



## The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 63 (2013)

Article 6

# The Upside of Dissent in Equality Jurisprudence

Carissima Mathen

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](http://creativecommons.org/licenses/by-nc-nd/4.0/).

### Citation Information

Mathen, Carissima. "The Upside of Dissent in Equality Jurisprudence." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 63. (2013).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol63/iss1/6>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

# The Upside of Dissent in Equality Jurisprudence

Carissima Mathen\*

## I. INTRODUCTION

In early 2013, the Supreme Court released its much-anticipated decision in *Quebec (Attorney General) v. A.*<sup>1</sup> The Court upheld the Quebec *Civil Code*'s exclusion of "de facto spouses"<sup>2</sup> from provisions relating to spousal support and property division. *A.* produced four opinions<sup>3</sup> and three lines of dissent. The Court disagreed about the required elements of discrimination; whether Quebec could assume that couples who simply cohabit have chosen to avoid statutory obligations; and whether spousal support and property provisions are functionally equivalent in terms of equality review.

---

\* Associate Professor of Law, University of Ottawa. I am grateful to Sonia Lawrence and to an anonymous reviewer for comments. With thanks to Eric McGill for superb research assistance.

<sup>1</sup> [2013] S.C.J. No. 5, 354 D.L.R. (4th) 191 (S.C.C.) [hereinafter "*A.*"].

<sup>2</sup> In Quebec, the term "de facto spouses" refers to couples who cohabit who have neither married nor entered into a civil union. See *Civil Code of Quebec*, S.Q. 1991, c. 64.

<sup>3</sup> Writing for four justices, LeBel J. found that the provisions did not *prima facie* discriminate and thus, dismissed the claim. Writing for five justices, Abella J. found a *prima facie* violation, but was alone in concluding that the impugned provisions also failed under s. 1. Chief Justice McLachlin found all of the provisions justified; and Deschamps J. (for three judges) found them justified except for the provisions excluding de facto spouses from spousal support. Some scholars have argued that McLachlin C.J.C.'s decision is so at odds with Abella J.'s that it ought not to be counted as part of a "majority". See Hester Lessard, "Narrative Strategies of Smoke and Mirrors vs Dramatic Struggles" (May 8, 2013), online: The Institute for Feminist Legal Studies at Osgoode <<http://ifls.osgoode.yorku.ca/2013/05/eric-lola-2-hester-lessard-narrative-strategies-of-smoke-mirrors-vs-dramatic-struggles/>>. For the purposes of this paper, I take the Chief Justice's reasons at face value.

It is practically impossible to imagine constitutional law without dissent.<sup>4</sup> The very first opinion in the Charter<sup>5</sup> era — the *Patriation Reference*<sup>6</sup> — was marked by it.<sup>7</sup> Dissent is powerful and evocative, even mythic; it suggests roads not taken and parallel universes. It evokes a fundamental and, sometimes, unsettling contingency about law. It can be problematic,<sup>8</sup> disrupting easy understandings of how to a court “gets it right” and, thus, damaging to a court’s legitimacy.<sup>9</sup>

Yet, dissent has positive aspects, too. It can: better articulate norms and understandings underlying key decision-rules;<sup>10</sup> provide a counter-narrative to prevailing orthodoxy;<sup>11</sup> lay the foundation for future development of law;<sup>12</sup> provide a necessary outlet for disagreement that otherwise might constrain and frustrate judicial actors; and even secure

<sup>4</sup> Throughout this paper, “dissent” and “judicial disagreement” are used interchangeably. “Dissent” can refer, narrowly, to a departure from the majority in both reasoning and result (for example, McLachlin J.’s dissents in *R. v. Keegstra*, [1996] S.C.J. No. 21, [1996] 1 S.C.R. 458 (S.C.C.) and *Taylor v. Canada (Human Rights Commission)*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.)). It also can be used more broadly to include a departure with respect to the reasoning but not the result (for example, Sopinka J. in *R. v. Jobidon*, [1991] S.C.J. No. 65, [1991] 2 S.C.R. 714 (S.C.C.)), or a departure with respect to the result but not the reasoning (for example, Fish J. in *R. v. Ryan*, [2013] S.C.J. No. 3, 353 D.L.R. (4th) 387 (S.C.C.)). Some refer to dissents in the latter category as concurrences.

<sup>5</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”]. While my focus here is constitutional adjudication, the functions performed by dissent are not limited to that arena.

<sup>6</sup> *Reference re Amendment to the Canadian Constitution*, [1982] S.C.J. No. 100, [1982] 2 S.C.R. 791 (S.C.C.).

<sup>7</sup> Carissima Mathen, “The Patriation Reference as Constitutional Method” (2011) 54 S.C.L.R. (2d) 143.

<sup>8</sup> Early in her tenure, McLachlin C.J.C. expressed a preference for unanimity. Emmett Macfarlane, “Consensus and Unanimity at the Supreme Court of Canada” (2010) 52 S.C.L.R. (2d) 379, at 384.

<sup>9</sup> I have argued elsewhere that dissenting opinions are not necessarily detrimental to authority. Carissima Mathen, “Dissent and Judicial Authority in *Charter* Cases” (2003) 52 U.N.B.L.J. 321. Briefly, judicial decisions are authoritative (meaning, they pre-empt the reasons one might otherwise have for action) because of their form, buttressed by the court’s duty to give reasons explaining the outcome. On this view, dissents are not fatal to authority, since authority does not depend on the *particular* reasons that a court adopts. Authority depends instead on the process and form by which the reasons are produced.

<sup>10</sup> *R. v. Cinous*, [2002] S.C.J. No. 28, [2002] 2 S.C.R. 3 (S.C.C.).

<sup>11</sup> Chief Justice Dickson in *R. v. Bernard*, [1988] S.C.J. No. 66, [1988] 2 S.C.R. 833 (S.C.C.).

<sup>12</sup> Claire L’Heureux-Dubé, “The Dissenting Opinion: Voice of the Future?” (2000) 38 Osgoode Hall L.J. 495; Anita S. Krishnakumar, “On the Evolution of the Canonical Dissent” (2000) 52 Rutgers L.R. 781; Richard A. Primus, “Canon, AntiCanon, and Judicial Dissent” (1998) 48 Duke L.J. 243.

broader acceptance of a majority decision by showing that it is a product of deliberation.<sup>13</sup>

In this paper, I present another possible “upside” to dissent, that focuses on the issue in *A.*: equality. First, I canvass two ways that dissent manifests in Charter jurisprudence: one (functional) relating to the judiciary’s appropriate role in constitutional disputes; and the other (principled) relating to the identification, scope or application of rules and norms. The two models are richly represented in equality jurisprudence. In the Supreme Court’s first section 15 case, *Andrews v. Law Society of British Columbia*,<sup>14</sup> the Court divided over the functional question of how closely the Court should scrutinize legislated difference. In subsequent cases, the Court has struggled to reach consensus on the meaning of equality itself — an issue of principle.

The fact that equality jurisprudence has been characterized by chronic disagreement might appear unfortunate. But my review of section 15 case law suggests that, by providing the space to fully flesh out points of disagreement, dissent has contributed to richer accounts of equality. Borrowing the language of Cass Sunstein, I suggest that a divided equality decision that is the result of failure to reach agreement on “deep” issues is preferable to one that, as the price of unanimity, remains “shallow”.<sup>15</sup> I conclude that the decision in *A.* is deep rather than shallow and so, despite its frustrating divisions, it is on the whole better than many of the unanimous equality decisions that preceded it.<sup>16</sup>

## II. TWO MODELS OF DISAGREEMENT

Judges disagree about *everything*. They dispute the assessment of particular facts,<sup>17</sup> the sufficiency of evidence,<sup>18</sup> and how to analyze a

---

<sup>13</sup> On this theory, dissents are illustrative of a quasi-democratic function in which appellate courts mirror the processes of other deliberative bodies. Kevin Stack, “The Practice of Dissent in the Supreme Court” (1996) 105:8 Yale L.J. 2235, at 2246.

<sup>14</sup> [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.) [hereinafter “*Andrews*”].

<sup>15</sup> Cass Sunstein, “The Supreme Court 1995 Term: Leaving Things Undecided” (1996-1997) 110 Harv. L. Rev. 4 [hereinafter “Sunstein”]. I explain my preference for “deep” versus “shallow” decisions in Part III.3.

<sup>16</sup> My debt to Sunstein is more conceptual than substantive. Sunstein argues that “[a]t least most of the time, constitutional law is narrower, shallower, more incremental, and based on analogies” and it is clear from his work that he thinks that this is, on balance, the right approach. So he would not advocate for “deep” equality decisions. I will address this point in the final section. *Id.*, at n 26.

<sup>17</sup> *R. v. Thibert*, [1996] S.C.J. No. 2, [1996] 1 S.C.R. 37 (S.C.C.).

body of precedent.<sup>19</sup> They take issue with the framing of legal questions.<sup>20</sup> They dispute the principles at stake in a given situation. They even contest what courts are or should be doing when they decide cases.

