Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach

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I’m beautiful in my way, ‘cause God makes no mistakes,
I’m on the right track, baby I was born this way.

Lady Gaga, Born This Way (23 May 2011)

I. INTRODUCTION

Lady Gaga’s “Born This Way” brand of equality rights advocacy is premised, in part, on the injustice of being discriminated against because of personal characteristics beyond our control. Her political message has broad appeal and a long history. From the suffragettes to Martin Luther King, Jr., many of the most influential civil rights advocates have made arguments that centred on so-called immutable personal characteristics. This popular attitude has also played a significant role in the evolution of equality rights under the Canadian Charter of Rights and Freedoms, influencing the doctrine for determining grounds of discrimination analogous to those enumerated in section 15. However, what does it mean for a personal characteristic to be immutable, and should our understanding of discrimination be limited to such characteristics?

The case law on this question has suffered from a lack of conceptual clarity because of the Supreme Court of Canada’s inconsistency with respect to the legal test it describes and applies. While the Court has

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1 The political message of opposing discrimination based on (allegedly) immutable characteristics such as sexual orientation persists in popular culture and the music industry. More recently than “Born This Way,” Macklemore and Ryan Lewis released the single “Same Love” on 18 July 2012, which advocates for gay rights in the United States on the basis of the immutability of sexual orientation even more explicitly than Lady Gaga: “I can’t change, even if I tried, even if I wanted to … I might not be the same, but that’s not important, no freedom till we’re equal, damn right I support it.”

applied many different tests, these can be grouped into three progressively expansive conceptions of immutability. The first, and narrowest, conception of immutability includes characteristics that are actually immutable (that is, unchangeable) along with those that are changeable only at unacceptable cost to personal identity. This narrow conception introduces the notion of constructive immutability but limits it to unacceptable costs to identity. The second and more expansive conception of immutability builds on the first by including as constructively immutable those characteristics that the government has no legitimate interest in pressing one to change. Finally, the third and broadest conception of immutability includes all of the above while adopting a wider account of factors beyond implications for personal identity that make a change difficult or costly and adds factors such as whether a characteristic is linked with vulnerability or historical disadvantage, or is present within human rights codes, into the analysis.

This article makes an argument in favour of this third and broadest conception of immutability. I argue that such a multi-variable approach to the recognition of analogous grounds is best for promoting substantive equality and is consistent with the jurisprudence. Others have criticized the Supreme Court of Canada’s approach to identifying analogous grounds, but their alternative approaches are not grounded in the jurisprudence. I extend the argument by directing it towards an alternative approach emerging from the leading precedents on the identification of analogous grounds under section 15. Following Carl Stychin\(^3\) and Cheryl Harris,\(^4\) I argue that a multi-variable approach promotes a more sophisticated discourse regarding identity. Drawing on Emily Luther\(^5\) and Martha Jackman,\(^6\) I argue that a multi-variable test allows for the most expansive protection against discrimination and the greatest promotion of substantive equality.

I start by setting out the doctrinal developments in order to demonstrate the lack of clarity in the Court’s use of the term “immutable.” Since the Court’s current legal test is unclear, I criticize the first and least inclusive test and contrast it with the final and most


expansive multi-variable analysis to illustrate the need for the latter. Based on a discussion of identity and how it should be understood in light of the goal of promoting substantive equality, I argue that a multi-variable approach promotes superior discourse, whereas a narrow immutability approach oversimplifies identity and effectively narrows the conception of discrimination targeted by section 15. Finally, I demonstrate the superiority of a multi-variable approach by showing how it more effectively encapsulates the currently protected grounds of discrimination, recognizes intersectional analogous grounds, and prevents discrimination based on weight and poverty, two equality claims on the horizon.

II. DESCRIBING IMMUTABILITY

Section 15(1) prohibits only discrimination that is based on protected grounds, whether enumerated or analogous. The enumerated grounds consist of the following personal characteristics: race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. The analogous grounds are an open set of personal characteristics that are comparable to the enumerated grounds. Many personal characteristics fall outside of the protection of section 15. Consequently, an area of controversy in equality jurisprudence focuses on which personal characteristics ought to be protected and which criteria the courts should use to identify them. Among the many factors inconsistently relied on by the Court, immutability is the factor used most frequently.


8 See, for example, Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 Canadian Journal of Women and the Law 37; Stychin, supra note 3; Gilbert, supra note 7.
A. Corbiere v Canada (Minister of Indian and Northern Affairs): A Foundation for Immutability

A clear understanding of the Supreme Court of Canada’s current approach is necessary before evaluating its merit. The leading case on the test for identifying analogous grounds is Corbiere v Canada (Minister of Indian and Northern Affairs), in which immutability was the central focus.9 A close analysis of the decision reveals the ambiguity in the analytical framework established by the majority judgment—this ambiguity was compounded by the majority’s implicit acceptance of the reasoning of the concurring judgment of Justice Claire L’Heureux-Dubé.

Corbiere was a status Indian belonging to the Batchewana First Nation. Like two-thirds of the Batchewana band members, he did not live on the band’s reserve land and therefore was not permitted to vote in band elections. Corbiere challenged section 77(1) of the Indian Act, which limits the right to vote to band members who are “ordinarily resident on the reserve.”10 He argued that section 77 violated his Charter equality rights because “Aboriginality-residence” was analogous to the legal grounds of discrimination enumerated in section 15.

The majority judgment in Corbiere identifies three types of personal characteristics that fall within the concept of immutability and provide the foundation for a discussion of the test for identifying analogous grounds. To begin with, the majority refers to “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.”11 This quote identifies two categories of personal characteristics: actually immutable ones12 and ones that are changeable (or mutable) but only at an unacceptable cost to personal identity.

9 [1999] 2 SCR 203, 173 DLR (4th) 1 [Corbiere]. More recently, in Withler, supra note 7 at para 33, the Supreme Court of Canada affirmed the approach in Corbiere. However, because Withler involved discrimination on the basis of the enumerated ground of age, the discussion of analogous grounds was minimal. One Court decision following Withler mentions analogous grounds but does not meaningfully discuss them in any way that assists our understanding of the identification of analogous grounds. The judgment skips the identification of an analogous ground and denies the equality claim because the group of farm workers involved in that case did not prove that they had been disadvantaged. See Fraser v Ontario, 2011 SCC 20, [2011] 2 SCR 3 at para 116: “[I]t has not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage. Until the regime established by the AEPA is tested, it cannot be known whether it inappropriately disadvantages farm workers. The claim is premature.”
10 RSC 1985, c I-5.
11 Corbiere, supra note 9 at para 13, cited in Withler, supra note 7 at para 33.
12 Immutability is the central concept of analogous grounds. Thus, describing a characteristic simply as “immutable” in the context of section 15 jurisprudence is an imprecise statement comprising different, more specific conceptions of immutability.
The majority judgment goes on to say:

[T]he thrust of identification of analogous grounds … is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.\(^{13}\)

This passage does two things. First it introduces a third category of personal characteristics, those “the government has no legitimate interest in expecting us to change.” Second, it places those characteristics into the category of constructively immutable characteristics.\(^{14}\) Since characteristics that can be changed, but only at high cost, are also constructively immutable, the innovation in this passage seems to be to extend the notion of constructive immutability.

These passages leave us with three types of characteristics that fall within the scope of analogous grounds: (1) actually immutable characteristics, (2) characteristics that are changeable but at an unacceptable cost to personal identity, and (3) characteristics that the

To clarify this conceptual ambiguity, I have added the qualifier “actually” to this category here.

\(^{13}\) Corbiere, supra note 9 at para 13 [emphasis added]. The Court has failed to engage with a proper understanding of race. See, for example, Kapp, supra note 7 at para 29, where McLachlin CJ and Abella J describe Aboriginality as a race. The Court’s understanding of race as an immutable characteristic like national origin is problematic given that race is socially constructed. The mutability of another enumerated ground, colour, helps to illustrate the construction of race. See Robert Leckey, “Chosen Discrimination” (2002) 18 Sup Ct L Rev (2d) at 450, n 17: “Race’s social construction makes me uneasy listing it as immutable. Not only the effects ascribed to race, but also racial identities are contingent and variable. Someone considered ‘white’ in South America may be considered ‘Hispanic’ in the United States.”

