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

Volume 104 Article 6

2022

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Citation Information

Mathen, Carissima. "Equality before the Charter: Reflections on Fraser v. Canada (Attorney General)." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 104. (2022).
DOI: https://doi.org/10.60082/2563-8505.1428
https://digitalcommons.osgoode.yorku.ca/sclr/vol104/iss1/6

Equality before the Charter: Reflections on *Fraser v. Canada (Attorney General)*

Carissima Mathen*

I. Introduction

In its 1989 decision of *Andrews v. Law Society of British Columbia*, the Supreme Court of Canada suggested that Canada had entered a new era of equality rights.[1] Too often, in cases decided before the arrival of section 15 of the *Canadian Charter of Rights and Freedoms*,[2] courts failed to look beyond the technical application of legal rules to consider their effect on individuals and groups.[3] In *Andrews*, the Court said that, henceforth, section 15 would be understood in relation to the broader context in which people make choices, live their lives and interact with the state — the approach that is known as "substantive equality".[4]

The new era brought many positive developments. It became settled law that a breach of section 15 of the Charter does not depend on intentional discrimination; and cannot be avoided merely by asserting that people have been treated "similarly". Instead, the state can treat people differently according to their needs, including through "ameliorative programs" that focus on disadvantage linked to personal characteristics. The result was a broad analytical construct for determining when laws or policies cross the threshold into discriminatory behaviour.[5]

Yet, throughout, the Court's approach to section 15 has inspired critique, and not

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* Professor of Law, University of Ottawa. I wish to acknowledge the support of the Social Sciences and Humanities Research Council provided to the *Judging Equality Judgments* project, an innovative research initiative that applies legal data analytics to qualitative studies of equality law. I am grateful to Keenan Macneal for his assistance.

1 *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.) [hereinafter "*Andrews*"]. See, especially, the discussion *per* McIntyre J., at 168-172.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("the Charter").

3 See *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349 (S.C.C.) and *Bliss v. Canada (Attorney General)*, [1978] S.C.J. No. 81, [1979] 1 S.C.R. 183 (S.C.C.).

4 *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

5 Carissima Mathen, "What Religious Freedom Jurisprudence Reveals About Equality" (2009) 6:2 JL & Equality 163, at 167.

only from those concerned about judicial overreach.[6] Many scholars who support a robust equality rights guarantee see a chronic mis-alignment between the Court's high rhetoric and a stream of underwhelming results.[7] They are concerned by the Court's insistence that the essence of section 15 remains a comparative process between rights claimants and others, which, while perhaps difficult to unseat as a matter of logic nonetheless presents significant barriers to recognizing inequality that takes more systemic forms or relates to very specific kinds of disadvantage. As well, commentators observe, some jurists continue to assume that proving discrimination requires some element of arbitrariness or unfairness. And, finally, the Court's marked reluctance to overrule any of its prior section 15 decisions leads to confusion and inconsistency.[8]

That somewhat checkered history helps explain why the Supreme Court of Canada's 2020 decision in *Fraser v. Canada (Attorney General)* attracted so much attention.[9] The decision stood out among numerous past disappointments. It was an unambiguous sex equality win for women who raised a claim of adverse effect discrimination.[10] At the same time, the panel divided in ways reminiscent of prior decisions. One of *Fraser*'s two dissents took aim at substantive equality, characterizing it as chimerical and unstable.[11] It is possible, as well, that the lack of a

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[6] See, *e.g.*, David M. Beatty, "Canadian Constitutional Law in a Nutshell" (1998) 36:3 Alta. L. Rev. 605; "The Supreme Court, deaf to reason" *The Globe and Mail* (October 14, 1997), at Al6.

[7] Diana Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1990-1991) 4 C.J.W.L. 407; Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 Sup. Ct. L. Rev. (2d) 183.

[8] Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16 Rev. Const. Stud. 31 [hereinafter "Meaningless Mantra"]; Patricia Hughes, "Supreme Court of Canada Equality Jurisprudence and 'Everyday Life'" (2012) 58 Sup. Ct. L. Rev. (2d) 245; Diana Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1990-1991) 4 C.J.W.L. 407.

[9] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.) [hereinafter "*Fraser*"]; see, *e.g.*, the special issue of (2021) 30:2 Const. Forum Const.

[10] Jennifer Koshan & Johnette Watson Hamilton, "Tugging at the Strands: Adverse Effects Discrimination and the Supreme Court Decision in *Fraser*" (November 9, 2020), online: https://ablawg.ca/2020/11/09/tugging-at-the-strands-adverse-effects-discrimination-and-the-supreme-court-decision-in-fraser/ [hereinafter Koshan & Hamilton, "Tugging at the Strands"].

