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The Alchemy of Equality Rights*

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I. Introduction

A clear legal test for equality is impossible, as it should be. Indeed were the test clear, it could not be *for equality*. It would have to be for something other than equality — in effect, *for inequality*.

The abstract character of equality is not a new idea. In fact, the Supreme Court of Canada's first decision under section 15 of the *Canadian Charter of Rights and Freedoms*[1] recognized equality as "an elusive concept" that "lacks precise definition."[2] Why, then, do judges continue to demand such definition over thirty years later? The answer, at times, is politics. On the surface, judges duel with doctrines and precedents; they trade barbs about whose burning "straw

* The title of this article intentionally riffs on the book: Patricia J Williams, *The Alchemy of Race and Rights* (*below* note 25) [*Alchemy*]. This is, in large part, due to the article's significant reliance on Williams' insights in analyzing the present moment in Canadian equality law.

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1 s 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 164, 56 DLR (4th) 1 [*Andrews*].

man" is least illuminating.[3] But, on closer examination, such rhetoric of *methodology* (the *path* of one's legal analysis) can conceal disagreement in *ideology* (the *destination* of one's legal analysis, which is inextricable from one's "beliefs, experience, ideals, and values"[4]). The more Canadian jurists assert that the politics and law of equality *diverge*, the more they obscure how politics and law actually *converge*.

The Supreme Court's latest equality decision in *Fraser v Canada*[5] provides an instructive opportunity to reflect on these dynamics of ideology and methodology — and, specifically, an opportunity to explore what may be described as the *alchemy* of constitutional equality law under section 15 of the *Charter*.[6] By equality law's alchemy, I mean the ways in which section 15 governs "a process of changing a thing into something better."[7] Whether a particular circumstance is unequal under section 15 — and thus, should be changed for the better — is a contextual inquiry. This contextuality of equality analysis has two consequences: (1) ideology is especially hard to avoid in equality analysis; and (2) a focus on methodology is especially likely to obscure that ideology. Given these consequences, the language we use to discuss equality should be more transparent with respect to ideological motivations. Specifically, the formal vs. substantive equality framing so often used when discussing equality law[8] should be supplemented. The distinction effectively captures different methods of analysis (that is, formal equality concerning *similar* treatment and substantive equality concerning *subordinating* treatment[9]). Yet, with the Court now clearly committed to promoting substantive equality[10] and opposing systemic discrimination[11] the formal/substantive dichotomy is insufficient for the next era of the legal struggle for equality.

To be clear, my point is not that methodology is irrelevant to equality analysis. Various methodological hurdles have limited section 15's substantive promise. Accordingly, rejecting those hurdles in equality methodology is essential to furthering substantive equality, as other scholars have rightly pointed out.[12] More specifically, arguments about method have led, now unequivocally, to the inclusion of systemic discrimination within the scope of section 15 of

3 *Fraser v Canada*, 2020 SCC 28 at para 133 (per Abella J.). See also, *ibid* at para 225 (per Brown and Rowe JJ.) [*Fraser*].

4 Michel Bastarache, "Decision-Making in the Supreme Court of Canada" (2007) 56 UNBLJ 328 at 329.

5 *Fraser*, *supra* note 3.

6 *Charter*, *supra* note 1.

7 *Collins English Dictionary*, online: <https://www.collinsdictionary.com/us/dictionary/english/alchemy> sub verbo "alchemy". See also Martha Minow, "Making All the Difference: Three Lessons in Equality, Neutrality, and Tolerance" (1989) 39:1 DePaul L Rev 1 at 5-6 ("Equality is a process which requires the continual re-examination of the treatment we accord to people.")

8 See e.g. *Fraser*, *supra* note 3 at paras 44, 88 (per Abella J.). See also, *ibid* at paras 146, 217, 225, 227 (per Brown and Rowe JJ.).

9 See e.g. Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const Stud 191 at 194-95 [Adverse Impact].

10 *Fraser*, *supra* note 3 at paras 40-49 (per Abella J.).

11 *Ibid* at para 29 ("[h]ow adverse impact or systemic discrimination is applied has received extensive academic consideration", that is, implicitly constructing "adverse impact" and "systemic" discrimination as overlapping). See also, *ibid* at para 47 ("[t]here is no doubt, therefore, that adverse impact discrimination 'violate[s] the norm of substantive equality'").

12 See e.g. Adverse Impact, *supra* note 9.

the *Charter*[13] — a significant accomplishment, which I in no way seek to diminish. Rather, my intervention is a more specific critique: the invocation of method to carve out zones where section 15 analysis should fail can operate as a conservative strategy for narrowing section 15's substantive force. In this way, the rhetoric of methodology can act as a smokescreen for conservative posturing — a performance of the "neutral and apolitical" — by rhetorically obscuring "social domination from … vision."[14] Viewed as such, fixation on methodology is its own ideology, a "process theory" that is "more accurately understood as the cultural ideology" through which social dominance — "white, male, and economically secure" — is reified in law.[15]

With the above in mind, this article is, primarily, a critique of certain modes of argument in the prevailing conservative analysis of equality. Recent calls by conservative jurists for "analytical discipline"[16] and "neutral principles"[17] in this area of law are futile: equality analysis simply cannot be severed from the ideological commitment that grounds it. Such jurists reach vainly for an equality law that will rise above a certain threshold of *clarity* — or, relatedly, fall below a certain threshold of *context* — weakening the ability for section 15 to respond to most experiences of inequality in society. These jurists would better recognize that "discrimination" is a fluid mischief predicated on social context and hierarchy.[18] In this way, calls for clarity can effectively dilute aspirations for substantive equality. Indeed, when substantive equality requires nuanced interrogation of where power exists in society, to oppose such interrogation — for greater clarity — is indivisible from opposing substantive equality itself (or, at least, is indivisible from opposing the capacity of courts to analyze substantive equality). As such, the push for clarity has an ideological valence — whether or not this is one's intent — and calls to restrict analysis of "policy" can function as a covert means of advancing one's own policy agenda beneath a veneer of judicial restraint.

The impulse to clarity is understandable. Clarity serves important ends, such as predictability. But equality — with the complexity that the concept innately entails — remains a constitutional guarantee.[19] So we must deal with it. Equality's uncertainty will always persist. And ironically, that uncertainty is, in important ways, a virtue, not a vice. It speaks to a continuing belief that there is a role for courts in the fight for substantive equality. We should prioritize substance over clarity and choose justice over simplicity.

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13 *Charter*, *supra* note 1.

14 Gary Peller, "Neutral Principles in the 1950's" (1988) 21:4 U Mich JL Ref 561 at 612.

15 *Ibid* at 621.

16 *Fraser*, *supra* note 3 at para 224 (per Brown and Rowe JJ., dissenting).

17 Mark Mancini, "Neutrality in Legal Interpretation" (12 November 2020), online (blog): *Double Aspect* <https://doubleaspect.blog/2020/11/12/neutrality-in-legal-interpretation/>.

18 See e.g. Sandra Fredman, "Substantive Equality Revisited" (2016) 14:3 Intl J Constitutional L 712 at 713 ("the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored"); Catharine A MacKinnon, "Substantive Equality Revisited: A Reply to Sandra Fredman" (2016) 14:3 Intl J Constitutional L 739 at 740 ("Social hierarchy is [substantive equality's] identifying principle"); Sandra Fredman, "Substantive Equality Revisited: A Rejoinder to Catharine MacKinnon" (2016) 14:3 Intl J Constitutional L 747 at 747 ("to characterize substantive equality solely in terms of hierarchy obscures the multi-faceted ways in which inequality manifests").

19 *Charter*, *supra* note 1, s 15(1).

This article is, secondarily, a critique of certain modes of argument in the liberal analysis of equality. Liberal jurists properly reject a "formalistic approach"[20] to equality, but fall short of acknowledging the ideological currents that shape Canadian equality jurisprudence.[21] The failure by liberal jurists to engage explicitly with ideology is significant, in at least two ways (or, more precisely, in at least two directions from the political position liberal jurists occupy on a crude ideological spectrum of judges). First, it is significant to *the political right* of liberal jurists. As between conservative and liberal jurists, core ideological disagreements are elided by failing to grapple with political divergence within the Court concerning social hierarchies. Simply put, conservative jurists see less social hierarchy than liberal jurists, and that influences disparate interpretations of "the law" by these groups — an explanation overlooked by a liberal analytical frame. Second, the failure to grapple with ideology is significant *to the political left* of liberal jurists. As between liberal jurists and jurists with more critical ideological positions, the Court's participation in the maintenance of social hierarchy is obscured through legalistic rhetoric. Ultimately, the scope of equality law in Canada is contingent on whatever inequality the Court is willing to "see."[22] And that conversation turns not on the dichotomy of formal conservatives and substantive liberals (that is, on the question of whether we should do *anything* about substantive inequality), but more importantly, on the dichotomy of substantive liberals and substantive criticals (that is, on the question of whether we "do *enough*"[23] for it).

To elaborate on the above points, this article juxtaposes the three sets of reasons from the Court's decision in *Fraser* by viewing them through the lens of Critical Race Theory: "an intellectual movement, a body of scholarship, and an analytical toolset for interrogating the relationship between law and racial inequality."[24] Specifically, this article uses Patricia Williams' *The Alchemy of Race and Rights*[25] as a foil for dissecting the *Fraser* opinions. This foil facilitates insight into *Fraser*. It helps to explain why Justice Abella's majority opinion properly leaves judges with the discretion needed to meaningfully scrutinize constitutional inequality, despite the seeming tension this creates with the "rule of law." Further, it distills the material basis for the spectrum of findings across three opinions purporting to apply the same two-part test for section 15: namely, political disagreement on the past and present of gender hierarchy (that is, disagreement on substantive inequality linked to gender). Attention to these ideological divides is, in my view, crucial for the realization of the *Charter*'s substantive promise. We now have a test that *can* promote substantive equality, but *will* it? Only, in my view, if a more critical perspective on equality rights is advanced by advocates and recognized by the Court.

II. Background: The Three Visions of Equality in *Fraser*

Fraser v Canada is the Court's latest decision concerning constitutional equality under section 15 of the *Charter*. The appeal explored whether the RCMP's pension plan (the "Plan") dis-

20 *Fraser*, *supra* note 3 at para 134.

21 Though I acknowledge the institutional constraints judges are under within a society that sustains the fiction of an apolitical judiciary.

22 See Adverse Impact, *supra* note 9 at 193.

23 *Fraser*, *supra* note 3 at para 143 (per Browne and Rowe JJ., concurring) [emphasis added].

24 Khiara M Bridges, *Critical Race Theory: A Primer* (New York: Foundation Press, 2019) at 7.

25 Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991) [*Alchemy*].

criminated based on sex or parental/family status by *permitting* employees who are suspended or on unpaid leave to "buy back" pension benefits, but *prohibiting* employees who job share — overwhelmingly, women caring for children — from doing the same.[26] (The irony of one of Canada's most progressive judgments on substantive equality benefitting members of one of Canada's most notoriously racist institutions — the RCMP[27] — is not lost on the author.)

In *Fraser*, the Court released three opinions: majority reasons by Justice Abella (concurred with by Chief Justice Wagner and Justices Moldaver, Karakatsanis, Martin, and Kasirer) and two dissents (the first co-authored by Justices Brown and Rowe and the second authored by Justice Côté). I first briefly summarize all three opinions before analyzing them through the lens of Critical Race Theory, and, more specifically, by using the frame of Williams' *The Alchemy of Race and Rights*.

Each of the three *Fraser* opinions adopts a distinct vision of equality, and as one progresses through the judgments — that is, from the majority to the dissents — one finds increasingly narrow visions of equality.