\(^{14}\) See Sheila McIntyre, “The Equality Jurisprudence of the McLachlin Court: Back to the 70s” in Sanda Rodgers and Sheila McIntyre, eds, The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat (Canada: LexisNexis, 2010) 129 at 151. The examples provided in the paragraph support the accuracy of this inference. Race is described as “actually immutable” and is considered by the Court to be a personal characteristic that we cannot change. Alternatively, religion is described as “constructively immutable,” and it would be reasonable to describe a government expectation of changing a personal characteristic such as religion as illegitimate (Corbiere, supra note 9 at para 13).
government has no legitimate interest in expecting us to change. The second and third possibilities make up the category of constructively immutable. The abstract notion of “immutability” is relevant to all three types of characteristics. The first aligns with a dictionary definition of immutability.\textsuperscript{15} By contrast, the second and third categories set out a broader understanding of immutability, including the cost of changing a characteristic and the legitimacy of the government expecting us to do so.

The application of the test to the potential ground of Aboriginality-residence provides further insight into the Supreme Court of Canada’s approach. The Court describes Aboriginality-residence as “constructively immutable,” like religion and citizenship. The majority’s reference to religion and citizenship suggests that it views constructively immutable characteristics as being linked to identity, community, and personal values. This link is what makes the cost of change unacceptable and the government’s interest in change illegitimate. Next, the Court describes Aboriginality-residence as “essential to a band member’s personal identity” and changeable “only at a great cost.”\textsuperscript{16} These are the only statements in which the Court actually analyzes the constructive immutability of Aboriginality-residence, and the only insight gained from this analysis is from the reference to “great cost,” which suggests a threshold that must be met to count as an “unacceptable cost.”

The Supreme Court of Canada never fully defines any of these types of immutability. For example, what it means for a personal characteristic to be actually immutable is never set out. Immutability might refer to the impossibility of a characteristic changing or the impossibility of a person controlling its change at will, but it is unclear whether the Court is referring to one or both of these. The notion of unacceptable cost to personal identity also lacks definition. In what way is a cost deemed to be unacceptable and according to whose perspective: the claimant’s, the court’s, or someone else’s? Finally, how does the court determine that a government interest is legitimate and how does this decision differ from determining whether the interest is “pressing and substantial” under section 1?\textsuperscript{17} All of these questions are at the heart of a robust

\textsuperscript{15} The\textit{ Concise Oxford English Dictionary} defines immutable as “not changing or able to be changed.”\textit{ Concise Oxford English Dictionary}, 12th edition (Oxford: Oxford University Press), \textit{sub verbo} “immutable.” The jurisprudence has not adhered to a dictionary definition of immutability. See Granovsky\textit{ v Canada (Minister of Employment and Immigration)}, [2000] 1 SCR 703 at para 27, 186 DLR (4th) 1 [Granovsky]. Nevertheless, reviewing the dictionary definition explains why “immutable” is a confusing word for the courts to use given the extent to which they have deviated from the usual understanding of immutability.

\textsuperscript{16} Corbiere, supra note 9 at para 14.

\textsuperscript{17} R v Oakes, [1986] 1 SCR 103 at para 69, 26 DLR (4th) 200.
understanding of these immutability categories but are left unanswered in Corbiere.

These ambiguities are exacerbated because the majority tacitly accepts the reasoning in the concurring judgment of L’Heureux-Dubé J, which was based on a broader understanding of immutability. The majority states that “L’Heureux-Dubé J’s discussion makes clear that the distinction goes to a personal characteristic essential to a band member’s personal identity, which is no less constructively immutable than religion or citizenship.”18 This statement suggests that L’Heureux-Dubé J’s reasoning fits within the analytical framework established by the majority but is unclear whether all of her argument is relevant or only those parts directly addressing the constructive immutability of Aboriginality-residence. The majority makes a point of commenting on “the criteria that identify an analogous ground” and hints at having a different approach from L’Heureux-Dubé J, but then never expressly rejects any of the factors she considers.19

Whereas the majority outlines a narrower conception of immutability for identifying analogous grounds, L’Heureux-Dubé J sets out a broad multi-variable approach to immutability, according to which the “fundamental consideration … is whether recognition of the basis of differential treatment as an analogous ground would further the purposes of s 15(1),” namely preventing violations of human dignity.20 L’Heureux-Dubé J then sets out “various contextual factors … that may demonstrate that the trait or combination of traits by which the claimants are defined has discriminatory potential.”21 These factors include personal significance, immutability, difficulty of change, cost of change, vulnerability to being overlooked, historical disadvantage, and whether the ground is included in human rights codes.22 This test includes both actual and constructive immutability, as in the majority’s approach, but is not confined by them. Additionally, L’Heureux-Dubé J considers these

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18 Corbiere, supra note 9 at para 14.
19 Ibid at paras 6 and 13.
20 Ibid at paras 58-9. Human dignity as a test for identifying analogous grounds has been rejected by the Supreme Court of Canada: Kapp, supra note 7 at paras 21-2. However, this rejection was due to dignity being an unworkable test. The Court still recognizes its enduring significance of dignity as the underlying purpose of section 15. Consequently, I argue that L’Heureux-Dubé J’s reliance on dignity does not undermine the precedential value of her test.
21 Corbiere, supra note 9 at para 60.
22 Ibid [emphasis in the original].

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factors to be non-exhaustive and does not consider any of the above factors to be “necessary for the recognition of an analogous ground.”

The majority does not explicitly reject factors such as vulnerability or historical disadvantage but, rather, regards them as “flow[ing] from the central concept of immutable or constructively immutable personal characteristics.” Again, this statement suggests that some of L’Heureux-Dubé J’s factors fit within the majority’s analytical framework, but it is unclear which factors are included and whether an independent analysis of them adds value under the majority’s approach. Stating that these other factors “flow from” immutability and constructive immutability could be interpreted either to signal an expansive conception of constructive immutability capacious enough to encompass L’Heureux-Dubé J’s list along with new additions as they crop up or to indicate that factors such as vulnerability and historical disadvantage are relevant only insofar as they are connected to actual and constructive immutability in a narrow sense. It is not clear from the judgment whether the majority endorses either of these interpretations.

A final source of confusion from Corbiere is the absence of a clearly defined perspective from which to perform the legal analysis of analogous grounds. Both the majority and the concurring judgments hint at the consideration of a perspective that is not purely objective. For example, the majority considers only Aboriginality-residence to be an analogous ground and not the ordinary residence decisions “faced by the average Canadian” due to the “the profound decisions Aboriginal band members make to live on or off their reserves.” These statements necessarily take into account the relative perspectives of Aboriginals and non-Aboriginals. Moreover, in the concurring judgment, L’Heureux-Dubé J refers to the perspective of “a reasonable person in the position of the claimant,” which is also not a purely objective approach. The legal test in Corbiere is replete with conceptual ambiguities. These ambiguities are not resolved by the rest of the jurisprudence, but an examination of the case law does show a general trend towards the acceptance of a multi-variable approach to identifying analogous grounds.

23 *Ibid* [emphasis in the original].
24 *Ibid* at para 13 [emphasis added].
26 *Ibid* at para 60.
B. Case Law beyond Corbiere: Shaping the Boundaries of Immutability

The Supreme Court of Canada has recognized only a few analogous grounds: citizenship, 27 marital status, 28 Aboriginality-residence, 29 and sexual orientation. 30 It has rejected occupation, 31 province of residence, 32 and substance orientation 33 as analogous grounds. A discussion of cases both before and after Corbiere demonstrates that there is considerable support in both lines of jurisprudence for a multi-variable approach to analogous grounds.