[11] Brown and Rowe JJ.'s opinion is discussed extensively below. Justice Côté's wrote separately. Similar to her dissent in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociau*x, [2018] S.C.J. No. 17, 2018 SCC 17 (S.C.C.), she did not recognize any sex-based discrimination in the program. In her view, the most relevant distinction in *Fraser* concerned family/parental status, which is not a prohibited ground under s. 15. Given space constraints, I will not further engage with her analysis.

significant section 1 argument from the state muted the level of disagreement among the majority judges.[12]

This paper uses *Fraser* as an opportunity to reflect on the continuing framework for section 15. Specifically, it interrogates a core narrative of "substantive equality": that it enabled Canadian law to move out of a dark age best symbolized by the *Canadian Bill of Rights.*[13] While substantive equality remains a vital tool, that narrative is misleading. First, it distorts the actual analysis under the *Bill of Rights* applying "equality before the law". Second, it rests on a misguided dichotomy between so-called substantive and formal equality.[14] Third, it obscures the roots of continuing judicial disagreement about section 15. While, in *Fraser*, that disagreement was notable for the sharpness of its expression, it is a mistake to think of it as being materially different from the divisions on section 15 that have come before.[15] Recognizing the shortfalls of a cherished constitutional story might better reveal the barriers to ensuring a meaningful commitment to the equality of all persons.

II. VICTORY WITH AN EDGE

In *Fraser*, three female RCMP officers participating in a job-sharing program challenged the subsequent treatment of their pension entitlements. The program offered employees facing acute family responsibilities an alternative to quitting or taking unpaid leave. The accompanying pension plan, however, limited the officers' ability to "top up" their benefits beyond their part-time hours. In contrast with officers who did take unpaid leave, those who job-shared were categorically ineligible for benefits based on full-time work. A vast majority of the participants were women. The officers argued that the policy discriminated against them on the basis of sex.

The claimants were unsuccessful in the Federal Court.[16] The application judge found that "job-sharing is not disadvantageous when compared to unpaid leave" and, in any event, any disadvantage the women experienced resulted from their own choices.[17] The Federal Court of Appeal upheld that decision.[18]

The officers ultimately prevailed at the Supreme Court which issued a 6-3 ruling

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[12] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.).

[13] *Canadian Bill of Rights*, S.C. 1960, c. 44 [hereinafter "*Bill of Rights*"].

[14] Keyword analysis of Supreme Court jurisprudence shows that "formal equality" and "substantive equality" are highly complementary terms.

[15] *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.) itself featured division, albeit about the justification, under s. 1, of a *prima facie* breach. For further discussion, see Carissima Mathen, "The Upside of Dissent in Equality Jurisprudence" (2013) 63 Sup. Ct. L. Rev. (2d) 111, at 124.

[16] *Fraser v. Canada (Attorney General)*, [2017] F.C.J. No. 609, 2017 FC 557 (F.C.).

[17] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.).

[18] *Fraser v. Canada (Attorney General)*, [2018] F.C.J. No. 1228, 2018 FCA 223 (F.C.A.).

overturning the lower courts. Justice Abella wrote the majority decision while two dissents were filed, respectively, by Brown and Rowe JJ., and Côté J. That the majority accepted the women's claim of adverse impact discrimination makes *Fraser* a highly significant moment for section 15. It has proved very difficult to win adverse effect or "indirect" discrimination claims — *Fraser* appears to be only the third such victory. Such cases tend to involve complex programs with multiple groups and beneficiaries, something that has inspired a cautious judicial approach at both the *prima facie* and justificatory stages of Charter analysis.[19]

Justice Abella's analysis of adverse effect discrimination cut a swath through many of those losses.[20] Reiterating that adverse impact discrimination violates an important norm of substantive equality, she championed a "unified approach" to direct and indirect discrimination.[21] Nevertheless, most of her focus was on the phenomenon of how an adverse effect arises and how it can be demonstrated. She noted that in such cases, because "the impugned law will not, on its face, include any distinctions based on [section 15's] prohibited grounds" a claimant must establish that the law has "a disproportionate impact on members of a protected group".[22] A result offensive to equality arises when members of those protected groups "are denied benefits or forced to take on burdens more frequently than others".[23]

Justice Abella described the *prima facie* stage of section 15 using a familiar[24] framework. First, a claimant must establish that the law imposes differential treatment based on protected grounds, either explicitly or through adverse impact. Second, they must demonstrate that the law has the effect of reinforcing, perpetuating or exacerbating disadvantage (if they succeed, the focus turns to whether the state can justify the limit under section 1). While it is preferable to keep the two stages "distinct", she said, adverse effects cases can create "overlap" because of the "impossibility of rigid categorizations", and the fact that in such cases the

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[19] *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.); *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, 2004 SCC 66 (S.C.C.); *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.).

[20] *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695 (S.C.C.).

[21] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 49, 2020 SCC 28 (S.C.C.).

[22] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 50, 2020 SCC 28 (S.C.C.).

[23] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 55, 2020 SCC 28 (S.C.C.).

[24] For a useful summary of the evolution of the s. 15 test, see Jonnette Watson Hamilton, "Cautious Optimism: Fraser v Canada (Attorney General)" (2021) 30:2 Const. Forum Const. 1.

differential treatment often is itself a function of existing disadvantage.[25]

Looking at the evidence that could be adduced to support such claims, Abella J. distinguished evidence about the situation of the claimant group from evidence about the results of the law.[26] The first type of evidence includes "physical, social, cultural or other barriers" tending to show that membership in the claimant group is associated with certain disadvantaging characteristics.[27] For example, membership in a religious group may create disadvantage in terms of a general legislative scheme imposing mandatory pause days for work. At the same time, she cautioned courts to be aware that certain disadvantage is less amenable to evidence gathering because "issues which predominantly affect certain populations may be under-documented".[28]

The second type of evidence shows how a law has caused or contributed to individual or group disadvantage. In prior section 15 cases, the need for such evidence tended to trip up claimants who failed to either demonstrate a sufficient statistical disparity, or establish a link between that disparity and the law in question. In *Symes v. Canada*, for example, the majority opinion stressed that, in order for adverse effects analysis to be "coherent, it must not assume that a statutory provision has an effect which is not proved",[29] concluding in the latter case that it did not.