A. Majority by Justice Abella: Broad Substantive Equality

Justice Abella explicitly recognizes "substantive equality" as the "philosophical premise" underlying section 15 of the *Charter*,[28] and applies it relatively broadly.[29] She therefore finds that the RCMP's adverse treatment of employees who job share — mostly women with children[30] — constitutes sex discrimination contrary to section 15(1) of the *Charter*.[31] Further, she finds that this discrimination could not be justified under section 1 due to the lack of a compelling objective for such adverse treatment.[32] Because she believes this claim can be resolved by analyzing sex alone, Justice Abella considers it unnecessary to assess the propriety of "parental/family status" as an analogous ground of discrimination.[33]

B. Dissent by Justices Brown and Rowe: Narrow Substantive Equality

In the first of two dissenting opinions in *Fraser*, Justices Brown and Rowe criticize the lack of definition governing "substantive equality."[34] Nevertheless, they identify "substantive discrimination"[35] as the mischief targeted by section 15 of the *Charter*. And, by inter-

26 *Fraser*, *supra* note 3 at paras 3-4. I acknowledge the incomplete record on this point: see *ibid* at para 25 (per Abella J.). See also, *ibid* at paras 161, 187 (per Brown and Rowe JJ.). But I also note that the respondent's statements "during the hearing" (*ibid* at para 161) are not evidence.

27 See e.g. Brandi Morin, "As the RCMP deny systemic racism, here's the real history" (11 June 2020), online: *Toronto Star* <https://www.thestar.com/opinion/contributors/2020/06/11/rcmp-deputy-commissioners-words-on-racism-fly-in-face-of-150-years-of-history-and-pain-for-indigenous-peoples.html>; Robyn Maynard, "Police Abolition/Black Revolt" (2020) 41 Can J Cultural Studies 70 at 72.

28 *Fraser*, *supra* note 3 at para 40.

29 To be clear: I say that Justice Abella applies substantive equality "relatively broadly", not because I think she applies it more broadly than *substantive equality requires*, but rather, more broadly than *Justices Brown and Rowe*, who likewise claim to apply substantive equality in their reasoning.

30 *Ibid* at para 21.

31 *Ibid* at para 113.

32 *Ibid* at para 129.

33 *Ibid* at para 114.

34 *Ibid* at para 146.

35 *Ibid* at para 191.

preting substantive equality/discrimination relatively narrowly,[36] Justices Brown and Rowe find that the RCMP's adverse treatment of job sharing does not violate section 15(1) of the *Charter*.[37]

Justices Brown and Rowe also reason that "because this case can be resolved on the basis of the enumerated ground of sex, it is … unnecessary and unwise to consider parental or family status."[38] This reasoning is confusing. Justice Abella, who *finds sex discrimination*, can logically abstain from considering discrimination on other grounds to resolve the appeal; Justices Brown and Rowe, who *do not find sex discrimination*, cannot — it is a distinct constitutional question material to their resolution of the appeal. In this way, it was, rather, "necessary" for them to address this question in their analysis.[39]

C. Dissent by Justice Côté: Licence to Discriminate

The word "substantive" is conspicuously absent from Justice Côté's sole-authored dissent. She claims to endorse the same general test as the other opinions, that is, grounds-based distinction and disadvantage. And she even tacitly concedes that "adverse effect discrimination" — a species of substantive inequality[40] — is legally cognizable.[41] But, in refusing to acknowledge that a policy disparately impacting women with children *disparately impacts women*,[42] Justice Côté jettisons substantive equality as the overarching framework in her analysis. Indeed, as I explain below, even formal equality is largely irrelevant to her approach.

Like the other dissenting judges, Justice Côté relies on Justice Abella's "compelling reasons" for not recognizing "caregiving, parental, or family status" as an analogous ground.[43] Again, this is confusing — having *not* found discrimination based on sex,[44] Justice Côté cannot rely on Justice Abella's reasons. Indeed, Justice Abella holds that "a robust intersectional analysis of gender and parenting … can be carried out under the enumerated ground of sex."[45] Justice Côté, in stark contrast, views sex as constitutionally unrelated to gender and parenting: "an

36 To be clear: I say that Justices Brown and Rowe apply substantive equality "relatively narrowly" because they apply it more narrowly than Justice Abella. Some may argue that Justices Brown and Rowe do not apply substantive equality *at all* — that their analysis is really just disguised formal equality analysis. But I do not think that is quite right. Their desire to carve out circumstances where substantive equality should fail — for example, where it involves "a matter of policy" (see *ibid* at para 143) — is a formalistic impulse. But they nevertheless acknowledge how section 15 extends to systemic discrimination (see *ibid* at para 169). And so, in that sense, I consider it incomplete to label their analysis as simply formal equality reasoning, a characterization they, too, dispute (see *ibid* at para 218).

37 *Ibid* at para 205.

38 *Ibid* at para 183.

39 *Ibid*.

40 Adverse Impact, *supra* note 9 at 192.

41 *Fraser*, *supra* note 3 at para 232. Though Justice Côté later casts doubt on the legitimacy of adverse effects discrimination: "Setting aside for now the doctrinal proposition that disproportionate impact is sufficient to meet step one" (*ibid* at para 242).

42 *Ibid* at paras 234-35.

43 *Ibid* at para 238.

44 *Ibid* at para 233.

45 *Ibid* at para 116. For a critique of Justice Abella's intersectional analysis, see Jennifer Koshan's essay in this collection: Jennifer Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*" (2021) 30:2 Const Forum Const 29.

innate and immutable characteristic"[46] detached from gender roles and parental obligations.[47] How she then cites Justice Abella's reasons for this point is difficult to understand.

III. Critical Race Analysis: The Faith, Simplicity, and Ideology in *Fraser*

In *The Alchemy of Race and Rights*, Patricia Williams — an American legal scholar and founding critical race thinker[48] — describes the "immense alchemical fire" required for "the making of something out of nothing."[49] Specifically, she outlines the social construction of both the law and those it regulates. Her insights about American law are timeless, and they are applicable to equality under the Canadian *Charter*, despite differences between our constitutional texts,[50] schemes,[51] and paradigms.[52] Her critical interrogation of "Anglo-American jurisprudence"[53] instructively applies to many Canadian legal norms, and in particular, helps in dissecting the Supreme Court's latest equality decision in *Fraser*.

In this article, there are three key points that I draw from Williams' text and which I apply to *Fraser*:

(1) Faith: that the legitimacy of our legal system is maintained by faith in our courts, which can be informed by — but is not coterminous with — scrutiny of their reasoning;

(2) Simplicity: that courts routinely deploy oversimplified heuristics that belie a complex reality;

(3) Ideology: that courts' application of these heuristics is guided by ideology.

I discuss these key points separately, but acknowledge that they are mutually informing. Indeed, the *faith* that sustains the legitimacy of legal institutions is strengthened by the *simplicity* with which those institutions misrepresent complex human disputes, and the ways in which that simplicity obscures the *ideology* inherent in such adjudication. In any event, for my purposes, here, the analytical separation of these three points provides guidance on how each operates in Canadian equality law.

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46 *Fraser*, *ibid* at para 231.

47 See e.g. *ibid* at para 234 ("The effect of the impugned provisions of the pension plan is to create a distinction not on the basis of being a *woman*, but being a woman *with children*. In other words, a distinction exists not because one is a *woman*, but because one has *caregiving* responsibilities." [emphasis in original])

48 Derrick A Bell, "Who's Afraid of Critical Race Theory" [1995] 1995:4 U Ill L Rev 893 at 898, n 16.

49 *Alchemy*, *supra* note 25 at 163. This alchemical formulation of equality is even more forceful in the context of Canadian equality law given the "expansive wording of section 15" (Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 at 22), which was "an attempt to remedy some of the the shortcomings of the right to equality in the *Canadian Bill of Rights*" (*Andrews, supra* note 2 at 170).

50 That is, "equal protection of the laws" (section 1 of America's Fourteenth Amendment) vs. equality "before and under the law" and "right to the equal protection and equal benefit of the law" (section 15 of the Canadian *Charter*).

51 That is, section 1 of the Canadian *Charter*, which permits "reasonable limits" of rights.

52 That is, *formal* equality in America (see e.g., *Washington v Davis*, 426 US 229 (1976) at 239) and *substantive* equality in Canada (see e.g., *Fraser*, *supra* note 3 at para 42).

53 *Alchemy*, *supra* note 25 at 8.

To avoid confusion, Williams' is not unique in advancing these critiques of legal systems and reasoning. Indeed, many of the points she makes participate in a long tradition of critical legal inquiry in scholarship (and, in particular, critical inquiry by Canadian feminist scholars, many of whom were cited throughout Justice Abella's reasons and join me in this special edition of the *Constitutional Forum*). However, I nevertheless frame my analysis in the context of her particular critique to illustrate how — *thirty years later* — so many of her observations about techniques in legal analysis persist in their relevance and explanatory value.

A. Faith: Whom We Trust

1. Williams on Faith

The Alchemy of Race and Rights opens with a single-page allegory elucidating the extent to which legal systems are principally predicated on *faith*, which can be informed by, but differs from, *reason*. Specifically, Williams describes a "society of priests" (lawyers) "who built a Celestial City" (the state) "with gates secured by word-combination locks" (rights) and where "ascending levels of power … became accessible to those who could learn ascendingly intricate levels of Word Magic" (law).[54] Further, she allegorically describes an apex court:

> At the very top level, the priests became gods; and because they then had nothing left to seek, they engaged in games with which to pass the long hours of eternity. In particular, they liked to ride their strong, sure-footed steeds around and around the perimeter of heaven: now jumping word hurdles, now playing polo with concepts of the moon and the stars, now reaching up to touch that pinnacle, that splinter of Refined Understanding called Superstanding, which was the brass ring of their merry-go-round.[55]

Williams' allegory can be read as a narrative elaboration on Justice Jackson's oft-cited aphorism regarding the Supreme Court of the United States: "We are not final because we are infallible, but we are infallible only because we are final."[56] Consequently, we defer to our apex court out of trust, not *necessarily* out of any agreement with its holdings in relation to some objective measure called "the law." In this sense, where controversy arises, it is, principally, faith — that is, a persisting belief in the system as a whole — that maintains the integrity of our legal order (an order where, due to social necessity, *someone* must have the final say).

Of course, the *reasons* that a court provides can test our faith. For example, failure to provide defensible reasons undermines the extent to which a holding endures future challenge — that is, such a failure informs a judge's reputation and credibility and subsequent judicial treatment of their holding (both on appeal and as a matter of precedent).[57] But this does not reveal law's objectivity, but rather, a "game of legality."[58] Specifically, judging implicates a complex bargaining process with legal and political capital. A judge's *legal* capital consists in the recognized sources of "law" they can draw from to articulate a line of reasoning, whereas a judge's *political* capital consists in the extra-legal sources (for example, the popularity of their holding) that can compensate for deficiencies in their legal capital in any given case.

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54 *Ibid* at Prologue.
55 *Ibid* at Prologue.
56 *Brown v Allen,* 344 US 443 (1953) at 540 (Jackson J concurring in the result).
57 Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36:4 J Leg Educ 518 at 527-28.
58 *Ibid* at 522.

Reference to an objective, ascertainable "law" subtly obscures the dynamic bargaining process outlined above. And, in particular, it obscures how this process can, at times, involve "the work of creating something out of nothing"[59] — that is, alchemy. Simply put, when "law" is understood as the product of various bargains *in law* and *in politics*, the foundational element of faith embedded in our judicial apparatus becomes clear. In Lon Fuller's words: "we inevitably see that [law] is compounded of reason and fiat, of order discovered and order imposed, and that to attempt to eliminate either of these aspects of the law is to denature and falsify it."[60] "[F]iat" — or "order imposed" — is where faith in law necessarily persists, and where law's alchemical character resides: making *something* (legal obligation) out of *nothing* (bare imposition).