1. Pre-Corbiere cases

Andrews was the first section 15 case to recognize a new analogous ground (citizenship). 34 Justice William McIntyre, writing for the majority on the section 15 analysis (but dissenting in the result), makes no mention of immutability. Instead, McIntyre J states that “distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape a charge of discrimination.” 35 McIntyre J’s description of non-citizens as “vulnerable to having their interests overlooked” and as a “discrete and insular minority who come within the protection of s 15” is the only hint of factors later flagged in Corbiere for identifying analogous grounds. 36 However, the key point to take away from Andrews is not the limits on the scope of analogous grounds, which the majority expressly states are unnecessary in this case 37 but, rather, the implicit understanding that analogous grounds cannot be limited to actually immutable characteristics given the Court’s unanimous recognition of citizenship as an analogous ground. 38

29 Corbiere, supra note 9.
30 Egan, supra note 7.
34 Andrews, supra note 27 at 183.
35 Ibid at 174-5
36 Ibid at 183.
37 Ibid.
38 Ibid at 31 (per Wilson J); at 152 (per McIntyre J); at 197 (per La Forest J).
ASSESSING ANALOGOUS GROUNDS

In 1995, a trilogy of equality cases came before the Supreme Court of Canada: *Egan*, *Miron*, and *Thibaudeau v Canada*. While there is substantial disagreement within the Court in these cases, which is reflected in thirteen separate judgments being written, the majority of the Court on the section 15 issue affirms a multi-variable approach in the two cases where a grounds discussion is considered relevant to the resolution of the decision. In *Egan*, a majority (split between the judgments of Justice Peter Cory and L’Heureux-Dubé J) finds a violation of section 15 and recognizes sexual orientation as an analogous ground. Cory J accepts an approach to section 15 premised on the fundamental consideration of human dignity. He recognizes historical disadvantage, vulnerability, whether the group is a discrete and insular minority, and legislative and judicial consensus as relevant factors in identifying analogous grounds.

L’Heureux-Dubé J rejects the enumerated and analogous grounds approach to section 15 but acknowledges the relevance of the factors considered by Cory J when describing the nature of the group affected by discriminatory government legislation, the first step in her distinctive approach to section 15. L’Heureux-Dubé J also considers the relevance of personal significance when identifying discrimination.

In *Miron*, a majority of the court (split between the judgments of Justice Beverley McLachlin, as she then was, and L’Heureux-Dubé J) finds a violation of section 15 and recognizes marital status as an analogous ground. McLachlin J recognizes the relevance of historical disadvantage, whether the group constitutes a discrete and insular minority, immutability, comparisons with the enumerated grounds, and recognition by legislators.

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39 Egan, supra note 7.
40 Miron, supra note 28.
41 [1995] 2 SCR 627, 124 DLR (4th) 449 [Thibaudeau].
42 In *Thibaudeau*, *ibid*, a majority (split between the judgments of Sopinka J, Gonthier J, and Cory and Iacobucci JJ) found that there was no burden imposed by provisions of the *Income Tax Act* thus making a discussion of analogous grounds unnecessary in their ruling.
43 While Cory, Iacobucci (concurring) and L’Heureux-Dubé JJ were only three of the nine justices of the Supreme Court of Canada in *Egan*, *supra* note 7, they represented a majority on the section 15 issue because both Sopinka and McLachlin JJ agreed with Cory and Iacobucci JJ on the section 15 violation.
44 *Egan*, *supra* note 7 at 599 (per Cory J).
45 While L’Heureux-Dubé J does not state in *Egan*, *supra* note 7, that she considers legislative or judicial consensus relevant to analogous grounds, she does discuss it in the companion case *Miron*, *supra* note 28 at para 100, and expressly recognizes its relevance in *Corbiere*, *supra* note 7 at para 60.
46 *Egan*, *supra* note 7 at 554.
47 *Ibid* at 544 and 554.

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and jurists that the ground is discriminatory.\textsuperscript{48} L’Heureux-Dubé J reaffirms her approach in \textit{Egan} and considers historical disadvantage, whether the group is a discrete and insular minority, personal significance, and recognition by legislators and jurists that the ground is discriminatory.\textsuperscript{49} Thus, pre-\textit{Corbiere}, a multi-variable approach was consistently employed by a majority of the Court.

2. Post-\textit{Corbiere} Cases

Following \textit{Corbiere}, there have been a series of rejected claims for new analogous grounds with minimal development of the Court’s approach. In \textit{Delisle v Canada}\textsuperscript{50} and \textit{Baier v Alberta},\textsuperscript{51} the Supreme Court of Canada rejects occupation as an analogous ground. In both decisions, the Court bases its reasoning on the mutability of occupation and the absence of historical disadvantage or vulnerability among these two groups, thereby supplementing the recognition in the pre-\textit{Corbiere} jurisprudence of a broader set of factors beyond immutability as relevant when identifying analogous grounds under section 15.\textsuperscript{52} \textit{Withler} is the most recent Supreme Court of Canada decision to mention analogous grounds, but it does so only in passing because it addressed discrimination based on age, an enumerated ground. \textit{Withler} defines analogous grounds narrowly as characteristics that are actually immutable or “changeable only with unacceptable cost to personal identity.”\textsuperscript{53} There is no mention of illegitimate government interests (from \textit{Corbiere}) or other factors such

\textsuperscript{48} \textit{Miron}, supra note 28 at para 148.
\textsuperscript{49} \textit{Ibid} at paras 91, 93-4, 97.
\textsuperscript{50} [1999] 2 SCR 989, 176 DLR (4th) 513 [\textit{Delisle}]. In \textit{Delisle}, the president of an RCMP member association argued that the exclusion of RCMP members from multiple labour acts violated sections 2(d), 2(b), and 15(1) of the \textit{Charter}.
\textsuperscript{51} \textit{Supra} note 31. In \textit{Baier}, three teachers argued that legislation prohibiting a school employee from concurrently holding a position with an Alberta school board as both an employee and trustee violated sections 2(b) and 15(1) of the \textit{Charter}.
\textsuperscript{52} In \textit{Delisle}, supra note 50 at para 44, the Court stated: “It is not a matter of functionally immutable characteristics in a context of labour market flexibility. A distinction based on employment does not identify, here, ‘a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality’ (\textit{Corbière}, at para. 8), in view in particular of the status of police officer in society.” In \textit{Baier}, \textit{supra} note 31 at para 65, the Court stated, “[n]either the occupational status of school employees nor that of teachers have been shown to be immutable or constructively immutable characteristics.” The Court went on to say that school employees are not a “discrete and insular minority” and that distinguishing school employees will not be likely to result in discrimination.
\textsuperscript{53} \textit{Supra} note 7 at para 33.

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as historical disadvantage that have been repeatedly considered by the Court in other cases.

**C. Conclusion to the Descriptive Question: A Consistently Affirmed Multi-Variable Approach**

The preceding discussion makes clear that the jurisprudence has consistently recognized the relevance of all of the factors considered by L’Heureux-Dubé J in *Corbiere*. In determining whether a personal characteristic should be protected under section 15, the Supreme Court of Canada has consistently considered whether this characteristic is immutable, personally significant or associated with unacceptable personal costs when changed, difficult to change, related to historical disadvantage or vulnerability, linked to a discrete and insular minority, or recognized by jurists or legislators as a basis for discrimination. Scholarship regarding analogous grounds has also reflected the relevance of factors beyond immutability and, at times, beyond constructive immutability.

In *Corbiere*, the leading precedent for analogous grounds, the Court defines an analogous ground as a personal characteristic that is either (1) actually immutable or (2) constructively immutable (a characteristic whose change results in unacceptable cost to personal identity or engages illegitimate government interests). While this leading precedent does not

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54 See *Andrews*, supra note 27 at 195; *Miron*, supra note 28 at para 158 (per McLachlin J); *Delisle*, supra note 50 at para 44; *Baier*, supra note 31 at para 65.

