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Four Models of Equality

PO-JEN YAP*

I. INTRODUCTION

Almost every modern constitution contains an equal protection clause that seeks to guard against arbitrary or discriminatory state practices. Legal scholars today speak of two main ways in which a constitutional guarantee of equality may be understood.¹

First, the *formal* model of equality requires the state to treat persons who are alike in a similar fashion.² This principle of equality does not demand all persons be treated identically, but rather allows differential treatment when all sharing the relevant differentiating characteristics are treated the same way.³ The *formal* principle, however, does not provide a framework that could help decide what characteristics are relevant in this constitutional calculus, i.e., what appropriate criteria of relevance may be legislatively determined.

Second, the *substantive* model of equality, by attempting to identify prohibited bases of discrimination, shoulders the task of elaborating the relevance criteria.⁴ Judicial understanding of the constitutional mandate of equality, however, has not been

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1. See Donna Greschner, *Does Law Advance the Cause of Equality?*, 27 QUEEN'S L. J. 299 (2001); see also Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983).

2. See Greschner, *supra* note 1, at 302-03.

3. See *id.*

4. See Greenawalt, *supra* note 1, at 1178-79.

homogeneous.⁵ The cases cannot be aptly categorized under either of the two principles of equality;⁶ instead, the cases lie on a continuum between the two categorical extremes of formalism and substantiveness.⁷ In fact, a survey of the constitutional practices of Malaysia, Singapore, India, the United States, South Africa, and Canada reveals four approaches to equality.

First, at one end of the constitutional spectrum is the *formal* model of equality, which requires similar treatment for all persons who are similarly situated.⁸ Second, a corollary of the *formal* principle is the *rational connection* model. This model does not merely require all persons sharing the same characteristic to be treated equally.⁹ Rather, this model goes further, providing that a piece of legislation would be deemed arbitrary if the legislative grounds do not have a rational connection to the object sought to be achieved by the law in question.¹⁰ Third, the *normative* model examines whether a rational nexus exists between the legislative classes and *legitimate* state policies. This *normative* model requires judicial inquiry into whether the differential treatment based on legislative classifications burden a claimant in a manner that reflects deeply personal social stereotypes that are immutable or changeable only at unacceptable personal costs. Thus, the normative model seeks to identify prohibited bases of legislative differentiations.¹¹ Finally, the *substantive* model, like the *normative* model, attempts to identify forbidden grounds of discrimination. However, it is the only model of equality that does not predicate a finding of inequality upon the presence of legislative classifications or differential treatment. The *substantive* model, therefore, allows inequality to be remedied when the state treats as similar persons who are differently situated.¹²

5. John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 53-54 (1997); see Greenawalt, *supra* note 1, at 1167.

6. *See id.*

7. *See id.*

8. Greschner, *supra* note 1, at 303.

9. *See* Victor V. Ramraj, *Comparative Constitutional Law in Singapore*, 6 SING. J. INT'L & COMP. L. 302, 312 (2002); *see also* Greenawalt, *supra* note 1, at 1177.

10. *See* Ramraj, *supra* note 9, at 312 n. 50; *see also* Greenawalt, *supra* note 1, at 1177.

11. *See* Stephen M. Wise, *Hardly a Revolution: The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 891-92 (1998).

12. Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 CARDOZO WOMEN'S L. J. 501, 521 (2004).

This Article advances two main claims. The first claim is that the *substantive* model of equality serves as the only logical and meaningful constitutional guarantee against legislative discrimination. The crux of this claim critiques the *formal*, *rational connection*, and *normative* models of equality on the basis that they do not approximate the true mandate of equality as it is embodied in the *substantive* model.

The *formal* model merely requires all persons within the same class or classification to be treated equally.¹³ This “similarly situated” test is highly deficient as an egalitarian concept because it does not provide the crucial criteria required to determine who is similarly situated to whom. Pursuant to this *formal* model, gender discrimination against females would satisfy the mandate of equality, as long as all females are treated the same way. The *rational connection* model is not much better. It scrutinizes the nexus between the object of the law and the legislative classifications, but fails to question the legislative objective itself. For instance, consider hypothetically a state that pursues a policy of racial segregation. Any race-based legislative classification would pass constitutional muster under the *rational connection* model, as there is a rational connection between the legislative class and the object of the law.¹⁴

Finally, the *normative* model is defective as an egalitarian concept because it only remedies inequality when discriminatory treatment arises from legislative classifications, thereby neglecting to remedy any inequality that results from treating differently situated persons alike. For instance, consider hypothetically a law that requires all candidates to pass an oral exam before they are eligible to enroll for undergraduate studies. Although all prospective students are treated alike, this requirement invariably discriminates adversely against persons with speech impairments. Nonetheless, pursuant to the *normative* model of equality, the

13. Greschner, *supra* note 1, at 302; see also generally, Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 2 (1994).

14. This is subject to any explicit constitutionally prohibited bases of discrimination. See, e.g., SING. CONST. (1999 Rev. Ed.) pt. IV, art. 12(2), *reprinted in* CONSTITUTIONS OF THE WORLD 3, 21 (Gisbert H. Flanz ed., 2001) (“[T]here shall be no discrimination against citizens of Singapore on the ground only of religion, race . . . in any law”); see also Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 229-30 (1991) (explaining that the separate-but-equal racial classifications of the *Plessy v. Ferguson* era were upheld using a rationality standard).

legislative provision would pass constitutional muster since it does not legislate differential treatment between groups of people. Hence, only the *substantive* model of equality is a logical and principled constitutional bulwark against arbitrary state action.

These four models, however, do not correspond exactly with the specific jurisdictions examined. Courts in many jurisdictions vacillate between different models, as they are undecided about which model of equality to adopt. Nonetheless, it is reasonable to state that some Malaysian cases support the *formal* model;¹⁵ Singaporean, Indian, and American courts endorse the *rational connection* approach;¹⁶ the *normative* model represents the South African approach and one approach in the United States,¹⁷ and the Canadian courts espouse the *substantive* model.¹⁸

A discussion of the constitutional right to equality would be incomplete without an analysis of the interpretive theories of reasonable limits that may be placed on this right. After all, the right to equal protection as conferred under the Constitution is the net concession between equality rights and their limits.

Although the substantive model of equality represents the Canadian approach, the Canadian judiciary has unfortunately been inconsistent in its understanding of the reasonable limits that may be placed on the constitutional right to equality.¹⁹ As a result of this equivocation, the courts have often watered down the essence of this sacrosanct right.

Naturally, I do not intend to defend the implausible claim that there should be no limits placed on a person's constitutional right

15. Victor V. Ramraj, *The Post-September 11 Fallout in Singapore and Malaysia: Prospects for an Accommodative Liberalism*, 2003 SING. J. L. STUD. 459, 466-67 (2003), quoting *Public Prosecutor v. Khong Teng Khen*, [1976] 2 M.L.J. [MALAY. L.J.] 166, at 170 (Kuala Lumpur Fed. Ct.).

16. Ramraj, *supra* note 9, at 312. For the United States' rational basis test, see *United States v. Moreno*, 413 U.S. 528, 533 (1973).

17. See, e.g., *Harksen v. Lane*, 1998 (1) SA 300 (CC); *Romer v. Evans*, 517 U.S. 620 (1996).

18. Stephen J. Toope, *Legal and Judicial Reform through Development Assistance: Some Lessons*, 48 MCGILL L.J. 357, 388 n.100 (2003).

19. See generally Alan Brudner, *Guilt Under the Charter: The Lure of Parliamentary Supremacy*, 40 CRIM. L. Q. 287, 287-88 (1998) (arguing that the Supreme Court of Canada has upheld laws that "trench seriously on" equality); Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 BERKELEY J. INT'L L. 27 (2003) (arguing that Canadian courts have "have increasingly supported notions of substantive equality").

to equality. No right can ever be absolute, as the state must often resolve competing claims from different sectors of society. In a seminal article, Alan Brudner has suggested that there are two ways in which rights and their limits may be conceived.²⁰ The first, a Millian understanding of rights and their limits, perceives a constitutionally protected right as “simply the legal recognition of a highly valued interest” such that more weighty interests can override it to maximize overall social welfare.²¹ The second, a Kantian approach, perceives a constitutional right not merely as a legally protected interest, but as the respect paid to a person’s “capacity for freely forming and pursuing interests.”²² Pursuant to this Kantian view, rights cannot be reduced to a numerical value and forfeited on utilitarian grounds whenever it is expedient and necessary.²³ Instead, under a Kantian conception of rights, a constitutional right may be limited only by a countervailing equal constitutional right or “when necessary to preserve the framework of rights itself, that is to say, in a national emergency.”²⁴ The Supreme Court of Canada, however, has been oscillating between the two theories of reasonable limits to rights, thereby creating laudable legal history in some cases and facing severe criticisms in others.²⁵

My second claim is bolder than the first: if one accepts that the substantive model of equality embodies the only logical and meaningful constitutional principle against arbitrary state action, then a Kantian construction of rights-limitations would be superior to a Millian theory of reasonable limits. Because Kantian theory presupposes that any inquiry into rights-limitations must be conducted in light of an equal commitment to uphold other enshrined constitutional rights, a Millian understanding of rights and their limits pales in comparison since it permits the robust ideal of substantive equality to be undercut by a Utilitarian and Consequentialist reading of reasonable limits.

