A Comparative Analysis of Constitutional Gender Rights between Canada and the United States

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The topic of gender-based discrimination in the United States is far from new, as its fragile constitutional foundation has paved the way for an unstable and perpetual cycle of inconsistent interpretation within U.S. courts and legislatures. The United States Supreme Court's establishment and application of intermediate scrutiny—a test often used by U.S. courts to determine a statute's constitutionality—in gender-based cases permits a constitutional gap in secure protections and reflects this vulnerable framework.[1] While this standard was initially viewed as progressive compared to the prior rational basis review, intermediate scrutiny has ultimately constrained the development of solid gender equality under the Constitution. In *United States v. Virginia* (1996), Justice Antonin Scalia's dissent criticized the Court's tiered system of review, stating "[T]hese tests are no more scientific than their names suggest" and noting that "[I]t is largely up to us which test will be applied in each case."[2]

Justice Scalia's statement exposes the arbitrary nature of intermediate scrutiny and demonstrates that gender equality is not guaranteed nor protected when left up to judicial discretion. This muddled framework vastly contrasts with Section Fifteen of Canada's Charter of Rights and Freedoms, which features a progressive and explicit protected category for sex, ensuring protection from gender discrimination under Canadian law.[3] In comparison, the

[1] Legal Info. Inst., *Checks and Balances* (June 2023), https://www.law.cornell.edu/wex/intermediate_scrutiny.
[2] United States v. Virginia, 518 U.S. 515, 568 (1996).
[3] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 § 15. (U.K.).

Supreme Court of the United States' reliance on intermediate scrutiny establishes explicit constitutional inequality for women and non-men, therefore leaving weak and insufficient protections vulnerable to political erosion.

Reed v. Reed (1971) marked a pivotal moment in the history of the Fourteenth Amendment in which the U.S. Supreme Court struck down a state law on the ground that it discriminated against women and therefore was in violation of the Equal Protection Clause.[4] This case represented the first victory against gender-based discrimination using rational basis review, which by definition "ensures that all laws both serve a legitimate governmental purpose and are reasonably related to said purpose."[5] Prior to this landmark case, it is important to note both the scarcity of gender discrimination cases the Supreme Court heard as well as the difference in tone with which those prior cases were decided. However, despite its precedent-setting protections against gender-based discrimination, *Reed* also reflected the substandard level of scrutiny applied to cases regarding such discrimination even before the emergence of intermediate scrutiny. Before 1971, the Court declined to recognize any woman's claim that a state or federal statute denied her equal protection under the law.[6] The tenuous precedent of *Reed* permitted the resolution of discriminatory legislation on a case-by-case basis. Had the Court adopted strict scrutiny in *Reed*, it would have signaled to lower courts that all legislation that discriminated on the basis of gender was unconstitutional, including legislation intended to protect women.

Unlike the United States, Section Fifteen of the Canadian Charter of Rights and Freedoms explicitly guarantees every individual is equal before and under the law "without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or

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[4] *See* Reed v. Reed, 404 U.S. 71 (1971); U.S. Const. amend. XIV, § 1.
[5] Jeffrey D. Jackson, *The Rational Basis Test [No. 86]*, The Federalist Soc'y (Dec. 2018), https://fedsoc.org/commentary/videos/the-rational-basis-test-no-86?.
[6] Associate Supreme Court Justice Ruth Bader Ginsburg, Address to the University of Cape Town, Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at the Equality Principle (2006) (transcript publicly available online), https://www.supremecourt.gov/publicinfo/speeches/sp_02-10-06.html.

