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CHARTER INSIGHTS FOR AMERICAN EQUALITY JURISPRUDENCE

Stephen F. Ross*

Although both the Canadian Charter *and the United States Constitutions protect persons from denial of equal protection of the law, the interpretation of the broad language of the two equality guarantees has been quite different. The Supreme Court of Canada has adopted an approach of substantive equality, concluding that section 15 is designed to prevent the loss of human dignity that accompanies discrimination based on disadvantage and stereotype. At least with regard to race, a majority of the justices on the United States Supreme Court adhere to a jurisprudence of formal equality, concluding that the Fifth and Fourteenth Amendments prohibit–absent compelling justifications–any formal distinction, regardless of whether differential treatment results from racism or a sincere desire to ameliorate prior conditions of racial inequality. This paper suggests that Canadian equality jurisprudence has developed over the last twenty years into a workable constitutional doctrine that deserves attention and, indeed, emulation in the United States. Although from a purely descriptive perspective there are a variety of historical and value-based differences between American and Canadian society that can explain the different constitutional doctrines developed in each country, the paper considers and rejects the hypothesis that these differences are so significant as to render Canadian insights irrelevant to the American context. The paper concludes that the Canadian approach is more faithful to a jurisprudence sensitive to the limited judicial activism called for by the landmark American decision in Carolene Products.*

I. INTRODUCTION

It would be preferable to add to the observations of my colleagues regarding constitutional developments in South Africa and New Zealand with parallel reports of the profound effect that the *Canadian Charter of Rights and Freedoms* [1] has had on American constitutional law. As in so many other areas of life, however, Americans are much less interested in the law of other countries than

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 [*Charter*].

we should be.[2] As is doubtless true elsewhere as well, this ethnocentrism, especially with regard to our northern neighbour, is a major mistake. Canadian constitutional law, and in particular the *Charter*, provide extremely valuable insights that may be employed to develop constitutional doctrines in the United States. This paper discusses the significant differences in equality jurisprudence between the Supreme Court of Canada's interpretation of section 15 of the *Charter* and the United States Supreme Court's interpretation of the Fourteenth Amendment to the Constitution.[3]

Although both the Canadian *Charter* and the United States Constitution protect persons from denial of equal protection of the law, the interpretation of the broad language of the two equality guarantees has been quite different. The Supreme Court of Canada has adopted an approach of substantive equality, concluding that section 15 is designed to prevent the loss of human dignity that accompanies discrimination based on disadvantage and stereotype. At least with regard to race, a majority of the justices on the United States Supreme Court adhere to a jurisprudence of formal equality, concluding that the Fifth and Fourteenth Amendments prohibit–absent compelling justifications–any formal distinction, regardless of whether differential treatment results from racism or a sincere desire to ameliorate prior conditions of racial inequality.

This paper suggests that Canadian equality jurisprudence has developed over the last twenty years into a workable constitutional doctrine that deserves attention and, indeed, emulation in the United States. Part I traces the evolution of the doctrine of formal equality in American jurisprudence and of substantive equality by the Supreme Court of Canada. Part II considers several objections to a jurisprudence that tolerates affirmative action programs and explores the Canadian response to these concerns. Although from a purely descriptive perspective there are a variety of historical and value-based differences between American and Canadian society that can explain the different constitutional doctrines developed in each country, Part III analyses these differences and suggests that they are not so significant as to render Canadian insights irrelevant to the American context. Part IV concludes that the Canadian approach is more faithful to a jurisprudence sensitive to the limited judicial activism called for by the landmark American decision in *Carolene Products*.[4]

II. The Different Approaches to Equality

Perhaps the best known statement of constitutional law ever written by the United States Supreme Court is the ringing declaration from *Brown v. Board of Education of Topeka, Shawnee County, Kan.* that "separate educational facilities

2 *See, e.g., Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) ("we think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one").

3 This represents an overview of a larger project planned to review a variety of differences between American and Canadian constitutional approaches, including other substantive, procedural, and separation of powers issues.

4 *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) [*Carolene Products*].

are inherently unequal."[5] When my students at the University of Illinois are asked, virtually all agree with this statement. Yet when I turn to my Comparative Constitutional Law students at the University of British Columbia, taking the course via teleconferencing, most demur, citing the *Charter* guarantee of separate educational facilities for linguistic minorities.[6] Canadian students easily distinguish *Brown*, observing the fundamental difference between a white majority telling racial minorities that their children cannot attend the same schools as their white neighbours and the situation where Anglophone Montrealers or Francophone Edmontonians demand the right to send their children to separate schools they control to be taught in their native language. In short, separate educational facilities are not *inherently* unequal.

Of course, the United States Supreme Court understood this distinction. Prior to its ringing, if misleading, statement, the Court carefully catalogued the way that apartheid in the American south had rendered equal segregated schools an impossibility–*in that specific context.* After emphasizing the importance of education in life's successes, the Court observed that to separate minority children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[7] The Court cited with approval the finding of the trial judge that state-sanctioned segregation "is usually interpreted as denoting the inferiority of the negro group."[8] In contrast, especially where minority parents are given control of a separate but equal education that is optional for their children,[9] inferences of inferiority can simply not be drawn.

Significantly, although the unanimous decision in *Brown* overruled the "separate but equal" doctrine originally enunciated by the Court in *Plessy v. Ferguson*,[10] the opinion did not expressly endorse (nor has a majority opinion ever endorsed) Justice John Marshall Harlan's famous statement in his *Plessy* dissent that the "Constitution is color-blind."[11] The Court did, however, suggest that *Plessy* had not been faithful to post-Civil War decisions interpreting the Equal Protection Clause of the Fourteenth Amendment "as proscribing all

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5 347 U.S. 483, 495 (1954) [*Brown*].

6 *Supra* note *2*, Section 23.

7 *Brown, supra* note 6 at 494.

8 *Ibid.* at 494.

9 *Mahe v. Alberta*, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69.

10 163 U.S. 537 (1896), rev'd *Brown, supra* note 6 [*Plessy*].

11 *Ibid.* at 559. Indeed, this famous adage has been cited only five times in minority opinions by Supreme Court justices. Its first invocation was in a concurring opinion by Justice Douglas in *Garner v. Louisiana*, 386 U.S. 157, 185 (1961), to support his view (not shared by the Court) that public restaurants could not constitutionally discriminate on the basis of race. See also *Bell v. Maryland*, 378 U.S. 226, 288 (1964) (Goldberg, J., concurring) (joining Court's remand of trespass convictions for protesting discrimination by restaurants because of change in state law, opinion found private discrimination unconstitutional). These concurring opinions have not received judicial acceptance, but were implemented by statute when Congress enacted the *Civil Rights Act of 1964*, Title II of which prohibits racial discrimination in public accommodations. Pub. L. No. 88-352, 78 Stat. 241. In the principal dissent to *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 356 (1978) [*Bakke*], four justices wrote

state-imposed discriminations *against the Negro race.*"[12] The ambiguity about whether the United States Constitution demands formal equality, or instead requires that an empowered majority not discriminate against a disadvantaged minority, indeed comes from the very opinions upon which *Brown* relied. In a footnote,[13] the Court in *Brown* quoted from *Strauder v. West Virginia*'s interpretation of the Fourteenth Amendment:

> It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that *the law in the States shall be the same for the black as for the white;* that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to *the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them* by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, *implying inferiority in civil society,* lessening the security of their enjoyment of the rights which others enjoy, and *discriminations which are steps towards reducing them to the condition of a subject race.*[14]

As is evident in this same paragraph, cited in full in *Brown*, the Court announced a doctrine of formal equality and at the same time read the Amendment to protect racial minorities against "unfriendly legislation *against them*" that "implied inferiority" or were "steps toward reducing them to the condition of a subject race." But the modern tension between colour-blindness and affirmative action was not even contemplated during legislative deliberations regarding the *Civil Rights Act of 1964,* much less at the time of the Fourteenth Amendment. As Justice Louis Powell explained:

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that Justice Harlan's "short-hand phrase" has "never been adopted by this Court as the proper meaning of the Equal Protection Clause." Harlan, J.'s language was first invoked to support an interpretation that prevented ameliorative legislation in the dissenting opinion in *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) [*Fullilove*], (Stewart, J., dissenting) (majority had upheld a statute requiring 10% of federal contracts to be set-aside for minority contractors), overruled, *Doe v. Univ. of Illinois* 138 F.3d 653 (7th Cir. 1998). *See also Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 627 (1990) (O'Connor, J., dissenting) (majority upheld FCC policy of favouring broadcast license applications from minority owned companies) *cert denied,* 497 U.S. 1050 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 421 (1989) (Scalia, J. dissenting) [*Croson*] (objecting to suggestion in plurality opinion of O'Connor, J. that racial discrimination may in some circumstances be constitutional to ameliorate prior discrimination).