2. Faith in Fraser

Justice Abella describes section 15(1) as reflecting "a profound commitment to promote equality and prevent discrimination against disadvantaged groups."[61] The three key phrases implicated here — "promot[ing] equality," "prevent[ing] discrimination," and "disadvantaged groups" — do not have rigid meaning, and leave important questions hanging. What is enough promotion? What qualifies as discrimination, requiring prevention? Which groups are disadvantaged, and in comparison with whom? Fundamentally, tasking courts with such inquiries demands faith — reason, alone, cannot resolve them.[62]

That is not to say that structure is unhelpful. A two-part test (distinction and disadvantage)[63] and a definition for adverse impact discrimination (facially neutral norms with disparate effects)[64] help to guide lawyers and judges navigating equality analysis. In particular, such structure guides analysis in a manner that facilitates some predictability (my point is not that law is *only* politics). But, ultimately, the judgment calls that must be made in relation to the questions listed above cannot be fully anticipated by prescriptive frameworks.

In this sense, I resist Justice Abella's characterization of Justice Brown and Rowe's dissenting reasons as being "based on conjecture not reality."[65] Their criticisms should be discarded not because they are *incorrect*, but, rather, because they are *misguided* and *self-defeating*. Justice Abella's analysis *does* leave judges with significant leeway in terms of how they identify inequality, and this demands faith in our judiciary and acknowledgment of its unavoidably ideological role. Assessment of, for example, what level of "participation" by marginalized

59 *Ibid* at 528.

60 Lon L Fuller, "Reason and Fiat in Case Law" 59:3 (1946) Harv L Rev 376 at 382.

61 *Fraser*, *supra* note 3 at para 27.

62 Of course, reason alone cannot resolve *any* area of law, given the innate uncertainty of language, and "the concurrent jurisdiction of language and law." See Kendall Thomas, "Reading Charles Black Writing: The Lawfulness of the Segregation Decisions Revisited" (2011) 1:1 Columbia J Race & L 1 at 2. But reason is *particularly* limited when seeking to resolve equality law because "equality" as a legal and constitutional signifier is so deeply contested — indeed, what some call equality, others call inequality (for example, affirmative action). My point, in other words, is not that equality is unique in *the fact* of its requiring faith in the judiciary, but rather, in *the degree* of faith that it demands.

63 *Fraser*, *supra* note 3 at para 27.

64 *Ibid* at para 30.

65 *Ibid* at para 133.

groups in society qualifies as "full and fair"[66] — let alone what it *means* to "participate" in society — is amorphous. But, as I explain below, Justice Brown and Rowe's criticism of the political cast of Justice Abella's analysis[67] is nevertheless misguided (because equality analysis is invariably political) and self-defeating (because *their* analysis of equality is equally political — that is, they too invoke "Word Magic"[68]).

My faith-based critique of Justice Côté's analysis differs. Her approach to equality analysis is, in a sense, more certain than the other two opinions. This has the benefit — for those who trust the legislature over the judiciary — of narrowing judicial discretion and thus facilitating judicial restraint.[69] But this greater certainty is achieved by dramatically narrowing the state's constitutional obligation to equality. Indeed, Justice Côté's opinion reflects Williams' apt observation that "being ruled by the cool formality of language is surely as bad as being ruled solely by one's emotions."[70]

Specifically, section 15 is essentially read out of the *Charter* by Justice Côté's analysis. She accomplishes this in two related ways — or, more precisely, with two distinct *modes of rearticulation*.

First, Justice Côté eviscerates section 15 through *rearticulation by addition*. She reasons that asserted grounds lose protection when something — a characteristic, attribute, or condition — is appended to them. On this basis, the RCMP's Plan does not discriminate against women because it, rather, discriminates against women "with children." This is astonishing reasoning. Indeed, I struggle to think of a form of discrimination that cannot, through this logic, be rearticulated outside the scope of section 15: literacy tests discriminated against *uneducated* Black people, not all Black people; the head tax discriminated against *some* Chinese immigrants, not all Chinese immigrants (for example, merchants); marital rape laws discriminated against *married* women, not all women. Simply put, this logic constitutes an infinite regress into our "infinite variety"[71] and an elective escape from any equality analysis.

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66 *Ibid* at para 1.

67 *Ibid* at paras 146, 219, 227.

68 *Alchemy*, *supra* note 25 at Prologue.

69 By "judicial restraint", I mean the idea that a judge "is obligated to apply the law as he understands it to be rather than as he thinks it ought to be." See John Paul Stevens, "Judicial Restraint" (1985) 22:2/3 San Diego L Rev 437 at 446. I consider the dichotomy of what the law *is* or *should be* often misleading (see generally, Kennedy, *supra* note 57). But I appreciate concerns about the weaponization of discretionary constitutional principles. For a critique of Williams' *The Alchemy of Race and Rights* from the standpoint of how rights discourse can *undermine* systemic equality, see Wendy Brown, "The Power of Rights" (1993), online: *Boston Review* <https://bostonreview.net/archives/BR18.3/brown.html>. And for a recent discussion of the conservative valence of judicial power — in the American context — see Daniel Denvir, "SCOTUS, Politics, and the Law" (9 October 2020), online: *The Dig Podcast* <https://www.thedigradio.com/podcast/scotus-politics-and-the-law/>. To be clear: I am sympathetic to concerns raised by some scholars about including apex courts in social change strategies (see generally: Ryan D Doerfler & Samuel Moyn, "Democratizing the Supreme Court" 109 Cal L Rev [forthcoming in 2021]). But where equality is a constitutional right, it is unclear to me where these concerns lead in terms of how equality should be legally negotiated, especially when left-wing inattention to constitutional norms leaves a strategic vacuum to be filled by right-wing interests.

70 *Alchemy*, *supra* note 25 at 141.

71 *Andrews, supra* note 2 at 165.

Second — and relatedly — Justice Côté eviscerates section 15 through *rearticulation by substitution*. She reasons that asserted grounds lose protection when they are indirectly targeted by the state. With respect to this framing, one passage from Justice Côté's (not even) formal equality analysis stands out. At one point, she explains that the Plan in *Fraser* evades sex discrimination because "the distinction in this case exists not on the basis of being a woman, but on the basis of needing to take care of someone"[72] (judicially severing gender and gender role). Again, this reasoning permits unlimited rearticulation of discrimination outside the scope of section 15 protection. Why? Because Justice Côté substitutes the *setting* of discrimination with its *victim*. On her logic, discussion of child-rearing responsibilities changes the discrimination from being *sex*-based to *caregiving*-based.[73] And to implicate sex-based discrimination, she reasons, the case must involve a "singularly sex-based issue."[74] Yet this is simply not how the phenomenon of discrimination functions, especially in a contemporary context. Returning to the examples above, literacy, immigration, and intimate relations are settings where certain raced and gendered people are victimized. Identifying these settings does not *detract* from the fact of discrimination, but rather, *explains* how it operates.[75]

Viewed in this way, Justice Côté's faith, rather than being in the courts, resides entirely in the legislature and executive — to whom she assigns virtual licence to discriminate. I hardly need to elaborate on how such a narrow vision of equality flatly contradicts decades of jurisprudence,[76] or how that vision reduces Justice Côté's analysis — not Justice Abella's, as she claims — to a "mere rubber stamp."[77]

B. Simplicity: Abstraction, Tests, and Incoherence

1. Williams on Simplicity

A running theme throughout *The Alchemy of Race and Rights* is how "legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem."[78] Williams observes multiple — and related — ways in which our legal vocabulary routinely (over) simplifies: abstraction, tests, and incoherence.[79]

First, the law simplifies by deploying *strategic abstractions*. Specifically, it places heavy reliance on "[f]loating signifiers,"[80] that is, terms which we associate with fixed and universal

72 *Fraser*, *supra* note 3 at para 235.
73 *Ibid* at para 234.
74 *Ibid* at para 251.
75 Of course, caregivers, too, are subordinated by the Plan. But that does not *detract from* sex discrimination, but rather, *complements* it.
76 This makes Justice Côté's concerns about doctrinal precarity particularly meta (see e.g. *Fraser, supra* note 3 at para 253).
77 *Ibid* at para 244.
78 *Alchemy*, *supra* note 25 at 6.
79 I note that these three techniques — like Williams' three key points I use in this essay (faith, simplicity, and ideology) — are not conceptually siloed. For example, a test may invoke abstractions. And incoherence will often result from the ways in which abstractions are held out as mutually exclusive yet contain overlap. Still, discussing each separately provides an instructive overview about how these distinct techniques may be deployed.
80 *Alchemy*, *supra* note 25 at 7.

meaning,[81] but which are actually fluid and contingent. That contingency is why Williams' analysis looks beyond "the four corners of a document" and draws insights from "psychology, sociology, history, criticism, and philosophy" — because, by rejecting the supposedly "transcendent, acontextual, universal legal truths"[82] upon which law implicitly rests, she "highlights factors that would otherwise go unremarked."[83]

Second, the law simplifies by articulating *rigid tests*, despite society's undeniable fluidity and complexity. In Williams' words:

> The hypostatization of exclusive categories and definitional polarities, the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication: rights/needs, moral/immoral, public/private, white/black.[84]

Third, the law simplifies by *rationalizing incoherence* — for example, "the degree to which much of what we call 'freedom' is either contradictory or meaningless."[85] Consider "free" expression. The *Charter* lists "freedom of expression" as a "fundamental freedom" despite there being myriad examples of what is unquestionably "expression" not being "free" at all.[86] We say expression *is* free. Then we call various forms of expression *not* expression (from violence[87] to keeping a bawdy house[88]). This maintains the illusion of expression's legal freedom in the midst of its obvious political restriction. My point, of course, is not that violence *should* be free, but that expression is *not*. Yet we say it is, thus rationalizing incoherence. And Williams explains why: because "the great paradox of democratic freedom is that it involves some measure of enforced equality for all."[89] Put differently, equality and freedom invariably conflict, despite both being constitutionally "guaranteed" — a contradiction baked directly into our constitutional architecture. It follows that bare reference to "equality" or "freedom" is merely a rhetorical technique for obscuring the necessarily political compromises courts are routinely called upon to negotiate.

The three techniques of (over)simplification described above are not inconsequential. To the contrary, as Williams observes, these techniques are inseverable from the law's relationship with justice:

> That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths.

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81 Stuart Hall, "What is the 'Black' in Black Popular Culture?" (1993) 20:1/2 Soc Justice 104 at 111.

82 *Alchemy*, *supra* note 25 at 8.

83 *Ibid* at 7.

84 *Ibid* at 8.

85 *Ibid* at 29.

86 Joshua Sealy-Harrington, "Twelve Angry (White) Men: The Constitutionality of the Statement of Principles" (2020) 51:1 Ottawa L Rev 195 at 230-31. To be clear, I do not mean that much expression is not free from state restraint simply because it may be limited under section 1 of the *Charter*. Rather, much *factual* expression does not qualify as *constitutionally protected* expression because, simply put, such a characterization would be *politically* untenable. See Thomas I Emerson, "Towards a General Theory of the First Amendment" (1963) 72 Yale LJ 877 at 914.

87 *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 970, 58 DLR (4th) 577.

88 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at 1206, 68 Man R (2d) 1.

89 *Alchemy*, *supra* note 25 at 101.

