

## THE BUT-FOR THEORY OF ANTI-DISCRIMINATION LAW

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*Discrimination law has long been in theoretical crisis. Its central theory—disparate treatment law—has no agreed-upon core principles. Because prevailing theories of discrimination once treated “disparate treatment” and “discriminatory intent” as coextensive—something we now know not to be true—it is unclear whether all “disparate treatment” is truly proscribed. In the absence of a clear commitment to proscribing all disparate treatment, judicial law-making has run amok. The result has been the development of a network of technical rules that have all but eclipsed the factual question of whether discrimination took place, and that have been devastating to discrimination plaintiffs’ success.*

*This Article contends that the time has come to resolve the theoretical crisis in anti-discrimination law. In a series of recent cases, the Supreme Court has situated the question of whether an individual or group would have fared differently “but for” their protected class status as the central defining question of anti-discrimination law. Moreover, the Court has suggested that this inquiry flows from anti-discrimination law’s plain text. As such, there are compelling arguments to be made that a true disparate treatment principle—the but-for principle—is the textually mandated inquiry in anti-discrimination law, and that judicial deviations from this standard are illegitimate.*

*This idea—that our anti-discrimination laws must reach all contexts where the outcome would be different “but for” the sex, race, or other protected class status of those affected—is simultaneously conservative in its aspirations and potentially radical in its legal effects. Such an*

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*approach comports with our often-stated commitment that all individuals in our society be given equal opportunities, and not be judged on the basis of their race, sex, or other protected class status. But anti-discrimination law has strayed far from these anti-disparate treatment principles—and thus taking such a commitment seriously would have truly significant effects. This Article thus suggests that reorienting our inquiry around the factual question of whether the outcome would be different “but for” protected class status is important to ensuring that anti-discrimination law can achieve its basic promises.*

INTRODUCTION.....	1623
I. THE THEORETICAL CRISIS IN ANTI-DISCRIMINATION LAW .....	1629
II. RESOLVING THE THEORETICAL CRISIS: THE BUT-FOR	
PRINCIPLE .....	1641
<i>A. The Origins of the But-For Principle</i> .....	1641
<i>B. The Potential of the But-For Principle</i> .....	1644
<i>C. Extending the But-For Principle to Constitutional</i> <i>Law</i> .....	1650
III. THE RADICAL POTENTIAL OF ASKING THE FACTUAL	
QUESTION OF “BUT FOR” .....	1653
<i>A. The But-For Principle in the Individual Case</i> .....	1653
<i>B. Revolutionizing Anti-Discrimination Law Through</i> <i>“But For”</i> .....	1660
IV. THE BUT-FOR PRINCIPLE AS A HOME FOR OTHER	
EQUALITY-PROMOTING DOCTRINES AND PRINCIPLES .....	1664
<i>A. Stereotyping Jurisprudence</i> .....	1665
<i>B. Negligent Discrimination</i> .....	1670
<i>C. Disparate Impact</i> .....	1673
<i>D. The “Motivating Factor” Paradigm</i> .....	1677
V. HEADWINDS TO RESOLVING THE THEORETICAL CRISIS IN	
ANTI-DISCRIMINATION LAW .....	1681
<i>A. Progressive Headwinds</i> .....	1681
1. <i>Opposition to Textualism</i> .....	1682
2. <i>Opposition to Anti-Classificationist Approaches</i> <i>to Anti-Discrimination Law</i> .....	1685
3. <i>Opposition to the But-For Principle</i> .....	1688
<i>B. Legal Headwinds</i> .....	1691
1. <i>Case Law</i> .....	1691

2021]	<i>The But-For Theory of Anti-Discrimination Law</i>	1623
	<i>a. Precedential Obstacles to Centering</i>	
	“ <i>But For</i> ” .....	1692
	<i>b. Precedential Obstacles to Applying</i>	
	“ <i>But For</i> ” .....	1694
	2. <i>Statutory Language</i> .....	1695
	C. <i>Judicial Headwinds</i> .....	1700
	1. <i>Not Enough Summary Judgment</i> .....	1701
	2. <i>Rule Creep</i> .....	1704
	3. <i>Judicial Disfavor for Anti-Discrimination Law</i>	
	<i>Claims</i> .....	1707
	CONCLUSION.....	1709

## INTRODUCTION

Discrimination law has long been in theoretical crisis. Because its core theory—disparate treatment—was recognized at a time when “disparate treatment” and “intentional discrimination” were believed to be one and the same, anti-discrimination law’s foundational cases conflate the two.<sup>1</sup> This has created a fundamental question as to disparate treatment law’s central theoretical principles. Does disparate treatment law in fact prohibit all “disparate treatment,” (i.e., all decisions in which the outcome would have been different “but for” race, sex, or other protected class status)? Or does it prohibit only the narrower category of “intentional discrimination” (i.e., decisions in which protected class status played a conscious role)?

These questions about anti-discrimination law’s core principles remain unanswered even today, with important adverse consequences for anti-discrimination law. In the absence of a clear commitment to barring “disparate treatment,” judicial law-making has run amok. Few judges even ask the question of whether a policy decision—or an employment action—would have turned out differently had the individual or group affected been white, male, or of a majority religion.<sup>2</sup> Instead, across both

<sup>1</sup> See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 & n.15, 382 (1977); see also *infra* notes 39–60 and accompanying text (discussing this issue in depth).

<sup>2</sup> See, e.g., Katie Eyer, *The Return of the Technical McDonnell Douglas Paradigm*, 94 *Wash. L. Rev.* 967, 1017 (2019). In the interest of brevity, I do not always list every protected group when giving examples of the “but for” principle. This is not intended to suggest the exclusion of other groups from the but-for principle, and, indeed, the application of the but-for principle would be the same across all of the various contexts in which groups have protections under statutory or constitutional anti-discrimination law.

constitutional and statutory law, convoluted doctrines result in the dismissal of the majority of anti-discrimination claims, whether or not “disparate treatment” (in the literal sense) has in fact occurred.<sup>3</sup>

This Article suggests that the time has come to address this theoretical crisis, and recenter anti-discrimination doctrine around what ought to be its core principles. As the very name of the doctrine suggests, “disparate treatment” law is supposed to be centrally concerned with differential treatment. This simple principle—that all groups and individuals have a right to receive the same treatment at the hands of government, employers, and others, regardless of race, sex, or other protected class status—is central to what anti-discrimination law is supposed to do. If our “anti-discrimination” principles regularly absolve defendants of liability where groups or individuals in fact would have been treated better if they were white, or men, or non-disabled, then anti-discrimination law is not worthy of its name.

While addressing anti-discrimination law’s theoretical crisis has long been urgent, it has recently become far more plausible. Across a series of recent cases, the Supreme Court has articulated the view that anti-discrimination’s law’s central defining principle is what I refer to in this Article as the “but-for principle.”<sup>4</sup> Thus, the Court has embraced the view that where the outcome would be different “but for” the protected class status of those affected, anti-discrimination law is violated.<sup>5</sup> This is of course simply another way of saying that disparate treatment (in its literal, not technical, sense) is proscribed. As such, the Court’s recent cases offer renewed opportunities to suggest that anti-discrimination law must be centered on a true “disparate treatment” theory, which would mandate liability wherever differential treatment occurs (i.e., wherever the outcome would be different “but for” protected class status).

Importantly, the Court has situated its reasoning in these cases as founded on the “plain meaning” of anti-discrimination law’s statutory

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<sup>3</sup> See *infra* notes 61–71 and accompanying text; Sandra F. Sperino & Suja A. Thomas, *Unequal: How America’s Courts Undermine Discrimination Law* 13–14, 40–44, 158 (2017).

<sup>4</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009) (Age Discrimination in Employment Act claim); see, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013) (Title VII retaliation claim); *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1018–19 (2020) (42 U.S.C. § 1981 claim); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020) (Title VII sex discrimination claim); see also *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (same); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (Title VII race discrimination claim).

<sup>5</sup> See sources cited *supra* note 4.

text.<sup>6</sup> As such, they offer an unusual opportunity to argue that a true disparate treatment principle not only resides at the core of anti-discrimination law but also in *its plain textual meaning*. In a Supreme Court where textualism is the ascendant method of statutory interpretation, this makes it uniquely plausible to claim that a commitment to proscribing all actual differential treatment is not only the preferred theory of disparate treatment law but (at least for statutory anti-discrimination law) the textually mandated one. And because disparate treatment doctrine has typically been construed comparably across the constitutional and statutory domains,<sup>7</sup> such a move could have profound impacts in the constitutional domain as well. As such, the current moment offers unique opportunities for resolving the theoretical crisis at the heart of anti-discrimination law and for addressing the many doctrinal pathologies that have arisen out of it.

Ironically, if there is one major obstacle to harnessing this recent turn in the Supreme Court's case law toward a true disparate treatment paradigm, it may be those who are, in theory, most committed to building a meaningful body of anti-discrimination law. Many anti-discrimination scholars and advocates have critiqued the but-for principle—and indeed at times disparate treatment law in general—perceiving it as a weak substitute for preferred theories of anti-discrimination law, such as disparate impact and motivating factor liability.<sup>8</sup> This longstanding opposition to the but-for principle may make anti-discrimination scholars and advocates reluctant to draw on these cases and accompanying theoretical principles, regardless of their potential.

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<sup>6</sup> *Bostock*, 140 S. Ct. at 1743, 1750.

<sup>7</sup> See, e.g., Richard Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1354–55 (2010). Importantly, no textual barriers would exist to such an interpretation of the Equal Protection Clause, which is fully consistent textually with the but-for principle. See U.S. Const. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). The one major difference between disparate treatment principles in the constitutional context and in most statutory contexts has traditionally been that the Constitution permits the government to show they had a sufficient “interest” to justify the discrimination. This Article addresses only the initial threshold inquiry into whether there was discrimination—and if so, of what kind—and does not address the ability of the government to justify the discrimination based on the government's interests.

<sup>8</sup> Indeed, in 2013, this Author joined a brief arguing against the but-for principle and in favor of a motivating factor standard. See Brief of Employment Law Professors as Amici Curiae in Support of Respondent at 5, app. 3, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (No. 12-484).

But this Article suggests that the increased risks of embracing the but-for principle are slight—and that the opportunity costs of not doing so are considerable. The opportunity to recenter disparate treatment law around what should be its core theoretical commitment is not one we ought to take lightly. Without such a core theoretical commitment, we can expect to continue to see an anti-discrimination law without any central rudder, overrun by judge-made doctrines, and highly susceptible to individual judicial biases.<sup>9</sup> Punitive or harmful government policies that would not have been adopted “but for” the (minority) race of those affected will continue to proliferate and go unremedied.<sup>10</sup> Employment decisions that treat women, minorities and members of the LGBTQ community more harshly than those who are men, white, cisgender and straight will continue to be evaluated—and often dismissed—under a network of doctrines that bear little relationship to whether differential treatment occurred.<sup>11</sup>

In contrast, an embrace of the but-for principle—and centering it as anti-discrimination law’s core commitment—offers myriad concrete opportunities to argue for a more sensible and elegant approach to anti-discrimination law. Under the but-for principle, our foundational inquiry ought to be a simple and factual one: would the outcome have been different “but for” the race, sex, or other protected class status of those adversely affected? While in many cases answering this factual question may be difficult—just as it is in, for example, tort claims—the procedure for doing so is straightforward. The fact finder (jury or judge) ought to consider all of the relevant evidence and consider whether it appears, by a preponderance of the evidence, that a different outcome would have resulted had the protected class status of those affected been different. For example, would the Voter ID law have been passed, if those it had been likely to disenfranchise were overwhelmingly white? Or would a man

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<sup>9</sup> See generally Sperino & Thomas, *supra* note 3, at 58–83 (describing in detail the judge-made doctrines that the courts use to routinely dismiss discrimination claims); Katie Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 *Minn. L. Rev.* 1275, 1276 (2012) (noting that dismissals on summary judgment and motions to dismiss are “extremely common in discrimination litigation, accounting for a full 86% of litigated outcomes”).

<sup>10</sup> See, e.g., Petula Dvorak, *We Scorned Addicts When They Were Black. It Is Different Now That They Are White*, *Wash. Post* (Apr. 12, 2018), [https://www.washingtonpost.com/local/we-hated-addicts-when-they-were-black-it-is-different-now-that-they-are-white/2018/04/12/cd845f20-3e5b-11e8-974f-aacd97698cef\\_story.html](https://www.washingtonpost.com/local/we-hated-addicts-when-they-were-black-it-is-different-now-that-they-are-white/2018/04/12/cd845f20-3e5b-11e8-974f-aacd97698cef_story.html) [<https://perma.cc/E49E-ZSGX>].

<sup>11</sup> See Sperino & Thomas, *supra* note 3, at 1–4.

have been assumed to be uncommitted to work—and thus denied a promotion—simply because he had small kids?

Centering this approach has the potential to address many of the pathologies that currently plague both statutory and constitutional anti-discrimination law. The search for a particular individual bad actor (or actors) becomes far less relevant if the but-for principle is the central defining principle of disparate treatment doctrine since the question can be asked without defining the precise role of particular individuals in producing the discriminatory action.<sup>12</sup> So too, the search for a strong form of self-aware conscious intent should not be dispositive if our central focus is on whether the outcome would have been different “but for” the protected class of those affected. Self-aware intent certainly may be helpful in proving “but for” causation, but it is only one of many ways that but-for causation can be shown.<sup>13</sup> Finally, widespread recognition of the but-for principle as the central defining feature of disparate treatment doctrine would provide an opportunity to address the myriad technical doctrines that currently result in the dismissal of numerous statutory anti-discrimination claims, without ever asking the core question of whether discrimination took place.<sup>14</sup>

In addition to providing the opportunity to address many of anti-discrimination law’s pathologies, the but-for principle could also provide a stronger foundation for many of anti-discrimination law’s equality-promoting doctrines and scholarly ideas. As the case of *Bostock v. Clayton County* demonstrates, the stereotyping principle—long critiqued by some for its lack of statutory foundation<sup>15</sup>—can be situated comfortably within the but-for principle, offering it renewed vigor and

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<sup>12</sup> Cf. *McCleskey v. Kemp*, 481 U.S. 279, 293–95 (1987) (rejecting Equal Protection claim in part on the grounds that statistical study could not identify the actors who engaged in discrimination).

<sup>13</sup> Cf. Linda Hamilton Krieger & Susan T. Fiske, Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment, 94 *Calif. L. Rev.* 997, 1029–38 (2006) (describing aspects of disparate treatment doctrine that assume the existence of a self-aware discriminatory actor).

<sup>14</sup> See generally Sperino & Thomas, *supra* note 3 *passim* (detailing such doctrines and their impact on anti-discrimination litigants); Eyer, *supra* note 9, at 1276 (noting that dismissals of plaintiffs’ claims at motions to dismiss and summary judgment account for 86% of litigated outcomes in discrimination cases); Eyer, *supra* note 2, 969–72 (describing the ways in which technical rules attached to the *McDonnell Douglas* paradigm are used to dismiss anti-discrimination claims).