Justice Abella evinced little patience for those limits. In relation to the second type of evidence, she held that a claimant need not necessarily prove: that the law affects all members of the claimant group identically; that the law is wholly responsible for the claimant group's social situation; that the law was motivated by discriminatory intention; or that the relationship between the law and the asserted disadvantage satisfies a particular standard of causation.[30] She also noted that there is no "universal measure for what level of statistical disparity is necessary".[31] Instead, the claimant need only establish a non-random disparate pattern of exclusion or harm.

Justice Abella drew on a rich history of scholarship about women's economic

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[25] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 82, 2020 SCC 28 (S.C.C.).

[26] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 57, 2020 SCC 28 (S.C.C.).

[27] Justice Abella notes evidence coming "from the claimant, from expert witnesses, or through judicial notice". *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.).

[28] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 57, 2020 SCC 28 (S.C.C.).

[29] *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695, at 764-65 (S.C.C.).

[30] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, note 8 at paras. 59, 69-72, 2020 SCC 28 (S.C.C.).

[31] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 59, 2020 SCC 28 (S.C.C.).

inequality. It is not a coincidence that she opened her decision with a quote from the 1970 Royal Commission on the Status of Women.[32] Despite the "spectacular" reversal in much sex-based inequality, she wrote, "the long reach of entrenched assumptions about the role of women in a family continues to leave its mark on what happens in the workplace."[33] Those assumptions include a critical one about the supposed choice that women make once they bear children, namely, that altering or even withdrawing altogether from paid work reflects neutral conditions of bargaining and background equality. Justice Abella rejected that contention:

> For many women, the decision to work on a part-time basis, far from being an unencumbered choice, "often lies beyond the individual's effective control" ... Deciding to work part-time, for many women, is a "choice" between either staying above or below the poverty line.[34]

Since women are still far more likely to be responsible for child-care, the women who worked for the RCMP had a correspondingly greater need to job share. Consequently, the RCMP pension plan's limitation on full-time accrual for those women had a sex-based adverse effect.

Justice Abella's marshalling of an enormous amount of scholarship about women's economic disadvantage reads as a determined effort to correct past judicial inattentiveness to that lived experience. That said, it remains to be seen how much of *Fraser*'s precedential force will be tied to its specific focus on sex-based economic disadvantage linked to child-bearing, as opposed to permitting broader recognition of other group-based inequality.[35] There was little mention of the class-based advantage enjoyed by the claimants, who sought to top up pension entitlements with their own resources. And, as mentioned earlier, section 1 barely features in the case, largely because the state respondent did not offer much by way of justification.[36] Justice Abella accordingly found "no pressing and substantial objective that explains why job-sharers should not be granted full-time pension credit for their service".[37]

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[32] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 1, 2020 SCC 28 (S.C.C.). Justice Abella, of course, authored the ground-breaking *Royal Commission on Equality in Employment* (1984).

[33] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.).

[34] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 91, 2020 SCC 28 (S.C.C.).

[35] Sonia Lawrence, "Critical Reflections on Fraser: What Equality Are We Seeking?" (2021) 30:2 Const. Forum Const., at 43.

[36] The respondent's factum devoted fewer than 10 paragraphs to section 1.

[37] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 126, 2020 SCC 28 (S.C.C.). Given the overwhelming evidence surrounding women's participation in the workforce and the various factors that combine to subject them to severe disadvantage at a chronic and continuing level, perhaps the policy in *Fraser* always stood a very weak chance of surviving under s. 1. But one need only tweak the facts but a little to upset any confident

Taking exception to the majority's characterization of both the program and the evidence, Justices Brown and Rowe issued a notably pointed dissent.[38] They stressed that the job-sharing program was intended to ameliorate disadvantage. Without explicitly relying on section 15(2) of the Charter, the two thought it unacceptable that such a laudable program could become constitutionally suspect merely because the government had not addressed all possible disadvantage.[39]

The dissent stressed that pension benefits are complex.[40] In previous (unsuccessful) section 15 claims, they said, the Court had taken that complexity into account.[41] Those cases included one, *Withler v. Canada (Attorney General)*, in which Abella J. herself wrote that "[i]t is in the nature of a pension benefit scheme that it is designed to benefit a number of groups in different circumstances and with different interests."[42] The Court would go on to unanimously find that an age-related diminution of pension entitlement did not breach section 15.[43]

The RCMP plan categorized employees as full-time, part-time and on unpaid leave. In the dissent's view, however, Abella J. effectively treated the female claimants as full-time employees who happened to be sharing a job, while *also* comparing them to officers, on leave without pay, who were permitted to buy back full-time pensionable service. In essence, they said, Abella J. shifted between two comparator groups without regard for their fundamentally different positions both in terms of each other and in terms of the claimants. (It should be noted that the dissent presumed without explanation that the choice to structure the employment categories in that way was an entirely neutral factor beyond review). By treating the claimants as full-time members who temporarily reduced their working hours, Abella J.'s analysis was painted as overly narrow. Looking at the entire pension

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predictions about a judicial response. Suppose that the program required some pre-vetting of the reason that an employee wanted to job-share and reserved the right to deny entry into it in cases that did not raise a conflict with one's family responsibilities. It is entirely possible that a majority of the Court would have less trouble justifying such a scheme.