This Article consists of three main parts. Part II begins with a description of the four models of equality as exemplified by case law. Part III examines how these four models are inherently

20. Brudner, *supra* note 19, at 290.

21. *Id.* at 290-91.

22. *Id.* at 291.

23. *See id.*

24. *Id.* at 292.

25. *See id.* at 324-25.

defective as constitutional safeguards against arbitrary state action. An affirmative argument is advanced in support of the *substantive* model of equality, as this model alone heeds equality's true mandate. Finally, Part IV examines recent Canadian equal protection jurisprudence and argues that the Canadian Supreme Court's inconsistent and haphazard understanding of a theory of reasonable limits to rights has compromised the substantive vision of equality in Canada.

II. FOUR MODELS OF EQUALITY

Part II describes four models of equality that have been used by the highest courts in Malaysia, Singapore, India, the United States, South Africa and Canada to interpret the equal protection clauses of their respective constitutions. At the outset, it would be useful to restate the *general* Equal Protection Clause enshrined in the constitution of each jurisdiction that guards against discriminatory state practices.

Malaysia: "All persons are equal before the law and entitled to the equal protection of the law."²⁶

Singapore: "All persons are equal before the law and entitled to the equal protection of the law."²⁷

India: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."²⁸

United States: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²⁹

South Africa: "Everyone is equal before the law and has the right to equal protection and benefit of the law. . . ."³⁰

Canada: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination. . . ."³¹

26. MALAY. CONST. pt. II, art. 8(1), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 7, 29 (Gisbert H. Flanz ed., 1995).

27. SING. CONST. pt. IV, art. 12(1).

28. INDIA CONST. pt. III, art. 14, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 2, 31 (Gisbert H. Flanz ed., 2003).

29. U.S. CONST. amend. XIV, § 1.

30. S. AFR. CONST. ch. 1, § 9(1), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1, 12 (Gisbert H. Flanz ed., 2004).

31. CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), § 15(1).

In many of these jurisdictions, additional constitutional provisions exist that enumerate *specific* bases of discrimination that are expressly prohibited, but these are beyond the scope of this Article.³² The equal protection clauses in question are similarly worded and state a broader *general* principle that constrains the ability of the state to differentiate between groups of people in the absence of *specific* instances of discrimination that are explicitly proscribed.

By comparing these four constitutional models of equality as interpreted by case law, we can better appreciate the interpretive options that are available to the courts in each jurisdiction. This comparative exercise will permit us to scrutinize the rationale and ramifications of endorsing one model over another in Part III of this Article.

A. Formal Model

Pursuant to the *formal* model, the mandate of equality is satisfied if the state treats all persons within each legislative classification alike.³³ Hence, the state may classify persons along any legislative baselines so long as it treats all people within each legislative class the same way and does not single out any person within the same classification for discriminatory treatment.³⁴

The *formal* model has been endorsed by the Malaysian courts in *Public Prosecutor v. Khong Teng Khen*.³⁵ In that case, the defendant was tried under the Essential Regulations as opposed to the Criminal Procedure Code. He argued that the different rules of evidence and procedure laid out in the Regulations violated Article 8(1) of the Malaysia Constitution, which provides that "all persons . . . are entitled to equal protection of the law."³⁶ The federal court rejected his argument and held that

[t]he principle underlying Article 8 is that a law must operate alike on all persons under like circumstances. . . . All that Article 8 guarantees is that a person in one class should be

32. See, e.g., MALAY. CONST. pt. II, § 8(2); SING. CONST. pt. IV, art. 12(2); S. AFR. CONST. ch. 1, § 9(3).

33. Greschner, *supra* note 1, at 303.

34. Wojciech Sadurski, *The Concept of Legal Equality and an Underlying Theory of Discrimination*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 63, 67-71 (1998); see also Greschner, *supra* note 1, at 303.

35. *Khong Teng Khen*, [1976] 2 M.L.J. 166.

36. *Id.* at 170 (quoting MALAY. CONST. pt. II, art. 8(2)).

treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.³⁷

Hence, according to the federal court, the Equal Protection Clause of the constitution would not be violated as long as every person tried under the Regulations was subjected to the same rules.

Under the *formal* model of equality, the court must ascertain whether the state has been treating persons within each legislative category similarly.³⁸ The court neither examines the reasonableness of the legislative classifications nor investigates whether the classifications have any connection with the legislative object.³⁹ Pursuant to this model, all forms of legislative classifications are permissible; whether they further the aims of the legislative policy in question is also immaterial.⁴⁰ Thus, the court is only concerned about discriminatory administrative decisions, not discriminatory legislation.

B. Rational Connection Model

According to the *rational connection* model of equality, the court examines the constitutional permissiveness of legislative classifications. However, the reasonableness of the legislative classes is determined by whether the classifications have a rational connection with the legislative policy in question or to legitimate legislative goals.⁴¹ So long as the legislative classes further a legitimate state interest or the ends of the law, the legislative provision in question is constitutionally valid.⁴² This model of equality, also known as the doctrine of rational classification, has its origins in American constitutional jurisprudence.⁴³ Although American courts no longer exclusively apply the doctrine of

37. *Id.*

38. *See* Greschner, *supra* note 1, at 302-03.

39. *Id.*

40. *Id.*; but see *Ong Ah Chuan v. Public Prosecutor*, [1981] 1 M.L.J. 64, 72.

41. *See* *Schweiker v. Wilson*, 450 U.S. 221, 234-35 (1981).

42. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also* *Harsen*, 1998 (1) SA 300 at 320.

43. *See* Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and Brown*, 72 TEMP. L. REV. 51, 103 (1999).

rational classification, this model of equality still finds favor with Singaporean and Malaysian courts.⁴⁴

Recently in *Taw Cheng Kong*, the Singapore Court of Appeal faced the question of whether an extraterritorial legislative provision that applied only to Singapore citizens violated Article 12(1) of the Singapore Constitution, which guarantees that “all persons are . . . entitled to the equal protection of the law.”⁴⁵ In deciding whether the differential treatments (i.e., legislative classifications) between citizens and non-citizens were reasonable, the court looked to whether “the classification was founded on intelligible differentia and whether the differentia bore a rational relation to the object of the provision – in other words, a nexus must be established.”⁴⁶ The court eventually concluded that there was a rational nexus between the legislative differentia⁴⁷ (i.e., citizens and non-citizens) and the object of the law, which sought to prevent and suppress corruption while abiding by the comity of nations.⁴⁸ The court upheld the constitutional validity of the legislative provision.⁴⁹

This approach to equality in Singapore can be traced to 1981, when the Privy Council, Singapore’s court of last resort, approved the doctrine of rational classification in *Ong Ah Chuan*.⁵⁰ In that case, the issue was whether imposing the death penalty upon drug traffickers who traffic in fifteen grams or more of heroin violated the Equal Protection Clause.⁵¹ The differential treatment between the classes of individuals concerned the quantity of the drug involved in the offense. Lord Diplock concluded that “[p]rovided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with Article 12(1) of the Constitution.”⁵² The court

44. Ramraj, *supra* note 9, at 312; see generally 16B AM. JUR. 2D *Constitutional Law* § 812 (2004) (describing the “three degrees of scrutiny . . . applied by the [U.S.] courts in analyzing statutes challenged under the Equal Protection Clause”).

45. *Public Prosecutor v. Taw Cheng Kong*, [Court of Appeal] 2 Sing. L. Rep. 410, 427 (1998) (quoting SING. CONST. pt. IV, art. 12(1)).

46. *Id.* at 431.

47. *Id.*

48. *Id.* at 434.

49. *Id.* at 437-38.

50. *Ong Ah Chuan*, [1981] 1 M.L.J. 64.