<sup>15</sup> See, e.g., *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1066–67 (7th Cir. 2003) (Posner, J., concurring).

promise.<sup>16</sup> Similarly, the theory of “negligent discrimination”—long argued for by some anti-discrimination scholars<sup>17</sup>—becomes largely unnecessary under a but-for discrimination regime.<sup>18</sup> A true but-for standard would also effectuate many—though certainly not all—goals of other equality-promoting doctrines, such as motivating factor and disparate impact.<sup>19</sup>

As such, there are many potential benefits to embracing the but-for principle as the theoretical core of disparate treatment doctrine and relatively few genuine drawbacks. Indeed, many of the sources of opposition have rested on misconceptions about what “but for” demands or permits (including, for example, misconceptions that a but-for standard effectively requires a showing that protected class status was the sole cause of the defendant’s actions).<sup>20</sup> Other sources of opposition have rested on fears that the but-for principle (or other anti-classificationist approaches) would endanger minority-protective doctrines such as affirmative action.<sup>21</sup> But as this Article demonstrates, much of what anti-discrimination scholars and advocates hope to accomplish through alternatives to the but-for principle can be achieved through the embrace of the principle—and much of what they hope to avoid has already come to pass.<sup>22</sup>

The time has come to resolve the theoretical crisis in anti-discrimination law. This Article takes up that work. The Parts that follow describe the theoretical crisis at the heart of anti-discrimination law, develop arguments for how it may be resolved, and suggest what the benefits of such a resolution might be. But before proceeding to this substantive discussion, it is important to note the role of terminology in both generating—and ultimately solving—anti-discrimination law’s theoretical crisis. For too long we have conflated two concepts—“disparate treatment” and “intentional discrimination”—and we ought not to do so going forward. Thus, in this Article, when I use the term “disparate treatment,” I mean a true disparate treatment standard—that the outcome would have been different “but for” the protected class of

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<sup>16</sup> See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741, 1748–49 (2020).

<sup>17</sup> See *infra* notes 226–29 and accompanying text.

<sup>18</sup> See *infra* Section IV.B.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See *infra* Part V.

<sup>21</sup> See *infra* Subsection V.A.2.

<sup>22</sup> *Id.*



those affected. When I refer to “intentional discrimination,” I mean to describe the narrower class of disparate treatment that is perpetrated with discriminatory intent.<sup>23</sup> Both of these standards are distinct from a “disparate impact” standard, which asks whether the burdens of a policy or practice fall more heavily on a particular group, but in a context where disparate treatment need not be present.<sup>24</sup>

The remainder of this Article proceeds as follows. Part I makes the case that anti-discrimination law is in conceptual crisis, describes the origins of this crisis, and details the ways that this theoretical crisis has led to serious pathologies in contemporary anti-discrimination law. Part II turns to the set of recent cases in which the Supreme Court has described the but-for principle—a true disparate treatment principle—as the central defining feature of anti-discrimination law and describes the potential of such cases for resolving anti-discrimination law’s theoretical crisis. Part III illustrates what a factual, but-for-centered inquiry might look like in an individual case and describes the radical systematic potential of arguing that this simple factual inquiry must control. Part IV describes how many of the objectives of the equality-promoting doctrines that anti-discrimination scholars and advocates have favored can be effectuated by turning to a true disparate treatment inquiry, via the but-for principle. Finally, Part V addresses likely headwinds to a project of recentering anti-discrimination law around the but-for principle, including potential progressive objections to such a project, potential legal obstacles, and judicial attitudes that may pose a barrier to reform.

## I. THE THEORETICAL CRISIS IN ANTI-DISCRIMINATION LAW

Both practically and normatively, disparate treatment law has long been central to American anti-discrimination law. Practically, the overwhelming majority of anti-discrimination claims are brought via the disparate treatment paradigm.<sup>25</sup> Normatively, disparate treatment (i.e.,

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<sup>23</sup> Though there may be some theoretical possibility of distinguishing between “intent,” “purpose,” and “motive,” (and any number of scholars have attempted to do so) I follow the convention of the Supreme Court herein, which is to use those terms interchangeably. See Katie Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 *Harv. C.R.-C.L. L. Rev.* 1, 56 n.318 (2016).

<sup>24</sup> 42 U.S.C. § 2000e-2(k).

<sup>25</sup> Disparate treatment is the only paradigm available in the constitutional context. See *Washington v. Davis*, 426 U.S. 229, 239–48 (1976). It is also the paradigm relied on in the overwhelming majority of statutory cases. See Ellen Berrey, Robert L. Nelson & Laura Beth

differential treatment based on race, sex, national origin, etc.) rests at the core of what most everyday people conceive of as invidious discrimination.<sup>26</sup> And yet what should be a basic first-order question—what is the central defining principle of disparate treatment law—remains unsettled. This has left anti-discrimination law’s core theory rudderless, with predictably problematic results for the development of anti-discrimination law doctrine.

This problematic failure to define anti-discrimination law’s core theory has arisen from a confluence of factors attributable at least in part to the time and place in which modern disparate treatment doctrine originated. Though both constitutional and statutory anti-discrimination proscriptions predated *Brown v. Board of Education*, modern anti-discrimination law, and with it, modern disparate treatment doctrine, can trace its origins to the 1960s and 1970s.<sup>27</sup> As the Supreme Court grappled with the sequelae of *Brown* and of the Civil Rights Act of 1964, it developed the set of doctrines, including the modern day categories of “disparate treatment” (i.e., differential treatment based on protected class status) and “disparate impact” (i.e., differential impact on a protected class not resulting from disparate treatment), which continue to largely define anti-discrimination law today.<sup>28</sup> But neither the Court nor legal advocates and observers were equipped at the time with a full understanding of how discrimination operates in the disparate treatment context.

Rather, as scholars such as Linda Hamilton Krieger have shown, prevailing theories of discrimination in the 1960s and 1970s understood

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Nielsen, *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality* 57 (2017).

<sup>26</sup> See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (describing disparate treatment as the most “easily understood type of discrimination”).

<sup>27</sup> See, e.g., Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 *Berkeley J. Emp. & Lab. L.* 395, 401–03 (2011) (describing the Supreme Court’s development of systemic disparate treatment law in the cases of *Teamsters* and *Hazelwood* in the 1970s); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 *Mich. L. Rev.* 213, 251–57 (1991) (describing the development of an anti-racial classification rule, i.e., an anti-disparate treatment rule in the 14th Amendment context in the aftermath of *Brown*); Eyer, *supra* note 2, at 974 (noting that *McDonnell Douglas v. Green* was one of the first disparate treatment cases the Supreme Court decided under Title VII and describing the paradigm it adopted).

<sup>28</sup> See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–32 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–07 (1973); *Castaneda v. Partida*, 430 U.S. 482, 492–95 (1977); *Teamsters*, 431 U.S. at 335 n.15; *Davis*, 426 U.S. at 238–48.

disparate treatment as necessarily conscious and volitional.<sup>29</sup> Thus, disparate treatment was conceived of as arising from the intentional behavioral manifestations of prejudice.<sup>30</sup> For this reason, disparate treatment was widely assumed to be coextensive with so-called “intentional discrimination”—an assumption no doubt bolstered by the commonality of explicit and extreme exemplars of bigotry during this era of responses to *Brown*.<sup>31</sup> Against this backdrop, the conflation of “disparate treatment” and “intentional discrimination” made sense—“intentional discrimination” was understood to exhaust the full category of contexts in which an individual had been treated differently based on their race, sex or other protected class status.

But this concept of disparate treatment—as self-aware differential treatment arising from prejudice—has since been shown to be fundamentally incomplete. Rather, as we now know disparate treatment can, and often does, occur without self-aware intent accompanying it.<sup>32</sup> Even those who are *explicitly* biased often will not perceive the ways in which their biases impact their perception—and thus may perceive their ultimate actions as neutrally justified based precisely on their biased beliefs.<sup>33</sup> For example, a racially bigoted supervisor is likely to genuinely perceive a Black worker as an inferior employee and notice his mistakes with far more commonality than he notices those of a white employee. And, as scholars have shown, the disconnect between disparate treatment and “intent” goes much deeper, given that even those who consciously reject such biases may nevertheless behaviorally manifest bias as a result of racial anxiety, cognitive processing biases, and deeply engrained societal stereotypes.<sup>34</sup> As such, we know today that “disparate treatment”

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<sup>29</sup> See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161, 1176 (1995).

<sup>30</sup> *Id.*

<sup>31</sup> Of course, even during the 1950s and 1960s, many racist actors believed their actions were justified by race-neutral factors. See, e.g., Nancy Maclean, *Freedom Is Not Enough: The Opening of the American Workplace* 49–50, 54–55, 67, 252 (2006); Katie Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 *Yale L.J.* 1002, 1025–31 (2019).

<sup>32</sup> See Krieger, *supra* note 29, at 1187–88; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 329–31 (1987); Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 *Iowa L. Rev.* 2235, 2247–56 (2017) (arguing that anxiety about being seen as racist or being profiled can result in disparate treatment).

<sup>33</sup> See, e.g., Eyer, *supra* note 31, at 1047–50.

<sup>34</sup> See sources cited *supra* note 32.

can and does occur, even where “intent”—at least in the strong sense of a self-aware discriminatory actor—does not exist.

It is important to emphasize that this form of disparate treatment (i.e., disparate treatment in the absence of strong self-aware intent) remains *disparate treatment*, rather than *disparate impact*, as that doctrine has been defined. For example, in a situation where a police officer shoots a Black man because he perceives him as more dangerous based on his race, that is disparate treatment, even if the officer does not consciously perceive himself to be motivated by race. Similarly, a large employer that systematically taps men, rather than women, for promotion, because men are perceived of (because of their sex) as “management material” has engaged in disparate treatment, even if the decision-makers involved are unaware of the role that sex played in their decision-making. The key question is would the outcome have been different “but for” the sex, race or other protected class status of those affected? If so, disparate treatment has indeed occurred.

In contrast, a true disparate impact model asks a different question. Disparate impact doctrine imposes no requirement that the policy or practice at issue was the result of disparate treatment, but instead simply asks if it has a differential impact on a protected group (by race, sex, etc.).<sup>35</sup> If the policy or practice produces such a differential impact, disparate impact doctrine then asks the question of whether there is some substantial justification for the policy or practice.<sup>36</sup> Finally, the plaintiff has the opportunity to show that even if the policy is justified by neutral factors, there is some alternative practice that would have a lesser impact but would equally meet the defendants’ objectives.<sup>37</sup> Thus, although disparate impact doctrine shares with a true disparate treatment paradigm a lack of a requirement of self-aware intent, it does *not* require a showing that the outcome would have been different “but for” the protected class status of those affected.

As such, it is clear today that there are *two* potential alternatives to a disparate impact regime—“disparate treatment” and “intentional discrimination”—alternatives that are not coextensive. But this set of

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<sup>35</sup> See 42 U.S.C. § 2000e-2(k); *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009).

<sup>36</sup> See sources cited *supra* note 35; see also *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 533, 541 (2015) (describing the disparate impact standards in the context of a Fair Housing Act case).

<sup>37</sup> See sources cited *supra* note 35.

understandings was not yet widespread in the 1960s and 1970s.<sup>38</sup> Thus, our foundational disparate treatment cases reflect the prevailing assumptions of the time—that disparate treatment and “intentional discrimination” were one and the same. For example, in the constitutional context, cases like *Washington v. Davis*—the seminal case which has been understood to impose an intent standard—identify only one possible alternative to a pure disparate impact standard, “discriminatory purpose.”<sup>39</sup> But as the context of cases like *Davis* and its progeny make clear, the Court did not consider itself to be opting for a purpose or intent standard *instead of* a “disparate treatment” standard.<sup>40</sup> Rather, the Court’s only aim in *Davis* was to reject a pure disparate impact standard in the Equal Protection context—something it (erroneously) assumed was the equivalent of a purpose inquiry.<sup>41</sup>

Similarly, early disparate treatment cases from the Title VII context make clear that the Court understood itself to be defining the parameters for a “disparate treatment” (as distinguished from a disparate impact) paradigm but did not grapple with the possibility that disparate treatment and “intentional discrimination” might not be coextensive. For example, early cases in the individual disparate treatment context under Title VII explicitly endorse a true disparate treatment standard, opining that “[t]he central focus of the inquiry in a case such as this is always whether the employer is treating ‘some people less favorably than others because of their race, color, religion, sex, or national origin,’”—while also interchangeably referring to requirements of “motive” or “intent.”<sup>42</sup> So

<sup>38</sup> See sources cited *supra* notes 29–31 and accompanying text.

<sup>39</sup> 426 U.S. 229, 237–48 (1976).

<sup>40</sup> See *id.*; see also Ralph Richard Banks & Richard Thompson Ford, (How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality, 58 *Emory L.J.* 1053, 1090–94 (2009) (making a similar observation).

<sup>41</sup> See sources cited *supra* note 40. Such cases must also be understood against a backdrop in which inquiries into intent were traditionally prohibited in Equal Protection doctrine, something that could have effectively eviscerated *Brown v. Board of Education*’s guarantees. See Eyer, *supra* note 23, at 4–5, 8–22, 53–54 n.305; see also Banks & Ford, *supra* note 40, at 1092 (making a similar observation). Thus, the focus on discriminatory intent or purpose in *Davis* and other contemporary cases must be understood at least in part as arising from a desire to ensure that intent was a permissible basis for constitutional invalidation. Banks & Ford, *supra* note 40, at 1092–93.

<sup>42</sup> *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 579–80 (1978) (including the above-quoted language, but also later referring to the relevant question as the issue of the employer’s “motive” or “intent” when discussing the admissibility of certain evidence) (citations omitted); see, e.g., *U.S. Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983) (stating that the relevant inquiry is “[whether] the defendant intentionally discriminated against the plaintiff” but then

too, such cases adopt an approach to the evidentiary structure and the relevance of particular categories of proof that is consistent with a true “disparate treatment” regime, without questioning whether such an approach could reliably detect intent.<sup>43</sup> Even when *requested* by defendants to address the question of whether “disparate treatment” could exist independent of “discriminatory intent” in early statutory cases, the Court simply ignored the question, apparently not perceiving any possible distinction between the two.<sup>44</sup>

Thus, early individual disparate treatment cases in both the statutory and constitutional context display a conceptual confusion of disparate treatment and intentional discrimination. But the conflation of “disparate treatment” with “intentional” discrimination is perhaps most apparent in the Court’s systemic disparate treatment cases of the same time. As the Court developed the modern framework of anti-discrimination law around the dual categories of “disparate treatment” and “disparate impact,” it further developed different doctrinal approaches for “systemic” and “individual” disparate treatment.<sup>45</sup> As to the former category, in which the allegation is that the defendant regularly and systematically engaged in disparate treatment, the Court adopted a method of proof, i.e., expected value statistics, that—while wholly consistent with a true “disparate treatment” paradigm—can say little about discriminatory intent.<sup>46</sup>

As such, the central paradigm that continues to control the adjudication of systemic disparate treatment cases today relies on properly constructed

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immediately thereafter stating that the relevant inquiry is whether “the employer [is] treating ‘some people less favorably than others because of their race, color, religion, sex, or national origin.’”).

<sup>43</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–07 (1973); see also *Banks & Ford*, *supra* note 40, at 1073–80 (explaining that nothing in *McDonnell Douglas* turns on how disparate treatment came about, whether from conscious or unconscious bias).

<sup>44</sup> *Furnco*, 438 U.S. at 574 n.6; see also sources cited *supra* note 42.

<sup>45</sup> See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 357–61 (1977).