12 *Brown, supra* note 6 at 490 (emphasis added).

13 *Ibid.* at 490 n.5.

14 100 U.S. 303, 307-08 (1880) (emphasis added)[*Strauder*].

> The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. ... There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee *those* citizens equal treatment.[15]

Both the *Strauder* footnote and the paradoxical marshalling of contextual evidence about the effect of segregation on African-Americans while proclaiming the "inherent" inequality of segregation contain the seeds of the division that now plays out in a series of five-to-four decisions by the United States Supreme Court on issues of racial discrimination. This division was first exposed in *Bakke*,[16] where a splintered Court struck down a plan reserving a fixed number of spaces at the UC Davis medical school for racial minorities. Four justices did not reach the constitutional issue, finding instead that the plan violated a statutory prohibition on race discrimination by institutions receiving federal funds.[17] Justice Louis Powell cast the decisive vote against the plan, concluding that the statute only prohibited discrimination that was unconstitutional[18] and then holding that the Fourteenth Amendment, although conceived by many of its drafters as "bridging the vast distance between the members of the Negro race and the white 'majority,'" was framed without reference to colour and therefore applied to prohibit programs that adversely affected white persons on the grounds of race.[19] Four other justices, agreeing with Powell, J. on the statutory issue, dissented from his conclusion that affirmative action programs were unconstitutional. The dissent found that these programs did not seem to violate the "cardinal principle" from the Court's prior equality jurisprudence: "racial classifications that stigmatize–because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism–are invalid without more."[20] However, "because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications," courts should review racially-differential treatment to ensure that it serves "an important and articulated purpose" and should invalidate action "that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program."[21]

The current five-justice majority has embraced Justice Powell's basic approach in *Bakke*, interpreting the Equal Protection Clause to require a state to demonstrate that ameliorative legislation drawing race-based lines is

15 *Bakke*, *supra* note 12 at 285 (Powell, J.)(emphasis added).

16 *Ibid.*

17 *Ibid.* at 412 (Stevens, J., concurring in the judgment in part and dissenting in part).

18 *Ibid.* at 287.

19 *Ibid.* at 293 (citing *The Slaughterhouse Cases*, 16 Wall. 36, 71, 21 L.Ed. 394 (1873)).

20 *Ibid.* at 357-58 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment and dissenting in part).

21 *Ibid.* at 361.

necessary to achieve a compelling state interest[22] and expressly rejecting the view that constitutional analysis depends "on the race of those burdened or benefited by a particular classification."[23] In contrast, the current dissenting justices adhere to the view expressed by the *Bakke* dissenters that the Fourteenth Amendment reflects a "duty to govern impartially" that is not violated when the majority acts to benefit under-represented groups that lack power.[24]

The United States Supreme Court's decision in *Bakke* also marks the departure point for Canadian equality jurisprudence. The drafters of the *Charter* specifically included section 15(2), stating that the general equality principle of section 15(1) "does not preclude" governmental action "that has as its object the amelioration of conditions of disadvantaged individuals or groups" in order to avoid litigation similar to *Bakke*.[25] Beginning with *Andrews v. Law Society British Columbia*,[26] the Supreme Court of Canada held that the purpose of the equality guarantee in section 15(1) is to remedy historical disadvantage, and has recognized that identical treatment can perpetuate disadvantage and that equality may sometimes require different treatment. As the unanimous Court recently stated in *Lovelace v. Ontario*[27]—after determining that the challenged governmental action the question imposes differential treatment based on grounds proscribed by section 15[28]—courts ask whether the challenged action "is substantively discriminatory."[29]

The Canadian embrace of substantive equality did not inevitably follow from the framers' determination to reject *Bakke*. Indeed, most American readers of the *Charter's* text assume that section 15(2) is an exception to the equality principles set forth in section 15(1), which otherwise would seem to be equivalent to the Equal Protection Clause of the Fourteenth Amendment.[30] Without this "exemption," the broad equality rights in section 15(1) could be

22 See, e.g., *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

23 *Ibid.* at 623 (quoting *Croson, supra* note 12 at 472 (plurality opinion).

24 *Ibid.* at 678 (Stevens, J., dissenting).

25 *Ardoch Algonquin First Nation v. Ontario* (1997), 33 O.R. (3d) 735, 148 D.L.R. (4th) 126, 142-43 (C.A.), *aff'd sub nom. Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193.

26 [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Andrews* cited to S.C.R.].

27 [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193 [*Lovelace* cited to S.C.R.].

28 Unlike the Fourteenth Amendment, the text of section 15 provides that individuals are protected from discrimination, "and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The Supreme Court has interpreted this to limit the scope of Section 15 to discrimination based on these enumerated grounds or grounds "analogous" to the enumerated ones. See, *e.g., R. v. Turpin*, [1989] 1 S.C.R. 1296, 1332, 48 C.C.C. (3d) 8. See P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, loose-leaf ed.), at §52.7(e) (alienage, sexual orientation, and status as a non-reserve Indian are analogous grounds; persons injured by employment-related accidents, claimants against the Crown, place of residence are not).

29 *Lovelace, supra* note 28 at 984.

30 To be sure, the Canadian *Charter* is more specific, declaring that every individual is equal before the law, under the law, has the right to equal protection, and the right to equal benefit of the law, while the American Constitution simply prohibits states from depriving persons of equal protection of the law. But this additional language was not designed to make Canadian equality rights more expansive than American equality rights, but rather to respond to specific and oft-criticized narrow interpretations of the equality provisions in the pre-*Charter* statutory *Bill of Rights*. Hogg, *supra* note 29 at §52.6(a).

read in accord with the majority American view.

The Supreme Court of Canada, however, has explicitly rejected such a reading, which would inappropriately view affirmative action programs as constituting prima facie violations of the basic equality principles of Section 15(1)—a view inconsistent with substantive equality analysis.[31] Rather, the section is seen as "comfirmatory and supplementary to Section 15(1)," not as "language of defence or exemption."[32] Both sections reflect a shared "central purpose"–"to protect against the violation of essential human dignity" that comes from substantive discrimination.[33]

To determine whether an act is substantively discriminatory, the Court takes a look at four "contextual factors"–"(i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability, (ii) the correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others, (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society, and (iv) the nature and scope of the interest affected by the impugned government activity."[34] Although the Court has rejected a "strict dichotomy" between advantaged and disadvantaged groups, the Court has identified

> the social reality that a member of a group which historically has been more disadvantaged in Canadian society is less likely to have difficulty in demonstrating discrimination. Since *Andrews*, it has been recognized in the jurisprudence of this Court that an important, though not exclusive, purpose of s 15(1) is the protection of individuals and groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities." The effects of a law as they relate to this purpose should always be a central consideration in the contextual Section 15(1) analysis.[35]

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31 *Lovelace, supra* note 28 at 1007 (citing Colleen Sheppard's 1993 report for the Ontario Law Reform Commission, "Litigating the Relationship Between Equity and Equality").

32 *Ibid.* at 1010. A leading constitutional expert "noted that the drafters of section 15 added section 15(2) out of 'excessive caution,' intending to bolster the substantive equality approach in section 15(1), since, at the time the *Charter* was being drafted, there was a worry that affirmative action programs would be over-turned on the basis of reverse discrimination." *Ibid.* (citing Walter S. Tarnopolsky, "The Equality Rights in the *Canadian Charter of Rights and Freedoms*" (1983), 61 Can. Bar Rev. 242). This line of reasoning was previewed by the opinion by Justice Ritchie, for himself and three colleagues, in *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1981] 1 S.C.R. 699, 711, 124 D.L.R. (3d) 1 [*Athabasca*] ("I can see no reason why the measures proposed by the 'affirmative action' programs for the betterment of the lot of the native peoples in the area in question should be construed as 'discriminating against' other inhabitants" in violation of the Alberta employment discrimination statute, which did not contain any exempting provision such as section 15(2) of the *Charter*). The majority of the Court did not reach that question.

33 *Lovelace, supra* note 28 at 984.

34 *Ibid.* at 990-91.

35 *Ibid.* at 986-87 (quoting *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 537, 170 D.L.R. (4th) 1) [*Law* cited to S.C.R.]. The reference in the quote is to *Andrews, supra* note 27.