51. *Id.*

52. *Id.* at 72.

held that a rational nexus was established on the facts since there was a reasonable relationship or connection between the legislative classes at issue and the legislature's desire to impose stricter punishment on illicit dealers who traffic in larger quantities of addictive drugs.⁵³ More significantly, the Privy Council pronounced that the courts should not question the reasonableness of the legislative policy, as "[u]nder the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary."⁵⁴

The Malaysian courts reached a similar position in *Datuk Yong Teck Lee*.⁵⁵ In that case, the plaintiff argued that section 27(8) of the Police Act, which imposed a higher mandatory fine for Parliamentarians who engaged in illegal demonstrations than on similarly offending non-Parliamentarians, violated Article 8(1) of the Malaysia Constitution.⁵⁶ The court applied the doctrine of rational classification and found a rational nexus between the differentia (i.e., Parliamentarians and non-Parliamentarians) and the object of the legislative provision, which may have been "to keep Parliamentarians and assemblymen on the floor in the august Houses and keep them away from the streets."⁵⁷ What is noteworthy, however, is that the court found it unnecessary and improper to adjudicate upon the necessity and appropriateness of this legislative policy: "The question whether the impugned Act or its section is unjust is a matter to be debated and decided by Parliament and it does not require judicial determination. . . . It is not for the court to consider the propriety or the wisdom of the provision of the statute."⁵⁸

This *rational connection* approach to equality is also evident in the Indian case of *Bhatia v. Union of India*.⁵⁹ The applicant in question challenged the constitutional validity of an amendment to the Rent Act that restricted the protection of rent-control legislation to premises for which the monthly rent was below 3500

53. *Id.*

54. *Id.*

55. *Datuk Yong Teck Lee v. Public Prosecutor*, reprinted in [1993] 1 M. L. J. 295 (Kota Kinabalu High Ct.).

56. *Id.* at 297-98.

57. *Id.* at 305.

58. *Id.* at 304.

59. (1995) 1 S.C.C. 104.

rupees.⁶⁰ After determining that the object of the Amending Act was to “rationalise the rent-control law by bringing about a balance between the interests of landlords and tenants,” the Supreme Court of India found a rational connection between the legislative classifications and the object of the law.⁶¹ The supreme court held that Article 14 of the Indian Constitution, which prohibits the state from denying any person equal protection of the law, “can only be invoked if the classification is made on the grounds which are totally irrelevant to the object of the statute.”⁶² More importantly, the Court “will not question its validity on the ground of lack of legislative wisdom.”⁶³

Pursuant to the *rational connection* model of equality, any legislative classifications that a state enacts must bear a rational and logical connection to the policy it seeks to pursue.⁶⁴ Hence, purely arbitrary legislative classes that do not further the aims of the legislative objective will be deemed null and void.⁶⁵ However, the Court will not consider the wisdom or propriety of the legislative policy.⁶⁶ Taken to its logical conclusion, the Court would even sustain legislative policies that are invidiously discriminatory, unreasonable, irrational or unjust, so long as there is some nexus between the object sought to be achieved and the classifications.

C. Normative Model

The *normative* model of equality is markedly superior to the *rational connection* model since normative considerations enter into the former’s constitutional calculus. Pursuant to this model, the court ensures there is a rational nexus between the legislative classes and *permissible* state objectives,⁶⁷ and that the legislative

60. *Id.* at 105.

61. *Id.* at 113.

62. *Id.* at 114.

63. *Id.* at 121.

64. *See Cleburne*, 473 U.S. at 440.

65. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 621-22 (1985) (striking down a state law held not rationally related to the asserted legislative objective).

66. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

67. In some cases, the national courts merely confined their normative review to the propriety of the legislative policy at hand and did not further adjudicate the reasonableness or moral relevance of the legislative classifications. This was the approach taken by the Supreme Court of India in *Deepak Sibal v. Punjab University*, 2 S.C.C. 145 (1989). A similar approach can be observed in some American jurisprudence interpreting the Fourteenth Amendment of the U.S. Constitution, which mandates that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S.

classifications are in themselves reasonable. This requires that the differential treatment based on legislative classifications not impose a burden upon the claimant in a manner that reflects social stereotypes of deeply personal characteristics that are immutable or changeable only at unacceptable personal costs.⁶⁸ Effectively, the normative model seeks to identify prohibited bases of legislative differentiations.

In the U.S. Constitution, the Equal Protection Clause of the Fourteenth Amendment was originally drafted as a safeguard against racial discrimination. A central concern has been to eradicate any government action tainted by a prejudice against "discrete and insular minorities"⁶⁹ who are "relatively powerless to protect their interests in the political process."⁷⁰ In *Edwards v. California*, Justice Jackson suggested in a concurring opinion that a state cannot consider certain "neutral factors" such as race, creed, and color, standing alone, when establishing legislative classes.⁷¹ The U.S. Supreme Court also extended the guarantee of equal protection beyond the Fourteenth Amendment's historical origins; for instance, criteria such as alienage and gender are now

CONST. amend. XIV. In *United States v. Moreno*, 413 U.S. 528, 533 (1973), the U.S. Supreme Court affirmed that legislative classification could only be sustained if "the classification itself is rationally related to a *legitimate* governmental interest" (emphasis added). The Court subsequently went on to state that if the constitutional conception of "equal protection of the laws [is to mean] anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 534. This strain of Indian and American cases might be explained on the basis that the legislative policies at issue were so egregiously unfair and arbitrary that the courts did not find it necessary to further decide whether the legislative classifications ran afoul of the mandate of equality. Furthermore, the courts were reluctant to explicitly articulate new prohibited bases of discrimination and were content to leave the adjudication of the legitimacy of such legislative differentiations to another occasion. While this strain of cases differed from the decisions discussed in the main text in that the courts did not examine explicitly the reasonableness or moral relevance of the legislative classes, these cases nonetheless fall within the same conceptual category of equality because normative considerations entered the constitutional calculus when the courts adjudicated the legitimacy and reasonableness of the legislative policies.

68. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a Colorado constitutional amendment that forbade the specific protection of homosexuals from discrimination was invalid because it was designed solely to harm a politically unpopular group, and hence served no legitimate government interest).

69. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

70. *Id.* at 152.

71. *Edwards v. California*, 314 U.S. 160, 184 (1941).

also suspect classifications.⁷² In *Reed v. Reed*, the Court considered the constitutionality of a state statute that preferred male over female applicants when two individuals were otherwise equally entitled to appointment as administrator of an estate.⁷³ While agreeing that the statutory objective of “reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy,” the Court held that “[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.” Later, in *Frontiero v. Richardson*, the Court denounced gender discrimination by stating that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”⁷⁴ Hence, while legislative classifications along racial or gender lines may bear a rational nexus with valid statutory policies, such classifications are generally forbidden by the government.⁷⁵

The South African Constitutional Court, in contrast, has been more expansive in its interpretation of the country’s Equal Protection Clause. The Constitutional Court first laid out the test for discrimination under Section Eight of the interim Constitution, now incorporated under Section Nine of the final Constitution.⁷⁶ In *Harksen v. Lane*, the court first considered whether the legislative provision differentiates between categories of people.⁷⁷ If so, the differentiation must bear a rational connection to a legitimate government purpose.⁷⁸ Similar to the American approach, the South African Court would subsequently investigate the reasonableness of the legislative classification. If the classification is not expressly prohibited by the Constitution, the claimant may still show that unfair discrimination nonetheless occurred by proving that the grounds for discrimination are “based on

72. While legislative classes drawn along racial and gender baselines are treated as suspect categories and are prima facie forbidden, U.S. courts have allowed more limits on a person’s right against gender discrimination. This is discussed more fully in Part IV.

73. *Reed v. Reed*, 404 U.S. 71 (1971).

74. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

75. *See id.* at 688. The state bears the burden of proving that the limitation on a person’s right to equality is justified. Different tiers of judicial scrutiny exist for different bases of discrimination. *See also* Part IV.

76. *Harksen*, 1998 (1) SA 300 (CC).

77. *Id.* at 336.

78. *Id.* at 321.

attributes or characteristics which have the potential to impair the fundamental human dignity of persons as human beings.”⁷⁹ The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his situation. In evaluating whether the discrimination was unfair, the court considers the nature of the interests at stake and whether the applicant belongs to a group that has been historically disadvantaged.⁸⁰ The South African constitutional system has been more flexible and expansive than its American counterpart in precluding discriminatory classifications.⁸¹ Although the South African Constitution provides a list of prohibited bases of discrimination, the court has invalidated analogous unspecified grounds of discrimination that are based on “immutable biological attributes or characteristics, . . . associational life of humans [and] . . . intellectual, expressive and religious dimensions of humanity.”⁸² For example, in *Larbi-Odam v. Member of the Executive Council for Education*, the Constitutional Court invalidated an employment statute that discriminated on the basis of citizenship.⁸³ In *Hoffmann v. South African Airways*, the court struck down an airline recruitment policy that discriminated against persons with HIV.⁸⁴

Some critics may also be surprised that I have classified the South African and American approaches in the same category. After all, South African jurisprudence is more sophisticated and nuanced than the American system; the former, unlike the latter, demands not only a judicial examination of the impugned legislation, but also requires equality to be determined against the

79. *Id.* at 322.

80. *Id.* at 336.