<sup>46</sup> See, e.g., *id.* at 337–40; *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–09, (1977); *Castaneda v. Partida*, 430 U.S. 482, 495–96, 496 n.17; see also *Green*, *supra* note 27 at 401–03, 411–17 (detailing the reasons why expected value statistics approach embraced in *Teamsters* and *Hazelwood*, which has formed the crux of systemic disparate treatment liability, does not necessarily allow a showing of purposeful discrimination). In some contexts today, more sophisticated statistical methods, like regression analysis, take the place of expected value in systemic disparate treatment contexts. See, e.g., *Bazemore v. Friday*, 478 U.S. 385, 398–401 (1986) (Brennan, J., concurring in part). However, for similar reasons, regression analysis also would be incapable of detecting intent as opposed to disparate treatment.

statistical design to ask the question of whether the “expected value,” i.e., the expected numbers of a particular group receiving better or worse outcomes in a particular context, is one that is likely to have resulted absent disparate treatment.<sup>47</sup> Imagine, for example, that 50% of qualified applicants for 100 teaching positions are African American, but that only 10% (10) of those hired are.<sup>48</sup> Assuming that all relevant non-racial considerations have been accounted for in defining the relevant applicant pool, we would have an “expected value” of 50 African American teachers hired.<sup>49</sup> Statistical tests can then identify, based on sample size and other considerations, whether this gap of 40 is statistically significant, meaning that it is highly unlikely to have occurred absent disparate treatment based on race.<sup>50</sup>

Importantly this expected value methodology does not allow one to identify intent, as opposed to disparate treatment.<sup>51</sup> The biased decision-maker who perceives African American candidates as less qualified, less friendly, or less competent may well be unaware of the role that race is playing in their decision, even as it produces disparate treatment on a systematic scale, which the expected value test would detect.<sup>52</sup> Indeed, history has shown that even among those who express explicit biases openly, many may genuinely believe their actual decisions—which treat minority groups differently—are based in the reality of non-invidious factors.<sup>53</sup> It is for this reason that early in the Civil Rights era, many members of the white establishment could argue, and apparently genuinely believe, that little actual disparate treatment existed, even as they systematically perpetrated such disparate treatment.<sup>54</sup>

Nevertheless, the Court’s seminal systemic disparate treatment cases—like its seminal individual disparate treatment cases—do not address this

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<sup>47</sup> See generally Dianne Avery, Maria L. Ontiveros, Roberto L. Corrada, Michael Selmi & Melissa Hart, *Employment Discrimination Law: Cases and Materials on Equality in the Workplace 205–07* (8th ed. 2010) (describing “expected value” statistics but referring to it as the “standard deviation” method).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See generally Green, *supra* note 27, at 411–17 (detailing the ways that imposing a purpose or intent requirement in systemic disparate treatment “would substantially alter the . . . use of statistics [i.e., expected value statistics] endorsed by the Court and relied on by lower courts and litigants for decades”).

<sup>52</sup> See sources cited *supra* note 32.

<sup>53</sup> See sources cited *supra* note 31 and accompanying text.

<sup>54</sup> *Id.*

tension, apparently because the Court was unaware it might exist. Thus, seminal cases from both the statutory and constitutional context—such as *Teamsters*, *Hazelwood*, and *Castaneda*—wholeheartedly endorse the expected value methodology, while simultaneously opining that “[p]roof of discriminatory motive is critical” for disparate treatment cases.<sup>55</sup> As the context of such cases make clear, the Court’s objective in stating that motive was important was, as in the individual disparate treatment context, simply to distinguish disparate treatment from disparate impact.<sup>56</sup> But the result was to conflate disparate treatment with “intentional discrimination,” leaving a profound theoretical conflict at the heart of discrimination law.

This theoretical conflict has continued into the present day. Even in contemporary cases, the Supreme Court has continued to conflate disparate treatment with discriminatory intent and has failed to recognize that more than one alternative to a pure disparate impact regime exists.<sup>57</sup> Systemic disparate treatment cases continue to substantively rely on statistical methodologies incapable of proving intent—while class certification requirements for such cases assume intent is required.<sup>58</sup> Model jury instructions across the federal system employ different standards (“disparate treatment” or “discriminatory intent”) in charging juries on the ultimate question in discrimination claims.<sup>59</sup> Casebooks and scholarly articles express a wide variety of mutually inconsistent perspectives on what the core principles of disparate treatment law

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<sup>55</sup> See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 324, 335–40, 335 n.15 (1977) (accepting expected value statistical methodology as the central proof in a systemic disparate treatment case, despite suggesting that discriminatory intent was the central requirement, in a seminal Title VII systemic disparate treatment case, in which the court ruled on the systematic non-hiring of Black and Spanish-surnamed drivers for “over-the-road” driver positions); see also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–09, 308 n.13 (1977) (applying the same methodology in the context of allegations of teacher non-hiring on the basis of race); *Castaneda v. Partida*, 430 U.S. 482, 495–97, 496 n.17 (1977) (applying the same methodology in the context of constitutional allegations of systemic disparate treatment against Mexican-Americans in grand jury selection).

<sup>56</sup> See *Teamsters*, 431 U.S. at 336 n.15.

<sup>57</sup> See, e.g., *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345, 1354–55 (2015); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–55 (2003).

<sup>58</sup> See *Green*, *supra* note 27, at 405–17.

<sup>59</sup> Compare Third Circuit Model Jury Instructions, 42 U.S.C. § 1981, at 12–13 (Mar. 2018), [http://www.ca3.uscourts.gov/sites/ca3/files/6\\_Chap\\_6\\_2018\\_March.pdf](http://www.ca3.uscourts.gov/sites/ca3/files/6_Chap_6_2018_March.pdf) (intentional discrimination jury instruction), with Seventh Circuit Model Jury Instructions, § 3.01, at 59 (2017), [http://www.ca7.uscourts.gov/pattern-jury-instructions/7th\\_cir\\_civil\\_instructions.pdf](http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf) [<https://perma.cc/8TKA-QV29>] (disparate treatment jury instruction).



actually are, and whether the Supreme Court has embraced an “intentional discrimination” or a true “disparate treatment” standard.<sup>60</sup>

This continuing theoretical conflict has had important consequences. In the statutory context, detethered from any core principle, judicial lawmaking has run amok. Especially in the lower courts (where the vast majority of discrimination cases are heard), the process of adjudicating anti-discrimination claims bears virtually no relationship to any ultimate question of discrimination—perhaps because it is not clear what that ultimate question is.<sup>61</sup> Instead, judges deploy a wide array of technical doctrines to, as Professors Sandra Sperino and Suja Thomas put it, “slice and dice” claims, frequently leading to dismissal before trial.<sup>62</sup> In the absence of a core central question to discipline the disparate treatment inquiry, judges have felt free to develop legal doctrines that turn on technical formalities, rather than the factual question of whether discrimination took place.<sup>63</sup>

Thus, for example, doctrines like the “same actor” doctrine are applied by judges to dismiss cases where the same manager hired and fired the plaintiff, even where there is compelling evidence that that manager was bigoted.<sup>64</sup> Courts routinely dismiss cases for failure to show that an employer’s articulated reason for the decision is wholly false—even where there is other persuasive evidence of disparate treatment.<sup>65</sup> The

<sup>60</sup> Compare Avery et al., *supra* note 47, at 89 (describing “discriminatory intent” as “the key element in a disparate treatment” case), and David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. Pa. L. Rev. 899, 923 (1993) (characterizing “conscious intent to discriminate” as “the touchstone” of the Supreme Court’s disparate treatment case law), with Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279, 287–89, 291–92, 294 (1997) (arguing that the Supreme Court’s cases are best understood as instantiating a causation-focused disparate treatment standard), and Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357, 1374–75 (2009) (same).

<sup>61</sup> See, e.g., Eyer, *supra* note 2, at 977–84.

<sup>62</sup> See, e.g., Sperino & Thomas, *supra* note 3, at 152–55 (quoting Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577, 591 (2001)); Berrey, Nelson & Nielsen, *supra* note 25, at 63.

<sup>63</sup> See Eyer, *supra* note 2, at 977–84; Sperino & Thomas, *supra* note 3, at 152–55.

<sup>64</sup> See, e.g., *Maybin v. Hilton Grand Vacations Co.*, 343 F. Supp. 3d 988, 993–99 (D. Haw. 2018) (awarding summary judgment based on the “same actor” inference in an age discrimination case, despite the fact that the manager regularly made ageist statements about the plaintiff and other sales managers during plaintiff’s period of employment); see also Sperino & Thomas, *supra* note 3, at 69–71 (discussing the way the “same-actor” inference is used against plaintiffs in statutory anti-discrimination cases).

<sup>65</sup> See, e.g., *Youry v. Exec. Transp. Co.*, No. 11–4103, 2013 WL 4774447, at \*5–6 (E.D. Pa. Sept. 6, 2013) (awarding summary judgment because the plaintiff did not show the employer’s

most compelling evidence of discrimination—explicitly biased comments by decision-makers—is often excluded from consideration altogether under the doctrine of “stray remarks.”<sup>66</sup> And many circuits require that the plaintiff identify a “nearly identical” comparator outside the protected class, regardless of how compelling their evidence of discrimination might otherwise be.<sup>67</sup> For decades, these and other technical doctrines have regularly been used to justify awards of summary judgment and judgment as a matter of law (“JMOL”) against statutory discrimination plaintiffs—without ever asking the central factual question of whether discrimination took place.<sup>68</sup>

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reason was factually false—despite evidence that the decision-maker had repeatedly referred to the plaintiff with racially derogatory remarks, including during the conversation in which the plaintiff was terminated); see also Sandra Sperino, *McDonnell Douglas: The Most Important Case in Employment Discrimination Law* 164–65 (2018) (describing this phenomenon). Note that this lower court practice is directly contradictory to Supreme Court precedent. See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (specifically noting that the plaintiff need not prove that the alleged reason was not a real reason, just that protected class status was a “but for” cause); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 514, 524–25 (1993) (holding that it is the factual question of discrimination, not pretext, which is the ultimate inquiry in a Title VII case, even one brought via the *McDonnell Douglas* paradigm).

<sup>66</sup> See, e.g., *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 222–24 (5th Cir. 2001) (awarding JMOL after a jury verdict in plaintiff’s favor on pregnancy discrimination claims and dismissing as a “stray remark” the plaintiff’s supervisor’s overheard statement that the plaintiff was fired because “she’s been pregnant three times in three years.”); see also Sperino, *supra* note 65, at 204–09 (discussing how the stray remarks doctrine is used against discrimination plaintiffs); Sperino & Thomas, *supra* note 3, at 60–69 (same); Jessica A. Clarke, *Explicit Bias*, 113 Nw. U.L. Rev. 505, 540–47 (2018) (same). This lower court practice also has been at least implicitly rejected by the Supreme Court. See *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 152–53 (2000) (reversing a lower court decision that had applied the stray remarks doctrine to disregard damning age-related remarks and stating that the lower court impermissibly substituted its judgment for the jury’s).

<sup>67</sup> See, e.g., *Mitchell v. Mills*, 895 F.3d 365, 371–72 (5th Cir. 2018) (denying plaintiff’s claim of wage discrimination because the contractors that were used as comparators were not similar enough to the plaintiff to meet the imposed “nearly identical” standard); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 Yale L.J. 728, 745–55 (2011); Charles Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 Ala. L. Rev. 191, 216–20 (2009); see also *Lewis v. City of Union City*, 918 F.3d 1213, 1221–29 (11th Cir. 2019) (en banc) (delineating all of the ways a comparator must be the same in order to satisfy the circuit’s standards and support a prima facie case). The Supreme Court’s decision in *McDonald v. Santa Fe Trail* seems to directly repudiate this approach. See *McDonald*, 427 U.S. at 283 n.11.

<sup>68</sup> See, e.g., Eyer, *supra* note 2, at 977–85. Often, these doctrines are tied to the application of the so-called *McDonnell Douglas* paradigm. For a compelling argument for why the *McDonnell Douglas* paradigm should be abandoned in favor of a textualist approach to anti-

So too in the constitutional law context, technical doctrines abound that impose severe obstacles to plaintiffs' success in bringing anti-discrimination claims. Requirements that plaintiffs identify a particularized actor that discriminated can impose obstacles to challenging even amply proven disparate treatment.<sup>69</sup> Federal jurisdiction doctrines such as standing, sovereign immunity, and abstention frequently bar claims on grounds that bear no relationship to whether discrimination took place.<sup>70</sup> And contradictory limitations on discovery and use of evidence of disparate treatment *or* discriminatory intent continue to exist in the doctrine, in ways that can make it virtually impossible for constitutional discrimination plaintiffs to prove claims.<sup>71</sup>

Of course, these problems are not wholly attributable to the theoretical crisis in disparate treatment law. But they have been substantially exacerbated by it. Rather than being able to coalesce around a singular straightforward critique—that the technical doctrines that bar disparate treatment claims are inconsistent with its central principle—anti-discrimination scholars have spent years disagreeing on what that central principle is.<sup>72</sup> Moreover, many scholars—having concluded that the Court has elected for a requirement of conscious discriminatory intent (as opposed to simply conflating disparate treatment and intent)—have devoted considerable energies to critiquing intent.<sup>73</sup> Rather than trying to recenter disparate treatment law around its core basic principles of differential treatment, much of the scholarly debate has revolved around trying to institute alternatives like disparate impact or motivating factor.<sup>74</sup>

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discrimination claims, see Deborah A. Widiss, *Proving Discrimination by the Text*, 106 *Minn. L. Rev.* (forthcoming 2021) (manuscript at 2–5).

<sup>69</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987).

<sup>70</sup> See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 125–29 (2010); David Cole, *No Equal Justice: Race and Class in the American Criminal System* 161–68 (1999); see also Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 *Harv. L. Rev.* 2283, 2322 (2018) (discussing the ways that *Younger* abstention arguments have led some courts to reject structural arguments challenging the criminalization of poverty).

<sup>71</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456, 468–70 (1996); Clarke, *supra* note 66, at 524–40, 547–71.

<sup>72</sup> See, e.g., sources cited *supra* note 60.

<sup>73</sup> See, e.g., Oppenheimer, *supra* note 60, at 967–72; Eyer, *supra* note 23, at 3 n.2 (collecting sources).

<sup>74</sup> See, e.g., Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. Rev.* 701, 702–07 (2006) (observing and critiquing the extensive scholarly focus on disparate impact); Charles A. Sullivan, *Making Too Much of Too Little?: Why “Motivating Factor” Liability Did Not Revolutionize Title VII*, 62 *Ariz. L. Rev.* 357, 358–59 (2020) (describing

Ultimately, without a core defining principle to unify critiques of its misapplication, scholarly critiques of the courts' approach to disparate treatment doctrine have remained atomized and have not been widely effective.<sup>75</sup>

The consequences of disparate treatment law's theoretical crisis have been even more evident in the political advocacy realm. Even as technical doctrines have rendered core disparate treatment cases extremely difficult to win, no cross-contextual movement has developed to urge the realignment of disparate treatment law around its core principles. Rather than a cohesive public message—that the courts are effectuating a massive and impermissible departure from anti-discrimination law's basic protections—advocates' critiques have also remained necessarily atomized and inconsistent. As in the scholarly realm, technical alternatives, like motivating factor and disparate impact, have often produced the most vigorous advocacy messaging.<sup>76</sup> Critiques of the evisceration of the core of disparate treatment itself have remained rare and uncoordinated—and ultimately ineffective in penetrating the public consciousness.<sup>77</sup>

Advocacy in the courts has similarly been hobbled. In the absence of any clear central principle defining disparate treatment doctrine, advocates have been stripped of what ought to be their most potent argument: that the technical doctrines that the courts have developed illegitimately depart from disparate treatment law's core principles. Instead, critiques of the devastating array of technical doctrines that the courts have developed have tended to focus on relative minutiae, like

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the extensive attention paid to “motivating factor” liability in the scholarly literature and observing that “[o]ne wonders what all the fuss is about” in view of the disappointingly small impact that “motivating factor” has had on anti-discrimination law).