[38] Justice Côté's dissent in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociau*x, [2018] S.C.J. No. 17, 2018 SCC 17 (S.C.C.), is briefly discussed, at note 11, above. Henceforth, I use "dissent" to refer to the Brown and Rowe JJ. opinion.

[39] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 146, 2020 SCC 28 (S.C.C.).

[40] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 196, 2020 SCC 28 (S.C.C.).

[41] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 148, 2020 SCC 28 (S.C.C.).

[42] *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, at para. 73, 2011 SCC 12 (S.C.C.).

[43] For a critique, see Koshan & Watson Hamilton, "Meaningless Mantra" (2011) 16 Rev. Const. Stud. 31.

plan, Brown and Rowe JJ. said, it was obvious that members who chose to job-share were not disadvantaged.

Accepting and applying Abella J.'s test for determining *prima facie* breaches of section 15, Brown and Rowe JJ. held that it was not met in the case at bar. While "it is indisputable that women have historically been disadvantaged in the workplace in part by the demands of childcare", the *causes* of that disadvantage were societal, mediated by individual choices and, crucially, not attributable to the state.[44] Given that the majority had expressly disavowed imposing any positive obligation on the state to ameliorate such disadvantage,[45] the dissent continued, the mere existence of such disadvantage could not, without more, breach section 15.

Justices Brown and Rowe also found that the second stage of the section 15 test could not be satisfied by adducing only evidence of historical disadvantage, because "substantive discrimination ... has always required an element of arbitrariness or unfairness".[46] While it need not be intentional, discrimination remains "fundamentally a wrongful form of behaviour".[47] Justice Abella's focus on historical disadvantage "robs the substantive discrimination analysis of its purpose, departing significantly and without acknowledgment or justification from decades of jurisprudence".[48]

Turning to the "practical applications" of the majority's approach, the dissent stated that governments should be permitted to act incrementally when confronting "deeply ingrained, complex and persistent social phenomenon".[49] A government expected to address every species of inequality every time it acted likely would decline to act at all. Justices Brown and Rowe pointed out that, as recently as 2018, the Court had accepted that "governments may implement reforms 'one step at a time'."[50] In their view, to find the pension plan "*insufficiently* remedial" would effectively impose positive state obligations and risk pulling courts "outside their

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[44] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 167, 2020 SCC 28 (S.C.C.).

[45] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 132, 2020 SCC 28 (S.C.C.).

[46] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 191, 2020 SCC 28 (S.C.C.).

[47] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 193, 2020 SCC 28 (S.C.C.).

[48] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 194, 2020 SCC 28 (S.C.C.).

[49] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 207, 2020 SCC 28 (S.C.C.).

[50] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 208, 2020 SCC 28 (S.C.C.).

institutional competence".[51]

Most dramatically, the dissent took issue with substantive equality itself or, at least, the Court's prior applications of it. In their view, the Court has struggled to define the term for 30 years.[52] Numerous scholars have critiqued section 15 caselaw as failing to provide "a conceptually rigorous understanding" of equality, resulting in "sketchy" and "occasionally contradictory" rulings.[53] The result was "antithetical to any notion of judicial restraint" leading courts to "exercise truly arbitrary powers of review".[54] Substantive equality was "an unbounded, rhetorical vehicle by which the judiciary's policy preferences and personal ideologies are imposed piecemeal upon individual cases".[55] By rendering it essentially unknowable, making it "impossible for claimants or legislatures to anticipate its demands", the current confusion over substantive equality was an affront to the rule of law.[56]

Justice Abella responded vigorously to these arguments.[57] She accused the dissent of preferring "a formalistic approach that 'embraces a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation'".[58] They had created "straw men" using arguments "based on conjecture

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[51] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at paras. 206-213, 2020 SCC 28 (S.C.C.).

[52] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 216, 2020 SCC 28 (S.C.C.).

[53] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 217, 2020 SCC 28 (S.C.C.).

[54] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 219, 2020 SCC 28 (S.C.C.).

[55] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.).

[56] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 221, 2020 SCC 28 (S.C.C.).

[57] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at paras. 132-133, 2020 SCC 28 (S.C.C.): The version of s. 15(1) advanced in my colleagues' reasons is essentially that advanced in the dissenting reasons in *Alliance*. They argued then, as they do now, that a finding of a breach would have a "chilling effect" on legislatures; that the impugned legislation was not "the source of the differences in compensation between men and women" (at para. 97); that the Court should not interfere with "incremental" efforts intended to narrow the gap between a group and the rest of society; and that finding a s. 15(1) breach would place legislatures under a freestanding positive obligation "to act in order to obtain specific societal results such as the total and definitive eradication of gender-based pay inequities" (para. 65). All of these propositions were squarely rejected by the majority in *Alliance*. Nothing, as far as I can see, has happened since [then] to justify discarding its premises. And no one involved in this case argued that we should, except, inferentially, my colleagues[.]