> Acknowledging, challenging, playing with these *as* rhetorical gestures is, it seems to me, necessary for any conception of justice.[90]

As is evident in the above passage, Williams is not unequivocally opposed to the use of categories in law per se.[91] Rather, she "acknowledge[s] the utility of such categorizations for certain purposes and the necessity of their breakdown on other occasions."[92] They are, in other words, not stable placeholders, but "rhetorical event[s]."[93] As such, "[c]ategorizing is not the sin; the problem is the lack of desire to examine the categorizations that are made."[94] Indeed, "[w]hen . . . society … grants obeisance to words alone, law becomes sterile and formalistic; [law] is applied without [justice] and is therefore unjust."[95] In sum, we should *use categories* to better understand law and society, not let categories *use us*.

2. Simplicity in Fraser

Other than some differences in phrasing, the Court was unanimous on the two-part test for section 15(1): whether the impugned law (1) "on its face or in its impact, creates a distinction based on enumerated or analogous grounds" and (2) "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[96] Where, then, does the divergence in reasoning across all three opinions arise? How far does this "test" *really* take us? Or, put differently: is its simplicity helping, or harming?

Justices Brown and Rowe criticize Justice Abella's equality analysis as indeterminate — that is, for lacking the *simplicity* of their analysis. But, as noted at the outset, some uncertainty is an unavoidable consequence of committing to equality, itself a value that cannot be effectively promoted once restrained. When substantive equality demands a non-prescriptive intermingling of history, context, and power, its analysis is necessarily indefinite. Justices Brown and Rowe, thus, are "seek[ing] out a level of clarity that isn't appropriate to the inquiry that they are being constitutionally granted."[97] More importantly, though, Justice Brown and Rowe's indeterminacy critique overlooks its application to their own analysis. Williams' three ideas related to simplicity — strategic abstraction, rigid tests, and rationalized incoherence — all help to navigate these issues in the *Fraser* opinion.

(a) Strategic Abstraction in *Fraser*

First, let us consider strategic abstraction, or "[f]loating signifiers."[98] Justices Brown and Rowe are correct about the indeterminacy of Justice Abella's analysis insofar as she deploys various

90 *Ibid* at 10.

91 Nor am I opposed to the use of categories in law. Indeed, my own argument deploys categories — for example, methodology and ideology — to argue about where material controversies should lie in relation to substantive equality. This is not because I think the methodology/ideology dichotomy is universally clear, but rather, contingently instructive in this context with respect to the divided opinions in *Fraser*.

92 *Alchemy*, *supra* note 25 at 11.

93 *Ibid* at 11.

94 *Ibid* at 102.

95 *Ibid* at 138-39.

96 *Fraser, supra* note 3 at para 27 (per Abella J.). See also *ibid* at para 169 (per Brown and Rowe JJ.) and *ibid* at para 232 (per Côté J.).

97 "Joshua Sealy-Harrington on Jury Selection, Diversity and Equality" (23 October 2020) at 00h:49m:00s, online (podcast): *StereoDecisis* <https://blubrry.com/stereodecisis/69362374/joshua-sealy-harrington-on-jury-selection-diversity-and-equality/> [StereoDecisis].

98 *Alchemy*, *supra* note 25 at 7.

imprecise terms to capture her vision of equality: for example, "full and fair participation,"[99] "equitable,"[100] "difficulties,"[101] and "illogical and unfair."[102] Further, while Justice Abella is right that "physical, social, cultural, [and] other barriers"[103] must be considered when assessing substantive inequality, this is no straightforward task. This is, in a sense, an alternate phrasing of the "psychology, sociology, history, criticism, and philosophy" that Williams considers critical to the project of situating law in our lived reality.[104] A complex, yet crucial, task.

Justice Abella acknowledges the complexity of her analysis. When she observes that "the Court should not … craft rigid rules" for step 1 (distinction),[105] that there is no "rigid template" for step 2 (disadvantage),[106] and that, indeed, the entire analysis raises "the impossibility of rigid categorizations,"[107] Justice Abella is recognizing equality's alchemy. And when she notes concerns about judicial decisions based on a "web of instinct,"[108] she is simultaneously acknowledging the limits of substantive equality analysis. These are not simply passages of *uncertainty*; they are moments of *transparency* — that is, admissions of equality's malleability.

Justices Brown and Rowe, in contrast, elide this acknowledgment of complexity, despite it being unavoidable in their analysis. They recognize "substantive equality" — the central abstraction in Canadian equality law — as section 15's animating norm.[109] But they simultaneously castigate substantive equality for failing to have the simplicity of formal equality.[110] As such, Justice Brown and Rowe do not avoid imprecision, but rather, overlook it.

(b) Rigid Tests in *Fraser*

Next, let us consider rigid tests. When Williams critiqued Anglo-American jurisprudence for "the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication,"[111] she laid a theoretical groundwork consonant with Justice Abella's contextual inquiry. Specifically, Justice Abella holds that a finding of discrimination under section 15(1) does not *require* discriminatory intent,[112] causation (either for a law's impact,[113] or the conditions giving rise to that impact[114]), exhaustion (that is, that all members of the group experience the impugned discrimination),[115] stereotyping,[116] arbitrariness,[117] or involuntari-

99 *Fraser*, *supra* note 3 at para 1.
100 *Ibid* at para 2.
101 *Ibid* at para 7.
102 *Ibid* at para 17.
103 *Ibid* at para 57. See also *ibid* at para 76.
104 *Alchemy*, *supra* note 25 at 8.
105 *Fraser*, *supra* note 3 at para 59.
106 *Ibid* at para 76.
107 *Ibid* at para 82.
108 *Ibid* at para 60.
109 *Ibid* at para 218.
110 *Ibid* at para 146.
111 *Alchemy*, *supra* note 25 at 8.
112 *Fraser*, *supra* note 3 at para 69.
113 *Ibid* at para 70.
114 *Ibid* at para 71.
115 *Ibid* at para 72.
116 *Ibid* at para 78.
117 *Ibid* at paras 79-80.

ness (that is, a circumstance the claimants are forced into, rather than one they chose).[118] In so doing, her test has the flexibility needed to meet the task to which it is assigned: responding to discrimination, an inextricably value-laden mischief.

In particular, Justice Abella's rejection of "choice" logics to immunize inequality from scrutiny[119] can be read as a reverberation of Williams' analysis of "choice" thirty years earlier:

> In our legal and political system, words like "freedom" and "choice" are forms of currency. They function as the mediators by which we make all things equal, interchangeable. It is, therefore, not just what "freedom" means, but the relation it signals between each individual and the world. It is a word that levels difference.[120]

In contrast, the dissenting opinions articulate frameworks for equality either too easily avoided by competent governments (because those frameworks invoke "bright lines" that overlook equality's "complication"[121]) or, contradictorily, which are just as indeterminate as Justice Abella's analysis. Specifically, Justices Brown and Rowe reason — and Justice Côté occasionally concurs — that government initiatives are immune from *Charter* scrutiny, seemingly, if they do *any* of the following: (1) intend to ameliorate; (2) involve policy; (3) take incremental steps; (4) target "private" rather than "public" discrimination; (5) lack demonstrated causation; or (6) lack the evils of "arbitrariness," "unfairness," or "wrongful[ness]." I elaborate on these six immunities, below.

Justices Brown and Rowe state that their section 15 analysis is "contextual, not formalistic."[122] Despite this, they outline various immunities to section 15 scrutiny. For example, central to their analysis is how the RCMP's job-sharing initiative had an *ameliorative intent*:

> Through its job-sharing policy and the [leave without pay] provisions, the RCMP has sought to provide flexible working arrangements in recognition of the burden women face in pursuing a career due to the unequal distribution of childcare responsibilities in society … The Plan and the RCMP's policy on job-sharing are not anathema to the vision of equality that underlies s[ection] 15 of the *Canadian Charter of Rights and Freedoms*, but instead represent an attempt to *accommodate* employees in light of their particular circumstances.[123]

Justices Brown and Rowe's language is telling. The position they take here is not even that the RCMP's job-sharing program must be found constitutional because it *effectively* (or even minimally) ameliorated working conditions for women, but rather, that it "sought to";[124] that it was "an attempt to"[125] ameliorate those conditions; and, later in their opinion, that the government made "efforts."[126] The simplicity is tempting: why punish a government in its attempt to promote equality? But only *trying* for equality is an impoverished view of the constitutional *duties* of Canadian governments. Moreover, Justices Brown and Rowe's view that the Plan's

118 *Ibid* at para 86.
119 *Ibid* at paras 86-92.
120 *Alchemy*, *supra* note 25 at 31.
121 *Ibid* at 8.
122 *Fraser*, *supra* note 3 at para 173.
123 *Ibid* at para 142 [emphasis in original].
124 *Ibid*.
125 *Ibid*.
126 *Ibid* at para 145. See also *ibid* at para 146: "this case is an instance of that inherent malleability being deployed so as to strike down a scheme which was, after all, *designed to be* ameliorative" [emphasis added].

intent as "ameliorative" is dispositive of its constitutionality[127] belies the contextual analysis they otherwise repeatedly endorse,[128] as well as their admission that "discrimination need not be intentional"[129] and the fact that this supposed ameliorative shield to constitutional scrutiny was clearly rejected by a majority of the Supreme Court just two years earlier, in a context arguably even more sympathetic to their claim.[130] Lastly, all this discussion of ameliorative intent overlooks how a scheme that *gives* women certain accommodations but *takes* their pension benefits hardly qualifies as genuinely ameliorative.

As a response to the analysis above, Justices Brown and Rowe have another seductive government immunity: *policy analysis* — that is, if courts can scrutinize more than whether governments *try* to promote equality, then they must scrutinize government initiatives based on whether they "*do enough*" [131] to promote equality, which will impermissibly interfere with "a matter of policy."[132] They call this an "extraordinary" step engaging "profoundly complex matters of public policy that no Canadian court is institutionally competent to deal with."[133] Similarly, Justice Côté holds that certain policy critiques of the Plan fall outside the Court's ambit because "it is not this Court's role to constitutionalize normative judgments."[134]

I have three responses to this classic line of conservative (in)equality reasoning.

First, Justices Brown and Rowe turn what is fair criticism of Justice Abella's reasoning into a slippery slope. To elaborate on their concern, Justices Brown and Rowe explain the supposed heights to which Justice Abella's reasoning takes us:

> [I]s not the next extension of our colleague's line of reasoning that governments (federal and provincial) have a positive duty under s[ection] 15(1) to initiate measures that will remove all effects of historic [sic] disadvantage, *and* that they are constitutionally barred from repealing or even amending such measures?[135]

But this "next extension" is, of course, contingent on whether courts eventually find that "do[ing] enough" requires the eradication of all social hierarchy — an astounding proposition] (particularly given that interim extensions of providing Indigenous people with, say, clean drinking water or, perhaps, shelter during winter, would surely precede judicially mandated emancipation from racial hierarchy). *This* case does not involve any claim of "positive duty," or a bar against "repealing or even amending" certain measures, but rather, the scrutiny of existing legislation which singled out a program predominantly used by women for prejudicial treatment — indeed, Justices Brown and Rowe concede that Justice Abella does not build the glass house

127 *Ibid* at para 210.

128 *Ibid* at paras 173, 184, 188, 191, 201, 203, 226.

129 *Ibid* at para 193.

130 *Ibid* at para 132, n 10 referring to *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*].

131 *Fraser, ibid* at para 143 [emphasis added].

132 *Ibid* at para 143.

133 *Ibid* at para 144. See also *ibid* at para 213. Though they, at least, acknowledge that courts routinely conduct such policy analysis under section 1 of the *Charter* (*ibid* at para 223).