81. See generally Jennifer C. Lukoff, Comment, *South Africa Takes the Initial Step Toward a Brilliant Twenty-First Century: A Comparative Study* of *State v. Kampher & Bowers v. Hardwick*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 459, 460 (1999) (arguing that South Africa's constitutional system protects the rights of all citizens, unlike the United States where the rights of certain groups may have historically been impaired); Adila Hassim, *Affirmative Action Policies in the United States and South Africa: A Comparative Study*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 119, 160-61 (2000) (suggesting that the South African high court's approach to equality should be adopted in the United States).

82. *Harksen*, 1998 (1) SA 300 (CC) at 323.

83. *Larbi-Odam v. Member of the Exec. Council for Educ.*, 1998 (1) SA 745 (CC).

84. *Hoffmann v. South African Airways*, 2001 (1) SA 1 (CC).

larger social, political, and legal context.⁸⁵ South African courts have also recognized some forms of adverse-impact discrimination. For instance, the Constitutional Court has used socio-historical data to determine whether indirect racial discrimination is being perpetuated despite the absence of laws that are facially discriminatory on the basis of race.⁸⁶ However, as much as the South African emphasis on socio-historical context and its recognition of indirect discrimination is distinct from the U.S. approach, these differentiating features constitute a distinction in interpretive methodology as opposed to a conceptual difference. Both the South African and the American approaches to equality are conceptually identical: both constitutional systems not only ensure that there is a rational nexus between the legislative classes and legitimate state policies, but they also examine whether the state has taken into consideration morally irrelevant traits in drafting the impugned legislative classifications.⁸⁷

The general *normative* model of equality imports a moral precept that limits the scope of legislative classifications. This model further instructs that some differences should be treated as accidental and are normally ignored in legislative allocation of benefits and burdens.⁸⁸ Thus, this model of equality provides the moral framework to determine which criteria are relevant in deciding what type of persons are sufficiently different and could be treated differently. Like the aforementioned models of equality, however, the *normative* model focuses only on differential treatment between categories of people and legislative

85. See generally Hassim, *supra* note 81, at 126-27 (quoting S. AFR. CONST. ch. 8 §§ 167-69, which provides that a court interpreting the Bill of Rights "must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom," must consider international law, and may consider foreign law).

86. In *Pretoria City Council v. Walker*, 1998 (2) SALR 363 (CC), the South African Constitutional Court held that differential state treatment by geographical areas had *indirectly* constituted racial discrimination. The court held that the prohibition against racial discrimination extended to laws that did not facially distinguish on the grounds of race, but was nonetheless its effect. However, it is important to note that the impugned legislation in question was not a facially neutral law of general application, unlike the Canadian examples of *Vriend* and *Eldridge*. *Vriend v. Alberta*, [1998] S.C.R. 493, 579; *Eldridge v. British Columbia*, [1997] S.C.R. 624. The law here had categorized persons into groups on the basis of the geographical areas in which they resided.

87. See, e.g., *Romer*, 517 U.S. at 620 (illustrating the United States' approach); *Larbi-Odam*, 1998 (1) SA 745 (CC) (illustrating the South African approach).

88. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

classifications. Hence, the Equal Protection Clause would not be violated if all persons were treated in an identical fashion. Therefore, the *normative* model requires legislative differentiations between people to trigger judicial review, thus ignoring inequality that occurs when differently situated persons are treated alike.

D. Substantive Model

To date, the *substantive* model stands as the most sophisticated model of equality. Like the *normative* model, it permits an investigation into the moral relevance of legislative classifications to decide whether the mandate of equality has been complied with. The difference between this model and the others lies in its recognition that facially neutral laws of general application—such as legislative classifications—may nonetheless result in discrimination.

Unlike South African and American jurisprudence, judicial review on equality grounds may be triggered in Canada even if there are no legislative classifications or differentiations.⁸⁹ In *Andrews v. Law Society of British Columbia*, the Supreme Court of Canada first proposed that “identical treatment may frequently produce serious inequality.”⁹⁰

Subsequently, *Eldridge v. British Columbia* led to the first successful adverse discrimination claim arising from a law of general application.⁹¹ In that case, the claimants argued that certain provincial Medicare legislations violated Section 15(1) of the Charter because they failed to provide medical interpreter services for hearing impaired persons.⁹² Particularly significant was that the Medicare system did not, on its face, make an explicit distinction based on disability by singling out hearing-impaired persons for differential treatment.⁹³ Instead, those with and without hearing disabilities were entitled to the same medical services.⁹⁴ Nevertheless, the appellants contended that the lack of funding for sign language interpreters rendered them incapable of benefiting from the legislation to the same extent as hearing

89. See, e.g., *Andrews v. Law Society of British Columbia*, [1989] 56 D.L.R. 1.

90. *Id.* at 10.

91. *Eldridge*, [1997] S.C.R. 624.

92. *Id.* at 625.

93. *Id.* at 626.

94. *Id.*

persons.⁹⁵ The supreme court agreed, holding that discrimination against hearing impaired persons resulted from “the construction of a society based solely on ‘mainstream’ attributes to which disabled persons will never be able to gain access.”⁹⁶ On behalf of the unanimous court, Justice La Forest stated:

Discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme.⁹⁷

Building on *Eldridge* in *Vriend v. Alberta*, the supreme court declared that a provincial human rights law violated Section 15(1) of the Charter by failing to include sexual orientation as a prohibited ground of discrimination.⁹⁸ In dismissing the Provincial Government’s argument that the legislative omission did not extend remedies for discrimination to either heterosexuals or homosexuals, the court observed that discrimination against heterosexuals based on sexual orientation was far less pervasive than discrimination against homosexuals. Thus, “there is a clear distinction created by the disproportionate impact” that arose from the legislative exclusion of sexual orientation as an illegal basis of discrimination.⁹⁹

In contrast, the U.S. Supreme Court has refused to invalidate any facially neutral legislation of general application that may have a discriminatory impact, absent an invidious discriminatory purpose.¹⁰⁰ In *Washington v. Davis*, the applicants challenged the constitutional validity of a qualifying test, administered to all prospective police officers that had an adverse impact on African-American candidates.¹⁰¹ In rejecting their claims, the Supreme Court articulated that it had never declared that “a law, neutral on its face and serving ends otherwise within the power of

95. *See id.* at 629.

96. *Id.* at 674.

97. *Eldridge*, [1997] S.C.R. at 680.

98. *Vriend*, [1998] S.C.R. at 579.

99. *Id.* at 542- 543.

100. *See generally* *Washington v. Davis*, 426 U.S. 229 (1976); *see also* Jeffery A. Kruse, Note, *Substantive Equal Protection Analysis Under State v. Russell, and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV. 1791, 1797-98 (1993).

101. *Davis*, 426 U.S. 229.

government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”¹⁰² Hence, in the United States, the Supreme Court has slammed the door shut on substantive equality, by refusing to acknowledge that at times, treating differently situated persons alike may perpetuate and not ameliorate inequality.

Canadian Supreme Court Chief Justice Beverley McLachlin most succinctly captured the essence of substantive equality: “The theme behind this concept of equality is the belief that if equality is to be realized, we must move beyond formal legalism to measures that will make a practical difference in the lives of members of groups that have been traditionally subject to the tactics of subordination.”¹⁰³ This model of equality recognizes that the adverse effect of discrimination may exist in facially neutral laws. While equal opportunity may be *prima facie* available for all members of society to enjoy, the legislative failure to consider certain differences based on personal characteristics may serve to condone unequal treatment by treating differently-situated persons in a like manner. Thus, the mandate of substantive equality lies in the betterment of societal members, who have been historically subordinated and disadvantaged, through positive enforcement of the Equal Protection Clause.

III. EVALUATING THE FOUR MODELS

A. *Formal Model*

Pursuant to the *formal* model of equality, all individuals must be treated similarly to the extent that they are the same.¹⁰⁴ *Prima facie*, this principle sounds unequivocally fair. However, the *formal* model simply presumes that people may be equal or unequal by virtue of certain characteristics they possess or lack, but it fails to articulate a moral standard for determining what traits are relevant in this constitutional calculus. It also provides no criteria to assess the propriety of any legislative differential treatment of persons who are not alike. As noted by Peter Westen, “[formal] equality is an empty vessel with no substantive moral content of its own.

102. *Id.* at 242.

103. Beverley McLachlin, *The Evolution of Equality*, 54 THE ADVOCATE 559, 563 (1996).

104. See Greschner, *supra* note 1, at 303.

Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act.”¹⁰⁵ No single individual is identical to another, as human beings are similar and different from one another in an infinite number of ways. Unless some restrictions are placed on the types of character traits that can be relevant for differential treatment, the principle of equality becomes tautological and meaningless.

Consider, for instance, a hypothetical legislative provision that states, “No females shall be allowed to attend public schools.” This rule clearly singles out females for differential treatment by denying them public education. According to the formal principles of equality laid out by the Malaysian court in *Khong Teng Khen*, the constitutional mandate of equality merely guarantees that “a person in one class should be treated the same as another person in the same class.”¹⁰⁶ Hence, since females form a separate class from males, the mandate of equality is satisfied so long as all females are treated the same way under the legislative policy.