Thus, in a marked departure from the current American majority view, the Court has explicitly held that:

> where a relatively more advantaged claimant was excluded from a targeted ameliorative program ... the exclusion will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.[36]

III. CANADIAN INSIGHTS ABOUT COMMON VALUES

This paper is obviously not intended to provide comprehensive treatment of the constitutionality of affirmative action in either country. However, the Canadian experience does shed light on at least two arguments often made by American justices hostile to the use of race-conscious measures to ameliorate social problems. One is that affirmative action programs do not really eliminate societal disadvantage and racism, but rather reinforce stereotypes about racial minorities, engender feelings of superiority by the majority, and create resentments that frustrate racial progress. Another argument is that a jurisprudence where the legality of classifications turns on concepts like societal disadvantage, stigma, or affronts to human dignity is standardless and not administrable. These arguments have salience on both sides of the border. The Canadian experience provides modest insights for interested Americans about how a similar legal culture views these important issues, raising serious questions about whether these arguments justify the use of judicial power to invalidate ameliorative statutes.

Interpreting the Fourteenth Amendment to promote formal equality is sufficient but not necessary to create doctrine hostile to race-conscious affirmative action programs. Many Americans hostile to affirmative action might well reach the same conclusion even if American equality jurisprudence, like Canadian law, focused on a contextual assessment of substantive discrimination. *Law*, after all, condemns differential treatment based on stereotype.[37] In *Bakke*, Justice Powell observed that preferential programs "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[38] In *Adarand*, Justice Thomas, citing the principle from the Declaration of Independence that "all men are created equal," argued that "the paternalism that appears to lie at the heart of [the challenged affirmative action] program is at war with the principle of equality that underlies and infuses our Constitution." He added:

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36 *Law, ibid.* at 539.

37 *Supra* note 36 at 535.

38 *Supra* note 12 at 298.

> But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. Socalled "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[39]

To be sure, these arguments are highly contested even within American jurisprudence. Justices in the American minority are keenly aware of the potential for discriminatory legislation to be designed in a manner appearing to be helpful to the disfavoured class, but have not found the racial classifications challenged in the cases discussed above to be wanting on that score. Justice Ruth Bader Ginsburg, for example, pioneered the argument that the exclusion of women from juries and other acts appearing to "help" women were constitutionally flawed because they were based on stereotype.[40] She has had no difficulty, however, concluding that deliberate drawing of majority-black districts or congressional schemes to aid minority entrepreneurs do not raise these constitutional difficulties.[41]

The significance for Americans of Canadian jurisprudence here is a version of Sherlock Holmes' famous insight about the dog that didn't bark.[42] None of the major equality decisions from the Supreme Court of Canada even discusses this concern seriously. In contrast, when the Canadian justices considered the constitutionality of criminalizing hate speech, now-Chief Justice McLachlin dissented expressly on the basis that providing special attention to crimes directed at racial or religious groups would create resentment and martyr status for bigots that would frustrate Canada's goals of ending discrimination and bigotry.[43] Inquiring American minds might find the Canadian sanguinity to simply be misguided, or might identify something in comparative sociology that suggests that ameliorative programs in the United States are more likely to exacerbate racial tensions than similar programs north of the border. Still, the Canadian perspective should at least call for further introspection about why

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39 *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., dissenting) [*Adarand*].

40 *See* K. M. Sullivan, "Constitutionalizing Women's Equality" (2002) 90 Calif. L. Rev. 735, 752.

41 *See, e.g., Hunt v. Cromartie*, 532 U.S. 234 (2001) (joining majority opinion upholding race-conscious redistricting plan); *Adarand, supra* note 40 at 271 (dissenting op.) ("in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case" and stating agreement with Stevens, J., that courts should defer to congressional authority to overcome historic racial subjugation).

42 *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991), *cert. denied* 975 F.2d 1092 (1992)(citing A. Doyle, "Silver Blaze," in *The Complete Sherlock Holmes* 335 (1927)).

43 *R. v. Keegstra*, [1990] 3 S.C.R. 697, 836-37, 852-53, 61 C.C.C. (3d) 1 [*Keegstra*].

American justices currently in the majority are so confident of their conclusion that they are prepared to displace the views of elected officials on the subject.

Another important concern expressed by the American majority about ameliorative programs is that a substantive equality standard lacks judicially manageable standards. In *Bakke*, Justice Powell complained that his brethren who favoured less active scrutiny of affirmative action than hostile racial classifications "offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification."[44] In his view, jurisprudence of substantive equality would require courts to:

> evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence–even if they otherwise were politically feasible and socially desirable.[45]

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44 *Bakke, supra* note 12 at 295 n.34.

45 *Ibid.* at 296-97. *See also DeFunis v. Odegaard*, 416 U.S. 312, 338 - 339 (1974) [*DeFunis*] (Douglas, J., dissenting):

> The reservation of a proportion of the law school class for members of selected minority groups is fraught with... dangers, for one must immediately determine which groups are to receive such favoured treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favoured group. There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt v. Painter*, 339 U.S. 629 (1950), and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and even-handed manner.

Even Justice John Paul Stevens, who has recently voted to support a variety of ameliorative plans, dissented from a "minority set-aside" to federal construction funds, arguing that "our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members."[46]

This is an area where American jurisprudence is in play, and the Canadian example may provide assistance. In the area of gender classifications, a majority of the United States Supreme Court agrees that

> "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promote equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to perpetuate the legal, social, and economic inferiority of women.[47]

Canadian judges have proved adept at managing the *Law* standard of substantive discrimination, which focuses on factors such as pre-existing disadvantage and stereotype, the relationship between the classification and the actual needs of affected persons, and the ameliorative purpose or effects of the

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46 *Fullilove, supra* note 12 at 539. My friend Robin Elliot observes that the risk that the legislature will use the pretext of affirmative action to favour various racial or ethnic groups may be greater in the United States than in Canada because of the structural differences in our legislative processes. In the United States, the President and legislative leaders may often need to resort to bargaining and favours to obtain the votes necessary to secure passage of legislation. Indeed, Justice Stevens suggested in *Fullilove* that the challenged "set-aside" of 10% of government contracts for minority contractors may have been more due to the political demands of the Congressional Black Caucus than a serious attempt to ameliorate particular forms of discrimination. *Ibid.* at 541-42. In Canada, a government that legislates with party discipline has less need to bargain to obtain votes to secure passage of legislation. However, this distinction can be overstated. Liberal governments in Ottawa are notorious for protecting ethnic and other constituencies among their supporters with patronage. Moreover, non-legislative pressure can also result in favoured treatment, which could represent legitimate ameliorative policy or simply raw politics. For example, the affirmative action hiring plan upheld in *Athabasca, supra* note 33, was approved to remove objections by native groups to a proposal, requiring approval of a provincial regulatory board, that would permit energy companies to engage in extensive exploration activities. (For a quick summary of these legislative differences, see S. F. Ross, "Comparative Canadian/U.S. Law" (fall 2002 ed.), at I-1 to I-8. These materials are available on the internet by going to my website: http://www.law.uiuc.edu/faculty/DirectoryResult.asp?Name=Ross,+Stephen, and going to the appropriate link.

47 *United States v. Virginia*, 518 U.S. 515, 533-34 (1996).

classification.[48] For example, in *Lavoie v. Canada*,[49] the Court sustained a federal statute granting a citizenship preference for certain "open competition" positions in the federal civil service as a reasonable limitation (under section 1) only after concluding that the statute's discrimination against non-citizens was a violation of section 15(1). The plurality thoughtfully explained the critical issue: how non-citizens, subject to political marginalization, stereotyping, and historical disadvantage, felt:

> legitimately burdened by the idea that, having made their home in Canada, ... their professional development was stifled on the basis of their citizenship status. Their subjective reaction to the citizenship preference no doubt differed from their reaction to not being able to vote, sit in the Senate, serve on a jury, or remain in Canada unconditionally. An obvious difference in this context is that employment is vital to one's livelihood and selfworth; another is that there is no apparent link between one's citizenship and one's ability to perform a particular job; finally, the distinction can reasonably be associated with stereotypical assumptions about

48 In addition to the cases discussed in text, see *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 186 D.L.R. (4th) 1 (applying *Law* to reject claim of discrimination by disabled pension applicant who had not met contribution qualifications for Canada Pension Plan benefits he was seeking); *Montreal (Ville) v. Quebec (Commission des Droits de la Personne et des Droits de la Jeunesse)*, [2000] 1 S.C.R. 665, 686 at para. 36, 185 D.L.R. (4th) 385 (liberally interpreting section 15's bar on discrimination on the basis of handicap–in a manner broader than provided under U.S. statutes–to include applicant denied employment because of physical impairment even though applicant was not deprived of general life functions, because purpose of anti-discrimination legislation is to "eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics"; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513 (not stereotypic substantive discrimination to exclude RCMP officers from collective bargaining scheme of *Public Service Staff Relations Act*); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, 678, 175 D.L.R. (4th) 193 (differential treatment of those found not criminally responsible due to mental illness, involving individualized analysis of their particular dangerousness, is "antithesis" of discrimination based on stereotype); *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 (majority and dissent both focus on whether statutory provision for "spousal support" for common law heterosexual couples but not same-sex couples is the result of stereotype or rather lack of economic disadvantage in same-sex couples). Although the concept of substantive discrimination from *Andrews, supra* note 27, seems widely accepted, Canadians disagree as to whether *Law's* consideration of human dignity as an element of the Section 15 analysis is proper, or whether instead these sorts of considerations are best analyzed in determining whether a discriminatory act constitutes a reasonable limit under section 1. Compare Hogg, *supra* note 29 at 52-25 (2001 leaflet ed.) ("element of human dignity ... is, in my view, vague, confusing and burdensome to equality claimants") with D. Greschner, "Does Law Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299, 309 ("labeling every distinction on enumerated or analogous grounds as a violation of equality ... is inconsistent with substantive equality itself"). See text accompanying notes 61-62, *infra*.