55 See *Andrews*, supra note 27 at 195; *Miron*, supra note 28 at para 161 (per McLachlin J); *Egan*, supra note 7 at 554 (per L’Heureux-Dubé J).


57 See *Miron*, supra note 28 at para 158 (per McLachlin J); *Egan*, supra note 7 at 554 (per L’Heureux-Dubé J); *Delisle*, supra note 50 at para 44; *Baier*, supra note 31 at para 65.

58 See *Andrews*, supra note 27 at 152; *Egan*, supra note 7 at 554 (per L’Heureux-Dubé J).

59 See *Andrews*, supra note 27 at 152; *Miron*, supra note 28 at para 158 (per McLachlin J); *Egan*, supra note 7 at 554 (per L’Heureux-Dubé J) and 599 (per Cory and Iacobucci JJ).

60 See *Miron*, supra note 28 at para 158 (per McLachlin J); *Egan*, supra note 7 at 602 (per Cory and Iacobucci JJ).

61 Luther, supra note 5 at 183 and 184, bases her argument for the recognition of weight as an analogous ground on immutability and historical disadvantage. Additionally, her discussion engages other factors such as difficulty of change, personal significance, and unacceptable personal costs. Hogg, supra note 7, chapter 55 at 83 and 87, implicitly accepts the notion of unacceptable costs and difficulty of change in his discussion of constructive immutability regarding occupation in *Delisle*, supra note 48, and *Baier*, supra note 31. Finally, Dale Gibson, “Analogous Grounds of Discrimination under the Canadian Charter: Too Much Ado about Next to Nothing” (1991) 29 Ala L Rev 772 at 787, implicitly recognizes the factor of difficulty of change while deconstructing the boundaries of constructive immutability.
explicitly rely on factors such as historical advantage, the judgment itself and the case law following Corbiere both make clear that the Court recognizes that other factors may be relevant. The majority judgments of the Court have never expressly rejected the relevance of factors considered by L’Heureux-Dubé J in Corbiere, and the absence of discussion of some of these factors in recent case law, when coupled with their consistent recognition in previous decisions, affirms their ongoing relevance to a section 15 analysis.

Still, many terms have been left undefined, resulting in a lack of clarity. The Court has never thoroughly defined what it really means for a characteristic to be actually or constructively immutable, leaving scholars and practitioners without a clear set of criteria to attempt to satisfy when arguing for novel analogous grounds. For example, L’Heureux-Dubé J states in Egan that “the common characteristics of all of the enumerated grounds other than religion is that they involve so-called ‘immutable’ characteristics.”62 However, how would the Court characterize the actual immutability of generally stable, yet changeable, enumerated grounds such as sex and colour? How would the Court characterize the immutability of enumerated grounds that change over time but often due to factors beyond our control, such as age and temporary disability? With respect to potential analogous grounds, how would the Court characterize the actual immutability of characteristics that are difficult, but not impossible, to change, such as weight and poverty? To date, an adequate answer to these questions remains elusive, and they must be discussed further to develop a robust and predictable approach to analogous grounds.

Furthermore, the Court has at times allowed for a very flexible and thus unpredictable understanding of immutability. For example, McLachlin J in Miron describes marital status as immutable “albeit in an attenuated form” because “it often lies beyond the individual’s effective control.”63 The spectrum from actual immutability (national origin) to attenuated immutability (marital status) is broad and vague and needs further definition for greater clarity.

Constructive immutability also has a very unclear scope. The Court has rejected occupation and province of residence as analogous grounds, but the analysis of their constructive immutability has been sparse. Why is the cost of naturalizing unacceptable while the cost of abandoning a lifelong career acceptable? Why is the government’s expectation that a

62 Egan, supra note 7 at 550.
63 Miron, supra note 28 at para 73.
French Canadian move outside of Quebec for employment legitimate, but the expectation that a common law couple get married to qualify for benefits illegitimate? These questions are central to the approach established in *Corbiere*, but the Court’s discussion of such issues has been very limited. The lack of conceptual clarity is not the only problem with the immutability test. Other arguments have been directed against the consideration of immutability within the context of equality rights, a topic to which this article will now turn.

III. CRITICIZING IMMUTABILITY: SHOULD NARROW IMMUTABILITY BE THE APPROACH TO IDENTIFYING ANALOGOUS GROUNDS?

The Supreme Court of Canada’s approach to identifying analogous grounds has suffered from imprecision, ranging from a broad “multi-variable” approach applied in *Miron*, which considers a non-exhaustive list of factors, to a “narrow immutability” approach outlined in *Withler*, which mentions only actual immutability and unacceptable costs to personal identity. Contrasting these two approaches illustrates the superiority of a multi-variable approach and demonstrates the need for the Court to explicitly affirm it. This article will criticize the effectiveness of the narrow immutability test in two steps. First, it will describe the concept of identity, which is central to any discussion of equality, and explain how a full appreciation of the importance of identity demands a multi-variable approach. Second, it will criticize the narrow immutability test by comparing it with a multi-variable approach in two ways. First, it will describe the discursive superiority of a multi-variable approach, discussing how a multi-variable approach promotes more empowering discourse about identity by recognizing the complexity of identity construction and not counteracting the efforts of minorities who attempt to avoid discrimination. Second, it will demonstrate the superiority of a multi-variable approach by applying it to the currently recognized protected grounds, intersectional forms of discrimination, and emerging equality claims based on weight and poverty.

An astute description of these different instances of constructive immutability is provided by Gibson, supra note 61 at 787:

It would be highly fictitious to tell a native trapper from the Northwest Territories, or the spouse of a Nova Scotia fisherman, or a francophone shop clerk from Trois Rivières, that they are free to move anywhere in Canada. Because of the powerful deterrents to migration that so frequently exist in the real world, a person's place of residence is for many an 'immutable' characteristic … In many cases it is little less so than citizenship.
A. Identity and the Pursuit of Equality beyond Immutability

Identity factors heavily into the Supreme Court of Canada’s approach to analogous grounds. For example, in Corbiere, Aboriginality-residence is recognized as an analogous ground because it is “essential to personal identity.” However, what does personal identity mean? My analysis of identity will revolve around the question of the kinds of changes a person should accept and can accommodate.65 This legal understanding of identity, which is evidential rather than constitutive, is well suited to a discussion of the pursuit of substantive equality, which the Court has recently affirmed as the “animating norm” of section 15.66 Evidential criteria of identity are what we use in our everyday practices of identification—they allow for a discussion of identity without going into deep philosophical discussions about how the self is constituted. The pursuit of substantive equality seeks the prevention of disadvantage.67 Thus, different approaches to section 15 must be adjudicated through a “substantive contextual approach,”68 which recognizes that government action should never result in prejudice or disadvantage to people as a result of irrelevant personal differences. How we standardly identify others and the effects this identification has on them are pertinent to an equality rights discussion.

Equipped with a substantive contextual approach and an identity analysis that emphasizes both the ability to change and the normative implications of being coerced into changing, the inadequacy of a discussion predicated entirely on narrow immutability becomes clear. For example, what should a discussion of poverty as an analogous ground take into consideration? Focusing on either the mutability of poverty (that is, on the occasional ability for the poor to escape poverty) or the cost of escaping it (which makes little sense since escaping poverty is generally desirable and thus not costly) to the exclusion of factors such as the historical disadvantage experienced by the poor and their economic and political vulnerability fails to consider the substantive contextual approach that the Court has adopted. It also fails to consider that the unlikely possibility of escaping poverty is not equivalent to the poor being able to easily accommodate such a change. Thus, a better approach must consider not only narrow immutability but also any factor

66 Withler, supra note 7 at para 2.
67 Law, supra note 7 at para 51.
68 Ibid at para 43.
that contributes to a contextual understanding of the experience of prejudice and disadvantage. The Court has often hinted at an approach that is broader than narrow immutability, but it must explicitly recognize other factors to ensure that these are considered consistently in future considerations of new potentially analogous grounds.