Why do judges disagree so pointedly, and on such a wide range of issues? One possible answer is the nature of deliberation in a common law system. Reasoning by analogy, demonstrating that a decision is either compatible with previous case law or articulating careful reasons why it need not be, considering the various arguments presented — these tasks represent complicated exercises of judgment, analysis and discretion. When such tasks are performed by different individuals, all operating from a position of relative equality,<sup>21</sup> it is not surprising that results will vary.

A second possible answer derives from the nature of constitutional interpretation. In Canada, courts have eschewed originalism<sup>22</sup> and other intent-based understandings of constitutional meaning. Taking their cue from the Supreme Court, most judges take a decidedly relaxed perspective to *in limine* issues such as standing,<sup>23</sup> and mootness,<sup>24</sup> and they jealously guard their role in identifying, and even generating, constitutional norms.<sup>25</sup> Given these starting points, it is not surprising that judges find themselves on different sides of a legal issue. Indeed, it is perhaps a minor miracle that they agree as much as they do.

The context just described generates its own special brand of disagreement. I call this functional disagreement, because it is about the framework that ought to govern judicial review itself.<sup>26</sup> It has been

---

<sup>18</sup> *R. v. Pappajohn*, [1980] S.C.J. No. 51, [1980] 2 S.C.R. 120 (S.C.C.).

<sup>19</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

<sup>20</sup> *R. v. A. (J.)*, [2011] S.C.J. No. 28, [2011] 2 S.C.R. 440 (S.C.C.).

<sup>21</sup> By this I mean that no single person's opinion is presumptively privileged (for example, if the person previously has written on the same subject, or has seniority); that all members are permitted to express their views; and that no one is required to conform to others' views.

<sup>22</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997); Edwin Meese III, "Toward a Jurisprudence of Original Intent" (1988) 11 Harv. J.L. & Pub. Pol'y 5.

<sup>23</sup> *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, [2012] 2 S.C.R. 524 (S.C.C.).

<sup>24</sup> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

<sup>25</sup> This is referred to as the purposive approach: *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.); *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.) [hereinafter "*Big M*"].

<sup>26</sup> For example, judges may disagree about whether to adapt a generally "passive" or "active" orientation. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (New Haven: Yale University Press, 1986). Drawing in part on a Bickelian view,

prominent since 1982, and one of its best examples is the aftermath of the decision in *Reference re Motor Vehicle Act*.<sup>27</sup>

The *Motor Vehicle Reference* was the Supreme Court's first opportunity to squarely address section 7 of the Charter. From the outset, the provision had generated anxiety. An oft-cited concern was that the Court might interpret section 7's special qualifying term, "fundamental justice", so as to mirror the experience of the U.S. During the so-called *Lochner* era, that country's Supreme Court used an expanded understanding of "due process" to strike down laws meant to promote social welfare.<sup>28</sup> *Lochner* itself now is discredited, and identified with the worst excesses of judicial power.

In the *Motor Vehicle Reference*, the Supreme Court acknowledged but dismissed the concern that an assertive approach to section 7 would transform the Court into a judicial "super legislature".<sup>29</sup> It pointed out that "the historic decision to entrench the *Charter*" was political, and thus, "[a]djudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy".<sup>30</sup> Resisting the idea that Canada should allow "the American debate to define the issue",<sup>31</sup> the Court decided that the Charter's distinctiveness required a purposive interpretative approach.<sup>32</sup>

---

Sunstein advocates the passive approach: "saying no more than is necessary to justify an outcome, and leaving as much as possible undecided" on the basis that it reduces the incidents and effects of mistakes and that it contributes to democracy by ensuring that courts do not pre-empt further discussion — and possibly, resolution — of situations giving rise to social conflict. Sunstein, *supra*, note 15, at 6. Obviously, there is a great deal that can be said about what constitutes a judicial mistake, as well as what its costs might be. In the U.S. context, one case often cited in this regard is *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (where the Supreme Court ruled that African-Americans were not "citizens" under the U.S. Constitution and struck down the Missouri Compromise). In the Canadian context, one might point to *Bliss v. Canada (Attorney General)*, [1978] S.C.J. No. 81, [1979] 1 S.C.R. 183 (S.C.C.) (where the Supreme Court ruled that pregnancy-based distinctions do not deny equality before the law on the basis of sex).

<sup>27</sup> *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) [hereinafter "*Motor Vehicle Reference*"]. While the opinion was contained in a reference, this did not factor into the Court's assessment of the appropriate scope of judicial review. For a discussion of the differences between advisory opinions and cases, see C. Mathen, "Mutability and Method in the Marriage Reference" (2005) 54 U.N.B.L.J. 43.

<sup>28</sup> *Lochner v. New York*, 198 U.S. 45 (1905) [hereinafter "*Lochner*"].

<sup>29</sup> *Motor Vehicle Reference*, *supra*, note 27, at para. 16.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, at para. 18.

<sup>32</sup> *Id.*, at para. 21. The Court decided that the principles of fundamental justice are reflective of the "basic tenets of the legal system", one of which is that no one should be found guilty of a criminal offence if he or she is "morally innocent" which requires some proof of fault.

The assertive nature of the *Motor Vehicle Reference* was all the more striking because of its unanimity.<sup>33</sup> No judge dissented from the idea that section 7 — and indeed the Charter itself — signalled a new era in judicial review subjecting legislation to greater and more in-depth scrutiny. The unanimity, though, was short-lived. Just two years later, in *R. v. Vaillancourt*, the Court divided on how section 7 applied to the offence of murder in a case challenging what was sometimes called the “felony murder rule”.<sup>34</sup>

The *Motor Vehicle Reference* had already determined the substantive potential of section 7. Yet, in the subsequent case of *Vaillancourt*, the Court avoided what would have been the most obvious extension: a rule that all criminal offences require a fully subjective *mens rea*.<sup>35</sup> Noting that many criminal laws do not use subjective fault, Lamer J. elected not to throw all of them into jeopardy.<sup>36</sup> Instead, he articulated a narrower principle: some crimes carry such intense “stigma” and/or penalties that conviction without proof of subjective fault is unfair.<sup>37</sup> The stigma of murder, he mused, is sufficiently severe to require proof that the accused actually foresaw that death was likely to result from his or her action. But Lamer J. found it unnecessary to make the foregoing a holding of the case because, he concluded, the existing rule did not require even *objective* foresight of death.<sup>38</sup>

---

<sup>33</sup> The *Motor Vehicle Reference* was heard by a panel of seven. There were two concurring opinions. Interestingly, in light of his subsequent and numerous dissents, McIntyre J. wrote a brief concurring opinion but basically agreed with Lamer J. Justice Wilson wrote a longer opinion arguing for a different approach to s. 1 (that violations of s. 7 could never be reasonable limits), foreshadowing her even more rigorous approach to Charter rights.

<sup>34</sup> *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.) [hereinafter “*Vaillancourt*”]; *Criminal Code*, R.S.C. 1970, c. C-34, ss. 21(2), 213(d). The term is borrowed from the U.S., as Canada no longer classifies serious crimes as “felonies”. *Vaillancourt* engaged in armed robbery with an accomplice who killed someone using a firearm that the defendant had believed was unloaded. Under a combination of the felony-murder rule and party liability, because the accomplice was vulnerable to a second degree murder charge, so was *Vaillancourt*.

<sup>35</sup> The case originally was heard before nine judges but one, Chouinard J., took no part in the judgment. It was decided on the merits, 7-1.

<sup>36</sup> *Vaillancourt, id.*, at para. 27 (emphasis in original).

<sup>37</sup> *Id.*, at para. 28.

<sup>38</sup> *Id.*:

I am presently of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight. ... I need not and will not rest my finding that s. 213(d) violates the *Charter* on this view, because s. 213(d) does not ... even meet the lower threshold test of objective foreseeability.

Justices Beetz and Le Dain agreed that the law violated the Charter but took issue with Lamer J.'s *obiter* statement about murder.<sup>39</sup> In dissent, McIntyre J. went further, stating that the "principal complaint" in the case was not whether the accused had committed a serious offence, but whether it should be called "murder".<sup>40</sup> He was dubious that section 7 could have anything to say about the matter:

[W]hile it may be illogical to characterize an unintentional killing as murder, no principle of fundamental justice is offended only because serious criminal conduct, involving the commission of a crime of violence resulting in the killing of a human being, is classified as murder and not in some other manner.<sup>41</sup>

These judges believed that while the legislative judgment reflected in the felony murder rule is harsh, it was entirely Parliament's to make. And, while McIntyre J. appeared to dissent on a matter of substantive law, he clearly drew on functional concerns: the Court should not usurp the legislature's prerogative to declare certain behaviour wrongful.

A few years later, in *R. v. Martineau*,<sup>42</sup> the Court confirmed subjective foresight of death as the minimum fault requirement for murder. Lamer, now Chief Justice, gave full effect to the principle he previously had hinted at. But *Martineau*, too, was divided. Justice McIntyre's mantle was taken up by L'Heureux-Dubé J., who expressed grave doubts that stigma is an appropriate consideration of fundamental justice.<sup>43</sup> For his

---

<sup>39</sup> "I do not find it necessary to decide whether there exists a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight." *Id.*, per Beetz J., at para. 45.