134 *Ibid* at para 252. Though the policy critique she identifies as inappropriate for judicial review — rationality — is, interestingly, part of the equality analysis conducted by Justices Brown and Rowe, that is, arbitrariness (see *ibid* at para 191).

135 *Ibid* at para 144 [emphasis in original]. Again, this argument is a repetition of the reasoning advanced — and rejected — by a majority of the Court in *Alliance*, *supra* note 130. See *Fraser*, *supra* note 3 at para 132, n 11.

at which they are casting stones, but only its "groundwork."[136] Further, Justice Abella never holds that any government failure to "*eradicate* disadvantage"[137] (Justices Brown and Rowe's emphasis) is discriminatory, or that the government is "expected to remove *all* inequalities for *all* groups on *every* occasion it act[s]"[138] (my emphases). Rather, she holds[139] — and Justices Brown and Rowe agree[140] — that governments must adequately account for the social reality in which government policy operates. Williams specifically cautioned against such exaggerations in argument: "Enlargement of the Stakes … [is] an ancient tactic of irresponsibility."[141] To demand *something*, according to the logic of Justices Brown and Rowe, is to demand *everything*.

Second, Justices Brown and Rowe object to the fact that "[t]he appellants are … asking to be put in a *better* position than everyone else under the Plan," a "vital point," they argue, that "undermines" Justice Abella's analysis.[142] Leaving aside their questionable characterization that women accessing job sharing as a means of sustaining some work/life balance under patriarchy are in a "*better* position" than men, Justices Brown and Rowe are here simply rejecting substantive equality itself.[143] Even if women *were* being put in a better position, that is precisely what substantive equality may demand: a corollary of how "identical treatment may frequently produce serious inequality."[144] To be fair, Justices Brown and Rowe at least acknowledge how "adverse-impact discrimination" can violate section 15.[145] But the *kinds* of adverse impacts that they would recognize as doing so are far narrower than Justice Abella. This is, fundamentally, an ideological disagreement, as I explain further below.[146] And it is an ideological disagreement, moreover, that is concealed by simplicity (namely, the Court's continued reliance on formal/substantive equality rhetoric[147] to describe what is, more precisely, an emerging liberal/critical divide).

Third, Justices Brown and Rowe are correct that "do[ing] enough" is a matter of policy. However, this critique only persuades if there is a blanket prohibition on courts considering

136 *Ibid* at para 145.

137 *Ibid* at para 145. See also *ibid* at para 212.

138 *Ibid* at para 207 [emphasis added]. These exaggerations are, to borrow from Kendall Thomas, "rhetorical excesses." See Kendall Thomas, "The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick" (1993) 79:7 Va L Rev 1805 at 1817 [Eclipse of Reason].

139 *Fraser*, *supra* note 3 at para 34.

140 *Ibid* at para 211.

141 *Alchemy*, *supra* note 25 at 141.

142 *Fraser*, *supra* note 3 at para 160 [emphasis in original].

143 And, in particular, Justices Brown and Rowe appear, here, to be revitalizing "equality with a vengeance", a concept rejected long ago by the Supreme Court. See *Schachter v Canada*, [1992] 2 SCR 679 at 702, 93 DLR (4th) 1. Simply put, substantive equality *encourages*, rather than *forbids*, preferential treatment of subordinated groups.

144 *Andrews*, *supra* note 2 at 164. In response, Justices Brown and Rowe would seemingly argue that, viewed substantively, job sharers are being *too* favoured — that there is, in other words, a privilege to accessing job sharing with an equivalent pension, and that this privilege should be accounted for in our substantive analysis. But, even if this were true, such an argument would isolate the particular circumstance of women in the program from the broader societal context of women in the labour market, where they are, unquestionably, disadvantaged, thereby justifying such ameliorative interventions. I am indebted to a peer reviewer's comment for this specific line of analysis.

145 *Fraser*, *supra* note 3 at para 170.

146 *Below* at 77-81.

147 See e.g. *Fraser supra* note 3 at paras 44, 88 (per Abella J.). See also *ibid* at paras 146, 217, 225, 227 (per Brown and Rowe JJ.).

"policy." And, as explained above, the adjudicative review of substantive inequality is unavoidably policy-focussed.[148] Justices Brown and Rowe try to circumvent this fact with additional rigid tests. They, for example, distinguish vetting "whether the Plan respects the bounds of the constitutional obligations imposed on the state" (*legal* analysis) from vetting "good or bad policy" (*policy* analysis).[149] But this tidy law/policy dichotomy elides how legal analysis of equality *demands* policy analysis — and, in particular, the extent to which the naming of "discrimination" is inextricably political.[150] In this way, law/policy heuristics mislead more than they clarify.[151] And for that reason, we need a broader equality vocabulary — specifically, a vocabulary that admits and grapples with the *policy of equality*. Again, a liberal/critical vocabulary would, I think, be more helpful here.

In any event, Justices Brown and Rowe do not avoid policy in their analysis; rather, they simply use distinct, and narrower, vocabulary to describe *their own policy preferences* (a further instance where simplicity obscures ideology). There are four examples of this, that is, the four remaining immunities enumerated above and detailed below.[152]

Example #1 — Taking Incremental Steps: Justices Brown and Rowe reason that Justice Abella's analysis does not let governments act incrementally in addressing inequality.[153] Yet it does. Justice Abella simply scrutinizes the constitutional adequacy of a particular increment.[154] As such, her disagreement with Justices Brown and Rowe is, properly framed, about whether *the increment chosen here* — that is, a policy which, viewed systemically, provides a worse pension to women raising kids than it does to officers suspended for misconduct — was sufficient.[155] Justices Brown and Rowe held that it was sufficient. But that is simply *their* policy preference.

Ultimately, Justices Brown and Rowe hang their hat on how the RCMP "sought to provide flexible working arrangements" to its employees.[156] But what if job sharing, given its flexibility — and the logistical burden this placed on the RCMP — compensated for that burden with not

148 *Above* at 61-62.

149 *Fraser*, *supra* note 3 at para 164.

150 Indeed, this is the implicit point made by Justices Brown and Rowe when they describe discrimination as "a form of wrongful behaviour." *Ibid* at para 193.

151 Critical race theorist Gary Peller observed a similar "analytic loop" in the context of American equality jurisprudence: "[T]he judiciary had to defer to legislative value judgments because the judiciary was unelected and therefore incompetent vis-à-vis the legislature to make value choices, but the democratic character of the legislature, the ground for the deference, could never be determined by the courts because it depended on the resolution of issues of value that were beyond the judicial competence." See Peller, *supra* note 14 at 613.

152 *Below* at 70-72. The concealing of judicial ideology by reference to notions of neutrality is an age-old technique of conservative legal reasoning unveiled by critical race scholarship. See e.g., Neil Gotanda "A Critique of Our Constitution is Color-Blind" (1991) 44:1 Stan L Rev 1 at 53-54 n 207.

153 *Fraser*, *supra* note 3 at para 145. See also *ibid* at paras 168, 177, 209.

154 Drawing on doctrine, Justices Brown and Rowe emphasize how, in *Alliance*, the Court held that states can "act incrementally in addressing systemic inequality." However, this overlooks the very next sentence: "But section 15 does require the state to ensure that whatever actions it *does* take do not have a discriminatory impact" (*ibid* at para 177 citing *Alliance*, *supra* note 129 at para 42 [emphasis in original]).

155 As noted earlier, I acknowledge the incomplete record on this point: see *Fraser, ibid* at para 25 (per Abella J.). See also *ibid* at paras 161, 187 (per Brown and Rowe JJ.). But I also note that the respondent's statements "during the hearing" (*ibid* at para 161) are not evidence.

156 *Ibid* at para 142.

only worse pension benefits, but a 5% pay cut? Would *that* be discriminatory, or would it still "narrow"[157] the gap? What about a 10% pay cut? 25%? 50%? At what point does an incremental shift, as the increment shifts, become *detrimental*, and thus, under Justices Brown and Rowe's test, properly subject to constitutional scrutiny? Such tinkering reveals the deceit inherent in categorically immunizing "incremental" policies from constitutional review. Simply put, social hierarchy does not exist on a linear spectrum in terms conducive to Justices Brown and Rowe's rigid analysis. Indeed, inverting Justices Brown and Rowe's critique of Justice Abella reveals this. They write that, under her substantive equality analysis, "[o]ne searches in vain for a logical or rational stopping point," when the government has done *enough*.[158] But the impossibility of clearly demarcating the boundary between incremental/detrimental extends this same critique to their own analysis, as one searches in vain for when the point when government has done *too little*.

Example #2 — Private vs. Public Discrimination: Justices Brown and Rowe reason that section 15 only concerns *public* discrimination (that is, discrimination which is "state-imposed"), not *private* discrimination.[159] But this "public/private" dichotomy — one of the misleading binaries Williams identifies[160] — obscures the interplay between "public" and "private" spaces and phenomena. Indeed, a "public" pension plan that disfavours an employment arrangement that women are "privately" pressured towards is the very collision of what we tend to call public and private. In any event, Justices Brown and Rowe's position supports the principle that state abdication of responsibility in relation to "private" harm — assuming, for the sake of argument, that harms may be neatly categorized as such[161] — falls beyond constitutional scrutiny. Yet this contradicts Supreme Court precedent troubling the public/private dichotomy.[162]

Further, this line of reasoning leads to absurd consequences. Would a province's wholesale repeal of its human rights code, for example, *really* not be subject to *any* constitutional scrutiny, simply on account of that code gratuitously addressing "private" discrimination? This is, as Williams astutely notes, "the tyranny of what we call the private."[163] And, again, these are coded policy preferences embedded in the reasons of Justices Brown and Rowe. If significant existing inequality can be linked to the violent inertia of colonialism, racism, and state-influ-

157 *Ibid* at para 177.

158 *Ibid* at para 199.

159 *Ibid* at para 165. See also *ibid* at paras 181, 224. Technically, Justices Brown and Rowe do not preserve the Plan based on it implicating private discrimination ("the Plan represents neither a public nor private source of ongoing systemic disadvantage"), but rather, on account of it being ameliorative (see *ibid* at para 168). For my response to this amelioration analysis see above at 67-68.

160 *Alchemy*, *supra* note 25 at 8. Likewise, critical race scholar Neil Gotanda has deconstructed the public/private dichotomy. Specifically, he notes how the dichotomy is both *normative* ("[t]o the extent that distinguishing between public and private realms places some social relations beyond the reach of government regulation, the distinction has normative consequences") and *strategic* ("[t]he familiarity of the public-private distinction obscures the contingent and political character of the initial designation, and subsequent challenges to the subordinating effects of such a 'neutral' distinction are then criticized as 'political'"). See Gotanda, *supra* note 152 at 12-13.

161 They cannot.

162 See e.g. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385.

163 *Alchemy*, *supra* note 25 at 43.

enced cultural norms,[164] then Williams has a complete answer to Justices Brown and Rowe's exclusion of such inequality from constitutional analysis: "It seems an extraordinarily narrow use of equality, when it excludes from consideration so much clear inequality."[165]

Example #3 — Demonstrated Causation: Justices Brown and Rowe reason that section 15 requires causation between state conduct and disadvantage.[166] This portion of their analysis is curious. The Plan, here, *does cause* disadvantage to women insofar as they are, for well-documented social reasons, overwhelmingly represented in job sharing, which has inferior pension entitlements. Justices Brown and Rowe raise concerns about reliance on *mere* correlation[167] or *mere* anecdote[168] for proof of causation. But Justice Abella does not license such reliance; rather, she observes that "evidence of statistical disparity and of broader group disadvantage may demonstrate disproportionate impact … and their significance will vary depending on the case."[169] She is, therefore, simply leaving space for the contextual inquiry equality innately demands. Justices Brown and Rowe's desire for there to be less space in the contextual inquiry is, again, their policy preference. And the same can be said of Justice Côté, who thinks, for example, that the Plan does not "create" women's subordination in relation to caregiving[170] while acknowledging — as elaborated below[171] — that aptitude tests created Black people's subordination in relation to education (despite both representing clear causal chains between social hierarchy and government policy).