L’Heureux-Dubé J’s multi-variable approach to analogous grounds in Corbiere makes the most promising move in the right direction. L’Heureux-Dubé J identifies a non-exhaustive list of factors to be considered when identifying analogous grounds, all of which contribute to a greater appreciation of the diverse ways in which people can experience prejudice and disadvantage. L’Heureux-Dubé J outlines her approach as follows:

An analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground … It is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked … Another indicator is whether the ground is included in federal and provincial human rights codes … Other criteria, of course, may also be considered in subsequent cases, and none of the above indicators are necessary for the recognition of an analogous ground or combination of grounds.69

This multi-variable approach is far better than narrow immutability at answering the question: “What kinds of changes should a person accept and can a person accommodate?” On the narrow approach, people should accommodate changes to their personal characteristics when it is possible for them to change and they do not suffer unacceptable costs to personal identity.

Many potential grounds of discrimination struggle to satisfy this test. For example, escaping drug addiction is possible (though “very difficult”70) and becoming someone who is no longer an addict does not

69 Corbiere, supra note 9 at para 60 [emphasis in the original].
70 See, for example, R v Nikolovski (2002), 104 CRR (2d) 126 at para 164, 2002 CarswellOnt 4483 (Sup Ct): “[G]aining control of a long-term crack cocaine addiction will be very difficult, requiring strict controls and meaningful treatment.”
result in unacceptable cost to personal identity.\footnote{While I recognize that addiction could also be considered to fit within the enumerated grounds (disability), this discussion is simply meant to illustrate the greater versatility in a multi-variable approach.} If anything, being a drug addict is the cost and escaping addiction the benefit. By contrast, on a multi-variable test, it is fairly easy to argue that addiction is difficult to change and that addicts have suffered historical disadvantage and are a vulnerable group in society. Additionally, because the multi-variable approach considers, among other things, immutability and personal significance, it encapsulates grounds that would be recognized by the narrow immutability criteria (for example, immutability and cost to personal identity). Consequently, the narrow immutability test is subsumed within the multi-variable approach, and there is no concern that the different factors under a multi-variable approach would fail to recognize any analogous grounds that would be recognized by a narrow approach.

The multi-variable approach is not without its own flaws. A review of the factors included in L’Heureux-Dubé J’s test shows that many of them are themselves difficult to analyze. However, it is possible to tease out a clearer understanding of what is meant by each factor by reference to the enumerated or currently protected analogous grounds. This discussion makes it clear that none of these factors should be relied on exclusively as an indicator for when the Court should recognize a new analogous ground.\footnote{The benefit of not relying on a single factor when applying a multivariable approach is reflected in the Court’s reasoning. See, for example, Miron, supra note 28 at para 156, where, following a consideration of personal significance, historical disadvantage, immutability, and legislative and juristic consensus, McLachlin J posited that “[t]hese considerations, taken together, suggest that denial of equality on the basis of marital status constitutes discrimination within the ambit of s. 15(1) of the Charter.”} However, when relied on in concert, the factors under a multi-variable approach fill in the gaps left by the other factors and result in a more robust test than the narrow immutability approach.

Personal significance (or, as L’Heureux-Dubé J puts it in Corbiere, the “fundamental nature of the characteristic”) is the most difficult factor to analyze.\footnote{Corbiere, supra note 9 at para 60.} Whether a personal characteristic is significant is complicated because assessing similar, deeply personal issues is a subjective inquiry according to constitutional jurisprudence generally.\footnote{See, for example, Syndicat Northcrest v Amselem, 2004 SCC 47 at para 46, [2004] 2 SCR 551, where, when discussing another deeply personal characteristic, religion, Justice Frank Iacobucci explicitly endorses a subjective test for freedom of religion, stating:} To not discuss
significance subjectively removes any human element from section 15 and fails to recognize the unique experience of discrimination faced by many Canadians. However, subjective considerations, such as the rejected human dignity test from *Law*, are admittedly complicated as legal tests.75

Purely objective legal tests also have problems. For example, identifying characteristics essential to identity or describing unacceptable personal costs through an objective lens by making assumptions about groups facing discrimination relies on broad generalizations, which themselves may reinforce prejudice.76 The relevance of personal characteristics to identity is heavily influenced by socially constructed values, and many personal characteristics have shared (albeit contested) social meanings. Thus, an objective approach that is willing to interrogate the perspective of particular communities (for example, religion is significant to the devout, residence is significant to Aboriginals) may adequately balance the need for an accurate, while also manageable, approach to identifying significant personal characteristics. The factor of personal significance, even when applied objectively, resonates with the currently recognized protected grounds. For many people, all or most of the characteristics identified by the protected grounds play a substantial role in defining who they are, and to be forced to change any of these would result in unacceptable cost to personal identity.

Difficulty and cost of change also strengthen the multi-variable approach to identifying analogous grounds. These two factors enable a more robust understanding of the barriers that prevent people from changing a characteristic and the unfairness that results from such a change when coerced by government actions. The harms of discrimination in the context of enumerated grounds (such as sex) and analogous grounds (such as citizenship) cannot be fully appreciated without consideration of the personal, financial, and logistical barriers that confront individuals attempting to change their sex or citizenship.

Freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

75 *Law, supra* note 7.

76 To claim that a personal characteristic is essential to a group’s identity in the abstract (see *Corbiere, supra* note 9 at para 14) fails to fully appreciate how widely the significance of personal characteristics can vary between individuals, even within small groups.
For example, changing citizenship status is difficult not only because of the cost to identity but also because of the barriers to changing citizenship that often lie beyond an individual’s control. Additionally, the unfairness of experiencing discrimination because of a characteristic over which an individual exercises no control (an actually immutable characteristic) persists with characteristics over which an individual exercises minimal control.

The consideration of historical disadvantage—or what Dale Gibson calls “prior group disadvantage”—helps to ensure that equality rights “should accrue to the members of certain disadvantaged groups” and that “a finding of discrimination will … in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.”77 Like the other factors, the consideration of historical disadvantage in identifying analogous grounds has strengths and weaknesses. Its key strength is that it effectively characterizes all of the enumerated and analogous grounds. The protected grounds are united as personal characteristics that have been historically (and contemporarily) a basis for discrimination.78 Moreover, historical disadvantage is often the best way to explain our stronger intuitive opposition to particular legislative distinctions. For example, historical disadvantage is the easiest way to explain how “race, perhaps more than any other, is a basis for distinction repugnant in Canadian society.”79

On the other hand, a salient criticism of historical disadvantage is that it is overly restrictive, “[shrinking] the ambit of the equality guarantee much more severely than either the language of s 15(1) or the common understanding of Canadians fairly permits.”80 If the legal test for identifying analogous grounds relied exclusively on a historical disadvantage test, novel forms of discrimination could never receive constitutional protection and equality seekers would have no constitutional redress for significant breaches of equality (for example, if people with blue eyes were prohibited from voting). However, this weakness is predicated on an exclusive reliance on historical disadvantage, which is not how a multi-variable approach should work.

77 Gibson, supra note 61 at 782.
79 Leckey, supra note 13 at 461. Leckey substantiates this claim by noting, “it is unlikely that a reviewing court would grind a race-based distinction through the normal Oakes analysis.”
80 Gibson, supra note 61 at 785.
When considered with other factors, novel claims can be easily recognized by those other factors, while historical disadvantage still helps to recognize some of the worst instances of discrimination. Thus, when considered in conjunction with other factors, historical disadvantage makes a positive contribution to the strength of a multi-variable test for identifying analogous grounds.