<sup>40</sup> *Id.*, at para. 51.

<sup>41</sup> *Id.*, at para. 51, citing *R. v. Munro*, [1983] O.J. No. 144, 8 C.C.C. (3d) 260, at 293 (Ont. C.A.). Justice McIntyre also disagreed with the Chief Justice's analysis of s. 213 itself, arguing that it was not possible for someone to be convicted despite a reasonable doubt about whether death was objectively foreseeable. *Id.*, at para. 49.

<sup>42</sup> [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.). The case considered a different subsection of constructive murder: s. 213(a) of the *Criminal Code*, R.S.C. 1970, c. C-34.

<sup>43</sup> *Id.*, at 665.

Those who are critical of all forms of the "felony-murder" rule base their denunciation on the premise that *mens rea* is the exclusive determinant of the level of "stigma" that is properly applied to an offender. This appears to me to confuse some very fundamental principles of criminal law and ignores the pivotal contribution of *actus reus* to the definition and appropriate response to proscribed criminal offences. If both components, *actus reus* as well as *mens rea*, are not considered when assessing the level of fault attributable to an offender, we would see manslaughter and assault causing bodily harm as no more worthy of condemnation than an assault. Mere attempts would become as serious as full offences. The whole correlation between the consequences of a criminal act and its



part, Sopinka J. found no need to consider a general principle. Drawing a link between interpreting common and constitutional law,<sup>44</sup> he argued for restraint in both, noting that an issue should not be decided unless it is necessary to the resolution of a case, or there is some other “overriding reason”.<sup>45</sup>

Thus, in the murder cases, after an initially united front, the Court split on the implications of the expanded approach to section 7. The dissents in *Vaillancourt* and *Martineau* presaged a Court that has never achieved sustained unity on the intersection between fundamental justice and culpable homicide.<sup>46</sup>

In contrast to functional disagreement stands disagreement based on principle. My use of “principle” here is based loosely on Ronald Dworkin’s account of legal interpretation.<sup>47</sup> In *Law’s Empire*, Dworkin argued that law best claims legitimacy — justifying its coercive aspects<sup>48</sup> — when as a process it seeks “integrity”.<sup>49</sup> Integrity is achieved through identifying and applying principles that provide the best interpretation of a community’s legal practice.<sup>50</sup> Famously, Dworkin used “an imaginary judge of superhuman, intellectual power and patience”<sup>51</sup> to demonstrate the interpretative manifestation of integrity. The judge, “Hercules”, does not shrink from cases involving questions of political morality; instead, he accepts that judges must make “decisions that give voice as well as effect to convictions about morality that are widespread throughout the

---

retributive repercussions would become obscured by a stringent and exclusive examination of the accused’s own asserted intentions.

Justice L’Heureux-Dubé also disagreed, in any event, that s. 213(a) permitted convictions in the absence of objective foresight of death.

<sup>44</sup> *Id.*, at 682:

Overbroad statements of principle are inimical to the tradition of incremental development of the common law. Likewise, the development of law under the *Canadian Charter of Rights and Freedoms* is best served by deciding cases before the courts, not by anticipating the results of future cases.

<sup>45</sup> *Id.*, at 684.

<sup>46</sup> *R. v. Logan*, [1990] S.C.J. No. 89, [1990] 2 S.C.R. 731 (S.C.C.). See also *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.), where Lamer C.J.C. narrowly lost a battle to entrench objective foresight of *death* as the minimum requirement for culpable homicide other than murder.

<sup>47</sup> Ronald Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 1986) [hereinafter “Dworkin”].

<sup>48</sup> *Id.*, at 191.

<sup>49</sup> *Id.*, c. 6.

<sup>50</sup> *Id.*, at 95-96.

<sup>51</sup> *Id.*, at 225.

community”.<sup>52</sup> This means that all courts have the power to decide “what the Constitution means and to declare acts of other departments of government invalid if they exceed the powers provided for them by the Constitution”.<sup>53</sup>

Though Dworkin’s account has been criticized on both analytic and normative grounds,<sup>54</sup> it is a reasonable description of what many Canadian judges appear to be doing. The Charter narrative involves judges searching for greater meaning, going beyond purely textual analysis, and seeking to situate particular disputes within a historical and political framework. In the *Motor Vehicle Reference*, for example, the Supreme Court stated that section 7 entrenches principles, which reflect a particular criminal law tradition and heritage. These principles, the Court noted, “do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system”.<sup>55</sup> The Court thus asserted a unique competence to identify those principles. The confident stance was echoed in other Charter cases, including *Big M* (articulating a broad and expansive understanding of the elements of a free and democratic society);<sup>56</sup> *Hunter v. Southam* (adopting the purposive approach to Charter interpretation);<sup>57</sup> and *Oakes* (incorporating balancing into section 1).<sup>58</sup>

A prime example of principle-based disagreement is found in *R. v. Edwards Books & Art Ltd.*<sup>59</sup> There, an Ontario law required the retail industry to observe Sunday as a common pause day but permitted some smaller establishments to instead close on Saturdays. In an earlier case, *Big M*, the Court had struck down the federal *Lord’s Day Act*<sup>60</sup> because of its clear religious orientation. Unlike *Big M*, the law in *Edwards Books* was not obviously religious, but it was held to indirectly violate the freedom of religion of Saturday observers who

<sup>52</sup> *Id.*, at 248.

<sup>53</sup> *Id.*, at 356.

<sup>54</sup> H.L.A. Hart, “Postscript”, *The Concept of Law* (Oxford: Clarendon Press, 1994); Larry Alexander, “Striking Back at the Empire: A Brief Survey of Problems in Dworkin’s Theory of Law” (1987) *Law & Phil.* 6, at 419; Brian Leiter, “Beyond the Hart-Dworkin Debate: The Methodology Problem in Jurisprudence” (2003) 48 *Am. J. Juris.*, at 17-51; John Mackie, “The Third Theory of Law” in M. Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1983).

<sup>55</sup> *Motor Vehicle Reference*, *supra*, note 27, at 503.

<sup>56</sup> *Big M*, *supra*, note 25.

<sup>57</sup> *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

<sup>58</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

<sup>59</sup> [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.) [hereinafter “*Edwards Books*”].

<sup>60</sup> R.S.C. 1970, c. L-13, s. 4, struck down in *Big M*, *supra*, note 25.

could not avail themselves of the exemption.<sup>61</sup> The case, then, largely turned on a section 1 analysis.

Writing for three judges, Dickson C.J.C. found the law to be a reasonable compromise between accommodating religious beliefs and securing the benefits of a common pause day.<sup>62</sup> For him, the case turned on the narrow issue of whether the scheme was a reasonable limit on those Saturday observers who were required to work. Relying on the particular characteristics of the retail industry,<sup>63</sup> Dickson C.J.C. held that the legislature need not always choose the *least* impairing choice but can select one of several reasonable alternatives.<sup>64</sup>

Justice Wilson, dissenting, explicitly invoked the notion of law as integrity and referenced Dworkin's use of "checkerboard" laws. These are laws which treat people differently based on considerations that are clearly arbitrary — figuratively, whether they occupy a red or black square. For example, the legislature might dispense abortion rights to women based on the year of their birth, or forbid racial discrimination only in certain places, such as in movie theatres but not in playgrounds.<sup>65</sup> One might think that people on opposing sides of political disputes would favour these kinds of compromises over an outright loss. But, Dworkin argued, reasonably, that no one would be satisfied with such a solution. To him, this fact revealed a fundamental point about our

---

<sup>61</sup> The majority that found a *prima facie* infringement consisted of Dickson C.J.C., Chouinard, Le Dain and Wilson JJ. While La Forest J. accepted the Chief Justice's s. 2(a) analysis, he was concerned that recognizing *prima facie* infringement where there is only an indirect interference with religious freedom would put at risk too many laws. *Edwards Books*, *supra*, note 59, at paras. 177, 187, 190.

<sup>62</sup> *Id.*, at para. 119.

<sup>63</sup> *Id.*, at para. 128. These characteristics — including intense competitiveness among merchants; low unionization rates; and high proportion of female employees — made it particularly "vulnerable to subtle and overt pressure from its employers".

<sup>64</sup> *Id.*, at para. 141. In explanation, Dickson C.J.C. said the following, at para. 136:

The economic position of [retail] employees affords them few choices in respect of their conditions of employment. It would ignore the realities faced by these workers to suggest that they stand up to their employer or seek a job elsewhere if they wish to enjoy a common day of rest with their families and friends. ... In interpreting and applying the *Charter*. I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. ... I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

<sup>65</sup> Dworkin, *supra*, note 47, at 178.

conception of law — that it rejects internal compromises.<sup>66</sup> Justice Wilson drew on this, describing the Ontario law as trying to “effect a compromise between the government’s objective of a common pause day and the freedom of religion of those who close on Saturdays for religious reasons”.