[58] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 134, 2020 SCC 28 (S.C.C.).

not reality".[59] In fact, she concluded, the Court's equality decisions over the last 30 years provided a clear framework for redressing inequality "one case at a time". Far from being an "extraordinary" overreach, the majority's holding was a natural product of that jurisprudence.

Fraser presents a clear victory, yet with a noticeable edge. It showcases a pointed debate about judicial competence, overreach and the separation of powers — punctuated by an unusually explicit divide over one of the Charter's most famous concepts. Aside from their skepticism of the actual evidence, Brown and Rowe JJ.'s chief complaint seems to be that substantive equality is too malleable. Judicial consistency is important, and it has not always been evident in the section 15 canon. But I query whether the dissent's expectation of predictability and guidance is realistic in a complex and deeply unequal society where the connection between law, individual circumstance and disadvantage is so deeply intertwined.[60] At the same time, their deeply skeptical critique points up some discomfiting truths in the discourse around substantive equality. It is to that that I turn next.

III. LOOKING BACK TO STARE AHEAD

From the beginning, the Supreme Court has identified substantive equality — which uses as its benchmark not just a law's parameters but the broader social context in which people experience that law — as the lodestar of section 15. The Court has defined its approach to section 15 in contradistinction to cases decided under the *Bill of Rights*. Indeed, a number of *Bill of Rights* cases are painted as the polar opposite of what Canadian equality law is all about, emanating from an especially formalistic framing linked to that statute's guarantee of "equality before the law".

This section aims to unsettle that narrative. While they rightly have been rejected, the *Bill of Rights* cases present a more complicated picture than is generally asserted. The outcomes in those cases do not rest on the specific wording of an equality rights guarantee. They are better explained by divergent judicial reasoning about when it is appropriate to evaluate a law on its own terms versus against a broader social context, and the degree to which the state is entitled to make choices that leave some persons worse off than others.

In the same vein, I query what is accomplished by continuing to carve equality into dichotomous aspects, with one (formal) clearly bad and one (substantive) clearly good. While they serve different purposes, the formal and substantive aspects of equality are indispensable to understanding how equality functions and how it is perceived by individuals. The divisions that have plagued equality analysis — over interpretation, fact-finding and values — cannot be eliminated by any particular combination of words. At their core, they are issues of judicial craft and politics.

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[59] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, at para. 136, 2020 SCC 28 (S.C.C.).

[60] For a skeptical critique of the dissent's demand for precision, see Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Const. Forum Const. 53.

The 1960 *Bill of Rights*, which served as an important antecedent of current equality law, states:

> **1.** It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> . . . . .
>
> **(b)** the right of the individual to *equality before the law* and the protection of the law[.][61]

As ordinary law, the *Bill of Rights* did not grant courts the power to declare other acts of Parliament *ultra vires*. Instead, it provided a judicial check for federal legislation (largely by declaratory or interpretative techniques) subject only to express derogation.[62]

The *Bill of Rights* invocation of "equality before the law" generally is assumed to have driven the statute's subsequent, largely discredited caselaw. It is true that, historically, the term "equality before law"[63] was associated with narrow, technical analyses. Dicey, for example, described it as "the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts";[64] while F.R. Scott said that it meant that the law "applied equally to all without fear or favour".[65]

The difficulty, of course, is that merely stating that everyone is subject to the express dictates of a legal order says little about the form those dictates can take. The above definitions do not settle the question of what is promised: equal treatment of everyone to whom a law happens to apply, *or* equal treatment with respect to the entire universe of people to whom it might apply? The idea that equality before the law is confined to the former, "as applied", meaning, corresponds with what is often called "formal equality".[66] What makes equality "formal", on this view, is that it takes as a given — and, critically, treats as judicially unreviewable — the legislative choice to direct a law at one class of persons but not another. As stated in the 1962 case of *R. v. Gonzales*, equality in this sense relates only to

> [a] right of every person to *whom a particular law relates or extends,* no matter what may be a person's race, national origin, colour, religion or sex, to stand on an

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[61] *Canadian Bill of Rights*, S.C. 1960, c. 44 [emphasis added].

[62] *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2.

[63] Given space constraints, I will not discuss the *Bill of Rights* guarantee of equal protection of the law.

[64] *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349, at 1366 (S.C.C.) [hereinafter "*Lavell*"], citing *Stephens Commentaries on the Laws of England*, 21st ed. (1950).

[65] *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349, at 1366 (S.C.C.).

[66] I use "equality before the law" and "formal equality" interchangeably.

> equal footing with every other person to whom a particular law relates or extends and a right to the protection of the law.[67]

In a similar vein runs the mantra that equality means "treating likes alike" — treating those who are like each other similarly, and those who are not dissimilarly.[68]

The two *Bill of Rights* decisions most frequently mentioned in regard to the above standard are *Canada (Attorney General) v. Lavell*[69] and *Bliss v. Canada (Attorney General)*.[70] Jeanette Lavell, an Indigenous woman who was a "status Indian", challenged provisions that stripped her and her children of that status after marrying a non-status man but applied no such penalty to men who married non-status women.[71] Stella Bliss was refused unemployment insurance benefits designed for pregnant women because she had not worked for the required number of weeks, which was longer than for other benefits. And, while she *had* worked the required period to access regular unemployment payments, Bliss' pregnancy meant that she was considered "unavailable for work" for an ineligible reason and, thus, could not access those benefits either.