Taking account of vulnerability when identifying analogous grounds resonates with many of the currently protected grounds. Youth, people with severe disabilities, and minority groups that may be too small in size to effectively lobby the government are all effectively disenfranchised by their limited political influence and therefore liable to having their interests overlooked. This is especially true for non-citizens who have no right to vote. However, the similarities between vulnerability and historical disadvantage risk these two considerations collapsing into one another with the consequence of obfuscating the identification of analogous grounds and limiting the independent (and at times overlapping) value that each factor brings to the discussion of equality. An explicit example of subsuming vulnerability within historical disadvantage can be found in *Law*:

> The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of “discrete and insular minorities” should always be a central consideration. Although the claimant’s association with a historically more advantaged or disadvantaged group or groups is not *per se* determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.

Clearly delineating between groups that have experienced prejudice in the past (historical disadvantage) and groups that are liable to experiencing prejudice in the present and future (vulnerability) will ensure that these two important factors are fully considered and not confused.

Finally, considering the inclusion of a personal characteristic within human rights codes also supports the strength of a multi-variable test. The symmetry between the *Charter* and provincial human rights codes, which are all directed towards the similar objective of promoting human rights, enhances the comprehensiveness of a multi-variable test for the

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81 See, for example, *Andrews*, *supra* note 27 at 152 (per Wilson J).
82 *Law*, *supra* note 7 at para 88.
analysis of human rights under the Charter. Furthermore, the flexibility of updating human rights codes provides advantages and disadvantages to their consideration. Being subject to the discretion of provincial legislators enables human rights codes to adapt more easily than constitutional documents to evolving social norms about discrimination. While social norms do not always evolve in a progressive manner, reference to human rights codes, with a cautious recognition of how current political trends can themselves be discriminatory, expands the court’s resources in the aim of equality.

Each of the factors from the multi-variable approach has its own strengths and weaknesses. However, most of the weaknesses of each factor when considered in isolation are eliminated or minimized when the factors are considered in concert. All of the factors can contribute to an understanding of the protected grounds in different ways, and they should all be open to the court’s consideration to provide a thorough understanding of the nuances and diversity present within potential analogous grounds while also counteracting the pitfalls of each when analyzed independently. When answering the question “what kind of changes should a person accept and can a person accommodate,” a multi-variable approach is far better equipped at recognizing and adapting to the various types of characteristics—mutable or immutable, difficult or easy to change, significant or insignificant to personal identity—than an approach limited to immutability and cost to personal identity.

B. The Discursive Superiority of a Multi-Variable Approach

The evaluation of legal tests for identifying analogous grounds should consider their merit “not only in terms of the actual results of litigation … but also with reference to the form of political discourse constitutional litigation generates.” The narrow immutability test may communicate messages about identity that are “highly problematic” because of its rigidity. Carl Stychin provides a thorough overview of the negative discursive impact of applying the narrow immutability test, in particular

83 The recent addition of gender identity and gender expression to the Ontario Human Rights Code, RSO 1990, c H.19, as amended by SO 2012, c 7, reflects this enhanced flexibility that has responded to the needs of the transgendered, a recently recognized group who face discrimination.


85 Stychin, supra note 3 at 56.
with respect to the gay rights movement. Conceiving of disadvantaged groups through the lens of narrow immutability portrays these personal characteristics as “( unfortunate) deviations from a static norm.” In other words, the logic that we must prevent discrimination against the “ others” who are inherently different from the norm (for example, heterosexual, able-bodied, white, male) fails to challenge the implied superiority of the norm and, thus, the inferiority of the other. This failure to challenge the hierarchy among various identities has many negative consequences for political discourse regarding identity and equality.

The negative discursive consequences of the narrow immutability test are twofold. First, the narrow test oversimplifies identity. Second, it is in tension with strategies of self-preservation used by oppressed communities. Both of these create barriers to substantive equality and detract from the normative strength of this test. Narrow immutability fails to appreciate the complexity of identity construction. By conceiving of a person’s identity as a combination of attributes that are either unchangeable or costly to change, the test classifies individuals based on stable characteristics generally beyond their control and pays inadequate attention to how individuals define themselves through conscious decisions and actions. This approach fails to take account of “identity as a complex developmental outcome, the consequence of an interactive process of social labelling and self-identification” and reinforces an approach to identity that conceives of identity through rigid categories that exist in a social, political, and cultural vacuum. This simplistic approach fails to understand the diversity of processes through which identities are produced and the diversity of identities that deserve protection. In turn, it “constrains the challenge posed by [equality seekers] to the coherence and stability of identity categories and disguises the role of relations of oppression in their construction and maintenance.” The narrow immutability test will be unlikely to advance our understanding of the constructed and dynamic nature of identity and, as a consequence, will never be able to succeed in the “broader political project” of challenging the dominant ideologies that perpetuate substantive inequality in our society. In particular, a narrow approach

86 Ibid. Notwithstanding Stychin’s focus on gay rights discourse, his arguments apply equally to any marginalized group that is perceived by society as counter to the norm.
87 Ibid.
89 Ibid at 62.
90 Ibid at 61.
merely characterizes the other based on impediments to change. While some protection against discrimination may be won through the narrow immutability analysis, the foundation of prejudice remains unchallenged.

While a multi-variable approach does not necessarily interrogate the constructed nature of identity or challenge prejudicial attitudes, it is more likely to foster the recognition of constructed identity and counteract prejudice. A multi-variable approach provides a broader legal vocabulary with which to discuss personal characteristics such as whether they are the basis for historical disadvantage, linked to vulnerability, or personally significant. For some grounds, such as weight and poverty, which will be discussed later in this article, this broader vocabulary greatly facilitates the discussion of analogous grounds by interrogating more aspects of personal characteristics confronted with discrimination.

Furthermore, because the narrow immutability test’s primary emphasis is on the barriers to changing a characteristic, it reinforces a more simplistic understanding of identity that can be challenged by a multi-variable approach. For example, it could be argued that public discourse often describes sexual orientation as actually immutable because that is perceived to be a barrier to receiving legal protection. By contrast, a multi-variable approach to identifying analogous grounds would allow for recognition of the social influences acting upon sexuality without any concern of detracting from its protection under section 15. Under a multi-variable approach, sexual orientation need not be actually immutable to receive protection. Instead, sexual orientation can be protected because of historical disadvantage and difficulty of change, leaving discussion about the various factors contributing to the construction of sexual identity open for debate. Opening up dialogue regarding personal characteristics, while not guaranteeing a more complex understanding of identity, at least makes a more complex understanding of identity possible.

The wisdom of the narrow immutability test can be further challenged because of its potential to lead courts into misunderstanding how oppressed groups cope with discrimination. Narrow immutability fails to recognize how many minorities attempt to redefine parts of their identity with the hopes of accessing privilege. When facing discrimination based on attributes that are misconceived as permanent by the majority (such as skin colour), minorities may alter those attributes to avoid this discrimination. By “not merely passing but trespassing” into what are perceived to be superior and immutable identity categories, minorities express an outward identity that mirrors what the majority deems to be
acceptable and thus worthy of privilege. In her essay “Whiteness as Property,” Cheryl Harris describes how her grandmother, using the “gift” of “fair skin, straight hair, and aquiline features” passed as a white person in order to gain the privilege of employment in Chicago’s central business district. Notwithstanding this transformation, the Court considers personal characteristics like race to be unchangeable. Given that race is socially constructed, the ability of an individual to re-define their race for all those who see them is arguably equivalent to literally changing their race. For example, skin colour is a primary factor considered when identifying race, and it is clearly a changeable characteristic. The use of skin lightening creams in India and skin bleaching in the Caribbean are well-known practices indicative not only of the mutability of colour but also of the contemporary value of passing between fluid racial categories in order to gain access to privilege. Eyelid surgery in Japan and chemical relaxation of Black hair are two further examples of how individuals seek to redefine personal characteristics they are born with or naturally develop in light of the oppression they experience because of them.