<sup>75</sup> It is important to note that other scholars have made arguments in the past that a true disparate treatment principle does or should reside at the heart of anti-discrimination law. See, e.g., Selmi, *supra* note 60, at 287–94; Zatz, *supra* note 60, at 1374–75; Green, *supra* note 27, at 414–17. But, in the face of the ongoing conceptual crisis in anti-discrimination law, such arguments have yet to generate a wider movement for focusing anti-discrimination law on a true disparate treatment standard. This Article argues that the Supreme Court's recent case law centering the “but for” principle offers perhaps a critical opportunity to spark such a wider movement for a true disparate treatment standard.

<sup>76</sup> See, e.g., Sharon Dietrich, Maurice Emsellem & Catherine Ruckelshaus, *Work Reform: The Other Side of Welfare Reform*, 9 *Stan. L. & Pol'y Rev.* 53, 67 n.51 (1998) (noting that the Civil Rights Act of 1991 arose in significant part from the outcry in the civil rights advocacy community over the retrenchment of disparate impact liability in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

<sup>77</sup> See, e.g., Eyer, *supra* note 2, at 1008 & n.250, 1016.

whether a different application of the particular technical doctrine is warranted.<sup>78</sup> Such a focus on minutiae has rendered the lower courts' persistent dismissal of discrimination claims virtually invisible, as it attracts neither headlines nor invites Supreme Court review.<sup>79</sup> In the absence of a clear central principle from which the lower courts' technical approach to discrimination law can be said to depart, the ability to craft a unified legal strategy has been significantly limited.

Thus, the theoretical crisis at the heart of disparate treatment doctrine has had important adverse consequences for anti-discrimination law. But as set out in the following Part, now may be a unique moment for addressing this ongoing theoretical crisis. While the theoretical crisis in anti-discrimination law has persisted for decades, recent cases offer a unique opportunity to re-center disparate treatment law around a true disparate treatment standard: the but-for principle.

## II. RESOLVING THE THEORETICAL CRISIS: THE BUT-FOR PRINCIPLE

As set out in Part I, there has long been a theoretical crisis at the heart of disparate treatment doctrine. This Part makes the case that now is the time to resolve this theoretical crisis, and that contemporary cases provide an opportunity to do so. In a series of recent cases, the Supreme Court has embraced the notion that anti-discrimination law must be centered around a true disparate treatment principle: the but-for principle. Moreover, it has suggested that such a principle derives from statutory anti-discrimination law's plain text. This series of cases thus provides an opening for anti-discrimination advocates, scholars, and ultimately the courts to coalesce around a true "disparate treatment" standard, thus resolving the conceptual crisis at the heart of anti-discrimination law.

### *A. The Origins of the But-For Principle*

The but-for principle has long roots in anti-discrimination law, dating back at least to the 1978 case of *City of Los Angeles Department of Water*

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<sup>78</sup> *Id.* at 1008; see also e.g., Plaintiff-Appellant's Reply Brief at 2–7, *Kozuma v. Barnhart*, 2002 WL 32102095 (9th Cir. 2002) (No. 01-16109) (arguing that the "same actor inference" did not apply given the circumstances of the case, but not contesting the legitimacy of the doctrine).

<sup>79</sup> Eyer, *supra* note 2, at 1016.

*and Power v. Manhart*.<sup>80</sup> In *Manhart*, the question was whether an employer could require women to contribute more to their pension fund than men, on the grounds that women on average live longer (and thus, women as a class are likely to derive greater benefits from the fund as retirees).<sup>81</sup> The Court easily found the answer to this question was no, relying on Title VII's plain text.<sup>82</sup> As the Court stated,

An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. *Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different."*<sup>83</sup>

The but-for principle is, of course, a true disparate treatment principle. It does *not* ask what was in the mind of the discriminator at the time of their actions, but rather simply whether the action would have been different "but for" the protected class status of those affected. Applying this approach, the full span of disparate treatment is captured: if the outcome would have been different "but for" the identity of those affected, the but-for principle has been violated. Thus, the but-for principle—to the extent it is truly controlling—offers an opportunity to center anti-discrimination law around a true disparate treatment principle, rather than one focused on discriminatory intent.

But while *Manhart* and other early cases introduced the but-for principle to the Court's modern anti-discrimination jurisprudence, it was not until thirty years later that the principle came to be situated as central to anti-discrimination law. Ironically, this increasing prominence of the but-for principle arose as a result of a series of cases that many saw as a *retrenchment* of anti-discrimination law. As described further in Parts IV–V, *infra*, progressive commentators and advocates had long argued for a so-called "motivating factor" standard (instead of a but-for standard) in

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<sup>80</sup> 435 U.S. 702, 711 (1978); see also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (observing, two years before *Manhart*, that "no more is required [under Title VII] to be shown than that race was a 'but for' cause.>").

<sup>81</sup> *Manhart*, 435 U.S. at 704.

<sup>82</sup> *Id.* at 708–11.

<sup>83</sup> *Id.* at 711 (emphasis added) (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971)).

anti-discrimination law, believing it to be easier for anti-discrimination plaintiffs to prove. But across a series of cases, the Court found that the central defining language of most anti-discrimination statutes requires a different standard: a showing that the outcome would have been different “but for” the plaintiff’s protected class status.

The turn to the but-for principle began with the 2009 case of *Gross v. FBL Financial Services, Inc.*<sup>84</sup> In *Gross*, the Court was asked to address what evidence was required to apply the “motivating factor” paradigm under the ADEA, a paradigm that the lower courts had assumed was available in some circumstances to age plaintiffs.<sup>85</sup> But the Court instead interpreted the ADEA’s text, which prohibits discrimination “because of . . . age”, as demanding but-for causation.<sup>86</sup> Drawing on textualist principles, the Court opined that the “ordinary meaning” of “because of . . . age” must control: that age was the “but-for cause” of the plaintiff’s injury.<sup>87</sup> The Court thus situated the but-for principle as the central required showing for an age discrimination plaintiff, making them show that their age “was the ‘but-for’ cause of the challenged adverse employment action.”<sup>88</sup>

Across a series of subsequent cases, the Supreme Court and the lower courts have expanded their textualist interpretation from *Gross* to other statutes, construing similar statutory anti-discrimination language to also connote but-for causation.<sup>89</sup> Even textually distinctive statutes like 42 U.S.C. § 1981 (affording “[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens”) have been construed by the Supreme Court as textually mandating the but-for principle.<sup>90</sup> Indeed, the Court has gone so far as to express the view that the “ancient and simple ‘but for’ common law causation test . . . supplies

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<sup>84</sup> 557 U.S. 167, 175–80 (2009).

<sup>85</sup> *Id.* at 170–73.

<sup>86</sup> *Id.* at 175–78 (quoting 29 U.S.C. § 623(a)(1)).

<sup>87</sup> *Id.* This reasoning has been heavily critiqued by progressives, as is described more fully *infra* note 93, and *infra* Sections IV.D and V.A.

<sup>88</sup> *Gross*, 557 U.S. at 180.

<sup>89</sup> See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350–52 (Title VII retaliation provisions); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (Americans with Disabilities Act).

<sup>90</sup> See *Comcast Co. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014–19 (2020). But cf. *Babb v. Wilkie*, 140 S. Ct. 1168, 1175–78 (2020) (holding, based on distinctive text, that the federal sector provisions of the ADEA are violated where age is a motivating factor, but also holding that a plaintiff must show “but for” causation in order to obtain individualized relief).

the ‘default’ or ‘background’ rule against which Congress is normally presumed to have legislated” in the discrimination context.<sup>91</sup> As such, most commentators agree today that the vast majority of anti-discrimination laws will be subject to the but-for principle under *Gross* and its progeny.<sup>92</sup>

### B. The Potential of the But-For Principle

While many anti-discrimination advocates and scholars opposed *Gross* and its progeny, this turn to the but-for principle offers considerable opportunities for addressing the ongoing theoretical crisis in anti-discrimination law.<sup>93</sup> As described *supra*, the but-for principle is a true “disparate treatment” principle (as opposed to a narrower “discriminatory intent” standard), and thus, to the extent it is controlling, can be used to situate anti-discrimination doctrine around a “disparate treatment” theoretical core. Moreover, the Court has described its decisions mandating the but-for principle as resting on the textual mandates of

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<sup>91</sup> *Comcast*, 140 S. Ct. at 1014. Scholars have criticized both the historical accuracy of the Court’s characterization of the pedigree of the but-for causation test in tort law and the appropriateness of its use of a tort frame in anti-discrimination law. See, e.g., Alexandra D. Lahav, Why Justice Gorsuch Was Wrong About Causation in *Comcast*, 23 Green Bag 2D 205, 205 (2020) (questioning the historical accuracy of the assertion in *Comcast* that but-for causation is an “ancient and simple” test); Sandra Sperino, The Tort Label, 66 Fla. L. Rev. 1051, 1052–54 (2014) (critiquing the Supreme Court’s tendency to draw on tort law in interpreting discrimination statutes). Nevertheless, this Article takes as its starting point the assertions of the Supreme Court in recent cases such as *Comcast* and *Nassar*.

<sup>92</sup> As Sandra Sperino has observed, the fact that *Comcast* was a virtually unanimous opinion signals that even the progressives on the Court have acceded to the controlling nature of the but-for principle. See Sandra Sperino, *Comcast* and *Bostock* Offer Clarity on Causation Standard, A.B.A. Human Rights Mag., Jan. 12, 2021, at 24–25.

<sup>93</sup> *Gross* and its progeny have been critiqued by legal scholars on a variety of grounds. In addition to those critiques discussed *supra* note 91, scholars have argued that *Gross* and its progeny are not the correct reading of the relevant statutory text, that they disregarded the legislative history of the Civil Rights Act of 1991, that the precedent of *Price Waterhouse v. Hopkins* should have compelled a different result, and that they will deprive civil rights litigants of adequate opportunity to make out their claims. See, e.g., Deborah A. Widiss, Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation, 90 Tex. L. Rev. 859, 926–41 (2012); Leora F. Eisenstadt, Causation in Context, 36 Berkeley J. of Emp. & Lab. L. 1, 3 n.6 (2015); James A. Macleod, Ordinary Causation: A Study in Experimental Statutory Interpretation, 94 Ind. L.J. 957, 959–63 (2019); sources cited *infra* notes 271–72. This Article takes as its starting point *Gross* and its progeny’s endorsement of the “but for” principle, and their description of the principle as textualist in nature, and thus does not re-litigate methodological disputes over the principle’s correctness or origins. Substantive arguments regarding the adequacy of the “but for” principle as a vehicle for civil rights litigation are addressed *infra* Parts III–V.



statutory anti-discrimination law's provisions, and indeed as representing anti-discrimination law's plain or "ordinary" meaning.<sup>94</sup> As such, there is a strong argument that the text of anti-discrimination law demands a true disparate treatment inquiry.

In an era where textualism is the ascendant method of statutory interpretation at the Supreme Court, this type of argument may have considerable promise in addressing the conceptual confusion at the core of disparate treatment doctrine, and in mandating a true disparate treatment standard. Consider, for example, the following language from the Supreme Court's decision in *Comcast Corporation v. National Association of African American-Owned Media*, addressing the Court's reading of 42 U.S.C. § 1981:

The guarantee that each person is entitled to the "same right . . . as is enjoyed by white citizens" directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the "same" legally protected right as a white person. *Conversely, if the defendant would have responded differently but for the plaintiff's race, it follows that the plaintiff has not received the same right as a white person.*<sup>95</sup>

After *Comcast*, it seems clear that the inquiry in a § 1981 case (and any other cases in which the but-for principle applies) should be a simple and factual one: would the outcome have been different "but for" the plaintiff's race? Or as the Court stated it otherwise, if we consider the counterfactual "what would have happened if the plaintiff had been white," what do we conclude?<sup>96</sup> Since intentional discrimination will ordinarily result in disparate treatment, this of course is a question that discriminatory intent may be relevant to answering. But it is ultimately a far more capacious standard. Thus, cases like *Comcast* and others mandate—as a matter of anti-discrimination law's "ordinary" meaning—

<sup>94</sup> See, e.g., *Comcast*, 140 S. Ct. at 1015; *Nassar*, 570 U.S. at 350–52; *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175–78 (2009).

<sup>95</sup> *Comcast*, 140 S. Ct. at 1015 (emphasis added) (quoting 42 U.S.C. § 1981(a)).

<sup>96</sup> *Id.*

that a true “disparate treatment” standard, the but-for principle, be dispositive.<sup>97</sup>

The potential of this type of argument can be seen already in the recent case of *Bostock v. Clayton County*.<sup>98</sup> *Bostock* addressed the issue of whether discrimination against LGBT employees is “because of . . . sex” and thus prohibited under Title VII.<sup>99</sup> Much to the surprise of many commentators, the *Bostock* case resulted in a 6-3 win for the plaintiffs, in an opinion authored by the textualist Justice Neil Gorsuch.<sup>100</sup> Embracing the textualist arguments of the plaintiffs and their amici (founded on *Gross*, *Nassar*, and *Manhart*), the Court recognized that the but-for principle controlled and that each and every instance of sexual orientation and gender identity discrimination would not occur “but for” the sex of employee.<sup>101</sup> Thus, for example, a woman who is fired for marrying her female partner, would not have been fired “but for” her sex—an employer would not object to her actions if she were a man.<sup>102</sup> So too, a transgender woman who is fired for, for example, wearing feminine clothing, or identifying as a woman, would not have been terminated if the employer perceived her as a woman.<sup>103</sup> In all instances of anti-LGBT discrimination, therefore, the but-for principle is violated.

While *Bostock* involved what may seem to some like a very specialized application of the but-for principle (whether anti-LGBTQ discrimination

<sup>97</sup> See sources cited supra note 94.

<sup>98</sup> 140 S. Ct. 1731, 1738–43 (2020).

<sup>99</sup> Id. at 1738–39 (quoting 42 U.S.C. § 2000e-2(a)(1)).

<sup>100</sup> Id. at 1736–37; see also Tara Leigh Grove, Which Textualism?, 134 Harv. L. Rev. 265, 279 & n.84, 303 (2020) (observing that “many observers” predicted that the Supreme Court would reject the claim of LGBTQ employees, but that a few, including this author, predicted that it would rule for the plaintiffs on textualist principles).

<sup>101</sup> *Bostock*, 140 S. Ct. at 1738–43; see also Brief for Respondent Aimee Stephens at 21–29, *Bostock*, 140 S. Ct. 1731 (No. 18-107) (making the textualist “but for” argument that was subsequently largely embraced by the Court); Brief of Statutory Interpretation and Equality Law Scholars as Amici Curiae in Support of the Employees at 4–12, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107) (same). In the interest of full disclosure, this argument was originally developed by this author in a 2019 article, Statutory Originalism and LGBT Rights. See Katie Eyer, Statutory Originalism and LGBT Rights, 54 Wake Forest L. Rev. 63, 73–80 (2019); see also Josh Block (@JoshABlock), Twitter (June 15, 2020, 11:34 AM), <https://twitter.com/JoshABlock/status/1272552949835800576> [<https://perma.cc/X2QE-C7FM>] (crediting the Wake Forest article with heavily influencing the Court’s reasoning); In Lieu of Fun, Episode 81: Leah Litman and Anthony Michael Kreis, Youtube, at 12:57 (June 15, 2020) <https://www.youtube.com/watch?v=zbxMG9Y9eB4&t=777s> [<https://perma.cc/LT3R-JPX5>] (same, amicus brief).