49 2002 SCC 23, 210 D.L.R. (4th) 193 [*Lavoie* cited to SCC].

> loyalty and commitment to the country, even if that is not Parliament's intention.[50]

In contrast, Justices Arbour and LeBel concluded that section 15(1) was not violated under the *Law* standard. Justice Arbour distinguished an unconstitutional provincial bar on non-citizens' admission to the bar from the challenged statute. She characterized the latter as establishing "a package of incentives–rights and privileges of citizenship–that will provide sufficient motivation for non-citizens to naturalize and in the process take on these more burdensome incidents, or duties, of citizenship."[51] Such a package "militates strongly against finding that [the citizenship preference] is discriminatory in the sense that it violates human dignity."[52] Although the justices disagreed, the focus of the dispute illustrates how substantive equality can be judicially manageable.

In *Lovelace*,[53] the unanimous Court found that an agreement between the Province of Ontario and representatives from the province's First Nations concerning casino development did not substantively discriminate against non-participating Aboriginal communities that were not registered as bands under the *Indian Act*.[54] Despite "a recognition that, regrettably, the appellant and respondent Aboriginal communities have overlapping and largely shared histories of discrimination, poverty, and systemic disadvantage that cry out for improvement,"[55] the specific action challenged–a partnership between the government of the province and the government of organized bands to create funds to facilitate effective Aboriginal self-government–did not function "by device of stereotype." Rather, it was tailored to accomplish the specific purposes of a government-to-government venture that was simply not possible with Aboriginal communities that were not formally organised under federal law.[56] In light of the ameliorative purpose of the law, the exclusion of other differently situated (even if similarly disadvantaged) groups are less likely to convey "the message that the excluded group is less worthy of recognition and participation in the larger society."[57] The Court drew a sharp contrast between the statute upheld in *Lovelace* and the one struck down in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.[58] In that case, the Court invalidated under section 15(1) a provision of the *Indian Act* that required Indians to be "ordinarily resident" on a band's reserve in order to vote in band elections. The Court had reasoned in *Corbiere* that

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50 *Ibid.* at para. 52. McLachlin, C.J.C., and L'Hereux-Dubé and Binnie, JJ., agreed with this portion of the plurality opinion but dissented from the plurality's conclusion that the violation of s.15(1) was a reasonable limit.

51 *Ibid.* at para 115.

52 *Ibid.* at para 117.

53 *Supra* note 28.

54 R.S.C., 1985, C. I-5.

55 *Lovelace, supra* note 28 at 961.

56 *Ibid.* at 993.

57 *Ibid.* at 954.

58 [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1[*Corbiere* cited to S.C.R.].

> The impugned distinction perpetuates the historic disadvantage experienced by offreserve band members by denying them the right to vote and participate in their band's governance. Offreserve band members have important interests in band governance which the distinction denies. They are coowners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of offreserve band members, the complete denial to offreserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live offreserve.[59]

Indeed, Law itself exemplifies how a substantive discrimination standard can be applied in a manageable way to lead to a conclusion of no discrimination. The plaintiff challenged her denial of survivor's benefits under the Canada Pension Plan until she reached age forty-five. The Court rejected her constitutional challenge, reasoning:

> The answers to the questions which I posed above with respect to human dignity thus lie, in part, in the aim and effects of the legislation in providing longterm financial security for Canadians who lose a spouse, coupled with the greater flexibility and opportunity of younger people without dependent children or disabilities to achieve longterm security absent their spouse. Yes, the law imposes a disadvantage on younger spouses in this class. But it is unlikely to be a substantive disadvantage, viewed in the long term. The law on its face treats such younger people differently, but the differential treatment does not reflect or promote the notion that they are less capable or less deserving of concern, respect, and consideration, when the dual perspectives of longterm security and the greater opportunity of youth are considered. Nor does the differential treatment perpetuate the view that people in this class are less capable or less worthy of recognition or value as human beings or as members of Canadian society. Given the contemporary and historical context of the differential treatment and those affected by it, the legislation does not stereotype, exclude, or devalue adults under 45. The law functions not by the device of stereotype, but by distinctions corresponding to the actual situation of individuals it affects. By being young, the appellant, a fortiori, has greater prospect of longterm income replacement.[60]

59 *Ibid.* at para. 17.

60 *Law, supra* note 36 at para. 102.

To be sure, the rhetoric of "human dignity" that is the focus of recent Canadian equality jurisprudence would seem to be subject to the very concerns raised in *Bakke* and other American cases about judicial administrability.[61] Although the court has used this broad language to explain the "central purpose" of section 15,[62] the Court's holdings make it clear that the doctrinal test remains focused on stereotype and disadvantage. That is to say, there are no cases where the Court has found stereotype and disadvantage where it did not find harm to human dignity, and no cases where the court found a harm to human dignity that did not involve stereotype and disadvantage. The Canadian cases thus reflect a body of law that builds upon a foundation similar to that articulated by the dissenters in *Bakke* and, more recently, in the area of gender classifications, by the majority in *United States v. Virginia*.[63] It deserves consideration and possible emulation south of the border.

IV. IS CANADA TOO DIFFERENT TO BE RELEVANT TO AMERICAN JURISPRUDENCE?

An analysis of the differences in legal doctrine between two countries with so much in common, like the United States and Canada, will generally reveal three major explanations for the differences:

A. differences in the origins of our political and legal institutions help expose the historical roots underpinning our respective constitutional doctrines;
B. in some important respects, American and Canadian societies reflect differing dominant cultural values that lead to political ideologies underlying constitutional judgments by our respective supreme courts;

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61 Indeed, it is controversial among Canadian scholars as well. See *supra* note 49.

62 *Supra* note 28 at 984.

63 *Supra* note 48. It might facially appear that the Canadian approach and the minority view in the United States are not the same, in that even the dissent in *Bakke* called for close judicial scrutiny of ameliorative racial classifications to assure that they furthered an important governmental interest and neither stigmatized nor unduly burdened a particular politically marginalized group. *Bakke, supra* note 11 at 361-62. One might view the Canadian approach as eliminating a similarly close review for ameliorative programs north of the border. This view was explicitly rejected in *Re MacVicar and Superintendent of Family and Child Services* (1986), 34 D.L.R. (4th) 488, 503, 29 C.R.R. 37 (B.C.S.C.) [*MacVicar*], where the court noted that under such a view "little discriminatory legislation could ever be attacked successfully, for almost all positive law has as its stated object the betterment or amelioration of the conditions in our community of a disadvantaged individual or group." (This view was endorsed by McLachlin and Gonthier, JJ., in *R. v. Hess and Nguyen*, [1990] 2 S.C.R. 906, 945, 59 C.C.C. (3d) 161.) The approach undertaken in *Lovelace* seems very much in accord with *MacVicar* and the *Bakke* dissent. Having found that the tripartite agreement between the provincial government, First Nations bands and private casino operators constituted a genuine ameliorative program, the Court did not end its inquiry but rather carefully considered whether the exclusion of Aboriginal groups not part of First Nations bands organized under the *Indian Act* constituted substantive discrimination, either by classifying based on stereotype or unfairly burdening them.