The twofold narrow immutability approach conflicts with the use of passing for self-preservation. Passing suggests not only that such characteristics are mutable but also that the cost of changing them is acceptable to the individuals who voluntarily set them aside. A court would still be able to reject discrimination against groups who pass because it could nonetheless find an unacceptable cost to personal identity. However, a court might well misunderstand a group’s motivations when redefining identity. The difference between a transsexual who is driven towards a new identity because of their rejection of a former identity and an African Canadian who is driven away from a prized identity because of its negative associations is complex. When these two motivations are confused it could undermine claims of equality by making the costs to identity acceptable to the passing claimant. Decreasing the likelihood of receiving protection under section 15 when minorities have struggled long enough with oppression to have developed effective passing strategies is both unjust and

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91 Harris, supra note 4 at 276.
92 Ibid.
93 See, for example, Constance Backhouse, “The Historical Construction of Racial Identity and Implications for Reconciliation,” online: <http://canada.metropolis.net/events/ethnocultural/publications/historical.pdf> at 22.
incoherent. It is in strong tension with another relevant factor for identifying analogous grounds—historical disadvantage, which is itself evidenced by prolonged efforts by minorities to develop effective passing strategies—and creates a perverse incentive against self-preservation. The better a minority is at redefining themselves, the less likely it is that the courts, when applying a narrow immutability approach, will intervene to prevent the discrimination that the minority reacted to—an unjust cycle of discrimination.

A multi-variable approach conflicts with self-preservation much less than an immutability test. For example, racial discrimination, which struggles for recognition under a narrow immutability approach because of passing, is more likely recognized by a multi-variable approach that considers the historical disadvantage experienced by racial minorities, the personal significance of racial identity, and the presence of race in human rights codes, all of which call attention to the past and present evils of racism. The prevention of discrimination based on race, which is an enumerated ground, admittedly does not depend on the Court’s approach to identifying new analogous grounds. However, the example of race still demonstrates how the concept of passing can go unnoticed and be misunderstood, particularly when the court only considers narrow immutability. The strategy of passing, provoked, for example, by such contemporary problems as the oppression of naturally Black hair in professional work environments, is still not recognized and could apply to other presently undiscovered forms of passing not associated with the enumerated grounds. While the factors of immutability, difficulty of change, and cost of change are still potentially at odds with these strategies of self-preservation, other factors such as historical disadvantage, vulnerability, significance, and presence in human rights codes all ensure that minorities implementing these strategies can still access equality rights and concurrently attempt to protect themselves against discrimination.

C. The Superiority of a Multi-Variable Approach in Application

In addition to its discursive superiority, a multi-variable approach to analogous grounds has other strengths. First, it better explains the currently recognized protected grounds. It also provides a better basis for understanding intersectional grounds. Last, it better promotes substantive

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95 See, e.g., Tania Padgett, “Ethnic Hairstyles Can Cause Uneasiness in the Workplace,” Chicago Tribune (12 December 2007), online: Chicago Tribune <http://articles.chicagotribune.com/2007-12-12/features/0712100189_1_hair-glamour-dreadlocks>: “[A]n undertone that natural hair is unacceptable, unprofessional and even ugly continues to pervade society.”
equality by facilitating the recognition of new equality claims such as those based on poverty and weight.

1. A Multi-Variable Approach Encapsulates the Protected Grounds Better Than Immutability

The currently recognized protected grounds are more easily characterized as protected through a multi-variable, rather than narrow, immutability approach. The only actually immutable protected grounds are national or ethnic origin, age, and permanent disabilities. If we adopt the narrow immutability test, the remaining protected grounds (race, colour, religion, temporary disability, citizenship, sexual orientation, marital status, and Aboriginality-residence) must be characterized as grounds changeable only at unacceptable cost to personal identity. This single analytical tool is not as comprehensive as a multi-variable approach when discussing these characteristics.

The multi-variable approach will almost invariably result in a broader discussion of potential grounds. For example, the narrow immutability test would have to say that demanding that someone change their sexual orientation or race imposes an unacceptable cost to personal identity. However, this tells only part of the story about why members of these groups might need to claim the protection of section 15. The difficulty of changing sexual orientation or race, their personal significance, the historical disadvantage suffered by such groups, and the vulnerability they currently experience add to the picture, which might be said to explain why both characteristics are included in human rights codes. Even if the Court is willing to recognize an analogous ground without going beyond narrow immutability, other criteria provide a broader understanding of the experience of oppressed groups, and this information informs the purpose underlying section 15 of preserving human dignity.96 The narrow immutability test is not incapable of confirming the currently recognized protected grounds. However, the multi-variable approach encapsulates the currently protected grounds in a much more intuitive and comprehensive way.

2. A Multi-Variable Approach Is More Likely To Accept Impending Equality Claims Based on Intersectional Grounds

A multi-variable approach is also more effective at engaging with intersectional grounds—that is, a combination of different personal characteristics. For example, poor immigrants experience intersectional forms of inequality. An account capable of dealing with such cases is

96 Corbiere, supra note 5 at para 5.
particularly important given that “intersectional discrimination claims … will undoubtedly become the primary task of the courts as equality challenges develop.” First, intersectional identities are far more specific than the broad enumerated grounds. Proving that a single characteristic such as poverty is unchangeable or changeable only at unacceptable cost to personal identity is complex enough in isolation. Multiple layers of intersectionality compound this complexity. Intersectional grounds, such as “single mothers on social assistance,” are “difficult to recognize in [their] specificity as analogous to those listed in section 15.” Moreover, the more layers of intersectionality, the narrower the group of individuals who fit into that intersectional category. As a result of this complexity, intersectional identities are difficult if not impossible to fit within the binary of mutable/immutable. As a consequence, equality discussion about intersectional claimants is stunted. If the court instinctively wants to protect a group, the insufficient complexity of narrow immutability may result in a contrived immutability discussion. For example, the vulnerability of poor immigrant communities, regardless of the mutability of that classification, may still weigh on the minds of the judiciary and lead them to characterize such a classification as “close enough” to actually immutable and meriting protection. Alternatively, if the court instinctively wants to reject a group’s claim, the insufficient complexity of narrow immutability may result in an overly mechanistic discussion. Rejecting poor immigrants because becoming a rich immigrant is not literally impossible fails to engage the broad purposive analysis section 15 demands. The extent to which the question “are these characteristics immutable?” is impossible to answer for certain intersectional characteristics limits the possibility of a successful claim to many claimants simply due to the structure of the analysis, rather than the severity of the discrimination they face.

A multi-variable approach makes the recognition of complex intersectional characteristics as analogous grounds much easier. To claim that being a single mother on social assistance is immutable or that changing her current state will impose costs on her personal identity is a much more difficult and unclear argument than claiming that she is part of a group that has experienced historical disadvantage, that she is vulnerable, or that she finds it very difficult to change her current financial status. Each added layer of intersectionality adds barriers to escaping oppression but is unlikely to ever surpass the threshold of actual

97 Gilbert, supra note 3 at 649.
98 Ibid at 648.
99 See, for example, Miron, supra note 28 at para 153, where McLachlin J describes marital status as immutable “albeit in attenuated form.”
or constructive immutability and is therefore unlikely to be protected by narrow immutability. Similarly, it would take an impressive feat for an obese drug addict to escape these conditions, but it would be inaccurate to describe it as impossible. Taking into account factors such as difficulty of change and vulnerability would easily recognize this combination of factors as an analogous ground. Thus, the rigid analysis of narrow immutability generally affords much less protection to equality claims based on intersectional grounds than does a multi-variable approach.

3. A Multi-Variable Approach Is More Likely To Accept Emerging Equality Claims Based on Weight and Poverty

Efforts to secure recognition of weight and poverty as analogous grounds have been underway for some time. If the Supreme Court of Canada applies a narrow immutability test in future decisions, equality advocates will have to confront the significant initial hurdle of arguing that obesity and poverty qualify as absolutely immutable or changeable only at an unacceptable cost to personal identity. In both cases, entrenched stereotypical beliefs understand weight and poverty to be within an individual’s control and therefore mutable.