<sup>102</sup> *Bostock*, 140 S. Ct. at 1742.

<sup>103</sup> Id. at 1741–42.

is covered by Title VII), in many ways it is emblematic of the potential of the but-for principle to address anti-discrimination law's conceptual confusion more broadly. As the *Bostock* defendants pointed out, they did not act with a conscious intention to discriminate based on sex, but instead with an intention to discriminate based on sexual orientation and gender identity.<sup>104</sup> Under the historically conceptually confused approach to disparate treatment doctrine, this argument appears to be a difficult one to rebut—is differential treatment sufficient, or is self-aware intent to discriminate based on sex required? And yet, because of the advent of cases like *Gross* and *Nassar*, plaintiffs and their amici were able to argue that the but-for principle was textually mandated, and must control.<sup>105</sup> Ultimately, their arguments persuaded six justices of the Court, in a result that few observers expected.<sup>106</sup> Thus, while the issue in *Bostock* was in some ways unique, the approach of the plaintiffs (focusing on “but for” as the textually mandatory core of the inquiry) and the potential result (success for anti-discrimination plaintiffs) was not.

But if *Bostock* demonstrates the potential of the but-for approach, it also demonstrates the likely near-term limitations of such an approach—and thus the need to seize the opportunity to build a longer-term movement for “but for.” Because of existing case law conflating disparate treatment and discriminatory intent, the Court majority in *Bostock* could not entirely disregard intent. Rather, the Court acknowledged that the Court's prior holdings (though not the statutory text) imposed a requirement that “the difference in treatment based on sex must be intentional.”<sup>107</sup> However, importantly, the Court went on to define the role of intent in “disparate treatment” cases in such a way that it does not detract from the but-for principle. Instead, the Court defined the intent required as an intentional employer decision to take an adverse action against a particular employee or group of employees—actions which the employer would, in turn, not have taken “but for” the sex of the employees.<sup>108</sup> Thus, the intent required of the employer is simply the intent to subject employees to differential adverse action from other

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<sup>104</sup> See, e.g., Brief for Petitioners Altitude Express, Inc., and Ray Maynard at 13–18, 38–39, *Bostock*, 140 S. Ct. 1731 (No. 17-1623).

<sup>105</sup> See Brief for Respondent Aimee Stephens, *supra* note 101 at 28–29; Brief of Statutory Interpretation and Equality Law Scholars as Amici Curiae in Support of the Employees, *supra* note 101 at 4–12.

<sup>106</sup> See sources cited *supra* note 100.

<sup>107</sup> See *Bostock*, 140 S. Ct. at 1740.

<sup>108</sup> *Id.* at 1741–43, 1745–46.

employees (i.e., to engage in “discrimination” in the literal sense of differentiating adversely), not a self-aware intent of the role of protected class status in their decision.<sup>109</sup>

This formulation of intent may seem overly complicated and confusing (and indeed, I suggest below that it would be better to ultimately focus exclusively on “but for”), but it makes some sense if the requirement of intentional action is conceptualized simply as the boundary marker between what Noah Zatz has described as “internal” and “external” membership causation.<sup>110</sup> Consider, for example, the hypothetical identified by Mitch Berman and Guha Krishnamurthi in their article, *Bostock is Bogus*:

Suppose Libby intends to dine one evening at Riley’s Restaurant. En route to Riley’s, Libby, a member of the local Libertarian Party, stops at the Party’s office for a short organizational meeting. When arriving at Riley’s, Libby is chagrined to learn that the restaurant’s last table was taken minutes earlier and that it will be accommodating no more diners that evening.<sup>111</sup>

As Berman and Krishnamurthi point out, in this scenario, Libby’s partisan membership is in some sense a “but for” cause of her being unable to secure a table at Riley’s—it is what led to her arriving late, without which a table would have been secured.<sup>112</sup> And yet our intuitions are that no sensible judge would find disparate treatment on these facts since her partisan status played no role in the *restaurant’s* actions.<sup>113</sup> By specifying the action to which “but for” causation must be linked—an intentional action by the defendant—*Bostock’s* formulation of intent makes clear that in this circumstance Libby cannot prevail. Because the restaurant did not take any intentional action that it would not have taken

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<sup>109</sup> *Id.*

<sup>110</sup> See Zatz, *supra* note 60, at 1376–78.

<sup>111</sup> Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 *Notre Dame L. Rev.* (forthcoming 2021) (manuscript at 28).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* Berman and Krishnamurthi go on to reach what I think are erroneous conclusions about the “but for” principle’s capability of resolving the question at issue in *Bostock*. *Id.* at 28–29. But I agree with them that this scenario would not be actionable, albeit for reasons that are distinctive from their own.

“but for” Libby’s partisan status, membership causation is external, and Libby cannot prevail.<sup>114</sup>

*Bostock*’s formulation of intent thus serves to hold the line between internal and external membership causation while simultaneously articulating a standard that is consistent with a true disparate treatment paradigm.<sup>115</sup> But although *Bostock*’s formulation of intent is consistent with a true disparate treatment paradigm—and may have been necessary in *Bostock* as a way of dealing with the longstanding conflation in the case law of discriminatory intent and disparate treatment—in the longer term, it seems likely to only further the conceptual confusion surrounding anti-discrimination law. *Bostock*’s language on this issue is opaque and was confusing to many commentators, even those who are deeply steeped in anti-discrimination law.<sup>116</sup> To the extent we wish to resolve disparate treatment law’s conceptual crisis, *Bostock*’s formulation of intent seems, in the long term, a poor vehicle. Thus, ultimately it seems likely that the goal of advocates and commentators ought to be a paradigm focused exclusively on the but-for principle.<sup>117</sup>

What would it take to achieve this goal? Like most other major efforts to shift the law, it seems likely that such an objective will necessarily be multi-faceted and iterative, and it would require building a movement for “but for.” As described more fully in the Parts that follow, individual cases offer opportunities big and small for putting forward but-for arguments in ways that would benefit individual anti-discrimination plaintiffs. Such repeated deployment of the but-for standard—coupled with arguments that it is textually mandatory—is no doubt an important part of shifting the discourse in anti-discrimination toward widespread recognition of the but-for principle as controlling. But as important is the wider buy-in and messaging of anti-discrimination advocates and scholars

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<sup>114</sup> See *Bostock*, 140 S. Ct. at 1741–43, 1745–46; see also Zatz, *supra* note 60, at 1377 (noting that internal membership causation is essential to disparate treatment claims).

<sup>115</sup> As Zatz points out, there are some areas of anti-discrimination law that do not require internal membership causation, but disparate treatment doctrine is not among them. See Zatz, *supra* note 60, at 1373–82 (demonstrating that while disparate treatment requires internal membership causation, third-party harassment cases do not require internal membership causation for the plaintiff to prevail).

<sup>116</sup> In my conversations with other anti-discrimination law scholars, many have expressed that they found this part of the Court’s opinion confusing and unpersuasive.

<sup>117</sup> To the extent that some principle is needed to avoid scenarios like the one that Berman and Krishnamurthi postulate in the disparate treatment context, the concept of internal and external membership causation, which Zatz originated, seems a more helpful and intuitive way of addressing the issue than the formulation of intent at issue in *Bostock*.

to such a project. Movement building and public messaging matter. To the extent anti-discrimination scholars and advocates speak with a cohesive voice that the but-for principle is the central defining feature of anti-discrimination law, they are far more likely to be heard.

As set out in the Parts that follow, such a movement could be critical to restoring the potential of disparate treatment law, and with it, anti-discrimination law more broadly. Currently, the public believes that they are protected against being treated differently by government, by employers, and by public accommodations, because of their race, sex, or other protected class status. The myriad of technical doctrines that ensure that the vast majority of discrimination plaintiffs lose—regardless of whether their protected class status was a “but for” cause of their harm—are largely invisible in the absence of a widespread movement to delegitimize them.<sup>118</sup> And such a movement cannot take place without a central conception of what discrimination law *should* be asking, as opposed to simply what it should not. The but-for principle provides such a conception and thus the opportunity to build a movement for a true disparate treatment principle.

### *C. Extending the But-For Principle to Constitutional Law*

Recent cases such as *Gross*, *Nassar*, *Comcast*, and *Bostock* afford an important opportunity to take up the longstanding theoretical crisis at the heart of anti-discrimination law and to resolve it in favor of a true disparate treatment standard. But all of these cases are statutory, so the question remains, how might such arguments fare in the constitutional law context? As set out below, *Gross*, *Nassar*, *Bostock*, and especially the Court’s recent decision in *Comcast* do offer opportunities for arguing that constitutional anti-discrimination law under the Equal Protection clause must also follow the but-for principle.<sup>119</sup> But those arguments are at least somewhat more attenuated and complex. It is thus doubly critical in the constitutional law context that such arguments be a part of—and not isolated from—a broader movement to instantiate the but-for principle as the central defining feature of anti-discrimination law.

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<sup>118</sup> See, e.g., Eyer, *supra* note 2, at 1016.

<sup>119</sup> Under the current approach to Equal Protection doctrine, government is still afforded an opportunity to justify discrimination under an appropriate level of scrutiny even after discrimination has been shown. This discussion pertains exclusively to proving discrimination at the first step of the constitutional analysis.

The Supreme Court's recent opinion in *Comcast*, embracing the but-for principle in the context of 42 U.S.C. § 1981, is especially suggestive of the ways that the Court's statutory turn to "but for" may be useful to arguing for a true disparate treatment doctrine in constitutional law.<sup>120</sup> *Comcast* addresses § 1981, which the Supreme Court has long suggested has a close relationship to the Fourteenth Amendment by virtue of the circumstances of its enactment.<sup>121</sup> Thus, as the Court has observed, the Fourteenth Amendment was in many ways an "expression[] of the same general congressional policy" as § 1981, and many members of Congress "support[ed] the adoption of the Fourteenth Amendment . . . to incorporate the guaranties of the Civil Rights Act of 1866 [Ed note: of which § 1981 was a part] in the organic law of the land."<sup>122</sup> Thus, under the Court's existing precedents, § 1981 and the Fourteenth Amendment are typically construed coextensively in the scope of their anti-discrimination principles.<sup>123</sup> As such, there is a strong argument that *Comcast*'s endorsement of the but-for principle as the central defining feature of § 1981 should be at least relevant—and potentially dispositive of—the proper interpretation of the Equal Protection clause itself.<sup>124</sup>

But *Comcast* is relevant to arguments for centering the but-for principle in the constitutional context for a second reason as well. *Comcast* embraces the idea that not only Congress—but the Court itself—has meant to endorse the but-for principle where it has used language to the effect that discrimination "on the basis of," "by reason of" or "because of" race is proscribed.<sup>125</sup> Thus, the Court observed that its prior decisions describing § 1981 and § 1982 as prohibiting discrimination "on the basis of race" and prohibiting actions taken "because of" race themselves signified an endorsement of the but-for principle.<sup>126</sup> As such, the Court assumed that where prior decisions of the Court use the language

<sup>120</sup> *Comcast Co. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1016–17 (2020).

<sup>121</sup> See, e.g., *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383–91 (1982).

<sup>122</sup> *Id.* at 384–85.

<sup>123</sup> *Id.* at 389–90.

<sup>124</sup> Of course, there is also a potential argument that the Court got it wrong in *Comcast* and that motivating factor liability should have been found to be available since the Court had already held that motivating factor liability is available in the Equal Protection context. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–70, 270 n.21 (1977).

<sup>125</sup> *Comcast*, 140 S. Ct. at 1016–17.

<sup>126</sup> *Id.*

“because of” or “on the basis” of race, they too endorse the but-for principle as the relevant standard.<sup>127</sup>

While the assumptions on which this approach rests may be questionable, taken at face value, it offers considerable opportunities to argue that the but-for principle extends to the Equal Protection context. Indeed, dozens of the Supreme Court’s Equal Protection cases, ranging from the immediate aftermath of the Fourteenth Amendment to today, use precisely this type of language (“because of,” “by reason of”) to describe the Equal Protection standard.<sup>128</sup> Thus, for example, cases such as *Adarand v. Peña* repeatedly state the principle that “government may treat people differently *because of* their race only for the most compelling reasons.”<sup>129</sup> So too, as the Supreme Court observed in *Bolling v. Sharp*, “[a]s long ago as 1896, this Court declared the principle ‘that the Constitution of the United States . . . forbids . . . discrimination . . . against any citizen *because of* his race.’”<sup>130</sup> Even decisions closely associated with a strong requirement of intent or purpose, like *Personnel Administrator v. Feeney*, ultimately state that such discriminatory purpose exists where “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘*because of*,’ not merely ‘in spite of’” its effects on a particular group.<sup>131</sup>

Finally, other well-established interpretive principles are likely to also aid in making the argument that the but-for principle ought to reside at the core of the constitutional anti-discrimination inquiry, not just the statutory one. The Supreme Court has typically treated disparate treatment discrimination in the constitutional and statutory contexts as following the same principles, relying on cases from one context to inform the other.<sup>132</sup> And there is nothing in the text of the Equal Protection clause itself that would bar an interpretation that rested on a true disparate treatment standard—indeed, arguably that is the most natural reading of the clause.

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<sup>127</sup> *Id.*

<sup>128</sup> See, e.g., *infra* notes 129–31 and accompanying text.

<sup>129</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 235 (1995) (emphasis added).

<sup>130</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896)) (emphasis added).

<sup>131</sup> *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979); see also *Selmi*, *supra* note 60, at 291–92 (interpreting *Feeney* as adopting what David Strauss has referred to as the “reversing the groups” test, i.e., but-for causation).

<sup>132</sup> See *Primus*, *supra* note 7, at 1354–55.



(“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”)<sup>133</sup>

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Thus, recent cases centering the but-for principle offer a unique opening to resolve the theoretical crisis at the heart of anti-discrimination law, in favor of a true disparate treatment standard. The following Part turns to what a disparate treatment law centered on the but-for principle might look like in practice and how such a turn could hold the potential to address many of the existing pathologies in anti-discrimination law.

### III. THE RADICAL POTENTIAL OF ASKING THE FACTUAL QUESTION OF “BUT FOR”

What would a disparate treatment doctrine centered on the but-for principle look like? This Part takes up the task of elaborating on that vision. It begins with describing what centering the but-for principle would entail in an individual case and then turns to how that simple individualized paradigm could revolutionize the broader landscape of disparate treatment law.<sup>134</sup> As set out below, the but-for principle calls for each anti-discrimination case to center on a simple factual inquiry: would the outcome have been different “but for” the race, sex, or other protected class status of those affected? But taken seriously, centering this simple factual inquiry in each case would also demand that most of the legalistic infrastructure of disparate treatment law be abandoned. Thus, the but-for principle offers a simple and compelling paradigm for everything from case-specific efforts to respond to summary judgment to systemic reform advocacy.

#### *A. The But-For Principle in the Individual Case*

In the context of a specific case, the inquiry that the but-for principle demands is straightforward: would the adverse outcome or policy have been different “but for” the race, sex or other protected class status of those affected?<sup>135</sup> As the Supreme Court has observed, this inquiry is the

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<sup>133</sup> U.S. Const. amend. XIV, § 1.

<sup>134</sup> I use “individual” here simply to connote a single case and *not* as a term of art encompassing only so-called “individual disparate treatment” cases.