> C. Canada's *Charter* of Rights and other significant parts of the Canadian Constitution were enacted in 1982, and in some cases reflect the benefit of, or reaction to, settled experience in the United States and elsewhere with difficult constitutional issues.[64]

In the context of equality, this sort of analysis reveals several plausible explanations about why the Canadian Nine have taken a different path from the American Five. A variety of different cultural values exist: Americans have a history of slavery and apartheid and American values emphasize individualism and the "melting pot," while Canadians lack such a history and possess a relative enthusiasm for governmental acts to protect the collective rights of disadvantaged groups. There is a lot to this theory, and it might be entirely persuasive if the United States' "colour-blind jurisprudence" was endorsed by American justices with the same unanimity as Canada's approach is by Canadian justices. However, the deep division within the United States Supreme Court, mirroring deep divisions within American society, demonstrates that a large percentage of Americans operating within the context of American history and values reach similar conclusions to those of Canadian judges. Several factors may explain this deep division. Contrary to the claims of the American majority, there is strong evidence that the original intent of the Fourteenth Amendment, like the original intent of section 15, was to assure substantive rather than formal equality. The lessons learned from prior judicial errors may not be the need for a colour-blind jurisprudence, but rather a need for judicial deference to legislative choices absent a showing of discrimination against marginalised groups. Perhaps the question whether colour-blindness is inconsistent with American values of individualism and meritocracy should be irrelevant to judges once politically-responsive American officials have decided that any inconsistency is appropriate.

A. The history/cultural values hypothesis

A strong argument counselling against the consideration of Canadian equality jurisprudence by American courts is that significant differences in historical experience combine with marked differences in contemporary cultural values to explain the American emphasis on formal equality and the Canadian focus on substantive equality. Decisions by the United States Supreme Court suggest several possible historic/cultural differences that explain why section 15 of the *Charter* has been interpreted to be more tolerant than the Fourteenth Amendment of acts that are formally but not substantively discriminatory.[65]

One argument is purely temporal. Section 15 was adopted in 1982, so that Canadian framers were fully cognizant of the issue of affirmative action and

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64 Ross, *supra* note 47 at i.

65 Preliminarily, two arguments raised by American justices to justify strict judicial scrutiny of ameliorative classifications can be eliminated as raising no arguably distinctive American issues. Justice O'Connor has argued that courts must closely examine a challenged governmental act to determine if the classification really is benign and remedial, or rather if it instead the

provided an answer consistent with contemporary Canadian political views. Moreover, the *Charter* was enacted with strong support from feminists chafing under the dashed hopes of the *Bill of Rights*, which had been interpreted to promote strictly formal equality.[66] Justice Powell explained in *Bakke*, however, that the body of American constitutional doctrine built up over time no longer permitted a narrowing construction that would not apply the equality principle to racial classifications designed to ameliorate prior racial disadvantage:

> Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." The clock of our liberties, however, cannot be turned back to 1868. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. "The Fourteenth Amendment is not directed solely against discrimination due to a 'two class theory'– that is, based upon differences between 'white' and Negro."[67]

Another argument could be made that Canadian and American students of history learn diametrically opposite lessons about formal versus substantive equality. Many Canadians look back critically on the Privy Council's highly formalist decision in *Barrett v. City of Winnipeg*.[68] That case concerned the meaning of a prohibition against any law that "shall prejudicially affect any

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government was motivated by "illegitimate notions of racial inferiority or simple racial politics." *Croson, supra* note 12 at 493. This really isn't a "difference," since it is clear that a section 15 challenge to a Canadian governmental action would succeed, as would similar American claims, if the plaintiff could demonstrate that under the pretext of amelioration the Act was either compounding disadvantage based on "illegitimate notions of racial inferiority," on that the chosen means lacked a reasonable connection to the ameliorative goals. See *Lovelace supra* note 28 at 1006-07 (citing with approval approach in *Silano v. The Queen in Right of British Columbia* (1987), 42 D.L.R. (4th) 407 (B.C.S.C.) and *Roberts v. Ontario* (1994) 19 O.R. (3d) 387 (C.A.). In another vein, in *Bakke, supra* note 12 at 292, Justice Powell supported his conclusion that the Equal Protection Clause required strict judicial scrutiny of racial classifications that harmed white plaintiffs as well as those that injured racial minorities by arguing that "the United States had become a nation of minorities" who were all struggling "to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups of whom it was said–perhaps unfairly in many cases–that a shared characteristic was a willingness to disadvantage other groups." Many of these groups (Powell cited a government conclusion that this included Jews, Catholics, Italians, Greeks, and Slavs) continue to be excluded from various jobs because of discrimination: *Ibid.* at 293 (citing 41 C.F.R. 60.50.1(b) (1977). In this regard, however, there does not appear to a significant difference north of the border—nor does this explain why the appropriate standard is formal equality rather than an inquiry that assures that the challenged classifications neither stigmatizes nor unfairly burdens the claimant.

66 *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III; D. Greschner, "Does Law Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299, 302 n.8.

67 *Bakke supra* note 12 at 294-95 (last sentence quoting *Hernandez v. Texas*, 347 U.S. 475, 478 (1954)).

68 [1892] A.C. 445 (PC)[*Barrett*].

right or privilege with respect to denominational schools" contained in the *Manitoba Act, 1870,* the province's founding legislation. The prohibition was clearly designed to protect the pre-confederation practice whereby Franco-Manitobans (almost all of whom were Catholic) were educated in French in Catholic schools, while Anglo-Manitobans (almost all of whom were Protestant) were educated in English in Protestant schools. Although the population of Manitoba in the early days was almost evenly split, by the 1890s it had tipped decidedly in favour of Anglophones, who secured a provincial statute creating tax supported English-language public schools. Using principles of formal equality, the Privy Council found these schools to be open to all, and the fact that these schools were to be conducted in a non-native language, without the benefit of the religious instruction demanded by the Catholic Church, was not discrimination or prejudice: As the Privy Council explained, "It is not the law that it is in fault" but rather due to their own convictions that Catholics "find themselves unable to partake of advantages which the law offers to all alike."[69] This decision played a significant role in the demise of a strong Francophone community in Manitoba and the consequent reduction of the French presence in Canada to Quebec and adjoining areas of New Brunswick and Ontario.[70]

Formal equality was similarly enforced in *Ottawa Separate School Trustees v. Mackell,*[71] concerning the equivalent provision of the *British North America Act*[72] (also adopted when religious and linguistic lines were almost completely identical). Franco-Ontarians sought to use the provision to challenge a provincial policy requiring all Catholic school instruction to be in English (imposed in part due to the increased immigration of Irish and other Anglophone Catholics). This argument was likewise rejected. The rise of Quebec nationalism has been attributed in part to the failure of the courts to protect Francophones outside of Quebec.[73] The legacy of these exercises in formal equality led to more recent enactments, including the *Official Languages Act,* section 23 of the *Charter,* and Section 530 of the *Criminal Code,* all of which are to be construed "purposively, in a manner consistent with the

69 *Ibid.* at 458.

70 Robert J. and Doreen Jackson explain the significance of the *Barrett* case in *Politics in Canada* 4th ed. (Scarborough, Ontario: Prentice-Hall, 997) [*Jackson and Jackson*] at 226-27. In rejecting the Franco-Manitobans' legal claims, the Privy Council emphasized the special power vested in the Canadian Parliament under section 93 of the *BNA Act* to disallow provincial legislation of this sort. (Indeed, Section 90 of the original *BNA Act* conferred upon the federal government a general power to disallow provincial legislation, but that power has now fallen into disuse. See Hogg, *supra* note 29 at § 5.3(e).) The political effect was to divide the Quebecois, who with a majority in their own province strongly opposed any notion of the federal veto, from their fellow Francophones in the rest of Canada: in this case Franco-Manitobans and the Catholic Church supported the predominantly Anglophone government of Charles Tupper, who pledged to use disallowance; he lost the 1896 election to the Liberals, led by Canada's first Francophone prime minister, Wilfred Laurier, who refused to use the federal disallowance power.

71 [1917] A.C. 62 (P.C.).

72 *Charter, supra* note 2, Section 93.

73 A summary of the suppression of French-language education outside of Quebec is reprinted in *Jackson and Jackson, supra* note 71, at 227.

preservation and development of official language communities in Canada."[74]

If Canadians view history as teaching that formal equality can result in substantive inequality,[75] Justice Potter Stewart wrote that the American history of separate but equal "contains one clear lesson: Under our Constitution, the government may never act to the detriment of a person solely because of that person's race."[76] Justice O'Connor noted that through the 1940s, the Supreme Court had found that there was "no guarantee against discriminatory legislation by Congress."[77] Although she cited no cases where the Supreme Court upheld federal legislation that would have violated the Equal Protection Clause, the Court's lax scrutiny led, in her view, to "unfortunate results" in cases sustaining the internment of Japanese-American citizens during World War II.[78] Justice Scalia, quoting a noted constitutional scholar, wrote, "I share the view expressed by Alexander Bickel that '[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'"[79]

Another significant historic and cultural difference between American and Canadian society concerns the relative importance given to individual rights south of the border. Justice O'Connor emphasized in *Croson* that the Fourteenth Amendment's prohibition on the deprivation of equal protection to "any person" guarantees personal rights to individuals, not to groups.[80] Characterizing affirmative action as creating "a creditor or a debtor race," Justice Scalia found such an approach to be "alien to the Constitution's focus on the individual."[81]

In contrast, group rights have always played a major role in Canada. The *Constitution Act, 1867* entrenches public support for pre-confederation denominational schools.[82] The *Charter* goes even further, specifically granting (section 23) education rights to members of linguistic minority groups and affirming (section 27) the multicultural heritage of Canadians.