<sup>67</sup> That compromise undermined the law’s stated purpose of ensuring respect for religious difference.

The point here is not that one opinion is more principled, or faithful, to Dworkin’s framework. Chief Justice Dickson’s reasons are consistent with an integrity-driven approach. Just like Wilson J., he wrestles with larger questions of consistency, fairness and equality. Yet, the opinions remain diametrically opposed, revealing fault lines in what are otherwise compatible approaches to constitutional interpretation.<sup>68</sup>

The line between functional and principled disagreement is not always a sharp one. For example, functional disagreement can rest on divergent principles about institutional competence and the separation of powers. The line between the two arguably becomes even fuzzier in the Charter context, where no right is absolute.<sup>69</sup> The interpretation of section 1 presents opportunities for division along both models of disagreement. So, I do not claim that functional and principle-based disagreement occupy purely separate categories — only that they represent a reasonable taxonomy of how judicial disagreement manifests in Charter jurisprudence. That taxonomy is useful for analyzing dissent in equality law, to which I turn next.

---

<sup>66</sup> *Id.*, at 179: “If there must be compromise because people are divided about justice ... it must be compromise about which scheme of justice to adopt rather than a compromised scheme of justice.”

<sup>67</sup> *Edwards Books*, *supra*, note 59, at para. 208.

<sup>68</sup> The fault lines appear in other cases such as *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) where, although both justices thought that the then-abortion law was unconstitutional, Dickson J. employed a narrow analytic approach focusing on arbitrariness and “illusory defences”, while Wilson J. tackled the question of whether terminating a pregnancy is itself protected by the Charter. I discuss Dickson J.’s approach in “Rational Connections: *Oakes*, Section 1 and the *Charter*’s Legal Rights” *Ottawa Law Review* (forthcoming).

<sup>69</sup> Alan Gewirth, “Are There Any Absolute Rights?” in Jeremy Waldron, ed., *Theories of Rights* (New York: Oxford University Press, 1984) 91.

### III. DISSENT AND EQUALITY

#### 1. Divided from the Start

Consistent with the Chief Justice's description of it as "the most difficult right",<sup>70</sup> section 15 of the Charter has generated much judicial disagreement. The *A.* decision joins numerous cases<sup>71</sup> using equality principles to recognize alternative family forms as equally worthy of respect and consideration. Yet, the Court has struggled over less direct claims of discrimination in family law, particularly when individuals within relationships have different needs and goals, or when one person relies on a prior choice to be legally un-tethered while the other seeks support.<sup>72</sup>

A conventional reading of section 15 might take the merit of judicial consensus at face value, perhaps drawing on concerns over institutional legitimacy or certainty. The reading probably would begin with the decision in *Andrews* which endorsed substantive equality. It certainly would highlight the dramatic 1995 split over so-called "functional relevance".<sup>73</sup>

---

<sup>70</sup> The Right Honourable Beverley McLachlin, P.C., "Equality: The Most Difficult Right" (2001) 14 S.C.L.R. (2d) 17.

<sup>71</sup> Consider the path from *Canada (Attorney General) v. Mossop*, [1993] S.C.J. No. 20, [1993] 1 S.C.R. 554 (S.C.C.) (absent a constitutional challenge, error of law to include a same-sex relationship within the prohibited ground of discrimination of "family status") to *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.) [hereinafter "*Egan*"] (heterosexual definition of "spouse" in federal benefits scheme is justified violation of s. 15) and *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.) [hereinafter "*Miron*"] (excluding common law couples from standard form insurance benefits available to "spouses" is unjustified violation of s. 15) to *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.) (excluding same-sex spouses from family law regime is unjustified violation of s. 15) to *Halpern v. Toronto (City)*, [2003] O.J. No. 2268, 65 O.R. (3d) 161 (Ont. C.A.) (definition of "marriage" must include same-sex couples).

<sup>72</sup> *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325 (S.C.C.) [hereinafter "*Walsh*"] and *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 (S.C.C.) [hereinafter "*Hodge*"]. *Walsh* was particularly relevant to the *A.* decision as it involved an equality challenge to a common law regime which denied property rights to unmarried couples. A majority of the Supreme Court found that the law did not discriminate in a *prima facie* sense. In *A.* the trial court and Quebec Court of Appeal felt bound by *Walsh* with respect to Quebec's treatment of property rights. Justice LeBel found that *Walsh* was consistent with the Court's general approach to discrimination and did not need to be distinguished or additionally supported. Justice Abella found that *Walsh* had been overtaken by subsequent jurisprudence and was no longer good law. In their respective opinions, the Chief Justice and Deschamps J. agreed. Given space restrictions, I cannot discuss the disagreement between LeBel and Abella JJ. in depth, although I do allude to it, *infra* note 155 and surrounding text.

<sup>73</sup> *Egan, supra*, note 71; *Miron, supra*, note 71.

That split might be seen as being “repaired” by the 1999 *Law*<sup>74</sup> case. The resulting equality framework created a backlash to which the Court responded a decade later, again unanimously, in *Kapp*<sup>75</sup> and in *Withler*.<sup>76</sup> The reading likely would end with dismay because, in *A.*, all consensus appears to have vanished.

My reading also begins with *Andrews* but is very different.<sup>77</sup> *Andrews* achieved critically important unity on several interpretative issues: the rejection of the similarly situated approach; the recognition that, sometimes, equality may require differential treatment and the concomitant need to show “discrimination”; the assertion that section 15 has a strong remedial component; and the idea that the enumerated grounds are not a closed list. Subsequent cases appeared to cement the expansive approach, confirming that discrimination must be analyzed from the perspective of the right-claimant<sup>78</sup> and need not be intentional;<sup>79</sup> and that differential treatment need not be tied to biologically immutable characteristics.<sup>80</sup>

In *Andrews*, the Court recognized that equality has formal and substantive aspects. Formal equality requires that similar cases be treated according to similar principles; it incorporates the rule of law command against arbitrary treatment and is indispensable to a just society. Substantive equality requires consideration of the broader social context in which people live and, therefore, cannot be attained merely by treating people similarly to those who appear to be “like” them.<sup>81</sup> More is required, namely, consideration to “the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application”.<sup>82</sup>

---

<sup>74</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter “*Law*”].

<sup>75</sup> *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] S.C.R. 483 (S.C.C.) [hereinafter “*Kapp*”].

<sup>76</sup> *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, [2011] 1 S.C.R. 396 (S.C.C.) [hereinafter “*Withler*”].

<sup>77</sup> *Supra*, note 14. The case arose as a challenge to a citizenship requirement for entry into the legal profession.

<sup>78</sup> *Id.*; *Law*, *supra*, note 74.

<sup>79</sup> *Andrews*, *id.*

<sup>80</sup> *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.).

<sup>81</sup> *Brooks v. Canada Safeway Ltd.*, [1989] S.C.J. No. 42, [1989] 1 S.C.R. 1219 (S.C.C.).

<sup>82</sup> *Andrews*, *supra*, note 14, at 169. See also *Weatherall v. Canada (Attorney General)*, [1993] S.C.J. No. 81, [1993] 2 S.C.R. 872 (S.C.C.), holding that differential treatment based on sex does not necessarily violate s. 15. In this case, a male prison inmate argued that the fact that female guards could frisk him constituted discrimination given that female inmates were not subjected to cross-gender frisks. Recognizing that women’s vulnerability to male sexual violence poses a distinctive concern not met in the converse situation, La Forest J. held that the policy’s facial inequality did not discriminate.

Clearly, *Andrews* was a milestone. Yet, the seeds of dissent already had been sown. For one thing, *Andrews* itself is a Janus-type<sup>83</sup> decision. Justice McIntyre, who authored the important equality analysis, did not think that limiting bar admission to Canadian citizens was unconstitutional.<sup>84</sup> Noting that “distinctions are one of the main preoccupations of legislatures”,<sup>85</sup> McIntyre J. cautioned that aggressive section 15 review would threaten myriad laws and regulations. His concern, which was explicitly functional,<sup>86</sup> cashed out in a more flexible approach to section 1 so as not to “deny the community-at-large the benefits associated with sound social and economic legislation”.<sup>87</sup> Because section 15 is “the broadest of all guarantees” which “applies to and supports all other rights”, and because the state has “a right and a duty to make laws for the whole community”, McIntyre J. continued, “it will rarely be possible to say of any legislative distinction that it is clearly the right legislative choice or that it is clearly a wrong one”.<sup>88</sup>

Arguably, in *Andrews* the “best” answer was not obvious. Noting the important influence that lawyers play in our society and legal system, and the fact that citizenship itself is generally attainable for those living here, McIntyre J. said that the Court should not simply replace the legislature’s opinion with its own.<sup>89</sup> He made no conclusions about the desirability of the actual policy, unlike the members of the majority who associated it with historical suspicion of non-citizens. His point was that the Court should tread lightly before terming any law “unreasonable”.

---

<sup>83</sup> Janus is the Roman god of beginnings and of transition. He is portrayed as having two faces, one turned toward the past and the other toward the future. I invoke him here for the more classic connotation of oppositional characteristics. But the image of Janus is also strikingly apt for *Andrews* which is, itself, both an ending and an origin point for equality law post-1982.