In *Lavell*, a majority of the Supreme Court held that "equality before the law" did not affect the *Indian Act*'s use of different status rules for men and women. It implied that, so long as the *Indian Act* treated all persons similar to Lavell (*i.e.*, status females who had "married out") similarly, there was no equality breach. In *Bliss*, the Court found no discrimination on the basis of sex at all, but rather a distinction based on pregnancy.

Lavell and *Bliss* have assumed a talismanic quality. They are viewed as examples of a grossly inadequate framework that subjected highly problematic laws to the barest form of procedural review. They are axiomatic for how *not* to think about equality.

The above framing, however, is simplistic. To see why, we must first revisit an earlier decision: *R. v. Drybones*.[72] There, the Court found inconsistent with the *Bill of Rights* a provision of the *Indian Act* that made it an offence for an "Indian" to be intoxicated outside of a reserve. The decision was not unanimous; three judges dissented. Interestingly, however, none of the three relied on the narrow understand-

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[67] *R. v. Gonzales*, [1962] B.C.J. No. 71, 32 D.L.R. (2d) 290 (B.C.C.A.), cited in *R. v. Drybones*, [1969] S.C.J. No. 83, [1970] S.C.R 282, at 296 (S.C.C.) *per* Hall J.

[68] Aristotle, *Ethica Nichomacea*, trans. W. Ross, Book V3, at 1131a-6 (1925) cited in *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

[69] *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349 (S.C.C.) [hereinafter "*Lavell*"].

[70] *Bliss v. Canada (Attorney General)*, [1978] S.C.J. No. 81, [1979] 1 S.C.R. 183 (S.C.C.) [hereinafter "*Bliss*"].

[71] The case included a second plaintiff: Yvonne Bedard.

[72] *R. v. Drybones*, [1969] S.C.J. No. 83, [1970] S.C.R. 282 (S.C.C.) [hereinafter "*Drybones*"].

ing of "equality before the law".[73] In fact, none of them tackled the question of whether the *Indian Act* actually offended equality before the law. Limiting their analysis to very different factors, including canons of interpretation, Parliamentary supremacy and enumerated federal powers, they concluded simply that it would be inappropriate to find the provision inoperative.

It was the judges in the *Drybones* majority who acknowledged the narrower approach to equality, but only to *reject* it. Justice Ritchie declined to apply a standard under which "the most glaring discriminatory legislation against a racial group would have to be construed as . . . [consistent with] 'equality before the law', so long as all the other members are being discriminated against in the same way."[74] Justice Hall went so far as to state that to find otherwise would be applying the notorious "separate but equal" doctrine from the American case of *Plessy v. Ferguson.*[75]

Because *Drybones* is the only Supreme Court decision to find a federal law inconsistent with the *Bill of Rights*,[76] it appears to be an outlier. But *Lavell* was closely divided (5-4) on a very similar issue. To be sure, there the majority *did* define "equality before the law" as equality of treatment in the enforcement and application of the laws of Canada. Relying heavily on Parliament's jurisdiction over, and need to classify, "Indians and lands reserved for Indians", Ritchie J. distinguished his own majority opinion in *Drybones* on the basis that the prior law (a) was penal in nature and (b) did not concern the management of Indians on reserve. A criminal offence that *only* Indians could commit without any connection to their status or reserve residence could not be enforced without denying equal treatment in the administration and enforcement of the law before the courts. In contrast, the registration provisions in the instant case were exclusively concerned with Indians on reserve. Justice Ritchie concluded, without explanation, that "no such inequality of treatment between Indian men and women flow[ed] as a necessary result" of the impugned status provision.[77]

In dissent, Abbott J. said that *Drybones* foreclosed him from interpreting

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[73] *R. v. Drybones*, [1969] S.C.J. No. 83, [1970] S.C.R. 282 (S.C.C.).

[74] *R. v. Drybones*, [1969] S.C.J. No. 83, [1970] S.C.R. 282, at 297 (S.C.C.).

[75] *R. v. Drybones*, [1969] S.C.J. No. 83, [1970] S.C.R. 282, at 300 (S.C.C.), citing *Plessy v. Ferguson* (1896), 163 U.S. 537.

[76] In a few other cases, the Supreme Court found federal state action to be inconsistent as well: *Leiba v. Canada (Minister of Manpower and Immigration)*, [1972] S.C.R. 660 (S.C.C.); *R. v. Brownridge*, [1972] S.C.J. No. 68, [1972] S.C.R. 926 (S.C.C.); *R. v. Lowry*, [1972] S.C.J. No. 116, [1974] S.C.R. 195 (S.C.C.); *Ontario (Attorney General) v. Reale*, [1974] S.C.J. No. 118, [1975] 2 S.C.R. 624 (S.C.C.); and *R. v. Shelley*, [1981] S.C.J. No. 77, [1981] 2 S.C.R. 196 (S.C.C.).

[77] *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349, at 1372 (S.C.C.).