Guaranteeing that Francophones in Alberta or Anglophones in Québec can send their children to separate public schools, or recognizing that membership

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74 *Official Languages Act*, R.S.C., c. 31 (4th supp.); R.S.C. 1985, c. C-46 [*Criminal Code*]; *Beaulac v. The Queen*, [1999] 1 S.C.R. 768, at 791-92, 173 D.L.R. (4th) 193 (Bastarache, J.)[*Beaulac* cited to S.C.R.].

75 *Cf. Andrews, supra* note 27, at 164 (McIntyre, J.) (recognizing that "identical treatment may frequently produce serious inequality").

76 *Fullilove, supra* note 12, at 525.

77 *Adarand supra* note 40, at 213. The Equal Protection Clause of the Fourteenth Amendment only applies by its terms to states. It was not until *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown* concerning segregation in District of Columbia schools, that the Court construed the Fifth Amendment's prohibition on congressional denials of due process to contain an equal protection component.

78 *Adarand, Ibid.* at 213, citing *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944).

79 *Croson, supra* note 12 at 521 (quoting Alexander Bickel, *The Morality of Consent* 133 (1975)).

80 *Ibid.* at 493, citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). *See also Adarand, supra* note 40 at 226 (the Constitution protects "persons, not groups").

81 *Adarand, supra* note 40 at 239.

82 (U.K.), 30 & 31 Vict., c. 3, Section 93, reprinted in R.S.C. 1985, App. II, No. 5.

in a First Nation may permit an individual to exercise Aboriginal rights (for fishing, hunting, or maintenance of a home) that other Canadians do not possess,[83] are clear signs that Canadians intend that their race and origin remain highly relevant in the future. In contrast, rejecting the dissenting justices' view that ameliorative racial classifications should be reviewed more deferentially, the American majority complained that such a "watered-down version of Equal Protection review effectively assures that race will always be relevant in American life."[84] Even Justice Blackmun, who supported the constitutionality of race-conscious ameliorative programs, earnestly hoped that they would only be temporary so that "persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history."[85] This is consistent with the traditional Canadian self-image that their society is a "mosaic," one that gives diverse ethnic groups the right to cultural survival, while Americans emphasize assimilation into a "melting pot."[86]

Another potential difference lies in the American ideal of a meritocracy. Condemning race-conscious law school admissions, Justice Douglas observed, in a dissenting opinion, that a white applicant "had a constitutional right to have his application considered on its individual merits in a racially neutral manner."[87] As Justice Scalia has more recently stated: "When we depart from this *American* principle we play with fire."[88] In contrast, class distinctions have a much richer tradition in Canada. Studies suggest that Canadians are "much more tolerant of ruling elites and oligarchs than Americans."[89] In the later part of last century, for example, over sixty percent of top Canadian executives were born into the upper-class, in contrast to less than a third of their American counterparts.[90]

A variety of Canadian traditions exemplify the greater concern with balance and inclusion than with idealized versions of merit. One of the keys to Prime Minister Jean Chretien's ascendancy to the leadership of the Liberal Party was the tradition that the head job should alternate between Anglophones and Francophones. Appointment to the Supreme Court of Canada has distinctive constraints (albeit not always strictly adhered to) concerning the province from whence a nominee should come and, for the central provinces, further sub-

83 *See, e.g., R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 (Section 35 of the *Charter* recognizes the Musquem Indians' right to fish for salmon in the Fraser River notwithstanding contrary provision in federal regulatory legislation).

84 *Croson, supra* note 12 at 495.

85 *Bakke, supra* note 12 at 403 (Blackmun, J., concurring in part and dissenting in part).

86 S.M. Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990) at 172.

87 *DeFunis, supra* note 46.

88 *Croson , supra* note 12 at 527. (emphasis added)

89 M. Goldberg & J. Mercer, *The Myth of the North American City: Continentalism Challenged* (Vancouver: UBC Press, 1986) at 247.

90 Lipset, *supra* note 87 at 163.

groupings.[91] Although there are a few American conventions,[92] the rhetoric of merit or qualifications is much stronger south of the border.

In sum, official Supreme Court decisions reveal a variety of explanations—based on history, culture, and values—for the establishment of a doctrine of substantive equality open to ameliorative programs in Canada, while in the United States the doctrine is one of formal equality and hostility to race-conscious ameliorative programs.[93] Defenders of formal equality could build on these explanations to conclude, in today's vernacular, that the United States' longer history has resulted in a "path dependence" that requires formal equality while the Canadian *Charter* specifically legalizes ameliorative programs.[94] The lessons of Canadian legal history suggest the courts err when embarking on formal equality; the lessons of American tolerance of "separate but equal" and judicial approval of the wholesale incarceration of loyal citizens of Japanese descent during World War II demonstrate that courts are not to be trusted with anything other than strict formal equality. Ameliorative action is much more consistent with group rights, which Canada endorses in a variety of constitutional provisions and culturally through the concept of the "Canadian mosaic," while the inevitable claim that individuals excluded from a race-conscious program have been injured is more consistent with the American emphasis on individual rights and the American goal of the "melting pot."

B. Rejecting the history/cultural values hypothesis

As a purely descriptive matter, the foregoing catalogue could lead reasonable people to conclude that the doctrinal differences between the Supreme Court

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91 By statute, three of the justices must be members of the Quebec bar. By tradition, three others come from Ontario, and one each from the maritime provinces, the prairies, and British Columbia. As to the smaller provinces, usually a nominee will succeed a justice from another province. Traditionally, one Quebec judge has been an Anglophone. One Ontario judge has often come directly from the bar, while another has traditionally come from the Ontario Court of Appeal.

92 From 1930 until today, one seat has generally been occupied by a Jewish justice (Cardozo, J. was succeeded by Frankfurter, J., Goldberg, J., & Fortas, J. After Blackmun, J.'s retirement, Stephen Breyer was named to the seat.)

93 An unstated and somewhat cynical political difference may also explain the relative Canadian embrace of substantive equality. Because controversies about legal treatment of aboriginals tends to deal more with section 35 of the *Constitution Act, 1980* (protecting Aboriginal rights), and because of the relative lack of racial tension in Canada, when Canadians think of those likely to benefit from a doctrine of substantive equality, they are more likely to think of themselves or people close to them (women, the disabled, gay and lesbian friends). When Americans think of substantive equality, they are more likely to think of the concept in racial terms and whites may simply be more reluctant to insist that the government grant substantive equality to African Americans or other racial minorities.

94 Path dependence is a concept borrowed from economics and antitrust law, which suggests that "even small historical events, particularly those that occur early in the formation of an industry, can have unexpectedly long-lasting effects on market outcomes." D. Roithmayr, "Barriers to Entry: A Market Lock-in Model of Discrimination" (2000) 86 Va. L. Rev. 727, 742. The QWERTY keyboard, the standard arrangement for typewriter (and now computer) keyboards, provides an oft-cited example of path dependence. An event need not be of major significance to have long-lasting effects on outcomes. *Ibid.* at 787. As applied here, the concept would suggest that events in American history have led the courts to adopt a jurisprudence of formal equality that would not have been required absent those events.

of Canada and the five-justice majority on the United States Supreme Court is primarily explained due to the important differences that still exist between Canada and the United States. If the colour-blind approach taken by the American majority was simply more consistent with American history and values than the more substantive approach adopted by both the Supreme Court of Canada and dissenting American justices, then *Charter* practice would indeed have little to add to the American debate. There are serious grounds to question, however, the claim that a doctrine of formal rather than substantive equality necessarily follows from American history and values.