Example #4 — Arbitrariness, Unfairness, and Wrongfulness: Justices Brown and Rowe reason that substantive inequality requires "an element of arbitrariness or unfairness"[172] — or, as they later describe it, "wrongful behaviour."[173] At this point, Justices Brown and Rowe cross the Rubicon. The first abstraction mentioned by Justices Brown and Rowe — arbitrariness — is illogical as a requirement for discrimination.[174] As Justice Abella notes[175] (and as Jonnette Watson Hamilton and Jennifer Koshan have persuasively explained[176]) arbitrariness is already addressed in the section 1 analysis. But, more importantly, the other two abstractions mentioned above — unfairness and wrongfulness — are at least as indeterminate as substantive

164 It can.
165 *Alchemy*, *supra* note 25 at 106.
166 *Fraser*, *supra* note 3 at para 181.
167 *Ibid* at para 180.
168 *Ibid* at para 178.
169 *Ibid* at para 67.
170 *Ibid* at para 251.
171 *Below* at 75.
172 *Fraser, supra* note 3 at para 191.
173 *Ibid* at para 193.
174 I note, parenthetically, that Justice Côté effectively labels the Plan arbitrary in her reasons, arguably complicating Justice Brown and Rowe's analysis on its own terms. See *ibid* at para 252: "To be sure, the impugned provisions may very well not be rational — there may indeed be no logical reason to deprive job-sharers of full pension benefits that are guaranteed to full-time members and members on leave without pay." See also *ibid* at para 255: "It therefore falls to the legislature, not the courts, to remedy any under-inclusiveness in this legislation, which was purportedly meant to assist with caregiving responsibilities in the first place."
175 *Ibid* at para 80.
176 Jonnette Watson Hamilton & Jennifer Koshan, "Kahkewistahaw First Nation v. Taypotat: An Arbitrary Approach to Discrimination" (2016) 76 SCLR (2d) 243 at 259-60.

inequality (if not more), making this argument self-defeating. Justices Brown and Rowe object to courts "fiddl[ing] with the complex mechanics of legislative schemes."[177] Yet few articulations of inequality are as abstract as their notions of "whether the lines drawn are generally appropriate"[178] having "regard to all the circumstances."[179]

In light of the above, the critiques exchanged between Justice Abella and Justices Brown and Rowe are misleading. Justice Abella criticizes Justices Brown and Rowe for formalism[180] and they criticize her for indeterminacy,[181] when, more instructively, their material disagreement is *ideological*. Crudely distilled, Justice Abella thinks it is "unfair" to systemically depreciate women's pensions,[182] whereas Justices Brown and Rowe think it is "fair" to do so.[183] And so, while there is undoubtedly some doctrinal disagreement between their two opinions, I think this fundamental point — their *ideological* divergence on sexism — is in many ways the key disagreement, albeit one obscured by legal rhetoric.[184] That said, this divergence is hinted at in the temporality of their articulations of sexism: Justice Abella invokes the present tense ("entrenched assumptions about the role of women in a family [*continue*] *to leave* [*their*] *mark* on what happens in the workplace"[185]); Justices Brown and Rowe invoke the past tense ("[i]t is indisputable that women *have historically been* disadvantaged in the workplace"[186]), and indeed, repeatedly criticize Justice Abella's reasoning for excessively weighing the past.[187] This, more than any methodological disagreement, is what drives their ultimate divergence in this case.

As Williams notes, it is not the *acceptance* but the *rejection* of substantive equality that invokes "rhetorical devices" for the narrow construction of equality.[188] Justices Brown and Rowe pose questions like "How can a legislature know what any given court will determine to be *sufficiently* remedial?" as if sliding scales — reasonableness, proportionality, foreseeability — are completely foreign to the judicial process. Simply put, we need a constitutional vocabulary that can reckon with the politics inherent in the legal adjudication of equality to properly understand and critique legal institutions. To the extent that legal analysis is invariably political, its critique *as such* is uninformative (at best) or disingenuous (at worst).

(c) Rationalized Incoherence in *Fraser*

The analysis above leads me, finally, to Justices Brown and Rowe's rationalized incoherence. This rationalization of incoherence is evident, for example, when Justices Brown and Rowe

177 *Fraser*, *supra* note 3 at para 214.
178 *Ibid* at para 203 citing *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 67.
179 *Fraser*, *supra* note 3 at para 204.
180 *Ibid*.
181 *Ibid* at para 216.
182 *Ibid* at para 17.
183 *Ibid* at para 191.
184 An example of Kendall Thomas' keen insight that "a judicial decision is a complex combination of rules *and* rhetoric that cannot be understood without rigorous attention to its discursive dimensions." See Eclipse of Reason, *supra* note 137 at 1812.
185 *Fraser*, *supra* note 3 at para 1 [emphasis added].
186 *Ibid* at para 166 [emphasis added].
187 *Ibid* at paras 190, 194. To be fair, they also gesture at contemporary sexism, but in more qualified terms, for example, as a claim at first instance about which "evidence" was "presented" and "accepted" by the application judge (*ibid* at para 166).
188 *Alchemy*, *supra* note 25 at 105.

nostalgically lament how substantive equality has "*become* so vague"[189] without ever identifying a time at which it was clear. It is also evident when they critique substantive *inequality* for indeterminacy,[190] yet invoke substantive *discrimination* as their guiding principle.[191] They, accordingly, rationalize incoherence in their reasons. What are the clear boundaries that emerge from the substitution of "discrimination" for "inequality"? That substantive discrimination forbids "unfairness"[192] and "wrongful behaviour."[193] These are, to be blunt, abstractions that are just as (if not more) lacking in intelligibility and principle,[194] just as unknowable in advance,[195] and thus, just as corrosive to the rule of law[196] as Justice Abella's substantive equality.

And, of course, the "rule of law" itself engages rationalized incoherence given the alchemy not of *equality*, but of *sovereignty*.[197] Justices Brown and Rowe call the rule of law a "concept" with "interlocking components,"[198] and they identify one of those components as the prescription that "Canadians should be governed by rules, stated and knowable in advance, that enable them to guide their conduct."[199] An admirable goal, no doubt. But a goal which their own articulation of substantive discrimination — unfairness and wrongfulness — falls short of. The "two considerations" they close their opinion with to purportedly reinvigorate the "analytical discipline"[200] of substantive equality — that section 15 cannot guarantee equality "throughout society" and that equality is "inherently comparative"[201] — are uncontroversial, are shared by Justice Abella,[202] and fail to disrupt the ambiguity their own analysis generates. Accordingly, their objection to Justice Abella's failure to "explain what 'substantive equality' means"[203] is, ironically, a meta critique.

Justice Côté, too, rationalizes incoherence in her analysis in a number of ways. Indeed this is how she sustains the misleading simplicity of her equality framework.

First, Justice Côté rationalizes the Court's pregnancy discrimination decision in *Brooks*.[204] She finds the Plan non-discriminatory because it creates "a distinction not on the basis of

189 *Fraser*, *supra* note 3 at para 221.
190 *Ibid* at para 216.
191 *Ibid* at para 191.
192 *Ibid*.
193 *Ibid* at para 193.
194 *Ibid* at para 216.
195 *Ibid* at para 218.
196 *Ibid* at para 220.
197 John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37:3 Osgoode Hall LJ 537 at 581-84. Though the references to "alchemy" by me and Borrows differ. He invokes alchemy to refer to the transmutation of "Aboriginal possession" to "Crown title" (*ibid* at 558). In contrast, I invoke alchemy similar to how Williams does, that is, in relation to the prolonged struggle by disenfranchised groups for the "marker[s] of our citizenship" (*Alchemy*, *supra* note 25 at 163-64).
198 *Fraser*, *supra* note 3 at para 220.
199 *Ibid*.
200 *Ibid* at para 224.
201 *Ibid* at para 224 [emphasis omitted].
202 *Ibid* at para 133, n 11 (regarding section 15 not eradicating societal inequality) and *ibid* at para 95 (regarding section 15 implicating a comparative analysis).
203 *Ibid* at para 227.
204 *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 59 DLR (4th) 321.

being a woman, but being a woman *with children*."[205] Does it not follow, then, that pregnancy discrimination creates a distinction not on the basis of being a woman, but being a woman *with child*? On her logic,[206] she cannot claim that "an insurance plan that discriminated against pregnant employees *necessarily* discriminated against women";[207] rather, it discriminated against *pregnant* women, a subset of women, just as women *with children* are a subset of women disparately impacted by the Plan.

Second, Justice Côté rationalizes the Supreme Court of the United States' racial discrimination decision in *Griggs*.[208] She reasons that high school education requirements and aptitude tests "effectively served as a proxy for race," and therefore qualified as racial discrimination.[209] But proxies are imprecise substitutes, which is exactly what Justice Côté rejects in the context of women's subordination. *Not all* Black people, and *some* white people, failed those aptitude and educational requirements, just as *not all* women, *some* men, and other gender identities, are primary caregivers. Yet both policies — in these admittedly distinct social and historical contexts — are indirect vehicles through which racial and gender subordination have been perpetuated by the state. As such, Justice Côté's "proxy" analysis contradicts her earlier pronouncement that discrimination based on a ground must happen, "by definition,"[210] only to those who occupy the ground. Some men care for children, and some white people failed educational requirements which perpetuated discrimination against Black people in the United States. Neither fact would insulate discrimination mediated through caregiving or education/aptitude from Canadian constitutional scrutiny.

The analysis above illustrates the virtue in Justice Abella's lack of simplicity: she — like Justices Brown and Rowe — starts from the *strategic abstraction* of "substantive equality." But by avoiding the *rigid tests* adopted by the dissenting judgments, she leaves courts with the flexibility needed to properly assess substantive inequality and, in turn, she avoids any need for *rationalized incoherence* to sustain the logic of her analysis. The ambiguity of equality itself is reflected in the ambiguity of the framework she designs — a necessary correspondence for bridging law, society, and equality.

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205 *Fraser*, *supra* note 3 at para 234.

206 I say "on her logic", in part, because trans men and non-binary people can *also* become pregnant, a fact overlooked by her framing. The lynchpin of Justice Côté's analysis is that "there is a meaningful distinction between pregnancy and sex, on the one hand, and caregiving status and sex, on the other" (*ibid* at para 242). This "meaningful distinction", however, is nothing more than an instance of where "[l]aws become described and enforced in the spirit of our prejudices" (*Alchemy*, *supra* note 25 at 67). Justice Côté reasons that pregnancy *only* affects women, whereas caregiving *may* affect men. But this limits gender hierarchy to a flawed and cisnormative misconception of "biology." Simply put, women's subordination is not solely biological, such that their inequality cannot be limited to biological traits which Justice Côté wrongly believes are unique to women. For instance, distinctions based on voice pitch or height would also be based on sex, whether or not they are *solely* sex-based (see e.g. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1). Further, "pregnancy" does not *only* affect "women" — itself, a contested category (see Judith Roof, *What Gender Is, What Gender Does* (Minneapolis: University of Minnesota Press, 2016) at 8-9). Pregnancy, for example, affects trans men as well (Syrus Marcus Ware, "Confessions of a Black Pregnant Dad" in Julia Chinyere Oparah & Alicia D Bonaparte, eds, *Birthing Justice: Black Women, Pregnancy and Childbirth* (London, UK: Routledge, 2015)).

