not—equality doctrine should consider the political ramifications and the message sent when some classifications, but not others, are said to be “suspect” and therefore more deserving of judicial review.

This brief survey of equality doctrine in Canada, South Africa, and the European Court of Human Rights provides an opportunity, I hope, to retool our approach to equality in the United States and offers a variety of options that could possibly be pursued. Dealing with the “paradox” of equality—in other words, coming up with a way to treat people equally while accepting that the modern state must necessarily classify—can be done in a way that leaves ample room to policymakers but does a better job of treating the objects of equality equally.
# Appendix: Comparative Chart

<table>
<thead>
<tr>
<th>United States</th>
<th>Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Equality Clause Text</strong></td>
<td>No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.</td>
</tr>
<tr>
<td><strong>Equality Clause Doctrine</strong></td>
<td>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.</td>
</tr>
<tr>
<td><strong>Equality Clause Text</strong></td>
<td>Strict scrutiny: if a law classifies on the basis of a suspect class or burdens a fundamental right, the government must show that the law is necessary to advance a compelling state interest.</td>
</tr>
<tr>
<td><strong>Equality Clause Doctrine</strong></td>
<td>First, does the impugned law <em>either</em> draw a formal distinction between the claimant and others on the basis of at least one personal characteristic <em>or</em> fail to take into account the claimant’s already disadvantaged position in society resulting in substantively differential treatment between the claimant and others on the basis of at least one personal characteristic?</td>
</tr>
<tr>
<td><strong>Equality Clause Doctrine</strong></td>
<td>Intermediate scrutiny: if a law classifies on the basis of sex or gender, the government must show that the law substantially serves an important government interest and any justification must be “exceedingly persuasive.”</td>
</tr>
<tr>
<td><strong>Equality Clause Doctrine</strong></td>
<td>Second, is the claimant subject to differential treatment on at least one enumerated or analogous ground?</td>
</tr>
<tr>
<td><strong>Equality Clause Doctrine</strong></td>
<td>Rational basis review: if a law does not burden a fundamental right or classifies on any other basis, the complainant must show that the law is not rationally related to <em>any conceivable</em> legitimate state interest.</td>
</tr>
<tr>
<td><strong>Equality Clause Doctrine</strong></td>
<td>Third, does the differential treatment discriminate by imposing a burden or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics <em>or</em> otherwise have the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or member of society, equally deserving of concern, respect, and consideration?</td>
</tr>
<tr>
<td><strong>Limitations Clause Text</strong></td>
<td>The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.</td>
</tr>
<tr>
<td><strong>Limitations Clause Doctrine</strong></td>
<td>First, is the objective of the law pressing and substantial?</td>
</tr>
<tr>
<td><strong>Limitations Clause Doctrine</strong></td>
<td>Second, are the means chosen to achieve the objective reasonable and demonstrably justifiable in a free and democratic society? This requires that:</td>
</tr>
<tr>
<td><strong>Limitations Clause Doctrine</strong></td>
<td>a. The rights violation be rationally connected to the objective of the law;</td>
</tr>
<tr>
<td><strong>Limitations Clause Doctrine</strong></td>
<td>b. The impugned law minimally impair the Charter guarantee; and</td>
</tr>
</tbody>
</table>
| **Limitations Clause Doctrine**                                               | c. There be proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgment.
<table>
<thead>
<tr>
<th>South Africa</th>
<th>European Court of Human Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>The 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.</td>
<td>The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.</td>
</tr>
<tr>
<td><strong>First</strong>, does the differentiation amount to <em>discrimination</em>? If the differentiation is on a specified ground, discrimination is established but if the differentiation is on an unspecified ground, discrimination is established only if the ground is based on attributes and characteristics with the potential to impair the fundamental human dignity of persons as human beings or with a comparably serious adverse effect.</td>
<td><strong>First</strong>, does the complaint of discrimination fall within the ambit of a protected right?</td>
</tr>
<tr>
<td><strong>Second</strong>, if the differentiation amounts to discrimination, does it amount to <em>unfair</em> discrimination? If the differentiation is on a specified ground, unfairness is presumed but if the differentiation is on an unspecified ground, the complainant must establish unfairness, focusing primarily on the impact of discrimination.</td>
<td><strong>Second</strong>, is the alleged reason for the discrimination one of the grounds listed in Article 14 or an analogous ground?</td>
</tr>
<tr>
<td><strong>Third</strong>, can the applicants properly compare themselves with another class of persons that is treated more favorably?</td>
<td><strong>Third</strong>, can the applicants properly compare themselves with another class of persons that is treated more favorably?</td>
</tr>
<tr>
<td>The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose.</td>
<td>Impliedly read into the test for Article 14, the limitations analysis asks whether the difference of treatment is capable of objective and reasonable justification.</td>
</tr>
<tr>
<td>Limitations analysis considers: a. The importance of the right; b. The importance of the purpose of the limitation (which must be sufficiently important); c. The extent of the limitation; d. Proportionality <em>strictu sensu</em> (involving both rational connection <em>and</em> a not-marginal connection); and e. Necessity</td>
<td>** ***</td>
</tr>
</tbody>
</table>

- 57 -