"equality before the law" to mean "'equal subjection of all classes to the ordinary law of the land'".[78] Justice Laskin found the majority's attempt to distinguish *Drybones* unpersuasive. The Constitution's grant of enumerated powers did not include an inherent right to discriminate; and the protection afforded by the *Bill of Rights* could not be "diluted by appeals to history".[79] The fact that Jeanette Lavell was equally treated with "other Canadian married females" did not erase the fact that "no similar disqualification [was] visited upon Indian men".[80] Indeed, the idea that the *Bill of Rights* condoned such differentiation so long as it operated *only* among one racial group "[would compound] racial inequality even beyond the point that *Drybones* found unacceptable".[81]

Turning to *Bliss*, which resembles *Fraser* in its location at the intersection of women's lived experiences and employment, there can be little argument that it is a troubling decision. First, it was unanimous — a disappointment given the healthy debate in earlier cases. The Supreme Court viewed the unemployment scheme as a "complete code"[82] that could hardly be considered discriminatory simply because it sorted people according to pre-determined criteria. Bliss was deemed to be incapable of and unavailable for work because she was pregnant — a state expressly anticipated and provided for under separate benefit-granting provisions than those for other workers. Equality before the law did not prohibit such "relevant" distinctions among classes of beneficiaries.[83] Most famously, the Court held that a distinction based on pregnancy was not based on sex, since not all members of the broader class (women) necessarily become pregnant.[84] One of the members of the *Bliss* panel explicitly overruled that perverse finding 15 years later.[85]

As the foregoing discussion shows, decisions under the *Bill of Rights* were

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[78] *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349, at 1374 (S.C.C.). It is worth mentioning that Abbott J. dissented in *R. v. Drybones*, [1969] S.C.J. No. 83, [1970] S.C.R. 282 (S.C.C.).

[79] *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349, at 1388 (S.C.C.).

[80] *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349, at 1376 (S.C.C.).

[81] *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349, at 1383 (S.C.C.).

[82] *Bliss v. Canada (Attorney General)*, [1978] S.C.J. No. 81, [1979] 1 S.C.R. 183, at 190 (S.C.C.).

[83] *Bliss v. Canada (Attorney General)*, [1978] S.C.J. No. 81, [1979] 1 S.C.R. 183, at 192-193 (S.C.C.).

[84] *Bliss v. Canada (Attorney General)*, [1978] S.C.J. No. 81, [1979] 1 S.C.R. 183, at 190-191 (S.C.C.); P.W. Hogg, "The Canadian Bill of Rights – "Equality Before the Law" – A.-G. Can. v. Lavell" (1974) 52:2 Can. Bar Rev. 263.

[85] *Brooks v Canada Safeway*, [1989] S.C.J. No. 42, [1989] 1 S.C.R. 1219, at 1243 (S.C.C.), *per* Dickson C.J.C..

multi-layered. Justices did not hold a uniform understanding of "equality before the law", nor did they confine their analysis to how a law applied to its named subjects. Pre-Charter jurists were quite capable of looking beyond a law's "four corners" to examine its treatment of individuals and groups compared to the broader population. A number of jurists rejected the rank unfairness in a doctrine such as "separate but equal", noting its tendency to heighten state oppression against disfavoured minorities. *Bliss*, it is true, does feature a puzzling obduracy about the realities of sex-based discrimination and women's lived experience. But, as scholars have noted, *Bliss* is hardly an outlier even among post-Charter decisions.[86]

Despite its much-maligned character, I contend that "equality before the law" — which, after all, is an enumerated section 15 right — can assist in the broader project of ensuring equal respect and concern for all individuals in a society. If one recognizes limits in the state's ability to shunt certain people into their own subject class — for example, Indian women under the *Indian Act* — then the idea of treating likes alike could demand simply that people deserve treatment comparable to others in a general sense, such that a regime that subjects certain of them to peculiar disabilities will be immediately (and properly) suspect.

To be sure, "equality before the law" is inadequate to deal with certain contexts. Where a claimant attacks an ameliorative regime that allocates benefits differently according to traits or characteristics they lack, one may well reach the limit of "equality before the law", but not of equality itself. Nor is the guarantee easily able to cover a situation where a law containing no facial distinctions has harsher effects linked to pre-existing disadvantage on a recognized section 15 ground. The first situation is expressly anticipated by section 15(2) but can also be accommodated under section 15(1)'s guarantee of "equality under the law". The second is the outgrowth of two ideas — that discrimination need not be intentional, and that facially equal treatment can exacerbate real-world inequality — introduced in *Andrews* and broadly confirmed in subsequent caselaw. These are important evolutionary moments in equality jurisprudence. My only point is that their recognition need not eclipse equality before the law or its close associate, "formal equality".

I admit that rehabilitating "formal equality" is difficult. In *Andrews*, McIntyre J. deemed it "seriously deficient in that it excludes any consideration of the nature of the law". He went so far as to say that "applied literally [it could] be used to justify the Nuremberg laws of Adolf Hitler [given that s]imilar treatment was contemplated for all Jews."[87] Some critics have observed that McIntrye J.'s observations were

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[86] Margot Young, "Blissed Out: Section 15 at Twenty" in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006), at 45.

[87] *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 166 (S.C.C.).

wildly out of context.[88] Still the damage done has been deep and enduring.

That such a label may be irredeemable, however, does not alter the force of the underlying principle. "Formal equality" is indispensable in a functioning legal system. In myriad ways a society will, appropriately, observe identical standards when it applies rules, allocates benefits or imposes penalties. The assurance of such treatment is linked to citizens' general feelings of fair play and protection against arbitrary treatment. While some of that assurance could be provided through rights other than section 15,[89] that fact does not detract from its core equality orientation.