207 *Ibid* at para 242.

208 *Griggs v Duke Power Co*, 401 US 424 (1971).

209 *Fraser*, *supra* note 3 at para 246.

210 *Ibid* at para 242.

C. Ideology: Obscuring Subjectivity, Society, and the State

1. Williams on Ideology

A final motif relevant to my analysis from *The Alchemy of Race and Rights* is the fiction of neutrality in legal reasoning — an ideological commitment to the performance of non-ideology. Insofar as it signifies the obscuring of subjectivity, state, and society and not merely even-handedness, neutrality functions as "a suppression, an institutionalization of psychic taboos."[211] In other words, "neutrality" functions as an intellectual posture whereby power is left unsaid. This, in particular, is how neutrality institutionalizes taboos: at the *societal level*, equality claims are viewed with skepticism (for example, as "playing the race card"[212]), and correspondingly, at the *adjudicative level*, equality reasoning is castigated as improper (for example, as "judicial activism" or "results-oriented reasoning").[213] Let us explore how gestures at neutrality can strategically obscure three settings of power, and thus, function ideologically.

First, the fiction of neutrality is sustained by *obscuring subjectivity*. By acknowledging law's contingency, Williams more candidly engages with the silent forces shaping the law, including the "temporal," the "historical," and the "socially constructed."[214] Such forces are overlooked by belief in "[t]he existence of objective, 'unmediated' voices."[215] But "much of what is spoken in so-called objective, unmediated voices is in fact mired in hidden subjectivities and unexamined claims."[216] The omission of these subjectivities is no accident. Rather, "it is an extremely common device by which not just subject positioning is obscured, but by which agency and responsibility are hopelessly befuddled."[217] As such, the law functions as a "shield behind which to avoid responsibility for the human repercussions of either governmental or publicly harmful private activity."[218] On this point, Williams powerfully invokes metaphor to unpack how "standards" (objective) are "nothing more than structured preferences" (subjective).[219] As she writes:

> Standards are like paths picked through fields of equanimity, worn into hard wide roads over time, used always because of collective habit, expectation, and convenience. The pleasures and perils of picking one's own path through the field are soon forgotten; the logic or illogic of the course of the road is soon rationalized by the mere fact of the road.[220]

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211 *Alchemy*, *supra* note 25 at 119.

212 Derrick Bell described this as "the special discounting of black views". See Derrick Bell, *Faces At the Bottom of the Well: the Permanence of Racism* (New York: Basic Books, 1992) at 111.

213 See e.g. Emmett Macfarlane, "What we're talking about when we talk about 'judicial activism'" (23 February 2015), online: *Maclean's* <https://www.macleans.ca/politics/what-were-talking-about-when-we-talk-about-judicial-activism/> (where Macfarlane notes cases critiqued as reflecting "judicial activism", all of which, I would argue, involve equity-seeking groups).

214 *Alchemy*, *supra* note 25 at 9.

215 *Ibid*.

216 *Ibid* at 11.

217 *Ibid*. For a recent critique of the strategic deployment of neutrality in the Canadian legal academy, see Joshua Sealy-Harrington, "Show Not Tell: Why I Am Declining to Participate in a Runnymede Society Debate" (31 August 2020), online: *Slaw* <http://www.slaw.ca/2020/08/31/show-not-tell-why-i-am-declining-to-participate-in-a-runnymede-society-debate/>.

218 *Alchemy*, *supra* note 25 at 140.

219 *Ibid* at 103.

220 *Ibid* at 99.

Second, the fiction of neutrality is sustained by *obscuring the state*. When courts back away from intervening in "the way things are" they routinely disregard how the state made things that way through various forms of intervention — active or passive, direct or indirect.[221] This "renders invisible the force of the state."[222] Only by ignoring the state's architectural role — this "fiction," this "half truth"[223] — can courts so often claim a severance between human suffering and government design.

Third, the fiction of neutrality is sustained by *obscuring society*. Specifically, the "blind application of principles," without reference to the context and history in which those principles are being applied, leaves "old habits of cultural bias" intact.[224] As Williams writes:

> Law and legal writing aspire to formalized, color-blind, liberal ideals. Neutrality is the standard for assuring these ideals; yet the adherence to it is often determined by reference to an aesthetic of uniformity, in which difference is simply omitted.[225]

The final clause above — "in which difference is simply omitted" — is especially crucial to the interrogation of equality. A constitutional analysis that elides social hierarchy renders marginalized groups "the objects of a constitutional omission that has been incorporated into a theory of neutrality."[226] Viewed in this way, "omission becomes a form of expression."[227] Again, Williams' analysis is apposite:

> [B]y describing zones of vulnerability, by setting up regions of conversational taboo and fences of rigidified politeness, the unintentional exile of individuals … may be quietly accomplished and avoided indefinitely.[228]

Critical scholars — for example, feminist,[229] queer,[230] race,[231] and disability[232] scholars — have been *loudly* resisting the "quiet" accomplishment of such inequality on these very terms. Indeed, such scholars have been targeting "zones of vulnerability" (for example, the home, the family, the market, and the state) for decades. No matter the site of subordination, addressing inequality is first of all a naming process — a process of "seeing" that is as textured as our society.[233] For this reason, equality analysis is invariably ideological: "a fundamentally contex-

221 See e.g. Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020) 94 SCLR (2d) 301 at 310.
222 *Alchemy*, *supra* note 25 at 34.
223 *Ibid*.
224 *Ibid* at 48.
225 *Ibid*.
226 *Ibid* at 121.
227 *Ibid*.
228 *Ibid* at 65.
229 See e.g. Jonnette Watson Hamilton & Jennifer Koshan, "Equality Rights and Pay Equity: Deja Vu in the Supreme Court of Canada" (2019) 15 JL & Equality 1.
230 See e.g. Brenda Cossman, "Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms" (2002) 40:3 Osgoode Hall LJ 223.
231 See e.g. Sherene H Razack, "Making Canada White: Law and the Policing of Bodies of Colour in the 1990s" (1999) 14:1 CJLS 159.
232 See e.g. Ravi Malhotra, "The Impact of the Convention on the Rights of Persons with Disabilities on Canadian Jurisprudence: The Case of Leobrera v. Canada" (2017) 54:3 Alta L Rev 637.
233 *Alchemy, supra* note 25 at 130.

tual question."[234] It follows that equality analysis is indivisible from the norms that mediate inequality. And, where dominant norms prevail, "[l]aws become described and enforced in the spirit of our prejudices"[235] — which is antithetical to our constitutional commitment to resisting prejudice and furthering substantive equality.

2. Ideology in Fraser

Analyzing ideology in *Fraser* reveals "the 'unconscious' of the text"[236] — that is, the unstated ideological divergence concealed in the justices' methodological rhetoric, as they "ride their strong, sure-footed steeds around and around the perimeter"[237] of section 15. Again, this ideological divergence is subtle; it manifests, not through overt political commitments, but rather the covert obfuscation of subjectivity, state, and society, each of which is discussed below.

First, *subjectivity*. Justice Abella concludes her overview with the claim that the Plan is a "clear" violation of women's equality[238] and later observes that there is "no doubt" that the Plan perpetuates women's disadvantage.[239] To clarify, I agree with the majority's holding in *Fraser*. But, in my view, that agreement is informed by my ideological agreement with Justice Abella on the ways in which caregiving[240] and pension plans[241] operate as sites of women's subordination, and that the Plan at issue in *Fraser* unconstitutionally perpetuated that subordination (that is, we agree in this instance on what should be named as "unequal" and "unconstitutional"). In this way, I also agree with Justices Brown and Rowe's reasons when they observe that their "disagreement is about the *meaning and requirements of* substantive equality."[242] Justice Abella and I view caregiving and pension plans as a site of women's subordination in society, whereas Justices Brown and Rowe view remediation of such subordination as a "new financial obligation" that "the public is now burdened with."[243] More explicit engagement with this ideological divide in Justice Abella's reasons would help to create a more transparent political climate at the Court.

That said, Justice Abella does outline the ingredients necessary for identifying how silent subjectivities shape the law. For example, she notes how "discrimination" can result from "continuing to do things 'the way they have always been done.'"[244] As such, she is sensitive to Williams' metaphor of the well-trodden path: where "the logic or illogic of the course of the road is soon rationalized by the mere fact of the road."[245] In contrast, Justices Brown and Rowe (who insist on an onerous threshold of causation) and Justice Côté (who refuses to even concede

234 StereoDecisis, *supra* note 97 at 00h:48m:30s.
235 *Alchemy*, *supra* note 25 at 67. Likewise, see *Minow, supra* note 7 at 1: "In law, problems of distinction, or 'line-drawing,' unfortunately converge with the legacies of prejudice and status conflict in our society."
236 Eclipse of Reason, *supra* note 137 at 1813.
237 *Alchemy*, *supra* note 25 at Prologue.
238 *Fraser*, *supra* note 3 at para 5.
239 *Ibid* at para 108.
240 *Ibid* at paras 97-106.
241 *Ibid* at para 108.
242 *Ibid* at para 218 [emphasis in original].
243 *Ibid* at para 228.
244 *Ibid* at para 31 citing Faraday, *supra* note 220 at 310.
245 *Alchemy*, *supra* note 25 at 99.

that social norms about caregiving implicate sex discrimination) derive their legal positions from their own ideological commitments, or rather, their ideological abdications — in Williams's words, their "subjective willingness not to look past a certain point."[246]

Second, one may detect ideological divergence in the justices' framings of *the state*. Justice Abella notes how "governments must be 'particularly vigilant about the effects of their own policies' on members of disadvantaged groups."[247] While the public nexus is apparent here (in a case concerning a state pension plan), this doctrinal point is critical. The state was historically — and is currently — entangled in social hierarchies. Courts, therefore, must be attuned to how existing inequality that seems *private* in nature is, in reality, a product of *public* acts and omissions for which the state should be held responsibile. Indeed, Williams reminds us that "the rhetoric of increased privatization" can function as "the rationalizing agent of public unaccountability and, ultimately, irresponsibility."[248]

For example, where a state refuses to fund equitable childcare or abortion access, is persisting gendered inequality in relation to such services — an absolutely foreseeable consequence — *really* just a private matter? In this sense, Justices Brown and Rowe's concern about the state being held "responsible for discrimination it has not caused"[249] is a smokescreen: social hierarchies are rarely, if ever, severable from the state. In this regard, Justices Brown and Rowe concede that "where the government itself has created the inequality, matters are … somewhat different"[250] in terms of the state's constitutional obligations. And they admit that "the availability of quality childcare" is a cause of women's inequality here.[251] But they still find the Plan constitutional.[252] Simply put, state "causation" cannot be limited to its overt, active, and inequality-exacerbating interventions if a meaningful conception of equality is to be realized. Indeed, ubiquitous inequality — linked to "social attitudes and institutions"[253] — can be traced to historical and contemporary government policy, making "causation" defences deceptive and misleading.