physical disability."[7] Embedding gender equality directly into the Canadian Constitution leaves little room for legal ambiguity. This unequivocal guarantee provides Canadian women and non-men with secure and stable protections; this stands in contrast with the U.S. legal system and the Equal Protection Clause, which depends entirely on judicial interpretation. Beyond its textual clarity, Canada's constitutional framework embraces the substantive form of equality which focuses on achieving equitable outcomes. According to this model, equality is measured by the fairness of outcomes rather than by identical treatment or means of achieving them.[8] This approach recognizes the limits of legal justifications and acknowledges that "inequitable treatment, discrimination, and inequality" often arise from state action and traditional societal values.[9] The Supreme Court of Canada has consistently interpreted this model as a guiding principle for combating discrimination.[10] Further, this contrast in foundational principles reflects a deeper difference in how the United States and Canada view gender equality and the rights of non-men. Canada's Charter imposes an affirmative obligation to promote equality "with a more specific prohibition of discrimination on the basis of a partially enumerated list of grounds."[11] The United States, however, takes a more reactive approach by design, as the broad nature of the Fourteenth Amendment fails to identify the particular form of discrimination prohibited by the Equal Protection Clause.[12]

Moreover, Canada's proactive commitment to equality has translated into tangible positive follow-on effects in the workplace and beyond. One clear example lies in the nation's

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[7] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 § 15. (U.K.).
[8] Arlene S. Kanter, *A Comparative View of Equality Under the U.N. Convention on the Rights of Persons with Disabilities and the Disability Laws of the United States and Canada*, 32 Windsor Y.B. Access Just. 65, 71 (2015).
[9] *Id*.
[10] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 § 15. (U.K.).
[11] Sandra Fredman, *Substantive Equality Revisited,* 14 Int'l J. Const. L. 712 (2016).
[12] *Id.* at 716.

progressive approach to maternity and parental benefits. Canada's policy framework incorporates a series of family and medical welfare policies, including child care support.[13] Under the Employment Insurance program, eligible employees receive up to "fifteen weeks of paid maternity leave and up to thirty-five weeks of parental leave."[14] Eligible employees receive up to 55% of their average weekly income (capped at $650 per week) after completing 600 hours of insured employment.[15] These benefits are also extended to self-employed individuals, which reflects Canada's recognition and commitment to inclusive social protections. In the U.S., under the Family and Medical Leave Act (FMLA), women are entitled to twelve weeks of unpaid leave by meeting specific criteria. To qualify, eligible employees must have worked for their employer for at least twelve months and accumulated at least 1,250 hours of work during the previous year before the leave.[16]

Moreover, Canada provides women with extensive protections regarding abortion, prohibiting any law that restricts or penalizes the procedure.[17] Additionally, the Canada Health Act does not specifically reference abortion but covers it under the broader category of "insured health services" alongside other medical and surgical procedures.[18] This approach to abortion differs drastically from the United States, where the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* (2022) overturned federal abortion rights, returning authority and regulation to individual states.[19] These constitutional and jurisprudential contrasts reveal how Canada's legal structures safeguard against gender-based discrimination and ensure

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[13] Jie Feng, *A Comparative Study of Maternity Leave Systems in the United States and Canada*, 12 Commc'n. Human. Res. 316, 318 (2023).
[14] *Id.*
[15] *Id.* at 319.
[16] *Id.*
[17] Courthouse Libr. Brit. Colum., *Abortion Rights in Canada* (last revised Feb. 2024), https://www.courthouselibrary.ca/how-we-can-help/our-legal-knowledge-base/abortion-rights-canada.
[18] *Id.*
[19] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

bodily autonomy, whereas U.S. frameworks provide only limited and conditional protections for the same issues.

Furthermore, the contrast between American and Canadian legal systems ultimately illustrates their discrepancy not only in constitutionally protected rights but also in societal values. By explicitly naming "sex" among its protected categories, Canada takes a proactive approach to gender-based discrimination and treats gender equality as an inherent constitutional right.[20] Conversely, the Supreme Court of the United States frames gender equality through the lens of intermediate scrutiny, a standard that reflects the fragility of its constitutional foundation and various courts' unpredictable interpretations of this standard. Ultimately, the persistent use of intermediate scrutiny within the Supreme Court will continue to impede protections for gender equality in the United States, therefore threatening the rights of women and non-men across the nation.

[20] Kanter, *supra* note 9.