Under the *formal* model of equality, the court is merely required to ensure that the state has treated all persons within a particular legislative category in the same way.¹⁰⁷ By not examining whether the legislative class is in itself reasonable, or whether the classifications further the ends of the legislative objects, all forms of legislative classifications could be constitutionally permissible, however irrational, silly or arbitrary they may be. Consider, for example, if the above legislative provision is redrafted to read: “No shortsighted person shall be allowed to attend public school.” Again, there are two distinct legislative classes because persons with myopia are sieved out from those with perfect vision for differential treatment. According to the *formal* model of equality, the state is only bound to deny all shortsighted persons public education and grant all persons with perfect vision access to public schools. Hence, the judiciary would intervene if some students with myopia are admitted into public schools while others similarly situated are kept away. It seems that under the *formal* model, all legislation would satisfy the constitutional mandate of equality, since the similarly situated test “catches every conceivable

105. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982).

106. *Khong Teng Khen*, [1976] 2 M.L.J. 166.

107. See Greschner, *supra* note 1, at 303.

difference in legal treatment.”¹⁰⁸ The court’s task is to merely intervene when discriminatory administrative decisions are made and not when discriminatory legislations are enacted.¹⁰⁹ This is certainly a strange state of affairs: the mandate of judicial review is to subject legislation to judicial scrutiny under all provisions of the Constitution. There is no logical reason why legislators should benefit from a *de facto* exemption from scrutiny under the Equal Protection Clause when they are subjected to more stringent judicial probes on other constitutional fronts.

Perhaps the most explicit judicial rejection of the *formal* model has been voiced by Canadian Supreme Court Justice McIntyre in *Andrews v. Law Society of British Columbia*: “[A] bad law will not be saved merely because it operates equally upon those to whom it has application.”¹¹⁰ If the similarly situated test was applied literally, “[i]t could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews.”¹¹¹

The similarly situated test is “seriously deficient” as a constitutional principle as it does not supply “the crucial criteria that are required to determine who is similarly situated to whom, and what kinds of difference in treatment are appropriate to those who are not similarly situated.”¹¹² In excluding any consideration of the nature, purpose, content, and impact of the law,¹¹³ the *formal* model of equality is merely a mandate for administrative consistency. The *formal* model does not afford a realistic test for determining whether a state has violated an individual’s or a group’s constitutional right to equal treatment and protection.

B. Rational Connection Model

The *rational connection* model of equality seeks to circumvent the tautological problems of the *formal* model by measuring the propriety of the legislative classifications against the object of the

108. *Mahe v. The Queen*, [1987] 80 A.R. 161, 185.

109. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (holding that the Court does not have an “unconditioned authority to determine the constitutionality of legislative or executive acts” due to the case or controversy requirement set forth in U.S. CONST. art. III, § 2).

110. *Andrews*, [1989] 56 D.L.R. 1 at 12.

111. *Id.*

112. PETER HOGG, CONSTITUTIONAL LAW OF CANADA 1242 (4th ed. 1997).

113. *See Greenawalt, supra* note 1, at 1177; *see also Andrews, supra* note 110, at 13.

law. In other words, the relevant class must bear a rational connection to the statutory purpose.

The formulation of equality is marginally better than its formal predecessor, but it is subject to legislative manipulation. By framing the purpose of the law narrowly, the legislature would always be able to establish a logical nexus between the legislative class and the purpose. For instance, if the Canadian Parliament decides to pass a piece of legislation with the purpose of "exempting all Ministers' sons from national service," the legislative classifications (i.e., ministers' sons and non-ministers' sons) would thus invariably bear a rational nexus to the object sought to be achieved. As S.M. Huang-Thio indicated, "[i]n this way, discriminatory provisions can be validly enacted so long as the purpose of the law is formulated in narrow terms."¹¹⁴

An alternative argument advanced against the *rational connection* model argues that "[i]t is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it" because "the reach of the purpose has been derived from the classifications themselves."¹¹⁵

Seen in this light, the definition of the legislative purpose would be a tautology because the classification would always coincide with the object of the law. In every case in which the courts have struck down a legislative provision for failing the rational nexus test, it would have been equally possible for the courts to define the purpose so that the court could have deemed the statute rational.¹¹⁶

Courts can either sustain or reject the rationality of the legislation by manipulating the level of abstraction of the legislative object. In *Taw Cheng Kong*, the High Court of Singapore held that the objective of the extraterritorial legislative provision in question was "to address acts of corruption taking place outside Singapore but affecting events" inside.¹¹⁷ The High Court's definition of the legislative objective allowed the judge to observe that the legislative provision caught a class of people not contemplated by the legislative objective (i.e., Singaporean citizens who lived and worked abroad, and who committed corrupt acts

114. S.M. Thio, *Equal Protection and Rational Classification*, 1963 PUB. L. 412, 428.

115. Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123, 128 & n.32 (1973).

116. *Id.* at 132.

117. *Taw Cheng Kong v. Public Prosecutor*, [1998] 1 S.L.R. 943, 946 (Sing. Ct. App.).

abroad that had no impact on Singapore).¹¹⁸ Thus, the High Court held that citizenship was "not a useful criteria for determining guilt"¹¹⁹ because the "strength of the nexus between the objective and the classification is not sufficiently strong to justify the derogation"¹²⁰ from the constitutional mandate of equality.

The Court of Appeal disagreed, holding that the intent of Parliament was to increase the effectiveness of corruption prevention while observing international comity.¹²¹ A differentiation among citizens and non-citizens was rationally connected to the furtherance of the legislative aim. Therefore, how a court defines or formulates the legislative purpose invariably allows it to decide the rationality of the statutory classifications. Thus, the *rational connection* model of equality is not a constitutional tool for *testing* the constitutional validity of a statute, but a method for *justifying* its legality.

When focusing on the relationship between the purpose of the law and the legislative classification, this model also fails to consider whether the purpose is in itself legitimate and fair. For instance, assume the legislature passes a statute that bars females from seeking public office. If the object of the law were framed as such, any gender classifications pursuant to this objective would still bear a rational nexus to the purpose at hand and would be sustained as constitutionally valid under this model of equality. Logically, a constitutional model of equality without limits on the goals that a legislature may pursue would also legitimize the apartheid regime in South Africa and the Nuremberg laws of Nazi Germany since the racial classifications invariably bear a rational nexus with the statutory goals.

C. Normative Model

The *normative* model of equality is a progressive formulation of equality because it seeks to eliminate discrimination by disallowing differentiation on morally irrelevant grounds.¹²² The *normative* model thus furnishes the framework to determine the relevant characteristics for differentiating legislative treatment.

118. See *id.* at 966-67.

119. *Id.* at 967.

120. *Id.* at 963-64.

121. *Id.*

122. See generally Tussman & tenBroek, *supra* note 88, at 353-56.

This model of equality focuses not only upon the ends of the law, but also upon the means by which the goals are achieved.

The major shortcoming of this model of equality is that it focuses only on differential treatment and legislative classifications.¹²³ The equality clause would not be invoked if the legislature fails to distinguish between persons and treats all persons in the same way. The *normative* model, therefore, requires legislative differentiations to trigger judicial review. Thus, it leaves inequality—which occurs when differently situated persons are treated alike—unremedied.

Consider, for instance, the following legislative provision: “All applicants to public universities must pass an oral examination before they are eligible for undergraduate studies.” On its face, this legislation does not distinguish between any groups of persons as all candidates are treated alike under the law, with no exceptions. Yet, undeniably, this admission policy adversely discriminates against persons with speech impairments. Unfortunately, there would be no judicial redress on equality grounds pursuant to the *normative* model of equality since there is no attempt by the government to differentiate persons into separate categories. If the admission policy was “No speech impaired persons would be admitted into public universities,” the courts would have grounds to intervene under the *normative* model because the legislature has facially classified prospective students into two categories, i.e., mute and non-mute persons. Yet, the consequences of both admission policies are the same: speech impaired persons are denied publicly funded undergraduate education.

In many facets of life, it is pointless to insist on the same treatment for everyone when the impact on some persons would be significantly different. Discrimination can flow both from legislations that classify persons and from facially neutral statutes of general application. As William Black and Lynn Smith argue, “it often makes sense to identify the purposes of a process and to ask whether they have been achieved in equal measure for all participants.”¹²⁴ This *substantive* vision of equality has led Canadian courts to recognize a duty to accommodate relevant

123. See generally *id.*

124. William Black & Lynn Smith, *The Equality Rights*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOM 14-11* (Carswell 1996).

differences in conferring benefits and burdens on persons before the law.¹²⁵

This duty to accommodate is not wholly novel: it originates from the inverse of Aristotle's formulation of equality that often goes ignored (i.e., the precept to treat all different persons differently).¹²⁶ Sometimes a uniform application of the same rule to differently situated persons may result in inequality. If the mandate of equality requires a normative review of differentia, there is no reason to disallow substantive review of those criteria or traits that would demand differential treatment by the state.