<sup>135</sup> Cf. David Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935, 956–58 (1989) (proposing a similar approach based on the Supreme Court’s then-existing case law, which he referred to as the “reversing the groups” test).

equivalent of the “simple” and “traditional” tort law inquiry into “cause in fact.”<sup>136</sup> Thus, just as in the tort law context, the question that the but-for principle asks is a *factual*, not a legal, one: would the outcome have been different “but for” protected class status?<sup>137</sup> Assessing that factual question at the trial stage simply requires the fact finder to consider all of the evidence offered by the plaintiff and the defendant in order to assess whether the fact finder is persuaded—by a preponderance of the evidence—that the outcome would have been different “but for” the race, sex or other protected class status of the plaintiff.

Because the vast majority of discrimination cases are civil cases, it is important to note that metaphysical certainty is not required in order for a plaintiff to prevail at trial in making this showing.<sup>138</sup> Rather, the plaintiff must only persuade the fact finder (typically a jury) that it is “more likely than not” that the outcome would have been different “but for” the protected class status of the plaintiff.<sup>139</sup> Thus, while there may be circumstances in which it would be difficult or impossible to prove with absolute certainty that “but for” causation exists, those circumstances tend to be of little practical significance in reality.<sup>140</sup> Because of the standards

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<sup>136</sup> See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–47 (2013); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020).

<sup>137</sup> See, e.g., Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 (Am. L. Inst. 2010); see also *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S., 711, 715–17 (1983) (emphasizing that the fundamental question in a Title VII disparate treatment case is a factual question); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 524 (1993) (same).

<sup>138</sup> For an overview of the criminal civil rights statutes that are subject to enforcement by the Department of Justice, see, e.g., Alison M. Smith, Overview of Selected Federal Criminal Civil Rights Statutes, Cong. Rsch. Serv. (Dec. 16, 2014), <https://sgp.fas.org/crs/misc/R43830.pdf> [<https://perma.cc/FB9F-L84G>]. Criminal civil rights enforcement may raise distinctive issues and is not the primary subject of this Article.

<sup>139</sup> See, e.g., Ruth Maurice, Legal Standards of Proof, NOLO <https://www.nolo.com/legal-encyclopedia/legal-standards-proof.html> [<https://perma.cc/4KXJ-N5GR>] (last visited Oct. 26, 2021) (describing the civil “preponderance of the evidence” standard of proof).

<sup>140</sup> For this reason, I do not view Alexandra Lahav’s theory of “chancy causation” to be particularly relevant for the discrimination context. See Alexandra D. Lahav, Chancy Causation in Tort, 14 J. Tort L. (forthcoming 2021) (manuscript at 2–3) (on file with author). While there may not be epistemic certainty in applying the but-for principle given the complications of fully reconstructing the counterfactual of a situation in which the plaintiff was outside the protected class, there is no need for such a perfect certainty. Rather, the plaintiff need only persuade the jury that it is “more likely than not” that the outcome would have been different “but for” protected class status. Thus, while Lahav argues that the standard of proof does not alleviate the problems of uncertain causation, *id.* at 10–11, I disagree, at least in those circumstances (such as discrimination) where causation is not exclusively proved via probabilistic statistical studies.

of proof in a civil case, the plaintiff need not achieve absolute certainty via their proof.<sup>141</sup> Rather, the plaintiff need only persuade the fact finder that it is more likely than not, i.e., slightly more probable than not, that the outcome would have been different but-for their protected class status.<sup>142</sup> In answering that question in a discrimination case, fact finders can (and must) ultimately rely on their own judgment to decide whether it is more likely than not that the outcome would have been different for someone outside the protected class—regardless of whether epistemic certainty is possible.<sup>143</sup>

Moreover, this is the *most* demanding standard that plaintiffs should face under a but-for approach at any stage of the litigation. As the Supreme Court held in its *Comcast v. National Association of African-American Owned Media* decision, “the essential elements of a claim remain constant through the life of a lawsuit.”<sup>144</sup> Thus, “while the materials the plaintiff can rely on to show causation may change as a lawsuit progresses from filing to judgment, the burden itself remains constant.”<sup>145</sup> As such, in the context of a “but for” case, the burden at all procedural stages is to show, to the standard demanded by the particular procedural stage, that the outcome would have been different “but for” the protected class status of those affected. Thus, while courts have often applied distinctive and more difficult substantive standards to summary judgment or even to motions to dismiss in anti-discrimination cases, this is erroneous. Rather, the only permissible judicial inquiry under *Comcast* is whether the plaintiff has plausibly alleged that they were treated differently “but for” their protected class status (at the motions to dismiss phase), or that a reasonable jury could so conclude (at summary judgment and JMOL).

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<sup>141</sup> *Id.* at 10.

<sup>142</sup> See sources cited *supra* note 139.

<sup>143</sup> Cf. *Ethyl Corp. v. Env't Prot. Agency*, 541 F.2d 1, 28 n.58 (D.C. Cir. 1976) (“Petitioners demand sole reliance on *scientific* facts, on evidence that reputable scientific techniques certify as certain. . . . Such certainty has never characterized the judicial or the administrative process. It may be that the ‘beyond a reasonable doubt’ standard of criminal law demands 95% certainty. . . . But the standard of ordinary civil litigation, a preponderance of the evidence, demands only 51% certainty. A jury may weigh conflicting evidence and certify as adjudicative (although not scientific) fact that which it believes is more likely than not. . . . Inherently, such a standard is flexible; inherently, it allows the fact-finder to assess risks, to measure probabilities, to make subjective judgments. Nonetheless, the ultimate finding will be treated, at law, as fact . . .”).

<sup>144</sup> *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).

<sup>145</sup> *Id.* at 1014–15.

Importantly, the Supreme Court has made clear that this but-for showing does *not* require a plaintiff to demonstrate “sole” causation—or to disprove that legitimate considerations may have played some role in the defendant’s decision. Rather, protected class status need only be the “straw that broke the camel’s back”—a factor that made a difference.<sup>146</sup> Thus, if an African American employee was late to work five times—and was terminated on that basis—but a white employee who was similarly tardy would not have been, the but-for principle would be satisfied.<sup>147</sup> So, too, if a government entity would not have enacted a policy “but for” the race or sex of those affected (for example, if a Republican legislature would not have enacted a voter ID law if it disproportionately impacted whites), that would suffice, even if there was some legitimate basis for the law.<sup>148</sup> As the Court observed in the *Bostock* decision in 2020, the but-for principle is thus a “sweeping standard,” which finds liability if protected class status was “one but-for cause of [the] decision,” even where other legitimate considerations also played a role.<sup>149</sup>

It is easy to see the potential of this standard on an individualized basis. Currently, most anti-discrimination claims are dismissed before trial, typically applying myriad technical legal doctrines.<sup>150</sup> But in many such cases, a reasonable jury could conclude *as a factual matter* that the adverse action or policy that the plaintiff complains of would not have happened “but for” the protected class status of those affected.<sup>151</sup> Indeed, taking “the straw that broke the camel’s back” approach seriously, there

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<sup>146</sup> *Burrage v. United States*, 571 U.S. 204, 211 (2014); see also *Bostock*, 140 S. Ct. at 1739–40, 1744 (making clear that protected class status under the “but for” standard need not be the sole, or even primary cause, so long as without it the defendant’s action would not have occurred).

<sup>147</sup> See *Bostock*, 140 S. Ct. at 1739 (observing that an employer cannot avoid liability under Title VII just by “citing some *other* factor that contributed to its challenged employment decision” and that if protected class status was one “but for” cause, the employer has violated the law).

<sup>148</sup> Cf. Restatement (Third) of Torts: Liability for Physical & Emotional Harm, § 26 cmt. e. (2010) (observing that the cause in fact inquiry demands a “counterfactual inquiry”).

<sup>149</sup> *Bostock*, 140 S. Ct. at 1739–40.

<sup>150</sup> See Sperino & Thomas, *supra* note 3, at 151–55 (quoting Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577, 591 (2001)); Berrey, Nelson & Nielsen, *supra* note 25, at 63. There are also a substantial number of discrimination claims that settle before trial (most commonly before summary judgment), but the amount of those settlements tends to be very low. See Sperino & Thomas, *supra* note 3, at 16; Eyer, *supra* note 9, at 1290–91.

<sup>151</sup> For a few examples of cases where it seems highly likely that a reasonable jury could have found for the plaintiffs as a factual matter, see Eyer, *supra* note 2, at 982–83.

may be relatively few discrimination cases in which we can confidently say that no reasonable jury could find for the plaintiff. Thus, the but-for principle counsels that—as some lower courts once suggested—summary judgment should “seldom be used” in anti-discrimination cases.<sup>152</sup> Instead, such cases ought to be decided by the relevant fact-finder.

Nor does the but-for principle require especially complex or technical rules of proof to be applied. Rather, focusing on the but-for principle as a *factual* question makes clear that—just like any other factual inquiry—the evidence that might be used to prove “but for” will be as varied as the individual cases in which the question is asked. In any given case, a plaintiff might introduce any of a variety of types of evidence, including evidence that those outside of the protected class were treated more favorably in similar circumstances, evidence of biased comments, evidence regarding common social stereotypes, evidence that the legitimate reasons the defendant has offered are false or weakly supported, and so on.<sup>153</sup> So too, a defendant, in arguing against “but for,” might introduce myriad of different forms of proof, from seeking to demonstrate that their reasons for acting were important and legitimate to evidence that a particular decisionmaker seems unlikely to have acted in a biased manner (for example, because he or she recently hired the plaintiff).<sup>154</sup>

Importantly, under a factual but-for approach, none of these particular types of evidence would be required or dispositive. Rather, the ultimate question would be whether—in view of all the facts and circumstances—the fact-finder believed that the outcome would have been different “but for” the protected class status of those affected. Or, at the summary

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<sup>152</sup> See, e.g., *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994), rev’d in part by *Torgerson v. Rochester*, 643 F.3d 1031, 1060 (8th Cir. 2011).

<sup>153</sup> Cf. *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 147–49, 151–54 (2000) (making clear that a variety of forms of evidence can be considered in determining the ultimate factual question of discrimination, including evidence that the employer has offered a false reason for their employment decision).

<sup>154</sup> The lower courts have a dizzying array of technical rules that they have crafted out of common factual situations that can arise in the context of discrimination law, such as, for example, the so-called “same actor” inference (that we presume the same manager who hired a minority worker will not turn around and fire them shortly thereafter on a discriminatory basis). These technical doctrines—which seek to enforce as a matter of law what inferences must be drawn from particular pieces of the factual record—are inconsistent with a true factual inquiry, and would not be properly applied under a factual “but for” approach. See, e.g., *Eyer*, supra note 2, at 1011 n.270 and accompanying text. However, that does not mean that the types of situations these doctrines represent may not be useful evidence for an employer to try to include in their arguments.

judgment stage, whether a reasonable jury could so conclude, drawing all inferences in favor of the non-movant, typically the plaintiff. Thus, unlike the current legal regime, in which courts typically enforce rigid rules on which evidence will be required or disregarded, and what the significance of that evidence will be, in a but-for regime, the fact-finder would simply be presented with all of the evidence, subject to the normal rules of evidence, and asked to resolve the ultimate factual question.<sup>155</sup>

For an example of how this approach would differ from the courts' current approach, consider the case of *Wallace v. Methodist Hospital System*.<sup>156</sup> In *Wallace*, the plaintiff, a nurse, took maternity leaves two times in close succession, and became pregnant with a planned leave shortly thereafter.<sup>157</sup> Her supervisor had expressed frustration with Wallace's repeated pregnancies and leaves, telling Wallace, for example, that she needed to "choose between nursing and family."<sup>158</sup> Wallace committed a significant infraction shortly before her third scheduled maternity leave by replacing a feeding tube without proper orders, and falsely indicating in her notes it had been authorized by a doctor.<sup>159</sup> She was fired, and sued claiming pregnancy discrimination.<sup>160</sup> At trial, there was evidence that some non-pregnant nurses had committed similar, though not identical infractions, and were not fired.<sup>161</sup> In addition, there was testimony from a co-worker that, when asked about the reasons for Wallace's termination, they had heard Wallace's immediate supervisor respond, "[f]irst of all, she's been pregnant three times in the last three years."<sup>162</sup>

Under a straightforward but-for approach, *Wallace* would be a clear case for a jury. While epistemic certainty may be impossible in a case like Wallace's, a reasonable jury certainly *could* conclude that it is "more likely than not" that the outcome would have been different "but for" her pregnancies.<sup>163</sup> That is, a reasonable jury could conclude that Wallace

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<sup>155</sup> See, e.g., Sandra Sperino, *Evidentiary Inequality*, 101 B.U. L. Rev. (forthcoming Dec. 2021) (manuscript at 56–58, 66–67) (on file with author) (calling for the courts to apply the normal rules of civil procedure and evidence in discrimination cases, instead of engrafting specialized evidentiary rules onto discrimination cases).

<sup>156</sup> *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212 (5th Cir. 2001).

<sup>157</sup> *Id.* at 215–16.

<sup>158</sup> *Id.* at 216.

<sup>159</sup> *Id.* at 216–17.

<sup>160</sup> *Id.* at 217–18.

<sup>161</sup> *Id.* at 221.

<sup>162</sup> *Id.* at 218.

<sup>163</sup> See *supra* notes 138–43 and accompanying text.

would not have been fired for her (unquestionably significant) offense had she not also been pregnant three times in the last three years. This and many other cases will ultimately be a judgment call for the fact-finder, based on all of the facts and circumstances it was presented with, coupled with the perceived credibility of the witnesses.<sup>164</sup>

And indeed, a jury did conclude that Wallace was terminated because of her pregnancies.<sup>165</sup> Yet the U.S. Court of Appeals for the Fifth Circuit affirmed a grant of judgment as a matter of law, applying a host of technical doctrines to “slice and dice” Wallace’s evidence.<sup>166</sup> The Court first opined that Wallace’s non-pregnant comparators were not close enough because they had committed infractions that were not identical to Wallace’s own.<sup>167</sup> It then dismissed Wallace’s explicit evidence of pregnancy discrimination (such as the remark that she was fired because “she’s been pregnant three times in the last three years”) under the stray remarks doctrine.<sup>168</sup> Ultimately, having dismantled the plaintiff’s evidence via these technical doctrines, the court concluded that the jury’s verdict could not stand.<sup>169</sup>

The Fifth Circuit’s approach should be clearly impermissible if the but-for principle controls.<sup>170</sup> The technical doctrines applied by the Fifth Circuit—such as rejecting comparators as insufficiently close<sup>171</sup> and ignoring damning testimony under the stray remarks doctrine—simply have no place in a straightforward factual inquiry. Rather, the question for the court is simply whether a reasonable jury could have concluded that Wallace would not have been terminated “but for” her pregnancies.<sup>172</sup>

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<sup>164</sup> *Id.*

<sup>165</sup> *Wallace*, 271 F.3d at 218.

<sup>166</sup> *Id.* at 220–26.

<sup>167</sup> *Id.* at 221–22.

<sup>168</sup> *Id.* at 222–23.

<sup>169</sup> *Id.* at 224.

<sup>170</sup> See *supra* notes 135–43 and accompanying text.

<sup>171</sup> It is important to emphasize that a but-for approach would provide a basis for pushing back on—and would not reify or exacerbate—the current tendency of the courts to demand close comparators in disparate treatment cases. See generally Goldberg, *supra* note 67, *passim* (extensively describing the problematic comparator requirements that the lower courts have imposed in the discrimination context). As the Supreme Court has made clear, the but-for inquiry is a *hypothetical* counterfactual one. See, e.g., *Comcast v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014–15 (2020). As *Wallace* illustrates, any evidence bearing on that counterfactual inquiry should be relevant, including many types of evidence that are not comparator evidence of any kind. Thus, while identifying a close comparator may certainly be useful for proving but-for causation, it should not be necessary.