Emily Luther’s argument that weight is both immutable and subject to historical disadvantage supports the contention that weight is much less likely to be recognized as an analogous ground by the narrow immutability test than by a multi-variable approach. While Luther claims that weight satisfies the Court’s understanding of immutability, it is difficult to argue that weight is either actually immutable or only changeable at unacceptable cost to personal identity. Weight is highly complicated given the “number of different causal factors that both cause and maintain higher weights” and how these factors vary between people. Genetics, metabolism, and other medical and psychological disorders can all have an influence. Thus, depending on the cause of obesity in a particular case, it could be argued that it is permanent for some and potentially changing over time but outside of the control of

100 For weight, see Luther, supra note 5; J Paul R Howard, “Incomplete and Indifferent: The Law’s Recognition of Obesity Discrimination” (1995) 17 Advocates’ Q 338; Nola M Ries and Barbara Von Tigerstrom, “Legal Interventions to Address Obesity: Assessing the State of the Law in Canada” (2011) 43 UBC L Rev 361; and McKay-Panos v Air Canada, 2006 FCA 8, [2006] 4 FCR 3. For poverty, see Jackman, supra note 6; Falkiner v Ontario (Director of Income Maintenance, Ministry of Community & Social Services) (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (CA) [Falkiner].

101 Luther, supra note 5 at 182-3; Jackman, supra note 6 at 90.

102 Luther, supra note 5.

103 Ibid at 183.

104 Ibid.
others.\textsuperscript{105} However, the conventional understanding of weight as a mutable personal characteristic could undermine these arguments. “The perception that larger people are at fault for their weight,”\textsuperscript{106} while “simplistic, inaccurate, and rooted in society’s stereotype of the obese as persistent, compulsive gluttons,”\textsuperscript{107} may still infiltrate legal reasoning. The popular understanding of weight as being exclusively contingent on psychological factors such as will power, as opposed to the more accurate understanding of it as dependent on both psychological and physical factors such as metabolism, poses a significant barrier to the recognition of weight as an absolutely immutable characteristic.

Assuming that the argument that weight is absolutely immutable fails, advocates could still argue that it satisfies the narrow immutability test because it is changeable only at an unacceptable cost to personal identity. However, the connection to identity is unclear. Luther outlines many significant personal costs associated with weight loss and describes how “[w]eight loss and diets can be both physically and psychologically dangerous, resulting in such undesirable results as metabolic slowing, which can lead to even more weight gain, and eating disorders, which can lead to serious health problems and even death.”\textsuperscript{108} Describing these costs as analogous to the role of residence in Aboriginal identity is difficult because the cultural and historical resonances of Aboriginality-residence are not present in the case of the obese. Furthermore, while Luther also outlines how weight is tied to deeply personal questions about practices and lifestyles, claiming that these questions reach the Corbiere threshold of essential to personal identity could still be a difficult argument to make.\textsuperscript{109}

The likelihood that weight would be recognized as an analogous ground increases dramatically under L’Heureux-Dubé J’s multi-variable test. Luther makes a good case for the difficulties associated with changing weight and the historical disadvantages associated with this characteristic.\textsuperscript{110} Moreover, the significant financial costs often associated with effective weight loss (for example, healthy eating, access to fitness facilities, and medical advice and procedures) can also be taken into account by a multi-variable approach that considers the cost of change.

\begin{itemize}
\item \textsuperscript{105} Ibid.
\item \textsuperscript{106} Ibid.
\item \textsuperscript{107} Howard, supra note 100 at 340.
\item \textsuperscript{108} Ibid.
\item \textsuperscript{109} Ibid at 184.
\item \textsuperscript{110} Ibid at 184-8.
\end{itemize}
Poverty suffers from similar misconceptions and has already struggled for recognition by the courts as an analogous ground.111 People often think of the poor as losers in the free market of meritocracy and view them as largely responsible for their situation.112 These attitudes are also present among some members of the judiciary.113 Martha Jackman argues that without attention to discrimination based on poverty “the Charter’s guarantee of substantive equality will remain meaningless for a vast number of Canadians.”114

Poverty, like weight, is a complex characteristic with multiple causes and is often difficult to change. The “socio-economic barriers preventing those who are poor from obtaining post-secondary education, trade, technical or professional training translate into marginal employment prospects—a guarantee of continuing poverty.”115 Moreover, other personal characteristics beyond our control greatly increase the likelihood of being poor.116 Still, to argue that escaping poverty is completely beyond an individual’s control is unlikely to succeed. Some individuals in the most dire of circumstances have been able to escape the cycle of poverty. This fact was used by the Nova Scotia Court of Appeal when it rejected poverty as an analogous ground of discrimination because “financial circumstances may change.”117 Thus, poverty is another example of how equality rights contingent on narrow immutability are insufficiently broad to tackle significant bases of substantive inequality. Again, it could be argued that poverty is only changeable with unacceptable cost to personal identity, but such an argument is as awkward when applied to poverty as when it is applied to weight. Generally, poverty is a condition individuals want to escape, so to characterize this escape as associated with negative costs to identity is counter-intuitive.

A multi-variable approach would increase the likelihood of the recognition of poverty as an analogous ground. Escaping poverty is difficult, and the poor have been subject to historical disadvantage. They are vulnerable to having their interests overlooked. All of these factors are relevant to the question of whether poverty should be recognized as an analogous ground. The examples of weight and poverty demonstrate how the

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111 See, for example, Boulter v Nova Scotia Power Inc, 2009 NSCA 17, 275 NSR (2d) 214 [Boulter], and Falkiner, supra note 94, both of which stopped short of recognizing poverty, in general, as an analogous ground.
112 Jackman, supra note 6 at 90.
113 Ibid at 91-2.
114 Ibid at 78.
115 Ibid at 89.
116 Ibid at 82-3: “Being a member of a mother led single-parent family, being an elderly women, being a person with a disability, a member of a visible minority, a recent immigrant, or an aboriginal person” all greatly increase the likelihood of being poor, and in turn, increase the impediments to escaping poverty.
117 Boulter, supra note 111 at para 42.
current legal tool of immutability is likely insufficient on its own to challenge the status quo and promote substantive equality by enabling these marginalized groups from bringing claims under section 15 even though both the poor and the obese suffer ongoing discrimination. Adoption of a multi-variable test for identifying analogous grounds is more likely to recognize these important grounds than narrow immutability and enhance the Supreme Court of Canada’s pursuit of substantive equality as a consequence.

IV. CONCLUSION

Narrow immutability when compared to a multi-variable approach has an inferior doctrinal foundation. It also has many normative weaknesses. It is an ineffective tool for promoting substantive equality because it contributes to harmful discourse regarding identity and equality and excludes important claims from groups experiencing oppressive forms of inequality. Furthermore, narrow immutability is much less effective than a multi-variable test at characterizing the currently recognized protected grounds. Consideration of a broader set of factors including difficulty of change, its cost, vulnerability, historical disadvantage, and inclusion within human rights codes in conjunction with immutability mitigates many of the normative criticisms of narrow immutability and provides for a more flexible approach to recognizing possible grounds of discrimination that is more likely to promote substantive equality.

The Supreme Court of Canada should more explicitly and consistently endorse a multi-variable approach to identifying analogous grounds in future equality disputes to provide greater access to section 15 for equality seekers and expand its pursuit of substantive equality. Greater analytical clarity about which factors are relevant when identifying analogous grounds and the meaning of those factors would also be welcome. Lady Gaga’s message of self-love has inspired many and contributed to a powerful movement advancing gay rights worldwide. As Jon Savage notes, “[t]he idea that sexuality is inborn, rather than some lifestyle choice or unfortunate disease, is at the heart of much modern gay identity formation.” However, we should be wary of a discourse that perpetuates tying protection from inequality to immutability. The concept may resonate with, and inspire, many, but it also suffers from several analytical and normative flaws. It is far more limited than the broader access to equality that the law should seek to promote.

118 See Luther, supra note 5 at 167; Jackman, supra note 6 at 90.