<sup>84</sup> Justice Lamer joined McIntyre J.’s opinion in full.

<sup>85</sup> *Andrews*, *supra*, note 14, at 168.

<sup>86</sup> In a concurring opinion (that foreshadowed more profound disagreement), La Forest J. stated: [I]t was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. ... Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.

Note, though, that La Forest J. agreed with the majority that the citizenship requirement was not justified (*id.*, at 194).

<sup>87</sup> *Id.*

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

<sup>89</sup> *Id.*

*Andrews*, then, was hardly a unified decision.<sup>90</sup>

By 1995, the Court's lack of internal cohesion on section 15 had intensified. In *Egan v. Canada*<sup>91</sup> and in *Miron v. Trudel*,<sup>92</sup> the Court split badly on the role of "functional relevance" in establishing discrimination.<sup>93</sup> On the surface, the disagreement was about whether a prohibited ground of discrimination might nonetheless be an appropriate basis for legislating different treatment in some circumstances. But the true disagreement was about whether certain personal characteristics previously viewed as foundational to the family unit had continuing significance for state policy. Thus, the minority opinions<sup>94</sup> in *Egan* and *Miron* insisted that it is open to the state to promote a family unit based on "biological realities" like procreation.<sup>95</sup>

A majority of the Court did not agree.<sup>96</sup> But that was not enough to vindicate the equality claims. Section 1 still provides the possibility of

---

<sup>90</sup> The case was heard before seven judges but one, Le Dain J. did not participate. Justice McIntyre's analysis was accepted by six justices (with a concurring opinion by La Forest J. cited above); his s. 1 analysis carried only two; and Wilson J.'s analysis of s. 1, deciding the outcome, commanded four.

<sup>91</sup> *Egan, supra*, note 71. *Egan* challenged the opposite-sex definition of "spouse" set out in the *Old Age Security Act*, R.S.C. 1985, c. O-9, ss. 2, 19(1).

<sup>92</sup> *Miron, supra*, note 71. *Miron* challenged the exclusion of unmarried couples from standard-form insurance agreements prescribed by provincial law.

<sup>93</sup> *Egan* and *Miron* were decided together with *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.), another failed equality claim but one decided on a different basis.

<sup>94</sup> By "minority" I refer to the analysis of *prima facie* infringement. The Court reached differing conclusions on outcome, finding the law constitutional in *Egan*, and invalid in *Miron*.

<sup>95</sup> *Egan, supra*, note 71, *per* La Forest J., at 515:

[M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.

<sup>96</sup> *Miron, supra*, note 71, at para. 56:

The danger of using relevance ... is acute when one is dealing with so-called "biological" differences ... If we are not to undermine the promise of equality in s. 15(1) of the *Charter*, we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s. 15(1) aims to eradicate.

Justice L'Heureux-Dubé concurred in the finding of discrimination, but wrote concurring reasons urging that any template for equality analysis, focusing for instance on prohibited grounds, be abandoned in favour of a purely contextual approach.



saving the legislation as a reasonable limit. This occurred in *Egan*, where Sopinka J. agreed with four judges that the law was discriminatory but, drawing on functional concerns, upheld it. Citing the need for “flexibility in extending social benefits”, he cautioned that aggressive judicial review would make governments “reluctant” to act at all.<sup>97</sup> Additionally, the legislative history of survivor benefits showed an “evolving expansion of the definition of the intended recipients of the benefits”.<sup>98</sup> Because the government was mediating between competing groups seeking scarce resources, it was entitled to take an “incremental approach”<sup>99</sup> to rights recognition.

In 1999, the Court unanimously declared that its earlier (fractured) decisions nonetheless reflected a common understanding of section 15’s central purpose. In *Law v. Canada*,<sup>100</sup> the promotion of essential human dignity became the new touchstone for discrimination. Dignity was described as an individual or group’s feelings of self-respect and self-worth,<sup>101</sup> determined from the perspective of a “rational” person in similar circumstances.<sup>102</sup> The Court identified four “contextual factors” to help determine whether a particular distinction constitutes discrimination.<sup>103</sup> The repeated reference to the “reasonable person” appeared to make the lived experience of inequality less relevant to discrimination. Discrimination instead became firmly attached to the rational individual, able to look past a personal slight and evaluate a state law or policy within its larger context. This was borne out in later (unanimous) decisions which dismissed equality claims because a “reasonable person” would not think that she had been subject to discrimination.<sup>104</sup>

---

<sup>97</sup> *Egan*, *supra*, note 71, at 572-73.

<sup>98</sup> *Id.*, at 574.

<sup>99</sup> *Id.*, at 575.

<sup>100</sup> *Law*, *supra*, note 74.

<sup>101</sup> *Id.*, at paras. 51-53.

<sup>102</sup> *Id.*, at para. 61.

<sup>103</sup> The contextual factors are: pre-existing disadvantage; the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the claimant’s actual need, capacity, or circumstances; any ameliorative purpose or effects of the law upon a more disadvantaged person or group in society; and the nature and scope of the individual interest at stake. *Id.*, at para. 88.

<sup>104</sup> See *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703 (S.C.C.) [hereinafter “*Granovsky*”]; *Hodge*, *supra*, note 72. Another decision that frequently is cited in this regard is *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.) [hereinafter “*Gosselin*”], though it was not unanimous.

In 2008, after a decade of criticism, the Court beat a sort-of-retreat. In *R. v. Kapp*,<sup>105</sup> the Court dramatically jettisoned “human dignity” from the discrimination analysis.<sup>106</sup> *Law* had never been intended as “a new and distinctive test for discrimination”,<sup>107</sup> the Court now proclaimed; it had merely affirmed *Andrews*.<sup>108</sup> The Court then restated the section 15 test as whether a law (a) differentiates on the basis of a prohibited ground; and (b) perpetuates disadvantage by way of stereotype or prejudice.

Because of the way that *Kapp* was decided,<sup>109</sup> the Court did not apply the restated equality test to the facts. In subsequent cases, though, the *Kapp* approach proved to be as restrictive as *Law*. Now, the stumbling block was the requirement to prove stereotype or prejudice. The Court dismissed claims relating to: the Crown’s management of Aboriginal funds leading to lesser returns;<sup>110</sup> the diminished decisional autonomy accorded to some youths with respect to medical decisions;<sup>111</sup> and a sliding scale of survivor benefits pegged to age.<sup>112</sup> In the latter case, *Withler*, the Court appeared to be especially concerned about interfering with questions of legislative design.<sup>113</sup> It seemed to imply that “broad-based plans meant to cover competing interests” of diverse

---

<sup>105</sup> *Kapp, supra*, note 75. *Kapp* concerned a one-time 24-hour licence granted to members of three Aboriginal bands to fish for salmon in the Fraser River in British Columbia. Some (mostly) non-Aboriginal fishers argued that the licence discriminated against them on the basis of race.

<sup>106</sup> *Id.*, at para. 20:

[A]s critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court’s post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.

<sup>107</sup> *Id.*, at para. 24.

<sup>108</sup> *Law, supra*, note 74, at para. 24.

<sup>109</sup> The Court found the program to be protected under s. 15(2) — the approach to which *Kapp* also restated — and, on that basis, held that it was not discriminatory. For a discussion of the Court’s approach to s. 15(2), see Carissima Mathen & Michael Plaxton, “Developments in Constitutional Law — The 2010-2011 Term” (2011) 55 S.C.L.R. (2d) 47, at 149-59.

<sup>110</sup> *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, [2009] 1 S.C.R. 222 (S.C.C.). See the discussion in Carissima Mathen & Michael Plaxton, “Developments in Constitutional Law: The 2008-2009 Term” (2009) 48 S.C.L.R. (2d) 71.

<sup>111</sup> *C. (A.) v. Manitoba*, [2009] S.C.J. No. 30, [2009] S.C.R. 181 (S.C.C.).

<sup>112</sup> *Withler, supra*, note 76.

<sup>113</sup> *Id.*

groups are not easily classified as discriminatory based solely on differential outcomes.<sup>114</sup>

*Withler* dealt with a complex question: the degree to which equality analysis requires a “mirror comparator group”.<sup>115</sup> The Court decided that it does not, but its ultimate prescription was unclear. The Court did not eschew comparison, or even comparator groups. Most strikingly, while it catalogued criticisms of mirror comparators, the Court never questioned earlier cases<sup>116</sup> in which the uses of a mirror comparator group led to defeat for the claimants. The past decisions were instead described as being fully consistent with substantive equality. Additionally, while the Court repeatedly invoked the need for a fully contextual inquiry, *Withler* engaged in very little analysis of the claimants’ actual situation.<sup>117</sup>

Thus, many of the decisions issued in the post-*Law* period, while unanimous, elided difficult questions of equality analysis. Disconcertingly, the Court continued to insist that section 15’s chronology was uniform and uncomplicated, a single path originating from substantive equality. The repeated assertions of a “contextual approach” subsumed quite distinct orientations and attitudes within a one-size-fits-all model. The more unified the Court appeared, the more shallow its analysis became.