D. Substantive Model

The *substantive* model of equality seeks to determine what criteria would demand differential treatment by the state and what personal traits would forbid legislative distinctions.¹²⁷ The *substantive* model of equality necessitates an examination of the concrete impact of state action. This model demands that an equality claim be examined within a broader social and political context, taking into account persistent disadvantages suffered by certain groups, independent of the differentiating or *facially neutral* law under scrutiny.

What distinguishes the *substantive* model from the other models is its capacity to remedy discrimination that arises from *facially neutral* laws of general application (i.e., laws that do not categorize people into groups). In *Vriend*, the legislature omitted sexual orientation as a prohibited ground for discrimination in the provincial human rights legislation.¹²⁸ This omission, however, did not stop the Supreme Court of Canada from venturing outside the legislative box to examine the contextual experiences of the heterosexual and homosexual communities in the real world.¹²⁹

The *substantive* model requires judges to confront the reality that systemic abuse may be suffered by persons "because of their place in the established discriminatory hierarchies, whether they

125. See *Eldridge*, [1997] S.C.R. at 680; see also *Vriend*, [1998] S.C.R. at 579.

126. See Kathleen E. Mahoney, *Charter Equality: Has It Delivered?*, in *RIGHTS AND DEMOCRACY: ESSAYS IN UK - CANADIAN CONSTITUTIONALISM* 95, 100-03 (Gavin W. Anderson ed., 1999); see McLachlin, *supra* note 103, at 560.

127. See Greenawalt, *supra* note 1, at 1178.

128. See *Vriend*, [1998] S.C.R. at 544.

129. See *id.*

be sexual, racial or otherwise,”¹³⁰ beyond the *facially neutral* dimensions of the law. According to the *substantive* model, the constitutional guarantee of equal protection seeks to ameliorate actual inequality as opposed to abstract inequality.¹³¹

The substantive vision of equality is perhaps most consonant with Ronald Dworkin’s philosophical understanding of egalitarianism.¹³² Dworkin argues that equality does not prescribe the right to equal treatment for all persons but the right of a person to equal concern and respect.¹³³ He proposes that the law does not always need to equally distribute resources, opportunity, and burdens to every person; instead, the legal process should reflect equal concern and respect for all persons affected by the law.¹³⁴ The right to equal concern and respect may often translate into an equal distribution of goods and benefits, but at times this right can only be duly observed through the legislative implementation of differential treatments.¹³⁵

Nonetheless, the *substantive* vision of equality is not without its critics. It has been argued that “courts are not meant to address any pre-existing disadvantages arising outside of law, which are created by broader social structures. That role is for the democratic body of the legislature.”¹³⁶ This statement criticizes the substantive model of equality on two fronts: the *legitimacy* and the *scope* of substantive judicial review in equal protection adjudication.

The legitimacy of judicial review has often been questioned by Robert H. Bork. He argues that when courts are used as vehicles for social change, the judiciary is used “to enforce the objectives of a dominant minority above the democratic process.”¹³⁷ For Bork, the scope of a constitutional clause has to be interpreted in light of its framers’ original understanding: the constitutional understanding of equality may only be used to

130. Mahoney, *supra* note 126, at 106.

131. See McLachlin, *supra* note 103, at 563.

132. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

133. See *id.* at 272-73.

134. See *id.*

135. See *id.*; see also Martha A. McCarthy & Joanna L. Radbord, *Foundations for 15(1): Equality Rights in Canada*, 6 MICH. J. GENDER & L. 261, 294 (1999).

136. McCarthy & Radbord, *supra* note 135, at 267-68.

137. ROBERT BORK, *COERCING VIRTUE—THE WORLDWIDE RULE OF JUDGES*, 135 (2003).

address the specific mischief the framers had in mind and its scope cannot expand or evolve with the times.¹³⁸

It seems inescapable, however, that the framers of most, if not all, modern constitutions have deliberately chosen open-textured and relativistic terms in their general equal protection clauses instead of expressly confining the scope of the equal protection clauses to specific bases of discrimination. After all, various constitutions include a number of provisions that are highly specific and particular. For example, in Canada, no person may be elected as senator unless he is "of the full age of thirty years."¹³⁹ The framers did not state that the Senate candidate must be of "reasonable age and sufficient maturity." In the United States, elections for the House of Representatives have to be held every two years¹⁴⁰ and not "periodically" or "regularly."

Given that the framers of the six constitutions discussed in this Article intentionally drafted their equal protection clauses ambiguously with the full understanding that the language could be interpreted in various ways, the choice to adopt a broader principle must thus be respected. Hence, the best way to effectuate the original intents of these framers is to allow the judiciary to interpret the value-laden and fluid concept of equality in light of "evolving standards of decency,"¹⁴¹ rather than shackle it to the "outmoded mores of yesteryear."¹⁴²

As for whether courts should confine themselves to examining the law in question or be allowed to scrutinize the context in which the law operates, my earlier arguments have already suggested an answer. Once the notion of a vacuous constitutional guarantee of equality is accepted, there is little reason to arbitrarily limit the *scope* of judicial review to legislative differentiations and ignore similar treatments by the state, unless a moral framework exists in which various criteria of relevance may be determined. If the constitutional mandate of equality requires a normative scrutiny of differentia or classes that are foreclosed to the State, there is no rationale for disallowing a substantive review of those criteria or traits that would require differential treatment by the State.

138. See *id.* at 51-57.

139. CAN. CONST. (Constitution Act, 1867) pt. IV (Legislative Power) §23 (1).

140. U.S. CONST. art. I, § 2.

141. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

142. *Reyes v. The Queen*, 2002 (2) W.L.R. 1034.

Discrimination may exist when we treat like persons differently and different persons alike. Unlike legislative differentiations, however, the only way in which one may determine whether a piece of legislation prescribing similar state treatment has resulted in discriminatory action is to examine the socio-political context in which the law operates. This form of state discrimination can only be remedied by looking outside the statutory confines of the legislation. As observed by Chief Justice Beverley McLachlin, the quality of a constitutional guarantee of equality lay not in "pious platitudes, but in actually using the law to end the disadvantage and discrimination that people suffer because their personal characteristics and beliefs slot them into a non-privileged category."¹⁴³

IV. SUBSTANTIVE EQUALITY AND ITS LIMITS

To date, the Canadian judiciary remains the only court that has pursued a *substantive* vision of equality, in the sense described earlier, within its constitutional framework. Part IV examines how the Supreme Court of Canada has sought to reconcile the constitutional right of equality with other competing rights and interests.

In Canada, even if a legislative provision violates Section 15(1) of the Charter (i.e., the Equal Protection Clause), the impugned law may still be upheld if it satisfies the *Oakes* test. Under the *Oakes* test, the legislative provision must (1) serve a pressing and substantial purpose, (2) be rationally connected to that purpose, (3) impair the right only to the extent necessary to achieve the objective, and (4) not have a disproportionately severe effect on the persons to whom it applies.¹⁴⁴ Under *Oakes*, the burden of proof is on the government to show that the constitutional violation is justifiable on a balance of probabilities.¹⁴⁵ As recognized by Justice Wilson in *Andrews*, "[g]iven that [section] 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one."¹⁴⁶

143. McLachlin, *supra* note 103, at 564.

144. *The Queen v. Oakes*, [1986] S.C.R. 103, 105-106.

145. *See id.*

146. *Andrews*, [1989] 56 D.L.R. 1 at 34.

My discussion on the reasonable limits of equality rights has been confined to Canadian jurisprudence because Canada has developed the most sophisticated rights-limitations framework among the jurisdictions explored in the earlier parts of this Article. Admittedly, South Africa's limitations analysis is equally nuanced, but because it is a derivative of the *Oakes* test, it is thus conceptually identical to the Canadian approach.¹⁴⁷

In the United States, different justificatory standards of equality rights-limitations exist for different bases of discrimination. In instances of gender discrimination, the state may override the constitutional right to equal protection if it can show that the legislative classifications serve "*important* governmental objectives and that the discriminatory means employed are *substantially related* to the achievement of those objectives."¹⁴⁸ Racial discrimination, on the other hand, is subjected to the "most rigid scrutiny."¹⁴⁹ Courts would only sustain racial classifications if there is an "*overriding purpose*"¹⁵⁰ and these classifications are "*necessary*...to the accomplishment of a permissible state policy."¹⁵¹

Despite the different tiers of scrutiny that exist in American jurisprudence, the limitation analysis in the United States is still conceptually similar to the Canadian *Oakes* approach as they both examine the *weight* of the overriding statutory *ends* and the *reasonableness* of the *means* by which the goals are attained. To date, neither Malaysia¹⁵² nor Singapore¹⁵³ has articulated an

147. In *State v. Makwanyane*, Chaskalson P. held that in deciding whether the limits placed on the right in question by the state were reasonable, relevant considerations include "the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation . . . and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question." 1995 (3) SA 391 (CC), available at <http://www.concourt.gov.za/cases.php>.

148. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (emphasis added). Despite the absence of a specific or general limitation clause to the right of equality enshrined under the Fourteenth Amendment, the U.S. Supreme Court has placed implied limitations on the exercise of this constitutional right.

149. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

150. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (emphasis added).

151. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (emphasis added).

152. MALAY. CONST. pt. II, § 8(2).

153. SING. CONST. pt. IV, art. 12(2).

interpretive framework that seeks to limit a person's right to equal protection.

Once the state action or legislation fails to conform to the tests laid out in the American and Canadian models of equality, a person's right to equality is infringed and no further limitations of this right are permitted. Given their minimalist notions of equality that fail to consider the criteria of relevance, i.e., statutory classifications, which may be legislatively determined, further limits on the right to equality may be unnecessary. Placing limits on the right may even be prejudicial, as this would further erode the already impoverished state of the constitutional right to equal protection.¹⁵⁴

The relationship between equality rights and their limits can not be overemphasized. A discussion of the legal models of equality would be incomplete without first analyzing the interpretive theories of reasonable limits that may be placed on this right. After all, the *resultant* right of equality conferred by the Constitution is the compromise between equality rights and their limits.

According to Alan Brudner, the relationship between rights and their limits may be conceived in two ways.¹⁵⁵ First, a Millian understanding of rights and their limits perceives a constitutionally protected right as the legal recognition of a weighty interest that could be sacrificed if necessary to maximize overall social welfare.¹⁵⁶ Second, a Kantian approach perceives a constitutional right as the respect paid to a human being's "capacity for freely forming and pursuing interests" that is "the basis of their claim to dignity."¹⁵⁷ According to the latter view, rights cannot be forfeited merely for utilitarian purposes.¹⁵⁸ Instead, a constitutional right may be limited only when another human agent exercises a competing constitutional right, or when it is necessary to preserve the system of rights that underpins the legal order.¹⁵⁹

154. On the other hand, one could argue that the presence of a limitation clause, either implied or express, would liberate these jurisdictions from their narrow interpretations of equality.

155. Brudner, *supra* note 19, at 290.

156. Brudner calls this the "Millian understanding of rights and their limits," since John Stuart Mills pioneered the view that "rights are merely legally protected interests of great weight." *See id.* at 290-91.

157. *Id.*

158. *See id.*

159. *See id.* at 292.

Brudner suggests that both theories of reasonable limits to rights are compatible with the *Oakes* test.¹⁶⁰ He argues, however, that the Kantian understanding of rights and its limits is a better theory of that relationship as "[a] theory of reasonable limits to rights that can countenance limits inconsistent with a free society will, following *Oakes*, be inferior [to] a theory that will accept only limits consistent with a free society."¹⁶¹ Brudner further argues that, in contrast, "the Millian understanding of reasonable limits will accept limits incompatible with a free society, because it will permit the sacrifice of the liberty of some to the greater welfare of others. And, since no self-respecting person would consent to a law that treated him as a means to another good, such a law could not be justified in a society of free and equal persons."¹⁶² Admittedly, Brudner was arguing in the context of section 1 of the Charter which forms the textual bedrock of the *Oakes* test.¹⁶³

Amongst the jurisdictions discussed in this Article, only South Africa shares a similar express general limitation clause that permits reasonable state derogation of enshrined constitutional rights, including a person's right to equality.¹⁶⁴ But the absence of a general limitation clause should not estop other jurisdictions from engaging in the same interpretive analysis of rights and their limits. Courts from every jurisdiction have recognized that no constitutional right can be deemed absolute and they have all placed either express or implied limitations on the exercise of these sacrosanct rights. Moreover, a broader principle may be extracted from Brudner's analysis that is relevant to other national courts engaged in the same task of defining reasonable limits on rights: "[a] limit on a right has to be theoretically consistent with the values underlying the right; it cannot simply contradict the right."¹⁶⁵ Thus, if one accepts that constitutional rights are fundamental liberties that have been deemed sacrosanct enough to be expressed in a written charter that is irrevocable by an ordinary

160. See *id.* at 293.

161. Brudner, *supra* note 19, at 294.

162. *Id.*

163. *Id.* at 293-94. Section 1 of the Canadian Charter reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

164. *Makwanyane*, [1995] 3 S.A. 391 at col. 100.

165. Brudner, *supra* note 19, at 293.

majority, one has to then acknowledge that the Kantian approach to rights is the only theory of limits that respects these rights. The Kantian approach applies because it stringently limits the types of public goals that may override the rights in question. It also ensures that any infringement of rights is rational and necessary to achieve the right's overriding goals.¹⁶⁶ Thus, it is open to all national courts, within or without Canada, to adopt such an interpretive theory of reasonable limits of rights when they embrace the *substantive* model of equality.

While Canada has developed a robust jurisprudence on equality over recent years, its supreme court has unfortunately been equivocal about which theory of reasonable limits of rights is superior. The Supreme Court of Canada has been oscillating between the Kantian and Millian visions of substantive equality in its enforcement of the *Oakes* test.¹⁶⁷ A Millian approach to rights may be observed in the recent case of *Lavoie*.¹⁶⁸ The court agreed that a legislative provision, which gave preference to Canadian citizens in public service employment, discriminated against non-citizens but held that this form of discrimination could be demonstrably justified in accordance to the *Oakes* test.¹⁶⁹ The legislative purpose in *Lavoie* that warranted a derogation of a constitutional right was the encouragement of naturalization by permanent citizens.¹⁷⁰

Lavoie suggests that the constitutional right to equal protection must be observed by the state except when the legislature wants to enhance the attractiveness and value of citizenship. While such a statutory policy was legitimate and laudable, the *Lavoie* court's stance reflected a "Millian understanding of rights as highly valued interests that can be outweighed by even more highly valued ones rather than a Kantian understanding of rights as constraints on the pursuit of ordinary public goals."¹⁷¹ The Supreme Court of Canada has not only permitted a person's constitutional right to equality to be overridden by common public goals, it has also been less vigorous

166. *Id.* at 292.

167. *Id.* at 294.

168. *Lavoie v. Canada*, [2002] S.C.R. 769.

169. *Id.* at 828.

170. *Id.* at 815.

171. Brudner, *supra* note 19, at 300-01.

in enforcing the requisites of rationality and necessity in the *Oakes* test.

In upholding the legislative provision under the rational nexus limb of the *Oakes* test, the majority of the *Lavoie* court observed that there was a rational connection between the legislative objectives of enhancing the value of citizenship and encouraging naturalization amongst immigrants.¹⁷² Strangely, on the facts, the court came to such a conclusion without any evidence from the government proving that the exclusion of non-citizens from federal employment would further the above-mentioned twin objectives.¹⁷³ The majority addressed this difficulty by simply stating that "Parliament is entitled to some deference as to whether one privilege or another advances a compelling state interest."¹⁷⁴ The dissenting voices of Judge L'Heureux-Dubé and Chief Judge McLachlin rejected this argument by stating that "judicial deference alone cannot establish a rational connection."¹⁷⁵ Unfortunately, for the majority, a legislative appeal to "common sense" without the production of any evidence satisfies the rational nexus test.¹⁷⁶

The application of the rational connection test was equally disappointing in *McKinney*.¹⁷⁷ In *McKinney*, the supreme court agreed that the legislative exclusion of persons above the age of sixty-five from statutory protection under the Ontario Human Rights Code was discriminatory. The court held, however, that such a limitation was justified.¹⁷⁸ As observed by the majority, the impugned provisions of the provincial code, by implicitly permitting mandatory retirement at age sixty-five, "achieves its purpose of maintaining stability in pension arrangements, and is thus rationally connected to that end."¹⁷⁹ Justice L'Heureux Dubé, in her dissenting judgment, applied the rational connection test more stringently: "the requirement of rational connection calls for an assessment of how well the legislative garment has been

172. *Lavoie*, [2002] S.C.R. at 818-20.

173. *Id.*

174. *Id.* at 818.

175. *Id.* at 769.

176. *Id.* at 819.

177. *McKinney v. Univ. of Guelph*, [1990] S.C.R. 229.

178. *Id.* at 319.

179. *Id.* at 304.

tailored to suit its purpose.”¹⁸⁰ Justice L’Heureux-Dubé rejected the existence of a rational nexus because the legislative provisions in question did not exclusively deal with mandatory retirement nor did they confine themselves to the stated objectives of the legislature.¹⁸¹ As opined by her Lordship, the impugned provision of the provincial Human Rights Code denied protection against employment discrimination to those over age sixty-five even if there was no pension plan or even when the integrity of the existing pension plan would not be affected if employees did not retire at age sixty-five.¹⁸² Unfortunately, Justice L’Heureux-Dubé’s observations were all lost on the majority.