Although Justice Powell is obviously correct in observing that the Equal Protection Clause is not limited to discrimination against African-Americans, his comment in *Bakke* that it was "far too late to argue that the guarantee of equal protection to all person permits the recognition of special wards entitled to a degree of protection greater than that accorded others"[95] would appear to rate a "False" if offered by an American student of constitutional law on a final exam, in light of the "three-tier" approach to equal protection established by the United States Supreme Court since the landmark case of *Carolene Products*.[96] In that case, the Court refused to seriously consider a claim that a federal statute unconstitutionally deprived equal protection of the laws to sellers of a certain kind of skim milk. In its famous footnote, the Court suggested that its highly deferential approach would not necessarily apply when "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[97] Since then, it is clear that a variety of classes of plaintiffs, including racial minorities, women, religious groups, aliens, children born to unmarried parents, and others are indeed "special wards entitled to a degree of protection greater than that accorded others" such as milk producers.[98] A consistent application of *Carolene Products* would appear to support the claim of the four justices in *Bakke* who favoured deferential treatment for ameliorative programs.[99] Thus, certainly by 1977 it was not "too late to argue" for an equality jurisprudence that reserved careful judicial scrutiny to governmental classifications that marginalize, ignore, or devalue people based on stereotype, prejudice, or vulnerability.[100]

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95 *Bakke, supra* note 12 at 294-95, quoted at *supra* note 67.

96 *Supra* note 5.

97 *Carolene Products, ibid.* at 153 n.4.

98 See generally, J. Nowak & R. Rotunda, *Constitutional Law*, 6th ed. (St. Paul, Minn.: West Publishing Co., 2001), at § 14.3.

99 *Bakke, supra* note 12 at 357 (Brennan, J., White, Marshall, and Blackmun, JJ. Dissenting). See also Paul Brest, "Affirmative Action and the Constitution: Three Theories", 72 Iowa L. Rev. 281, 283 (1987) (*Carolene Products* jurisprudence leads to conclusions that reverse discrimination will rarely state a cause of action under the Fourteenth Amendment). Justice Powell distinguished *Carolene Products*, concluding that its teaching had "never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious." *Bakke, supra* note 12 at 290.

100 *Cf. Lovelace, supra* note 27 at 990-91.

Nor can devotees of an originalist approach to constitutional interpretation draw sharp distinctions between the framing of the Fourteenth Amendment and the framing of the *Charter*. The Court's initial view of the Amendment as protecting an African-American "from the oppressions of those who had formerly exercised dominion over him"[101] was, as Justice Powell conceded in *Bakke*, effectively "strangled in infancy by post-civil-war judicial reactionism."[102] In his separate *Bakke* dissent, Justice Marshall provided detailed historic support for his conclusion that it was "plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes."[103]

Although Canadians may have learned some unique lessons about the problems of formal equality from the interpretation of their founding document, the *British North America Act*, by English judges who have been criticized as the "wicked stepfathers of confederation,"[104] the American lesson is not necessarily, as Justice O'Connor argued, that racial classifications are always bad. A very strong counter-argument–indeed the one propounded by *Carolene Products*–is that the lesson of American legal history is that judges should not interfere with the complex policy judgments of legislative officials absent some evidence that the legislative process has serious flaws that will result in discrimination against disadvantaged or politically marginalised groups.[105]

To be sure, comparative sociological studies suggest that Americans place greater value on individual rights and are more adamant in believing in meritocracy than Canadians. But these insights do not explain why, when American legislators believe that an exception to these values are justified, American judges should displace this judgment with their own values.[106] In a similar vein, the differences between the "melting pot" and "mosaic" ideologies might explain why ameliorative programmes are less likely to succeed on

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101 *Slaughterhouse Cases, supra* note 20 at 71.

102 *Bakke, supra* note 12 at 291 (quoting J. Tussman & J. tenBroek, "The Equal Protection of the Laws" (1949) 37 Calif. L. Rev. 341, 389).

103 *Ibid.* at 396-97. In particular, Marshall, J. recounts the enactment by the same Congress that proposed the Fourteenth Amendment of the *Act of July 16, 1866 (the "Freedmen's Bureau Act")*, ch. 200, 14 Stat. 173, providing many benefits solely to former slaves. Responding to objections that the bill "undertakes to make the negro in some respects ... superior ... and gives them favors that the poor white boy in the North cannot get," Cong. Globe, 39th Cong., 1st Sess. 401 (remarks of Sen. McDougall), the bill's supporters argued: The very discrimination it makes between 'destitute and suffering' negroes, and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection. *Ibid.* at 75 (remarks of Rep. Phelps).

104 Hogg, *supra* note 29 at 5-17 (quoting constitutional scholar E. A. Forsey).

105 See, e.g., J.H. Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard Univ. Press 1980).

106 Note that a constitutional doctrine of substantive equality does not *require* affirmative action programs but *allows* elected officials to enact them if they so choose. For example, the NDP (social democratic) government in Ontario enacted the *Employment Equity Act, 1993*, S.O. 1993, c. 35, requiring employers to adopt a number of affirmative steps to improve hiring of Aboriginals, people with disabilities, racial minorities, and women. A Conservative government subsequently enacted the *Job Quotas Repeal Act, 1995*, S.O. 1995, c. 4. The constitutional authority to enact the latter was upheld in *Ferrell v. Ontario (Attorney General)*, 42 O.R. (3d) 97, 168 D.L.R. (4th) 1 (C.A.).

Capitol Hill than Parliament Hill, but these differences don't explain why, when faced with a judgment by elected officials somewhat inconsistent with the nation's traditional ideology, American judges feel justified in intervening. This is particularly troublesome when sociological evidence, at least, suggests that Americans may be moving away from their assimilationist traditions.[107]

Finally, scepticism toward a socio-historic determinist approach is appropriate in light of the bare majority of the United States Supreme Court that endorses the "American" view. *Bakke* was a highly divided opinion and while Justice Powell's concurrence has significant precedential weight—both because it was in the middle and because it is the most detailed and thoughtful exposition of the formal equality position to date emanating from the Supreme Court—it is still an opinion from a single justice. To be crude, it is no exaggeration to suggest that if Chief Justice Rehnquist's ailing back had becoming disabling during President Carter's administration, the United States Supreme Court could well have a five-justice majority who viewed the Equal Protection Clause in a manner very similar to that expressed by the Supreme Court of Canada, even if nothing else in the prior discussion about differing histories or values had changed.

If that had occurred, then the socio-historic determinists would be hard pressed to explain why a majority would reject Justice Stewart's view that the constitutional standard "cannot be any different when the persons injured by a racially biased law are not members of a racial minority" because from "the perspective of a person detrimentally affected by a racially discriminatory law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law's purpose, be it purportedly 'for the promotion of the public good' or otherwise."[108] Instead, the majority view of justices who share the same American history as Justice Stewart, would be that:

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavoured group to enhance or maintain the power of the majority. Remedial racebased preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially" should ignore this distinction.[109]

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107 Lipset, *supra* note 87 at 187 observes that a 1989 survey showed that 61% of Canadians thought that newcomers should change their culture "to blend with the larger society," compared to only 51% of Americans who felt the same way.

108 *Fullilove, supra* note 12 at 526.

109 *Adarand, supra* note 40 at 243 (Stevens, J., dissenting), quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). The dissenting opinion continued: The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An

If history or nationalistic cultural values explained the doctrinal differences in constitutional equality norms, then obviously the Canadian approach would have little relevance south of the border. Since these differences do not adequately explain why a bare majority of American justices would adopt one approach while a minority of American justices and virtually all Canadian justices would adopt another one, Canadian insights take on greater relevance in shaping American thinking about ideologies and values we share with our northern neighbours.

V. *CAROLENE PRODUCTS* VINDICATED

When the Charter was enacted, Canadians were anxious, but cautious, about adopting an American-style regime of judicial review of legislative judgments. A variety of provisions — including the critical provision in section 1 that all rights are subject to reasonable limits that can be demonstrably justified, and the power under section 33 to enact laws notwithstanding their inconsistency with certain sections of the Charter — demonstrates this caution. American constitutional jurisprudence was plagued during the early part of the previous century with the so-called "*Lochner* era" whereby judges invalidated social and economic legislation, under the guise of the broad language of the Fourteenth Amendment, because of their own philosophical disdain for the legislation, and eventually led the United States Supreme Court to adopt in *Carolene Products* a deferential view of legislative determinations vis-à-vis the broad norms of the Fourteenth Amendment.[110] Framers of the Canadian *Charter* were anxious to avoid these problems.

One of the advantages of a constitutional doctrine of substantive equality is that it gives legislatures more room to develop *constructive* solutions to complex problems of social inequality. Where solutions reflect stereotype, perpetuate disadvantage, or unfairly burden a discrete and insular minority, both *Carolene Products* and Canadian jurisprudence suggest that judges should intervene; when solutions do not have these adverse characteristics, judges should exercise restraint.