Consider the domain of criminal law. In citing this area, one must be careful to recognize the deep problems in the criminal justice system that produce all manner of unequal treatment and outcomes. Too often, those outcomes are sheltered by outwardly neutral processes, like prosecutorial discretion, that are extraordinarily difficult to review. There is self-evidently a place for a substantive equality-informed insistence on examining, among other things, the social determinants of crime. Having recognized those evident truths, it remains the case that "formal" equality plays a critical role in criminal law. To name but one example, offences contain a set of elements that is uniformly applied to everyone bound to obey them.[90] And, those charged with breaching those standards are owed the same processes including with respect to standards of evidence and proof. It would be deeply wrong to impose different standards of criminal responsibility keyed to one's personal characteristics such as race or sex.[91] To be clear, that expectation is perfectly consistent with recognizing that certain legal standards might only *appear* to be neutral and therefore require modification. The change in self-defence laws to include more than paradigmatically male experiences of violence and threat in no way offends formal equality (in part because, even if the experiences of women were its motivating factor, the ensuing reform was not tied to a defendant's sex).[92] And, while it is not entirely without complication, Parliament's direction to sentencing judges to consider individual circumstances can also be accommodated in a system that permits tailored sentencing subject to some form of review to ensure general consistency.

In fact, there are numerous contexts involving access to important benefits or

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[88] *Catholic Children's Aid Society of Metropolitan Toronto v. S. (T.)*, [1989] O.J. No. 754, 69 O.R. (2d) 189 (Ont. C.A.), *per* Tarnopolsky J.A.

[89] The Charter's legal rights (ss. 7-14) could be pressed into service here.

[90] Of course, Parliament is free to define more than one way to commit a crime, but it cannot apply those definitions differently depending on one's personal characteristics such as race or sex.

[91] The one ground that would seem to be relevant is mental disability (incapacity) which is already recognized as a potentially exculpatory condition. See, *e.g.*, *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 16.

[92] See *R. v. Lavallee*, [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.); *Criminal Code*, R.S.C. 1985, c. C-46, s. 34.

recognition where "formal" equal treatment is warranted. A citizenship or tax regime should treat potential citizens with perfect rigour *vis-à-vis* whatever its rules happen to be. The rules of such regimes are subject to challenge, including on equality grounds.[93] But, when administering and sorting through scores of individuals, it is wise to operate from a default position of strict neutrality in applying whatever (legitimate) criteria have previously been set. Doing so reduces the need for discretionary processes which carry a risk of inherent, if unconscious, bias that may put people at risk of unfair treatment that is resistant to challenge after the fact.

The expectation of equal treatment with others is powerful. Ignoring that is as unhelpful as it is unrealistic. Those expectations operate among members of equality-seeking groups themselves. The *Fraser* victory means that the claimant officers are entitled to top up their pensions to the amounts available to full-time employees. Those women surely would anticipate that their respective participation in the scheme proceed identically and would rightly demand justification for any subsequent differentiation.

The problem with "formal equality" is not its invocation of similar treatment *per se*. The problem is with the closely associated idea that so long as the state can point to uniform application of its chosen legal rules, there is no room for further scrutiny of those choices. But, as discussed in the previous section, that sort of association is *not* inherent to the term. Even in the *Bill of Rights* era judges did not express universal allegiance to it.

The point on which the majority and dissent *Fraser* divided is the basis on which the state may consider one group — in this case, employees who job share — as being "like" or "unlike" another group. It is not about whether groups *properly classified through the employment of sufficiently sensitive metrics* are to ever be classified or treated in a way that is different from another group. Determining what counts as proper classification and appropriate metrics is the core conundrum of equality law. It persists, despite the presence of a sophisticated framework for recognizing inequality, because it rests on specific value judgments and premises that permit of neither easy disambiguation nor confident prediction. One need only look at past Supreme Court decisions which concluded, among other things, that section 15 did not prevent the state from legitimately distinguishing among types of disability,[94] or among groups of Indigenous peoples.[95]

To conclude, I take no issue with the ideals and aspirations of substantive equality. Its naming of (in)equality as something that inheres in potentially everything the state does, and, just as importantly, fails to do, was a singularly

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[93] Certainly, one could challenge the utility of a citizenship test applied to naturalized but not birthright citizens; or, perhaps, the requirement to swear fidelity to the Crown.

[94] *Granovsky v. Canada (Minister of Employment and Immigration*), [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703 (S.C.C.).

[95] *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.).

important moment in Canadian law. What I do suggest is that the term used matters less than the understanding that it embodies. At times, equality requires procedural consistency. At others, it requires sensitive appreciation of how disadvantage impedes full participation in, or recognition by, legal regimes. The essentially comparative nature of equality makes it dependent upon a demonstration that one has been afforded the dignity of equal regard, and in some cases that is most naturally demonstrated by equal treatment.

Recognizing the different aspects of a commitment to equality would not end division on the Supreme Court, nor would it orient judges' results in a particular direction. But it could promote fuller discussion of the interests and considerations at work in a law or policy. A posture of epistemic humility that recognizes that the questions raised when applying section 15 are not self-evident might even lessen judicial acrimony. In the fourth decade of section 15, perhaps it is time to treat it as guaranteeing "equality" — without further qualification.