<sup>172</sup> See *supra* notes 135–43 and accompanying text.

And shorn of the Court's technical justifications, it seems clear that the answer to that question is "yes."<sup>173</sup> *Wallace* thus provides a clear example of how the but for principle could transform the approach—and outcome—in many contemporary anti-discrimination cases.

And, while it may be hard for some to imagine anti-discrimination law without all of the technical twists and turns, especially at summary judgment, where most cases are currently dismissed, as then-Judge Gorsuch observed, a simple focus on the factual question of causation is actually far easier to apply.<sup>174</sup> Under the current approach, parties in an anti-discrimination case can produce dozens of pages of briefing at summary judgment, addressing myriad nuances of specific technical doctrines, all of which the court must address in order to resolve the motion.<sup>175</sup> But under a simple but-for approach, a court must simply consider all of the facts and evidence before it, taken as a whole in the light most favorable to the non-movant, and determine whether a reasonable jury could find that the outcome would have been different "but for" race, sex, or other protected class status. No technical tests or specialized elements are required to answer this common-sense question. And while no doubt judicial biases against discrimination claims would continue to play a role in some adjudications, overall, such a system would be far more likely to produce fair outcomes, eliminating the maze of technical requirements that anti-discrimination law currently entails.

### *B. Revolutionizing Anti-Discrimination Law Through "But For"*

A disparate treatment doctrine focused on the but-for principle thus has the potential to benefit individual litigants. But could it produce wider change in anti-discrimination law? In a word, yes. Improbably, simply insisting that the factual question of "disparate treatment" be dispositive *would* be revolutionary in anti-discrimination doctrine. Currently, as described above, anti-discrimination law is a highly rigid technical area of the law, in which any of myriad technical doctrines can lead to dismissal.<sup>176</sup> Courts approach the question of discrimination as if it were

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<sup>173</sup> Indeed, the statements of Wallace's immediate supervisor alone—indicating that Wallace was fired because "she's been pregnant three times in the last three years"—seem likely to create a jury issue in this case. *Wallace*, 271 F.3d at 218.

<sup>174</sup> *Walton v. Powell*, 821 F.3d 1204, 1212, 1214 (10th Cir. 2016).

<sup>175</sup> See, e.g., Suja Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 178 (2007).

<sup>176</sup> See *supra* notes 61–63 and accompanying text.



a complex legal puzzle, in which any piece out of place must result in the dismissal of the plaintiffs' claims.<sup>177</sup> Prior precedent is treated as legally dispositive of the unique factual circumstances of *this case*—despite the fact that no prior case has adjudicated a case with these exact facts and circumstances.<sup>178</sup> Evidence is “sliced and diced” without ever asking the factual question of whether disparate treatment took place.<sup>179</sup> Cases are dismissed based on collateral doctrines that have no relationship to the question of whether discrimination took place.<sup>180</sup>

All of this is arguably illegitimate if the but-for principle controls. The complex technical doctrines that the courts have engrafted onto the disparate treatment inquiry—such as rigid comparator requirements, the “same-actor” inference, the “stray remarks doctrine,” and, indeed, the *McDonnell Douglas* paradigm itself—all are impermissible distractions from the factual question of discrimination if the but-for principle controls.<sup>181</sup> Demands that the plaintiff shoehorn her proof into particular categories—and the courts' propensity to address each of those categories as if they were separate elements, rather than a unified whole—is also inconsistent with a factual but-for approach.<sup>182</sup> Searches for the particular role of specific actors in producing disparate treatment—or for concrete evidence of self-aware intent—provide no justification for dismissing claims.<sup>183</sup> Even the operation of independent doctrines—like standing or the immunity of government officials—to bar discrimination claims can at least be challenged more effectively when set against a backdrop of the presumption that all “but for” discrimination ought to be proscribed.<sup>184</sup>

<sup>177</sup> *Id.*

<sup>178</sup> See Eyer, *supra* note 2, at 980–81, 1011 n. 270.

<sup>179</sup> See generally Sperino & Thomas, *supra* note 3, at 152 (describing this phenomenon extensively and using the phrase “sliced and diced”).

<sup>180</sup> See *supra* notes 69–71 and accompanying text.

<sup>181</sup> See, e.g., Eyer, *supra* note 2, at 978–84; see also Widiss, *supra* note 68, at 29–34 (describing the ways that the *McDonnell Douglas* paradigm is often applied in conflict with the principles behind but-for causation).

<sup>182</sup> See, e.g., Eyer, *supra* note 2, at 1008–09.

<sup>183</sup> See generally *McCleskey v. Kemp*, 481 U.S. 279, 293–99 (1987) (rejecting Equal Protection claim based on a statistical showing that Black defendants were more likely to receive the death penalty when they killed white victims, based in part on the difficulties of identifying individual discriminatory actors, and a lack of specific evidence of discriminatory intent).

<sup>184</sup> See generally *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–10 (1983) (holding that plaintiff lacked standing to seek injunctive relief from illegal police chokehold); *Imbler v. Pachtman*, 424 U.S. 409, 427–28 (1976) (holding that prosecutors are absolutely immune from civil liability under § 1983 in the conduct of their duties).

Thus, although the but-for principle (and its associated mandate to focus on the factual question of discrimination) is simple, it has broad potential impact. Indeed, it is arguably the very simplicity and adaptability of the but-for principle that affords it such significant potential as a tool of reform. It can be raised by an individual litigant in a brief opposing summary judgment or by an advocacy organization arguing to overturn a major doctrine before the Supreme Court. It can be used to frame discussions of legislative amendments in Congress and to produce scholarship critiquing many of the most devastating doctrines that currently are attached to anti-discrimination law. Its very simplicity of messaging—that the core guarantee of anti-discrimination is and must be the promise that no individual or group can be treated differently because of their race, sex, or other protected class status—is precisely what makes it versatile, intuitive, and potentially powerful across a variety of contexts.

Such an approach to reforming anti-discrimination law is, of course, not guaranteed to succeed. But there are numerous reasons for thinking that it could, especially if widely adopted by anti-discrimination law advocates and scholars. As described in Part II, *supra*, recent cases of the Supreme Court offer a strong basis for arguing that the but-for principle is textually compelled and that it is anti-discrimination law's central defining principle.<sup>185</sup> Moreover, some circuits have *already* adopted approaches to anti-discrimination claims that are wholly consistent with the but-for approach.<sup>186</sup> And, there are even reasons to believe that—when cases raising but-for-based challenges ultimately reach the Supreme Court—a majority of the current Justices may be receptive.

Most notably, Justice Gorsuch, though often thought of as aligned with the “conservative” wing of the Court, has repeatedly signaled his receptiveness, and indeed endorsement of the but-for approach to anti-discrimination law. During the 2019 Term, Justice Gorsuch authored two

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<sup>185</sup> See *supra* Part II.

<sup>186</sup> For example, some circuits have rejected technical approaches to discrimination claims and instructed courts in their circuit to ask the simple question of “[w]hether a reasonable juror could conclude that [the plaintiff] would have [experienced a better outcome] if he had a different [protected class status] and everything else had remained the same.” *Ortiz v. Werner Enters.*, 834 F.3d 760, 763–65 (7th Cir. 2016); see also *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (explaining that a plaintiff in an employment discrimination case need not satisfy the elements of *McDonnell Douglas* to survive summary judgment, because all that is required is a showing from which the jury could find that the plaintiff was fired because of his protected class status).

opinions—*Comcast* and *Bostock*—that wholeheartedly endorsed the but-for principle, characterizing it as the “simple,” “traditional,” and textually mandated test at the core of anti-discrimination law.<sup>187</sup> Moreover, these views are not new. As a judge on the U.S. Court of Appeals for the Tenth Circuit, then-Judge Gorsuch repeatedly articulated the view that the technical overlay of anti-discrimination law is burdensome and unnecessary, and that the courts should instead focus on the simple factual question of causation.<sup>188</sup> Finally, in opinions both as a Supreme Court Justice and as an appellate judge, Justice Gorsuch has articulated the view that the inquiry ought to be the same at all stages of a discrimination case—and that the courts should not adopt complex tests in order to justify summary judgment, the stage at which most discrimination cases are dismissed.<sup>189</sup>

And while the possible fifth vote on the Supreme Court for but-for-centered anti-discrimination law reform is less certain, there are reasons to believe that both Justice Kavanaugh and Chief Justice Roberts could be plausible candidates. Chief Justice Roberts has, of course, until recently been thought of as the “swing” vote on the Court, and joined Justice Gorsuch’s opinions in both *Comcast* and *Bostock*.<sup>190</sup> And Justice Kavanaugh—though he dissented in *Bostock*<sup>191</sup>—joined Justice Gorsuch’s opinion in *Comcast*.<sup>192</sup> As importantly, Justice Kavanaugh also wrote a significant opinion while on the Court of Appeals simplifying the anti-discrimination law inquiry—and has characterized such simplification generally as beneficial to “courts and litigants alike.”<sup>193</sup> Thus, while neither Justice Roberts nor Justice Kavanaugh is clearly aligned with a project of but-for-focused anti-discrimination law reform,

<sup>187</sup> *Comcast v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014, 1018 (2020); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020).

<sup>188</sup> See, e.g., *Walton v. Powell*, 821 F.3d 1204, 1211–12 (10th Cir. 2016); *Barrett v. Salt Lake Cnty.*, 754 F.3d 864, 867–68 (10th Cir. 2014).

<sup>189</sup> See *Comcast*, 140 S. Ct. at 1014–15; *Walton*, 821 F.3d at 1212.

<sup>190</sup> See *Comcast*, 140 S. Ct. at 1012; *Bostock*, 140 S. Ct. at 1736; see also Adam Liptak, A Supreme Court Term Marked by a Conservative Majority in Flux, N.Y. Times (July 2, 2021), <https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html> [<https://perma.cc/JKR4-9F97>] (noting that Justice Roberts has traditionally been the “swing” Justice on the Court, but that impact was no longer so apparent during the 2020 Term).

<sup>191</sup> *Bostock*, 140 S. Ct. at 1822 (Kavanaugh, J., dissenting).

<sup>192</sup> See *Comcast*, 140 S. Ct. at 1012.

<sup>193</sup> *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1226 (D.C. Cir. 2008); see also *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (critiquing the prima facie case factors of *McDonnell Douglas* for creating “enormous confusion” and wasting judicial resources).

there are reasons to believe that each of them might be receptive to cases raising such arguments.

There are thus reasons to believe that but-for-centered arguments for the reform of anti-discrimination law could succeed in future cases at the Supreme Court, just as they did in *Bostock*. But it is important to note that innumerable opportunities exist to center the but-for principle *right now* in the lower courts, regardless of its further endorsement by the Supreme Court. As described in Part II, *supra*, the Court has already endorsed the but-for principle as the central textual mandate of anti-discrimination law.<sup>194</sup> And some circuits too have already independently adopted an approach to anti-discrimination law that follows an analogous approach.<sup>195</sup> Thus, advocacy within the lower courts—where the lion’s share of discrimination cases will be resolved—is both possible and important. Indeed, pushing for the broad embrace of the but-for principle in the lower courts—and its simple, factually focused inquiry—is an important part of laying the groundwork for more substantial challenges, at whatever level those challenges might occur.

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In sum, a but-for approach—centering the simple factual question of whether the outcome would have been different “but for” the protected class status of those affected—is radical in its simplicity. Focusing on this simple argument—that we ought always to be asking the factual question of whether disparate treatment took place—could offer the opportunity to meaningfully overhaul anti-discrimination law, and to ultimately rid it of many of its most devastatingly anti-plaintiff doctrines. The following Part turns to a discussion of other equality-promoting doctrines that anti-discrimination scholars and advocates have argued for and shows that many of them are wholly or partially encompassed within the but-for principle.

#### IV. THE BUT-FOR PRINCIPLE AS A HOME FOR OTHER EQUALITY-PROMOTING DOCTRINES AND PRINCIPLES

Perhaps because of the conceptual crisis in disparate treatment law, alternatives to disparate treatment doctrine, such as stereotyping doctrine, negligent discrimination, motivating factor, and disparate impact, have

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<sup>194</sup> See *supra* Part II.

<sup>195</sup> See sources cited *supra* note 186.

traditionally attracted considerable attention from anti-discrimination scholars and advocates. But as this Part demonstrates, many of these alternatives are wholly or partially encompassed within a true disparate treatment standard. Thus, embrace of the but-for principle does not, in most instances, conflict with such alternatives. Indeed, to the contrary, it affords an opportunity to strengthen their foundations, by situating them as textually mandated.

### A. Stereotyping Jurisprudence

As anti-discrimination scholars and advocates have long recognized, stereotypes lie at the heart of many, if not most, discriminatory acts.<sup>196</sup> As such, scholars and advocates have long contended that anti-stereotyping principles ought to play a central role in anti-discrimination law.<sup>197</sup> And in a seemingly substantial victory, a majority of the Justices in 1989 endorsed the perspective that gender stereotyping is impermissible under Title VII in the case of *Price Waterhouse v. Hopkins*, albeit in a splintered set of opinions.<sup>198</sup>

But while *Price Waterhouse* led to certain significant successes for plaintiffs (including most notably, a wave of lower court cases recognizing anti-transgender discrimination as sex discrimination), stereotyping doctrine in general has not been as effective as advocates had hoped.<sup>199</sup> Cases addressing racial stereotyping, or other forms of non-sex-based stereotyping have continued to see little success.<sup>200</sup> And even gender stereotyping has long been dogged by critiques that it lacks any

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<sup>196</sup> See, e.g., Lawrence, supra note 32, at 332–44.

<sup>197</sup> See, e.g., Stephanie Bornstein, Unifying Antidiscrimination Law Through Stereotype Theory, 20 Lewis & Clark L. Rev. 919, 925 (2016); Lawrence, supra note 32, at 355–78; Kyle C. Velte, Toward a Touchstone Theory of Anti-Racism: Sex Discrimination Law Meets #LivingWhileBlack, 33 Yale J.L. & Feminism (forthcoming 2021) (manuscript at 3) (on file with author).

<sup>198</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (plurality opinion); *Id.* at 272 (O'Connor, J., concurring).

<sup>199</sup> See infra notes 200–79 and accompanying text. For the success of transgender litigants under gender stereotyping theory, see, e.g., Glenn v. Brumby, 663 F.3d 1312, 1316–18 (11th Cir. 2011); Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1047–54 (7th Cir. 2017).

<sup>200</sup> See, e.g., EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1024, 1035 (11th Cir. 2016). But cf. Harden v. Hillman, 993 F.3d 465, 482–85 (6th Cir. 2021) (quoting Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017)) (recognizing that unsubstantiated assumptions that a Black excessive force plaintiff was a “crack head” likely arose from racial stereotypes and were indicative of “overt racial bias” on the part of the jury).

clear textual foundation in anti-discrimination law.<sup>201</sup> As such, in *Bostock* and its companion cases, many of the employers and their amici critiqued the application of gender stereotyping doctrine in the lower courts as jurisprudentially ungrounded, and called on the Court to narrowly cabin its application.<sup>202</sup>

But in *Bostock*, the Court resoundingly rejected this argument, recognizing that prohibitions on stereotyping are directly linked to the but-for principle, and thus to the text of Title VII itself. As the Court observed in *Bostock*, it should be a “simple test” under the but-for principle to find that an “[e]mployer [who] hires based on sexual stereotypes” has violated Title VII.<sup>203</sup> One need only ask the question—would the employer have objected to this contra-stereotypical characteristic “but for” the plaintiffs’ sex?<sup>204</sup> Or, as elaborated below, would the defendant have adopted this stereotype-based policy “but for” the protected class it benefits or harms?<sup>205</sup> Often, that question will easily yield the answer “no,” making clear that the but-for principle has been violated.<sup>206</sup> As such, the Court in *Bostock* recognized that a defendant who acts based on gender stereotypes has violated Title VII, pursuant to the but-for principle.<sup>207</sup>

While *Bostock* specifically addressed gender stereotypes, importantly, its reasoning linking stereotyping to the but-for principle plainly extends to other protected groups as well. The but-for principle textually applies to *all* protected groups. And, in most instances when individuals or groups are subjected to adverse stereotype-based actions, those stereotypes

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<sup>201</sup> See, e.g., *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1066–67 (7th Cir. 2003) (Posner, J., concurring).