Indeed, an overview of all of Canadian constitutional law is useful as a reminder to Americans of the merits of returning to a *Carolene Products* jurisprudence limiting judicial activism to situations where the political process is unlikely to protect rights. Canadian courts have long been active in policing the bounds of federal and provincial power because the Canadian political process provides no means for provincial interests to constrain, effectively, a determination by a federal Prime Minister to encroach on their power, nor the reverse.[111] Active scrutiny, along lines roughly similar to American

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attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities. *Ibid.* at 245. These sentiments would appear to be fully shared by Justice McIntyre in *Andrews* or Justice Iacobucci in *Lovelace* (see text accompanying notes 27-30 *supra*).

110 See Nowak & Rotunda, *supra* note 99, §11.4; Hogg, *supra* note 29, §44.7(b).

111 Compare P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto:

jurisprudence, characterizes Canadian protection of individual rights. Here, Canadians and Americans share similar concerns about the risk of majoritarian oppression concerning expression, association, religion, and the rights of the accused.[112] On the other hand, the fear of unwarranted judicial activism that characterized the so-called "*Lochner* era" in American jurisprudence and the Canadian experience without any constitutional protection for property or economic interests led to the deliberate exclusion of economic liberty or property rights from *Charter* protection.[113]

There is strong evidence in American legal history that the cause of social equality has been furthered more by Congress than by the Supreme Court.[114] While not precisely analogous, the Canadian legal history of protection of the French minority suggests that Canadian courts have done better when deferring to legislative judgments and less well in protecting individual rights.[115]

In sum, the Canadian lessons reinforce American efforts to return to a

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Carswell, 1974) (arguing that the Supreme Court of Canada necessarily acts in a manner similar to an interest arbitrator to prevent overreaching) with J. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980) (arguing that structure of American Congress and American party politics adequately protects states from federal overreaching, thus obviating the need for active constitutional scrutiny of legislation on federalism grounds).

112 See generally Hogg, *supra* note 29 Part III.

113 *Ibid.*§ 44.7(b). The theoretical arguments justifying the exclusion of a right to property from the *Charter*, see, e.g., J. Bakan, "Against Constitutional Property Rights," in D. Cameron & M. Smith, eds., *Constitutional Politics* (Toronto: Lorimer, 1992), were, in fairness, bolstered by a *realpolitik* awareness by the Trudeau government that provincial approval of a *Charter* would not be possible if such a right were included. Prince Edward Island was fiercely opposed to such a right as a potential threat to their laws restricting non-resident land ownership and the New Democratic Party (especially significant because it controlled the Manitoba government at the time) rejected any potential restriction on the socialization of resources. See J. McBean, "The Implications of Entrenching Property Rights in Section 7 of the *Charter* of Rights" (1988) 26 Alta. L. Rev. 548. For American readers, it is useful to observe that the jurisprudential point that property owners do not need counter-majoritarian constitutional protection seems borne out by the Canadian experience. The federal government and the provinces all have enacted legislation requiring compensation for expropriation and the courts have adopted a non-constitutional principle of statutory interpretation requiring compensation absent explicit legislative wording to the contrary: see, e.g., *Manitoba Fisheries, Ltd. v. The Queen*, [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462.

114 In his article, "The Rise and Fall of Supreme Court Concern for Racial Minorities," (1995) 36 Wm. & Mary L. Rev. 345, my colleague John Nowak traces the anti-original interpretation of the Civil War Amendments utilized by the Supreme Court in the late 19th Century to strike down legislation and how the Supreme Court in recent years has consistently interfered with congressional efforts to ameliorate the effects of racial discrimination. *Cf.* M. Mandel, "Commentaries on Mark Tushnet's Taking the Constitution Away from the Courts: Article: Against Constitutional Law (Populist or Otherwise)" (2000) 34 U. Rich. L. Rev. 443, 445 (leftist scholars have traditionally asserted that active judicial review was likely to be reactionary, a view that "got sidetracked for a short period after that because of the world-famous liberal period of the U.S. Warren Court").

115 A complete analysis of this point is beyond the scope of this paper. However, early efforts to protect the Francophone communities in Alberta and Ontario by preserving French-language education were apparently sabotaged both by formalist interpretations of the *British North America Act* and by a political judgment by Francophone politicians from Quebec that French Canadians as a whole had more to lose from potential federal intervention in Quebec than to gain from federal intervention to protect Francophones elsewhere. At the same time,

Carolene Products jurisprudence cabining close judicial scrutiny for those sort of classifications that raise a serious risk of majoritarian tyranny over a minority. A jurisprudence of formal equality such as the contemporary American equality jurisprudence raises all the fears that led to *Carolene Products* while a jurisprudence that looks at differential treatment from the perspective of substantive disadvantage and stereotype seems more consistent with the spirit of footnote four.

VI. CONCLUSION

The twentieth anniversary of the *Canadian Charter of Rights and Freedoms* provides a wonderful opportunity for Canadians to celebrate. Obviously the greatest impact of the *Charter*, over the past two decades and into the future, will be in shaping a distinctly Canadian society. Important dividends of the evolving *Charter* jurisprudence come from insights for those beyond the Canadian border.

One prominent example is the interpretation of equality principles in

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the development of a distinct French Canadian culture within Quebec can be attributed at least in part to a federalism jurisprudence that allowed Quebec to govern itself relatively free of meddlesome (and predominantly English) political directives from Ottawa. Similarly, the courts upheld *legislative* initiatives to protect Francophones through the *Official Languages Act*, *supra* note 75, and other bilingual initiatives. On the other hand, the Court's record during the 1980s–when Quebec nationalism and antagonism with English Canada was quite strong–was characterized primarily by the inconsistent use of various methods of constitutional interpretation with the result that the French usually lost: see, e.g., *A.G. (Québec) v. Blaikie*, [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15 (giving a broad and purposeful interpretation of Section 133 of the *Constitution Act, 1867* to require Quebec administrative regulations to be promulgated in English and French); *Attorney General (Quebec) v. Association of Quebec Protestant School Boards*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321 (adopting a previously rejected originalist interpretive approach to refuse to consider justifications for why a requirement that Anglophone Canadian children moving to Quebec attend French-language schools was a reasonable limit, under section 1, on the linguistic rights guaranteed to those children by section 23 of the *Charter*); *Societe des Acadiens v. Ass'n of Parents*, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406 (adopting a narrow approach to section 19 of the *Charter*–a provision mandating bilingualism in the Canadian and New Brunswick governments–to hold that the provision was not violated when an appeal by Francophone litigants was heard by a panel including a unilingual Anglophone judge); *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 (holding first that a section of the *Quebec Charter of Human Rights and Freedoms* permitting the legislature to fix limits on the scope of rights was to be read identically to a differently worded section 1 of the federal *Charter*, thus requiring that any limitation on rights must be shown to minimally impair the rights, and then holding second that a law requiring all commercial signs to be in French only (subject to administrative waiver) was unnecessary to accomplish the legitimate, pressing, and substantial provincial interest in creating a *visage linguistique* that would demonstrate to Francophones that they can flourish in their own language, Anglophones that they should become bilingual, and immigrants that they should learn French rather than English). By 1990, with a greater acceptance of bilingualism, the Supreme Court began to reverse that approach and broadly protect Francophone minorities outside Quebec: *see, e.g., Mahe v. Alberta*, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69 (broad interpretation of section 23 minority linguistic rights to require that Francophone Edmontonians control French-language schools).

section 15 of the *Charter*. Canadian jurisprudence reading this constitutional provision as a prohibition on government actions that substantively discriminate, usually by victimizing the disadvantaged through stereotype or prejudice, contrasts sharply with the current American doctrine that, on grounds of formal equality, invalidates race-conscious programmes designed to remedy the legacy of racial injustice in the United States. The Canadian experience is relevant to the American controversy in several respects. It is significant that, in contrast with other areas of jurisprudence, Canadians do not seriously believe that ameliorative programmes result in harm to disadvantaged groups through stigmatizing them with a brand of inferiority, but, rather, are effective in remedying social disadvantage. Even more significant is the development of post-*Bakke* jurisprudence in a different direction in Canada, which demonstrates that courts can develop a judicially manageable body of precedent where the test is substantive rather than formal equality. Although significant differences between Canadian and American history and culture plausibly explain the different doctrines adopted by the majority of each nation's highest court, these differences are not so significant that one can conclude that formal equality is compelled by American history and culture to a degree sufficient to render the Canadian experience irrelevant south of the border. Indeed, while differences exist, the major lesson for Americans from Canadian equality jurisprudence is that the latter is arguably more faithful to a jurisprudence of careful judicial restraint set forth in the landmark American decision in *Carolene Products* than the more recent interventionist body of American case law, which is relative terms looks to be judicial activism. These lessons are as useful in the "Land of the Free and the Home of the Brave" as well as in the "True North Strong and Free."