The same deference to the legislature may be observed in the *McKinney* court’s application of the minimal impairment test. In *Oakes*, for an impugned legislative provision to survive the minimal impairment scrutiny, Chief Justice Dickson held that the government had to adduce compelling evidence that the constitutional right in question had been impaired “as little as possible.”¹⁸³ Moreover, the court would need to know what other alternative measures were open to the legislature in the implementation of the legislative goals.¹⁸⁴

By the time *McKinney* came along, the supreme court had shifted ground and was willing to provide the government considerable leeway when the state interest in question involved the “the reconciliation of claims of competing individuals or groups or the distribution of scarce . . . resources,”¹⁸⁵ as opposed to the imposition of criminal sanctions on individuals. In the former scenario, “the appropriate balance between interests is a political decision, one that depends on social science evidence concerning which there is no certainty, and so the decision must be entrusted to the political discretion of accountable representatives.”¹⁸⁶ In such cases, the court would not subject the legislature to the minimal impairment requirement. So long as the government had “a reasonable basis for concluding that the legislation impaired the

180. *Id.* at 434 (quoting *R. v. Edwards Books and Art, Ltd.*, [1986] S.C.R. 713).

181. *Id.* at 443.

182. *Id.* at 434.

183. *Oakes*, [1986] S.C.R. at 106.

184. *Id.* at 138.

185. *McKinney*, [1990] S.C.R. at 281 (quoting *Irwin Toy, Ltd. v. Quebec*, [1989] S.C.R. 927, 994).

186. Brudner, *supra* note 19, at 303.

relevant right as little as possible," the discriminatory legislation would be upheld on this basis. In the criminal context, the court's expertise in criminal law would require a much higher degree of certainty in the scrutiny of legislative decisions.¹⁸⁷

Yet, the supreme court did not stay true to their word in maintaining a dichotomy between criminal and non-penal cases. In *Rodriguez*, a majority of the court conceded that the criminal code prohibition against assisted suicide discriminated against disabled persons who were physically incapable of committing suicide without assistance.¹⁸⁸ The court nevertheless held that such a limitation was justifiable.¹⁸⁹ The same deference to legislative policy was shown by the court in this criminal case.¹⁹⁰ Justice Sopinka opined for the majority: "in dealing with this 'contentious' and 'morally laden' issue, Parliament must be accorded some flexibility."¹⁹¹ Furthermore, Justice Spinka argued that so long as the government had a reasonable basis for concluding that it had complied with the requirement of minimal impairment, "it is not the proper function of this Court to speculate as to whether other alternatives available to Parliament might have been preferable."¹⁹²

Chief Justice Lamer, in dissent, was more vigorous in applying the traditional *Oakes* test.¹⁹³ Chief Justice Lamer noted that there are a "range of options from which Parliament may choose in seeking to safeguard the interests of the vulnerable and still ensure the equal right to self-determination of persons with physical disabilities."¹⁹⁴ He found that an absolute prohibition of assisted suicide that was indifferent to the individual and his circumstances could not "satisfy the constitutional duty on the government to impair the rights of persons with physical disabilities as little as reasonably possible."¹⁹⁵

A Kantian understanding of reasonable limits to rights may be observed in *Vriend*.¹⁹⁶ In that case, the supreme court held that

187. *McKinney*, [1990] S.C.R. at 309.

188. *Rodriguez v. British Columbia*, [1993] S.C.R. 519, 612-613.

189. *See id.* at 615.

190. *See id.* at 614-15.

191. *Id.* at 614.

192. *Id.* at 614-615.

193. *See id.* at 558-69.

194. *Rodriguez*, [1993] S.C.R. at 569.

195. *Id.*

196. *Vriend*, [1998] S.C.R. at 579.

the legislative omission of sexual orientation as a prohibited ground of discrimination in a provincial human rights legislation was discriminatory and could not be justified.¹⁹⁷ From the outset, the court rigorously applied the *Oakes* test. Justice Iacobucci, writing for the majority, rejected the government's submission that only the overall objectives of the legislation needed to be examined.¹⁹⁸ Instead, when an impugned statute was under-inclusive, the government had to also "demonstrate that the 'objective' of the omission is pressing and substantial."¹⁹⁹ In this case, alleged "moral considerations that likely informed the legislature's choice," without evidence supporting the allegation, was insufficient to constitute a pressing substantial purpose that could override a Charter right.²⁰⁰

The majority in *Vriend* was also equally diligent in applying the rational connection test. The government argued that a rational connection to the purpose of a statute could be achieved through the use of incremental means which, over time, expand the scope of the legislation to all those whom the legislature determines to be in need of statutory protection. Rejecting this submission, Justice Iacobucci held rather laudably that "groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time."²⁰¹ If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the *Charter* will be reduced to little more than empty words."²⁰²

Subsequently, in *M v. H*, the Canadian judiciary was equally adamant about scrutinizing constitutional violations.²⁰³ The supreme court held that a provincial spousal support regime, which excluded statutory protection to persons in same sex relationships, was discriminatory and could not be reasonably justified.²⁰⁴ The court's application of the minimal impairment test

197. *Id.* at 579.

198. *See id.* at 556.

199. *Id.*

200. *Id.* at 557.

201. *Id.* at 559.

202. *Vriend*, [1998] S.C.R. at 559-60.

203. *M v. H*, [1999] S.C.R. 3.

204. [1999] S.C.R. at 89.

in *M v. H* was particularly praiseworthy. In rejecting the argument "that the government should be accorded time to amend discriminatory legislation," Justice Iacobucci, for the majority, held that where there was no evidence of progress by the legislature in its attempts to move towards *Charter* compliance, then "deference as to the timing of reforms loses its *raison d'être*."²⁰⁵ Unlike the highly deferential stance taken later in *Lavoie*, the court emphasized here that "[d]eference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed are reasonable and justifiable."²⁰⁶

The Supreme Court of Canada's haphazard oscillation between the Kantian and Millian understanding of rights and their limits may reflect in part the court's doubts about its own competence to analyze broad social policy issues. For instance, Justice La Forest consistently exhorted the court to defer to the legislature's will whenever a dispute arose over the allocation of scarce resources. He argued frequently that the courts should permit incremental solutions to discrimination and not "second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality."²⁰⁷ Perhaps Chief Justice Beverley McLachlin voiced the most eloquent defense of the court's activist stance:

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.²⁰⁸

The interaction between equality rights and their limits can never be overstated. An analysis on the existing legal models of

205. *Id.* at 81.

206. *Id.* at 82 (quoting *RJR-MacDonald Inc. v. Canada* [1995] S.C.R. 199, 332).

207. *McKinney*, [1990] S.C.R. at 317-318.

208. *MacDonald*, [1995] S.C.R. at 332-33.

equality would be incomplete without a concurrent examination of the interpretive theories of reasonable limits that may be placed on this right. Even if a jurisdiction adheres to a substantive vision of equality, this robust ideal may be undercut by a utilitarian calculus of rights and their limits. A Kantian interpretive construction of constitutional rights and their limits, as discussed earlier, is equally plausible if not superior to a consequentialist reading of reasonable limits. As argued by Dwight Newman, "Freedom and democracy are not just about social utility. Although consequentialist outlooks are relevant, they should not be the sum total of our construction of the fate of human dignity."²⁰⁹

V. CONCLUSION

In this Article, I have attempted to demonstrate that four models of equality can be gleaned from the constitutional jurisprudence of Malaysia, Singapore, India, the United States, South Africa, and Canada. Since absolute equality amongst all persons is impossible and differential treatment amongst groups of persons is inevitable, the *substantive* model of equality, as embodied by the Canadian approach, stands out as the most principled paradigm as it permits judicial scrutiny into the moral relevance of the criteria or traits that the legislature has used to justify differential or identical treatment amongst groups of persons.

Recognizing the substantive model of equality as the most logical and meaningful constitutional principle against arbitrary state action is only the first step. This recognition must be complemented with a Kantian theory of reasonable limits to rights that seek to reconcile the exercise of competing rights and interests within the legal system. The deontological principle of reasonable limits, as embodied by the Kantian theory, is premised on the understanding that any inquiry into the limits of rights must be conducted in light of a commitment to uphold the rights and freedoms set out in other sections of the Constitution.

Admittedly, none of the jurisdictions discussed has successfully achieved such a constitutional feat. But Canada is certainly leading the pack in its ideological evolution toward

209. Dwight Newman, *The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests*, 62 SASK. L. REV. 543 (1999).

substantive equality and a Kantian justificatory standard of rights-limitations. One can only hope that the other jurisdictions will soon catch up.