## 2. The Decision in *A*.

Against the foregoing, the sharp divisions in *A*. take on a different cast. As previously mentioned, the case involved a challenge to the *Civil Code of Québec*,<sup>118</sup> which provides access to spousal support and property division for married and civil union couples. *De facto* couples have no legal status. The appellant in this case, “A”, cohabited for seven years with a man, “B”, and their three children.<sup>119</sup> Throughout their

---

<sup>114</sup> *Id.*, at para. 73.

<sup>115</sup> *Hodge*, *supra*, note 72, at para. 23.

<sup>116</sup> See *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.); *Granovsky*, *supra*, note 104; *Hodge*, *supra*, note 72.

<sup>117</sup> Jennifer Koshan & Jonnette Watson Hamilton, “Meaningless Mantra: Substantive Equality after *Withler*” (2011) 16 *Rev. Const. Stud.* 31.

<sup>118</sup> *A.*, *supra*, note 1.

<sup>119</sup> A and B met, in her native country, when she was 17 and he was 32. B was running a large international business which made him extremely wealthy. A accompanied B to Canada and did not work during the relationship. At the time of their separation, B was ordered to pay A \$34,260.24 a month in child support. *A.*, *supra*, note 1, at paras. 4-7.

relationship, B made it clear that he did not believe in marriage.<sup>120</sup> After they separated, A was granted child support but since the Code did not permit her to seek either spousal support or a share in the family property, she launched a Charter challenge. The Quebec Superior Court rejected her claim.<sup>121</sup> The Court of Appeal partially overturned, finding article 585, which deals with spousal support, fatally under-inclusive.<sup>122</sup>

In the Supreme Court, LeBel J. provided a detailed history of Quebec's family law regime, in particular its evolution from "community of property and separation of property"<sup>123</sup> to an equality-based approach. In the modern era, he said, marriage is not just a union, but a socio-economic partnership. It extends, too, beyond formal marriages. In 2002, Quebec created the category of "civil unions".<sup>124</sup> Once parties manifest their intention to enter into one, civil unions are treated largely similar to marriage.<sup>125</sup> Those who neither marry nor execute a civil union are considered as *de facto* spouses. Historically, the legislative treatment of *de facto* unions reflected harsh views: such unions were "suspect", "contrary to public order and good morals" and even "immoral".<sup>126</sup> Beginning in the 1980s, such hostility gradually dissipated,<sup>127</sup> but Quebec never included them within the family law regime.

While married and civil union couples are subject to regimes that are mandatory in at least some respects, *de facto* spouses are governed above all by freedom of contract. They are "free to shape their relationships as they wish, having proper regard for public order".<sup>128</sup> Between 1981 and 2006, the proportion of Quebec couples in *de facto* unions increased from 7.9 to 34.6 per cent, about double the rate elsewhere in Canada.<sup>129</sup>

Against this socio-historical context, LeBel J. turned to section 15. First, he affirmed the provision's preoccupation with substantive equality, linking the latter to autonomy-based notions of dignity:

<sup>120</sup> *Id.*, at para. 5.

<sup>121</sup> *Droit de la famille — 091768*, [2009] J.Q. no 7153, [2009] R.J.Q. 2070 (Que. S.C.).

<sup>122</sup> *Droit de la famille — 102866*, [2010] J.Q. no 11091, [2010] R.J.Q. 2259 (Que. C.A.).

<sup>123</sup> *A.*, *supra*, note 1, at para. 52.

<sup>124</sup> Bill 84, *An Act instituting civil unions and establishing new rules of filiation*, 2nd Sess., 36 Leg., Quebec, 2002 (assented to June 8, 2002), S.Q. 2002, c. 6.

<sup>125</sup> *A.*, *supra*, note 1, at para. 99.

<sup>126</sup> *Id.*, at para. 100.

<sup>127</sup> For example, children's status no longer depended on the marital status of their parents, and agreements between the parties became legally enforceable. *Id.*, at paras. 103-104.

<sup>128</sup> *Id.*, at para. 114.

<sup>129</sup> *Id.*, at para. 125.

[Substantive equality] recognizes the dignity of each human being and each person's freedom to develop his body and spirit as he or she desires, subject to such limitations as may be justified by the interests of the community as a whole. It recognizes that society is based on individuals who are different from each other, and that a free and democratic society must accommodate and respect these differences.<sup>130</sup>

Not only is it “unfair to limit an individual's full participation in society solely because [of] personal characteristics[,] ... it is unacceptable to refuse on the basis of these characteristics to treat a person as [someone] who deserves to realize his or her full human potential”.<sup>131</sup> The discrimination analysis must be cognizant of both realities. In particular, it is insufficient simply to show legal disadvantage on the basis of an enumerated or analogous ground. A *prima facie* case requires something more: a “discriminatory disadvantage” which perpetuates prejudice or engages in stereotype.<sup>132</sup>

Justice LeBel then offered a detailed analysis of the two concepts, beginning with prejudice:

A legislative distinction based on prejudice denies a class of persons a benefit out of *animus* or contempt. It directly connotes a belief in their inferiority, a denial of equal moral status. ... It thus treats members of a group as *loci* of intrinsic negative value, rather than intrinsic moral worth.<sup>133</sup>

Prejudice “is most likely to result in a finding of the types of discrimination to which s. 15 applies”.<sup>134</sup> In addition, it “provides a framework to enable courts to consider such discrimination without lapsing totally into subjectivism”.<sup>135</sup> The negative view encompassed by prejudice need not be intentional.<sup>136</sup> But, it requires more than mere differential treatment.<sup>137</sup>

---

<sup>130</sup> *Id.*, at para. 138 citing *Miron, supra*, note 71, at para. 145.

<sup>131</sup> *Id.*, at para. 140.

<sup>132</sup> *Id.*, at para. 171.

<sup>133</sup> *Id.*, at para. 195, citing Denise G. Réaume, “Discrimination and Dignity” (2003) 63 La. L. Rev. 645, at 679-80 [hereinafter “Réaume”].

<sup>134</sup> *Id.*, at para. 192.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*, at para. 194.

<sup>137</sup> *Id.*

With respect to “stereotype”, LeBel J. focused on the lack of correspondence between the impugned law and the actual needs, merits or capacities of the affected individuals. It uses easy generalizations to extraordinarily harmful effect:

Negative characteristics ... which are in fact distributed throughout the human race, are falsely attributed predominantly to members of a particular group. [These assumptions] can carry forward ancient connotations of second class status, even if the legislators did not intend that meaning.<sup>138</sup>

Stereotype can operate in the absence of actual malice; can co-exist with honest beliefs about “natural” differences; and can reflect misguided paternalistic concern. Nonetheless, the denial of access to benefits or opportunities available to others is demeaning<sup>139</sup> and, thus, inconsistent with equality norms.

Justice LeBel spoke for four justices. Four others partially joined an opinion authored by Abella J., who proposed “a flexible and contextual inquiry” that focuses on whether “a distinction has the effect of perpetuating arbitrary disadvantage”.<sup>140</sup> This, she noted, is consistent with McIntyre J.’s decision in *Andrews*.<sup>141</sup> Given that “certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed”, it follows that “[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.”<sup>142</sup>

Justice Abella rejected requiring proof of prejudice or stereotype, reasoning that because some discrimination involves neither, to focus on them would distort the analysis.<sup>143</sup> It forces the claimant to prove that the impugned law creates negative attitudes, resembling outmoded

---

<sup>138</sup> *Id.*, at para. 202, citing Réaume, *supra*, note 133, at 681-82.

<sup>139</sup> *Id.*

<sup>140</sup> *A.*, *supra*, note 1, at para. 331. As previously stated, Abella J. spoke for five justices with respect to the *prima facie* infringement, but only herself with respect to s. 1.

<sup>141</sup> *Id.*, at para. 322:

[T]he words “without discrimination” require more than a mere distinction in the treatment given to different groups or individuals. Instead, McIntyre J. found that those words were a form of qualifier built into s. 15 which limits the distinctions forbidden by the section to “those which involve *prejudice or disadvantage*” (p. 181 (emphasis added)).

<sup>142</sup> *Id.*, at para. 332.

<sup>143</sup> *Id.*, citing Sophia Moreau, “R. v. Kapp: New Directions for Section 15” (2008-2009) 40 Ottawa L. Rev. 283, at 292.

understandings of discrimination that required malicious intent. Justice LeBel's approach, she wrote, would impose on claimants "largely irrelevant, not to mention ineffable burden[s]"<sup>144</sup>.