True, governments must have some "latitude" to set priorities.[254] But how that latitude is exercised must be subject to constitutional scrutiny. Justices Brown and Rowe raise the spectre of a "chilling effect"[255] resulting from substantive constitutional review. Yet such review is inextricable from Canada's constitutional architecture.[256] It follows that "restricting the government's ability to incrementally address disadvantage" is not a "peculiar way to promote equality" (as Justices Brown and Rowe reason), but rather, a necessary corollary of the state's extant obligations to its most vulnerable citizens.[257]

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246 *Ibid*.
247 *Fraser*, *supra* note 3 at para 31 citing Faraday, *supra* note 220 at 310.
248 *Alchemy*, *supra* note 25 at 47.
249 *Fraser*, *supra* note 3 at para 181.
250 *Ibid* at para 207.
251 *Ibid* at para 215.
252 *Ibid* at para 147.
253 *Ibid* at para 224.
254 *Ibid* at para 207.
255 *Ibid* at para 208.
256 *Charter*, *supra* note 1, ss 1, 15, 32; *Fraser*, *supra* note 3 at para 132, n 8.
257 In any event, I would hope that public figures are motivated, not only by the threat of being held accountable to the constitution (thereby choosing the supposedly "safer route" of legislative "inaction" (*Fraser*, *ibid* at

This leads me to a third point of ideological divergence: on the justices' conceptualizations of *society*. Justice Abella understands that critical examination of "systems" and "structures" is prerequisite to any meaningful conception of equality. And, more concretely, she notes that "accounting for" the "unique constellation of physical, economic and social barriers" that confront particular groups[258] — their particular "need or vulnerability"[259] as well as their "systemic or historical disadvantages"[260] — is required for a meaningful understanding of discrimination. Indeed, Justice Abella recognizes how addressing adverse effects discrimination can be among "the most powerful legal measures available to disadvantaged groups in society to assert their claim to justice."[261] These doctrinal commitments foreground her application of equality law in this case. She observes that "[n]early all of the participants in the job-sharing program are women and most of them reduced their hours of work because of child care."[262] Further, she describes the applicants' expert evidence concerning "the disadvantages women with children face in the labour force."[263] In other words, she observes how the Plan not only disadvantages women, but does so in well-established sites of women's subordination (the workforce and, relatedly, the home and the family).

The dissenters, in stark contrast, obscure gender hierarchy. And, critically, their disregard of society and existing social hierarchy is not "[n]eutrality," but rather the "suppression" of relevant social context and the attempted "institutionalization" of their own ideology.[264] In this regard, many critical passages in Justices Brown and Rowe's opinion strategically obscure gender hierarchy, beginning with their opening line: "At one level, this appeal presents the simple question: is tying pension benefits to hours worked discriminatory?"[265] Likewise, they describe this case as merely raising different "options that may be valuable to members at different points in their lives and careers"[266] and as implicating a government that simply "tried to be accommodating in their employment options."[267] These are paradigmatic expositions of Williams' "aesthetic of uniformity, in which difference is simply omitted."[268] Also on this "level" — that is, the level of needless abstraction — *Brown v Board of Education*[269] (the US Supreme Court's judgment on racial segregation in public schools) simply concerned whether equal facilities could somehow be unequal[270] and *Bowers v Hardwick*[271] (on the criminalization of "homosexual sodomy") sim-

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para 228, per Brown and Rowe JJ.)), but also, by the genuine public good promoted by responding to the needs of marginalized people.

258 *Ibid* at para 34.

259 *Ibid* at para 75 citing *Quebec (Attorney General) v A*, 2013 SCC 5 at para 354.

260 *Fraser*, *supra* note 3 at para 76.

261 *Ibid* at para 35 citing Hugh Collins & Tarunabh Khaitan, "Indirect Discrimination Law: Controversies and Critical Questions" in Hugh Collins and Tarunabh Khaitan, eds, *Foundations of Indirect Discrimination Law* (London, UK: Hart Publishing, 2018) 1 at 30.

262 *Fraser*, *supra* note 3 at para 3.

263 *Ibid* at para 21.

264 *Alchemy*, *supra* note 25 at 119.

265 *Fraser*, *supra* note 3 at para 140.

266 *Ibid* at para 203.

267 *Ibid* at para 228.

268 *Alchemy*, *supra* note 25 at 48.

269 347 US 483 (1954) [*Brown*].

270 Rather, *Brown* concerned whether "a massive intentional disadvantaging of the Negro race … by state law" violates the equal protection clause, which forbids such disadvantaging. See Charles L Black Jr, "The Lawfulness of the Segregation Decisions" (1960) 69:3 Yale LJ 421 at 421.

271 478 US 186 (1986) [*Hardwick*].

ply concerned whether the state may regulate immoral conduct.[272] *Everything is equal when the context of inequality is erased.* Who could reasonably object to the proposition that "employers must be able to compensate employees based on hours worked"?[273] This is a rhetorical sleight of hand, again, anticipated by Williams:

> There is something seductive about this stone cool algebra of rich life stories. There is something soothing about its static neutrality, its emotionless purity. It is a choice luxuriantly free of consequence.[274]

Justice Côté obscures gender hierarchy even more. Justices Brown and Rowe at least acknowledge that, given women's disproportionate representation in job sharing, the adverse treatment at issue constitutes a distinction based on sex.[275] In contrast, Justice Côté — as detailed above — claims that this distinction is merely based on "caregiving,"[276] thereby immunizing virtually all social discrimination from her purview of constitutional inequality — hence why she views the case as "relatively straightforward."[277] In this way, she erases caregiving as a notable "zone of vulnerability"[278] for women's oppression by overlooking the "systems"[279] — here, patriarchy — that contribute to women's subordination. To be fair, her concerns about "statistics-based litigation"[280] are understandable. But knowledge of society is indispensable to the meaningful adjudication of substantive inequality.[281] Accordingly, her objection to such litigation is not a commitment *to* neutrality, but rather, *against* it — an entrenchment of status quo hierarchies,[282] contradicting her claimed opposition to constitutionalizing "normative judgments."[283]

IV. Conclusion

The Alchemy of Race and Rights is a superb foil for the dynamics of methodology and ideology that run throughout the three opinions in *Fraser*. Indeed, Justices Brown and Rowe critique Justice Abella's reasons in a manner specifically anticipated by Williams. They raise the "fundamental concern" of Justice Abella's failure in defining substantive equality "except by refer-

272 Rather, *Hardwick* concerned, doctrinally, "the constitutionality of a statutorily codified homophobia", and rhetorically, "the discursive construction and ideological consolidation of a certain 'heterosexual' identity." See Eclipse of Reason *supra* note 138 at 1813, 1828.

273 *Fraser*, *supra* note 3 at para 200. Of course, this characterization of the issue is misleading because compensation *is not* linked to hours worked: Under the RCMP pension plan, those on leave without pay can buy back pension credits whereas those who job share — overwhelmingly, women with children — cannot. *Ibid* at para 3.

274 *Alchemy*, *supra* note 25 at 98.

275 *Fraser*, *supra* note 3 at paras 185, 188.

276 *Ibid* at para 234.

277 *Ibid* at para 239.

278 *Alchemy*, *supra* note 25 at 65.

279 *Fraser*, *supra* note 3 at para 31.

280 *Ibid* at para 245.

281 *Ibid* at paras 56-67.

282 As Charles Black explained, in his defence of the lawfulness of *Brown v Board of Education*: "it would be *the most unneutral of principles*, improvised *ad hoc,* to require that a court faced with [racially segregated public schools] refuse to note a plain fact about the society of the United States — the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority — or the other equally plain fact that such treatment is hurtful to human beings." See Black Jr, *supra* note 270 at 427 [emphasis added].

283 *Fraser*, *supra* note 3 at para 252.

ence to what it is *not*."[284] But as Williams writes, such analysis simply reflects critical theory, which infuses Justice Abella's contextual framework. To quote Williams, critical theory:

> … is often attributed to a "nihilistic" interpretive stance ("I don't know what it is, but I do know what it isn't"). A better way of describing this last category may be as interpretive discourse that explores the limits of meaning, gives meaning by knowing its bounds. (I think, by the way, that an accurate understanding of critical theory requires recognition of the way in which the concept of indeterminacy questions the authority of definitional cages; it is not "nihilism" but a challenge to contextualize, because it empowers community standards and the democratization of interpretation.)[285]

Fraser is a doctrinal victory for progressives, though I share the cautious optimism of my fellow contributors to this special issue. who also joined me on the initial panel inspiring it. *Fraser*'s analysis — particularly the clear incorporation of systemic discrimination within the ambit of section 15[286] — is worthy of celebration. But this victory must now be translated into further victories against broader systems of inequality. To apply section 15 analysis to these systems is not "utopian," but rather, integral to its "ambitious" project.[287] A project, of course, that could not — and should not — rest solely with courts. But a project in which courts can nonetheless play an influential role.

How can we ensure that, post-*Fraser*, courts bring a systemic lens to their analysis of equality? Acknowledgment of equality's alchemy — as a fluid process for transmutation from unjust to just — is crucial to this task. The three opinions in *Fraser* — viewed through Williams' critical lens — highlight how equality is fundamentally contextual, how ideology is an unavoidable dimension of equality analysis, and how methodology can be invoked to obscure ideology. In light of these dynamics, particularly but not uniquely present in equality law, the formal/substantive equality dichotomy should be supplemented. On this front, we need an equality vocabulary that maintains the flexibility secured by Justice Abella's majority opinion in *Fraser*, but which directs section 15 more critically towards targeting pervasive systemic inequalities throughout society. The formal/substantive heuristic partially explains why Justice Abella promotes substantive equality, while the dissents do not. But a liberal/critical heuristic can explain why the Court has, to date, abjectly failed to respond to the vast majority of structural inequalities throughout Canadian society, grappling with issues like "positive obligations" and "redistribution of resources and benefits"[288] — substantive equality issues which are, in my view, on the immediate horizon.

The alchemy of substantive equality requires courage and vision, and it will only manifest if we come to grips with the "word-combination locks" that the law represents, and the "gates" that the law reveals.[289] Homelessness?[290] Abortion access?[291] Withdrawal of financial

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284 *Fraser*, *supra* note 3 at para 146 [emphasis in original].
285 *Alchemy*, *supra* note 25 at 109.
286 Adverse Impact, *supra* note 9.
287 *Fraser*, *supra* note 3 at para 136.
288 Adverse Impact, *supra* note 9 at 195.
289 *Alchemy*, *supra* note 25 at Prologue.
290 Joshua Sealy-Harrington, "Can the Homeless Find Shelter in the Courts?" (2 April 2015), online: *ABlawg* <https://ablawg.ca/2015/04/02/can-the-homeless-find-shelter-in-the-courts/>.
291 Jacques Poitras, "New Brunswick being sued over abortion access" (7 January 2021), online: *CBC News* <https://www.cbc.ca/news/canada/new-brunswick/abortion-new-brunswick-lawsuit-civil-liberties-association-medicare-1.5864555>.

assistance?[292] Drinking water-advisories on First Nations reserves?[293] There is no neutral position about how section 15 informs state (in)action on these issues — only differing "vision[s] of the good society",[294] and the courage it will take to get there. Courage which, I would argue, requires disrupting the needs/rights dichotomy that Williams critiqued three decades ago,[295] and which continues to maintain pervasive substantive inequality across Canada to this day.

292 See e.g. Andrea Huncar, "Pro bono constitutional challenge reveals gaps in access to justice, say legal experts" (21 May 2020), online: *CBC News* <https://www.cbc.ca/news/canada/edmonton/pro-bono-constitutional-challenge-alberta-government-support-program-1.5578387>.

293 Kristin Annable, "'Change to seek justice' after First Nations' water advisories lawsuit certified as class action" (17 July 2020), online: *CBC News* <https://www.cbc.ca/news/canada/manitoba/lawsuit-class-action-first-nations-water-1.5652581>.

294 *Andrews, supra* note 2 at 164 citing John H. Schaar, "Equality of Opportunity and Beyond", in *Nomos IX: Equality*, eds. J. Roland Pennock and John W. Chapman (1967) at 228.

295 *Alchemy*, *supra* note 25 at 8.