The distinction between the majority and dissenting opinions is rooted in fundamentally different analytics of discrimination. It is, in other words, based on principle. It is not surprising that LeBel and Abella J.J. reached divergent conclusions about the equality claim. To LeBel J., Quebec's exclusion of *de facto* couples involved neither prejudice nor stereotype. While acknowledging that *de facto* spouses "were subjected to both legislative hostility and social ostracism",<sup>145</sup> he noted that any societal disapproval had long since disappeared. The fact that the regime privileges the choice to "opt out" of marriage or civil union does not make it discriminatory. To the contrary, setting up different frameworks for different kinds of relationships "connotes respect for the various conceptions of conjugality".<sup>146</sup> Nor should the state be forced to assume that conjugality involves mutual obligations until those obligations are expressly rejected by the parties to the relationship.<sup>147</sup> That would undermine the state's asserted goal of "[enhancing] respect for the autonomy and self-determination of unmarried cohabitants".<sup>148</sup>

Justice LeBel employed a similar analysis for stereotype, asking whether the legislature was mistaken in assuming that people generally exercise autonomous will in their formation of particular family units.<sup>149</sup> Although he accepted that some individuals are unaware of the (lack of) consequences of cohabiting without any prior agreement, he answered "no". It would exceed the limits of "legitimate judicial notice", he said,

---

<sup>144</sup> *Id.*, at para. 330.

<sup>145</sup> *Id.*, at para. 248.

<sup>146</sup> *Id.*, at para. 266.

<sup>147</sup> This was an argument made by Abella J., *id.*, at para. 375, in the context of s. 1, specifically, minimal impairment. Justice LeBel responded (*id.*, at paras. 266 and 268):

[Abella J.] does not recognize the role played by consent in the application of the rights and obligations that result from the various forms of conjugality. And it is odd that the opt-out solution she proposes for parties living in a *de facto* union would itself depend on this mutuality of consent and would not be available to parties who have chosen other forms of conjugal relationships. Next, she fails in practice to consider the social context of the *de facto* union in Quebec. Finally, her analysis would tend to reduce the review of alleged infringements of the right to equality to a requirement that adverse distinctions be found. There would no longer be an analytical framework to guide the courts in considering such matters, and this could affect the legitimacy of their decisions in this regard.

<sup>148</sup> *Id.*, at para. 265.

<sup>149</sup> *Id.*, at para. 270.

to accept that a Quebec resident who chooses to remain unmarried has not made an autonomous decision “to avoid the legal regimes”<sup>150</sup>.

Justice Abella’s application of section 15 to the facts was more focused on the lived impact of exclusion:

That [the legislative distinction between *de facto* and other spouses] imposes a disadvantage is clear, in my view: the law excludes economically vulnerable and dependent *de facto* spouses from protections considered so fundamental to the welfare of vulnerable married or civil union spouses that one of those protections is presumptive, and the rest are of public order, explicitly overriding the couple’s freedom of contract or choice.<sup>151</sup>

Despite the amelioration of negative social *attitudes* towards *de facto* spouses, the law continues to perpetuate negative *treatment* of them. Referring repeatedly to the “functional similarity”<sup>152</sup> of *de facto* and other spouses, Abella J. held that the former’s exclusion from the statutory regime “perpetuates historic disadvantage” based on marital status.<sup>153</sup>

Justice Abella also worried that an excessive focus on individual choice opened up hazardous avenues of inquiry:

[A] legal issue of particular importance in this case [is] the proper stage in the analysis to address the effect of the choice not to marry. In *Miron*, the fact that marital status is not a real choice was the basis for designating marital status as an analogous ground under s. 15(1)... Any discussion of the reasonableness of distinctions based on this ground, or justifications for such distinctions, must take place under s. 1.<sup>154</sup>

Citing the need to keep section 15 and section 1 distinct, as well as the proper place to consider individual choice, Abella J. refused to accord

---

<sup>150</sup> *Id.*, at paras. 272-274.

<sup>151</sup> *Id.*, at para. 349. While the conclusion regarding s. 15 is only briefly explained, Abella J. does spend a fair amount of time on the needs, economic dependency and disadvantage faced by *de facto* spouses on relationship breakdown. *Id.*, at paras. 296-300. She accepts LeBel J.’s “elegant” legislative history, but highlights two points: (a) the various stages of law reform uniformly have been motivated by the protection of economically vulnerable spouses; and (b) “far from being designed to reflect the actual choices made by married spouses, these measures subordinated those choices to the agenda of protection” (*id.*, at paras. 305, 307).

<sup>152</sup> *Id.*, at paras. 350-353.

<sup>153</sup> *Id.*, at para. 356.

<sup>154</sup> *Id.*, at paras. 334, 335 (emphasis omitted).



any precedential value to *Walsh*.<sup>155</sup> She described the decision as being at odds with both *Kapp* to the extent that it rests on an analysis of “human dignity”; and with *Withler* in its use of the heterogeneity of common law couples to conclude that there is no relevant comparison between them and married couples in terms of need.<sup>156</sup>

Under section 1 Abella J. focused primarily on minimal impairment,<sup>157</sup> concluding that a “presumptive protective scheme”<sup>158</sup> would provide economically vulnerable spouses with the necessary protection, while reasonably safeguarding their partners’ freedom to choose.<sup>159</sup> Although Quebec had made “a carefully considered policy choice”,<sup>160</sup> total exclusions of this sort are difficult to justify. Here, Abella J. briefly referenced a functionalist argument, acknowledging the need for judicial deference when reviewing decisions to allocate scarce resources among competing groups or to evaluate complex socio-scientific research. But neither consideration existed with respect to spousal support and property rights.<sup>161</sup> Alternative legal mechanisms were inadequate.<sup>162</sup> Therefore, all of the impugned provisions were unconstitutional.

At this point, Abella J. lost her majority. The Chief Justice joined with LeBel J., dismissing the claim in its entirety, while Deschamps, Cromwell and Karakatsanis JJ. upheld the provisions related to property division.

---

<sup>155</sup> *Walsh, supra*, note 72. Space restrictions prevent me from engaging in this further, but the relevant passages may be found (*id.*, at paras. 339-347).

<sup>156</sup> *A., supra*, note 1, at para. 345:  
The importance the *Walsh* majority placed on the heterogeneity of unmarried relationships resulted from its use of the then operative comparator group analysis. The majority assessed the discrimination claim by comparing two groups: married heterosexual cohabitants and unmarried heterosexual cohabitants. Although the majority in *Walsh* found that the “functional similarities” between married and common law spouses may be substantial, it held that “it would be wrong to ignore the significant heterogeneity that exists within the claimant’s comparator group [i.e. unmarried heterosexual cohabitants]” (para. 39).  
In their respective opinions, the Chief Justice and Deschamps J. agreed.

<sup>157</sup> Justice Abella shared the Quebec Court of Appeal’s skepticism about the objective of promoting choice in the context of spousal support, because the government already had minimized that choice in the case of married or civil union couples. She ultimately determined, though, that the issue had not been fully argued. She reached a similar conclusion with respect to rational connection, which she found “tenuous”. *Id.*, at paras. 358-359.

<sup>158</sup> *Id.*, at para. 360.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*, at para. 363.

<sup>161</sup> *Id.*, at para. 364.

<sup>162</sup> *Id.*, at paras. 365-369.

Justice Deschamps reasoned that spousal support and property rights fulfil different policy goals. Support provides relief for former spouses who are economically disadvantaged. It is not compensatory or contractual, but need-based. Therefore, the exclusion of *de facto* spouses was unjustified, since such persons “may find themselves in a position of vulnerability”<sup>163</sup> unrelated to the choice of getting married. The provisions relating to rights of ownership are different.<sup>164</sup> They are not focused on need, but are intended to “ensure autonomy and fairness for couples who have been able to, or wanted to, accumulate property”.<sup>165</sup> There is, in addition, a “pragmatic” difference between spousal support and property rights: living together, and the resulting dependence, often happens gradually, while property is acquired by discrete and concrete acts.<sup>166</sup> Thus, a total exclusion of *de facto* spouses from support was both excessive and disproportionate, but exclusion from the patrimonial provisions was justified.<sup>167</sup>

The case’s outcome turned on the Chief Justice, whose swing vote is reminiscent of the *Egan* case discussed earlier.<sup>168</sup> Chief Justice McLachlin agreed with much of Abella J.’s section 15 analysis. In particular, she found that while prejudice and stereotype are “useful guides”,<sup>169</sup> discrimination requires a contextual analysis. She agreed that the Court was not bound by *Walsh*.<sup>170</sup> She argued for a careful separation of section 15 and section 1.<sup>171</sup> She then sounded some different notes. Most notably, she was the only justice to anchor discrimination in the views of the “reasonable person”:

[A] reasonable person in A’s position would conclude that in denying her recourse to spousal support and equitable property division, the law relies on false stereotypes. The law assumes that *de facto* partners choose to forego the protections it offers to married and civil union partners. Yet people in A’s situation have not in fact chosen to forego

---

<sup>163</sup> *Id.*, at para. 388.

<sup>164</sup> Generally, these are the matrimonial regime, the compensatory allowance, the family residence and the family patrimony. *Id.*, at para. 383.

<sup>165</sup> *Id.*, at para. 392.

<sup>166</sup> *Id.*, at para. 393.

<sup>167</sup> Space restrictions prevent me from further discussing Deschamps J.’s s. 1 analysis. See *id.*, at paras. 399-408.

<sup>168</sup> *Egan*, *supra*, note 71. See also note 97 and surrounding text.

<sup>169</sup> *A.*, *supra*, note 1, at para. 418.

<sup>170</sup> *Id.*, at para. 422.

<sup>171</sup> *Id.*, at para. 421.

the protections of the mandatory regime. A's real choice was of a different nature: she could either remain in a *de facto* relationship with B, or walk away from it ... More broadly, the law rests on the assumption that *de facto* partners will provide for their needs by making their own agreements or arrangements for property and support. Again, for claimants in A's situation, this assumption fails to accord with the reality of their situation.<sup>172</sup>

Under section 1, the Chief Justice described the law's objective as "promot[ing] choice and autonomy for all Quebec spouses with respect to property division and support".<sup>173</sup> It became clear that she accepted a peculiarly sweeping and maximal version of this goal. It is not just that the regime allows for personal choice and autonomy; the scheme posits that autonomy must include complete freedom to remain legally unattached. Similar to her reasons in *Hutterian Brethren*,<sup>174</sup> the Chief Justice cautioned that the criterion of minimal impairment cannot undermine or change the law's purpose (which would occur were the law to switch from presumptive non-obligation permitting couples to "opt in", to presumptive obligation requiring couples to "opt out").<sup>175</sup> Quebec was entitled to pursue this idealized version of choice by creating a category of intimate relationships essentially separate from the family law regime.

In *A.*, then the Court split in almost every conceivable way. The case primarily diverges on questions of deep principle, but interspersed here and there are a few functional concerns. The fact that LeBel J. does not have to consider section 1 arguably mutes the debate about the propriety of a court upending a powerful and deeply held commitment in Quebec society. Chief Justice McLachlin also makes a brief but intriguing reference to the need in a federal system to permit regional

---

<sup>172</sup> *Id.*, at para. 428.

<sup>173</sup> *Id.*, at para. 435.

<sup>174</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.). For further discussion, see Carissima Mathen, "What Religious Freedom Jurisprudence Reveals About Equality" (2009) 6:2 J.L. & Equality 163.

<sup>175</sup> *A.*, *supra*, note 1, at para. 445. Under the final stage of proportionality, the Chief Justice accepted that the negative impact on people like A is "significant". But she concluded that any discriminatory effects were attenuated by: the lack of animus or social disapproval of *de facto* spouses; the law's enhancement of freedom of choice and autonomy; the need to allow legislatures "a margin of appreciation on difficult social issues"; and the need in a federal system for regions to legislate for their particular populations. *Id.*, paras 449-450.

experimentation.<sup>176</sup> This is an argument that has been articulated in other jurisdictions, notably the U.S.,<sup>177</sup> but rarely in Canada. How can such a divided decision not be worrisome? Below, I consider this question.

### 3. Dissent's Upside

*A.* is a complex decision.<sup>178</sup> While I do not contend that the ultimate outcome is necessarily laudable,<sup>179</sup> I maintain that *A.*'s dialogic process and analytics are superior to many of (unanimous) cases that preceded it.

First, *A.* contains specific, detailed articulation of a debate that has never been fully resolved: given that *Andrews* requires more than a distinction based on a prohibited ground, what is that “something more” that transforms a mere distinction into a discriminatory one? What definition of “discrimination” does justice to section 15's underlying purpose? Justice LeBel ties discrimination to classic markers of state oppression — prejudice and stereotype — reasoning that these criteria motivated the early vision of section 15. This has the benefit of setting forth a clear template for future cases. The majority rejects this approach as inconsistent with substantive equality. Prejudice and stereotype, while important, cannot capture the variety of ways in which discrimination manifests. The majority's approach provides space for more diverse understandings of “discrimination”, particularly as regards social benefits, but leaves space to justify otherwise discriminatory laws under section 1, which at least some of the judges proceed to use.

Second, all of the justices in *A.* confront the precedent created by *Walsh*. As a matter of *stare decisis*, *Walsh* needed to be dealt with on two levels: first, as a directly analogous case dealing with property rights for

---

<sup>176</sup> *A.*, *supra*, note 1, at para. 440, citing P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., vol. 2 (Toronto: Thomson/Carswell, 2007), at 38-39 and *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, [2001] 3 S.C.R. 209, at para. 275 (S.C.C.).

<sup>177</sup> Hillel Y. Levin, “Resolving Interstate Conflicts over Same-Sex Non-Marriage” (2011) 63 Fla. L. Rev. 47.

<sup>178</sup> Much of the scholarly reaction to it has been negative. Bruce Ryder *et al.*, *Eric v Lola: an online roundtable* (May 2, 2013), online: Osgoode Institute for Feminist Legal Studies <<http://ifls.osgoode.yorku.ca/category/thinkingabout/roundtable/eric-lola/page/2/>>.

<sup>179</sup> Throughout this article I have refrained from endorsing or critiquing decisions on the basis of their ultimate resolution of the equality dispute. This has been intentional, in part because the categorization of a decision as “positive” would require its own separate matrix; and in part because I accept the content-independent nature of legal authority.

unmarried couples; and, second, because it used concepts (human dignity, mirror comparison) that appear to have been rejected in subsequent jurisprudence. Unlike the Court in *Withler*, the justices do not simply paper over problematic doctrine. They may disagree about *Walsh*'s utility, but they do face the issue.

Although a majority of sorts does emerge on section 15, *A.* has hardly resolved the key issues. The rejection of proof of prejudice or stereotype comes from the narrowest majority. Chief Justice McLachlin's swing vote is especially curious; while she agrees with Abella J.'s rejection of prejudice and stereotype, her use of the "reasonable person" draws on a limiting element of *Law*-era jurisprudence that is likely to cut off future section 15 claims at the *prima facie* stage. In addition, her willingness to accept totalizing characterizations of legislative goals could prove very challenging for claimants. Added to this is the fact that the Court is entering a period of profound compositional change.<sup>180</sup> Undoubtedly, *A.* will be revisited.

Yet, for all its infelicities, I contend that *A.* is a deep rather than shallow equality decision, precisely because it recognizes the messiness and contingency of equality analysis and does not attempt to mask that with easy agreement.

Against my position it could be argued that it is not obvious why "deep" decisions are better than "shallow" ones. Sunstein, for example, prefers most constitutional law decisions to be shallow, "incompletely theorized" agreements: "concrete judgments backed by unambitious reasoning on which people can converge from diverse foundations".<sup>181</sup> Sunstein is operating in a system with far sharper poles regarding the desirability of judicial review *per se*. He favours "deep" decisions in a narrow category of cases, most pointedly, when the issue in dispute imperils democracy.<sup>182</sup> Such a crabbed approach to judicial review is not the norm in Canada and, given the explicit character of the *Constitution Act, 1982*, would be difficult to justify. Sunstein's aversion to deep decisions in equal protection cases likely is also fuelled by the American doctrinal limitations of tiered scrutiny which, given the distinctly different standards of review for different legal classifications, make

---

<sup>180</sup> Kirk Makin, "Supreme Court justice's departure puts pressure on PM", *The Globe and Mail* (April 22, 2013), online: <<http://www.theglobeandmail.com/news/politics/supreme-court-justices-departure-puts-pressure-on-pm/article11472235/>>.

<sup>181</sup> Sunstein, *supra*, note 15, at 20.

<sup>182</sup> *Id.*, at 13.

broad pronouncements on equality trickier to produce.<sup>183</sup> The lack of such internal regulators within section 15 increases the utility and desirability of deep principles.

To be sure, there are times when a shallow decision *is* preferable, such as in cases of empirical uncertainty or when a Court is just starting down a particular doctrinal path. The section 7 decisions discussed earlier are examples of this. What is undesirable is the Court portraying itself as having resolved foundational conceptual questions it clearly has not.

In the third decade of equality jurisprudence, the conceptual underpinnings of section 15 should be clearly articulated and not subsumed under vague, one-size-fits-all tests. When unanimity is purchased at the price of shallow reasoning, the cost to doctrinal coherence and predictability is greater than the political cost of a divided decision on contentious issues. A shallow decision leaves the hard questions unexamined. Consider that both *Law* and *Kapp*, two unanimous “restatements” of section 15 post-*Andrews*, did little to assuage uncertainty. The best evidence for this is the extent to which those issues needed to be hashed out, again, in *A*. My suspicion is that at a fundamental level the Court has never fully agreed on those precepts. If so, such disagreement is better acknowledged than masked. In the end, the most significant upside to the fractured decision in *A*. is that it lays bare the essential questions and makes clear how much further we have to go.

---

<sup>183</sup> Under U.S. equal protection law, the 14th Amendment has been interpreted to require varying levels of judicial scrutiny for legislative distinctions depending on the personal characteristics at issue. The levels are divided into “tiers”, commonly referred to as “strict” (applied, for example, to race), “intermediate” (applied, for example, to sex) and “rational basis” (applied, for example, to disability). *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); C. Mathen, “Constitutional Dialogue in Canada and the United States” (2003) 14:3 N.J.C.L. 403.