<sup>202</sup> See, e.g., Brief for Petitioner Altitude Express at 40–43, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (No. 17-1623); Brief of Institute for Faith & Family and Christian Family Coalition as Amici Curiae at 11–14, *Bostock*, 140 S. Ct. 1731 (No. 17-1623) (criticizing lower courts that “have morphed stereotyping into a separate species of sex discrimination and a rationale for judicially amending Title VII.”).

<sup>203</sup> *Bostock*, 140 S. Ct. at 1748–49.

<sup>204</sup> *Id.* Importantly, as Suzanne Goldberg has observed, courts do not require comparators for this inquiry in the stereotyping context. See Goldberg, *supra* note 67, at 784; see also *Bostock*, 140 S. Ct. at 1741–43, 1748–49 (recognizing that the but-for principle can apply based on background knowledge of the differential stereotypes applied to men and women, without requiring real-world comparators).

<sup>205</sup> See *infra* notes 217–23 and accompanying text.

<sup>206</sup> See *infra* notes 211–23 and accompanying text.

<sup>207</sup> See *Bostock*, 140 S. Ct. at 1741–43, 1748.

would not have been applied, “but for” protected class status.<sup>208</sup> This is true both of adverse actions resulting from prescriptive stereotypes (stereotypes about how a particular group *should* act or be), and descriptive stereotypes (stereotypes about how a particular group *does* act or is).<sup>209</sup> Thus, the operation of racial, religious, national origin, disability, age, sex, and other stereotypes to effectuate disparate treatment against individuals will, as a matter of course, violate the but-for principle.<sup>210</sup>

While this does not mean that the mere existence of stereotyping evidence is sufficient to show but-for discrimination in all instances, in many circumstances, the existence of stereotype-based disparate treatment may be easy to infer. For example, in cases involving family responsibilities discrimination against women *or* men, it is often easy to identify the ways that gender-specific stereotypes lead to “but for” discrimination.<sup>211</sup> In the case of a woman who is denied a promotion because she is a parent of small children, and thus stereotyped as being uncommitted to the job, it takes no special evidence or expertise to recognize that the same stereotype would not have been applied to a man (indeed, a man might be assumed to need the extra income for his growing family).<sup>212</sup> Conversely, in the context of a man who is penalized especially harshly at work for taking time off to care for a newborn (because of the stereotype that men are not supposed to engage in caregiving), a simple “but for” analysis will also often lead to the

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<sup>208</sup> See *infra* note 210; see also Bornstein, *supra* note 197, at 962–74 (describing the ways that stereotyping theory can be used to craft disparate treatment claims across the protected classes).

<sup>209</sup> See Bornstein, *supra* note 197, at 962–63 (describing the distinction between prescriptive and descriptive stereotypes).

<sup>210</sup> See, e.g., *Bostock*, 140 S. Ct. at 1741–43, 1748–49 (characterizing stereotyping as an application of the “but for” principle, and linking the “but for” principle to Title VII’s “because of” language). As the courts have recognized, the but-for principle also applies to most other major federal anti-discrimination laws, since they tend to have identical or cognate language as a part of their core proscriptions. See, e.g., *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175–78 (2009) (private sector age claims); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (Title VII retaliation provisions); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (ADA).

<sup>211</sup> See, e.g., Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 *Univ. S.F. L. Rev.* 171, 174–81 (2006).

<sup>212</sup> See, e.g., *Chadwick v. Wellpoint*, 561 F.3d 38, 46–47, 48 n.12 (1st Cir. 2009).

conclusion that a different stereotype—and thus a different outcome—would have resulted, “but for” his sex.<sup>213</sup>

In other contexts, the presence of a stereotype-consistent explanation—or other evidence of stereotyping—may not lead as inexorably to a finding of disparate treatment, but would still be an important indication that disparate treatment may have occurred. For example, as the U.S. Court of Appeals for the Sixth Circuit recently recognized, ungrounded assumptions that African Americans are drug users can be substantial evidence of disparate treatment, given the long existence of pernicious racial stereotypes associating drug use (and specifically crack-cocaine usage) with African Americans.<sup>214</sup> Or in the case of a Mexican-American employee who was fired because he was “lazy”—but appears to have been as productive as other employees—national origin-based stereotypes may be the most obvious explanation—stereotypes that would not have been applied “but for” his national origin.<sup>215</sup> So too, where a school suspends a Black girl because she was “belligerent,” it is important to question whether that perception arose from race and gender-based stereotypes—stereotypes which would not have been applied to, for example, an outspoken white boy.<sup>216</sup>

But what about circumstances where stereotypes appear to be at play, but where an employer or government actor ostensibly treats all groups similarly? Although not addressed by the *Bostock* court, here too, the but-for principle can often comfortably accommodate stereotype-based challenges.<sup>217</sup> Disparate treatment law prohibits not only the differential

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<sup>213</sup> See, e.g., Catherine Albiston & Lindsey Trimble O'Connor, Just Leave, 39 Harv. J.L. & Gender 1, 40–44 (2016).

<sup>214</sup> See *Harden v. Hillman*, 993 F.3d 465, 482–85 (6th Cir. 2021).

<sup>215</sup> See, e.g., Pierre Tristram, Stereotype This: “Lazy Mexicans” and Other Insolvent Myths of American Superiority, (Apr. 15, 2011), <https://flaglerlive.com/20876/pt-us-superiority-laziness/> [<https://perma.cc/82CA-2BPT>].

<sup>216</sup> See, e.g., Jamilya J. Blake & Rebecca Epstein, Listening to Black Women & Girls: Lived Experiences of Adulthood Bias 1, 4–5 (2020).

<sup>217</sup> See *infra* notes 218–23 and accompanying text. For this reason, I disagree with the perspective of those such as Robin Dembroff, Issa Kohler-Hausmann, and Elise Sugarman who believe that the but-for principle cannot accommodate an analysis of social meanings at the group level. See generally Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, What Taylor Swift and Beyonce Teach Us About Sex and Causes, 169 U. Pa. L. Rev. Online 1, 3–4, 8–9 (2020) (arguing that the “but for” test obfuscates, rather than focuses on the real question in anti-discrimination law cases, which should be an analysis of social meanings at the group level). Rather, it is exactly the social meanings of particular actions that help inform why stereotypes are relevant under the but-for principle and can form the basis for a



treatment of individuals qua individuals, but *also* group-based disparate treatment.<sup>218</sup> Thus, where a policy or practice would not have been adopted “but for” the group adversely affected (or the group advantaged), the but-for principle is violated.<sup>219</sup> But, this is ordinarily precisely the circumstance at issue in the context where a defendant has adopted a stereotype-based policy which it subsequently applies across the board.

Consider, for example, the enactment of the federal crack/cocaine sentencing disparity, the backdrop of which was a highly stereotype-based image of Black criminality.<sup>220</sup> Even on the hypothesis that the resulting crack sentencing provisions were applied equally to Black and white defendants alike (something that there is considerable reason to doubt), there are still reasons to believe that the original policy would not have been adopted “but for” the racial stereotypes that permeated its enactment.<sup>221</sup> Or, consider the adoption or application of a “no dreadlocks” policy, as in the U.S. Court of the Appeals for the Eleventh Circuit case of *EEOC v. Catastrophe Management*.<sup>222</sup> It seems exceedingly unlikely that the employer would have adopted such a policy—barring most traditionally African American hairstyles—“but for” the racial stereotype that predominantly Black hairstyles are “unprofessional.”<sup>223</sup> Put otherwise, would the employer have adopted the policy “but for” the race of those affected? Again, it takes no special evidence or expertise to recognize that it is hard—indeed, virtually impossible—to imagine a comparable policy requiring white employees to adopt traditionally African American hairstyles.

Thus, the anti-stereotyping principles that advocates and scholars have long argued for within anti-discrimination law can be comfortably

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determination that a facially neutral policy would not have been adopted “but for” the protected class status of those affected.

<sup>218</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 579–80 (2009) (holding that it was disparate treatment for City to refuse to certify test results because of how the test would affect minority candidates as a group).

<sup>219</sup> *Id.*

<sup>220</sup> See, e.g., *United States v. Clary*, 846 F. Supp. 768, 783–87 (E.D. Mo. 1994), rev’d 34 F.3d 709 (8th Cir. 1994).

<sup>221</sup> *Id.* See also Dvorak, *supra* note 10 (making the point that we have treated addiction crises affecting the Black and white communities very differently); *Harden v. Hillman*, 993 F.3d 465, 482–85 (6th Cir. 2021) (describing the pernicious racial stereotypes that have long surrounded cocaine use, and specifically crack-cocaine).

<sup>222</sup> *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021–22 (11th Cir. 2016) (employer policy requiring “professional” hairstyles, interpreted by the employer as prohibiting dreadlocks).

<sup>223</sup> *Id.*

situated within the but-for principle. This is important, since the most stubborn obstacles that stereotyping jurisprudence has faced—the unwillingness to extend it to other groups (beyond sex), and critiques of its lack of textual grounding—are evidently erroneous when viewed through the lens of “but for.” With only minor exceptions, the but-for principle extends to *all* major protected groups under federal anti-discrimination law.<sup>224</sup> Thus, to the extent that stereotyping jurisprudence is founded in the but-for principle, it must extend to all such groups as well. And because the but-for principle arises from anti-discrimination law’s central text, it upends traditional critiques of stereotyping jurisprudence as textually ungrounded and instead suggests that anti-stereotyping principles arise from the core of anti-discrimination law’s statutory text.<sup>225</sup>

### *B. Negligent Discrimination*

So-called “negligent discrimination” has also been a long-standing project of anti-discrimination law scholars. Building on the insights of Charles Lawrence III, Professor David Oppenheimer in 1993 developed for the first time a theory of “negligent discrimination.”<sup>226</sup> As Professor Oppenheimer noted, much discrimination does not in fact take place as a result of conscious intent to discriminate.<sup>227</sup> Assuming that the Court’s disparate treatment opinions generally required such self-aware intent, he further argued that the Court ought to recognize so-called “negligent discrimination”—discrimination where the “employer fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur.”<sup>228</sup> Over the last three decades, scholars have continued to build on Professor Oppenheimer’s work in calling for anti-discrimination law to recognize a variety of forms of “negligent” or “reckless” discrimination.<sup>229</sup>

As Professor Oppenheimer and those who have built on his work have properly recognized, “intentional discrimination” and “disparate

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<sup>224</sup> See *supra* Part I.

<sup>225</sup> See *supra* Part II.

<sup>226</sup> See Oppenheimer, *supra* note 60, at 900–17.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 900, 922–25, 967–72.

<sup>229</sup> See, e.g., Stephanie Bornstein, *Reckless Discrimination*, 105 *Calif. L. Rev.* 1055, 1059–60 (2017).

treatment” are not co-extensive.<sup>230</sup> History, experience, and the social sciences all tell us that people can and do engage in “disparate treatment” (in the sense that their actions would have been different “but for” the race, sex or other protected class status of those affected), without a self-aware intent to treat others differently based on protected class status.<sup>231</sup> Indeed, as described in Part I, *supra*, it is precisely the conflation of these two non-commensurate concepts—“intentional discrimination” and “disparate treatment”—that has led to the conceptual crisis in anti-discrimination law.<sup>232</sup> Professor Oppenheimer (and those who have built on his work) were no doubt correct that excluding all cases in which the actor does not possess a self-aware intent to discriminate would lead to much disparate treatment going unremedied, and would be a crisis for anti-discrimination law.

But as should be evident from the discussion in Parts I–III, *supra*, “negligent discrimination” is in many ways a pale substitute for the but-for principle. It simply is not necessary as a theory of disparate treatment if the but-for principle controls.<sup>233</sup> Under the but-for principle, an entity will be liable wherever the harm would not have occurred “but for” the protected class status of the individual harmed.<sup>234</sup> One need not layer on a complicated inquiry into whether the entity “knew or should have known” that such discrimination would occur—and indeed doing so arguably engrafts additional contra-textual obstacles to plaintiffs’

<sup>230</sup> See, e.g., Oppenheimer, *supra* note 60, at 900–04; Bornstein, *supra* note 229, at 1059–60.

<sup>231</sup> See *supra* Part I.

<sup>232</sup> *Id.*

<sup>233</sup> It is important to note that there may still be more narrow instances in which negligence or recklessness principles are important in anti-discrimination law, especially in the context of employer responses to harassment, and employer liability for certain types of damages. But the but-for principle makes clear that the heartland of what many scholars have sought to address with negligent discrimination arguments—instances of disparate treatment that may be effectuated without conscious intent—does not require a negligence paradigm, and that indeed such a paradigm is likely to impose additional unnecessary burdens on plaintiffs as compared to a “but for” approach.

<sup>234</sup> See *supra* Part II; see also 42 U.S.C. § 2000e(b) (defining “employer” to include agents). Note that the constitutional law context is different insofar as there are circumstances in which sovereign immunity or § 1983 doctrines bar holding the entity itself liable. See, e.g., *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 80–81 (1989) (discussing the holding in *United States v. Fox*, 94 U.S. 315, 318 (1877) that neither the state nor state officials acting in their official capacity are “person[s]” within the meaning of § 1983). However, those restrictions exist regardless of what the underlying standard is for assessing discrimination in the first instance, the subject of negligent discrimination and the but-for principle.

relief.<sup>235</sup> Thus, the very set of cases that Oppenheimer and other scholars have meant to target—cases where disparate treatment has occurred, but where the defendant did not act with self-aware discriminatory intent—fall squarely within the but-for principle without any additional inquiry.<sup>236</sup> The but-for principle is thus not only an adequate but a superior theory to “negligent discrimination” for instituting a true disparate treatment standard. It provides a much simpler and more straightforward means to the same end.

But what about cases like *Bostock*, which continue to suggest that a showing of some form of intent *is* still required in anti-discrimination law? As an initial matter, while cases like *Bostock*, *Gross*, and *Nassar* situate the but-for principle as arising from the “ordinary meaning” of anti-discrimination law’s core language, they have not so characterized intent.<sup>237</sup> Thus, textualist principles arguably lean in favor of an exclusively but-for focused standard. And while many contemporary anti-discrimination cases *do* situate intent or purpose as a requirement, it is clear that such cases have simply conflated disparate treatment and “intent,” rather than affirmatively selecting one or the other standard.<sup>238</sup> Therefore, one ultimate goal of a but-for-centered project can and should be to challenge existing language in Supreme Court case law situating intent as a necessary, distinct requirement.

But even assuming that in the near-term some nominal intent requirement may be attached to the but-for principle, cases like *Bostock* make clear that that requirement does *not* entail a showing of self-aware conscious discriminatory intent.<sup>239</sup> Indeed, as described in Part II, *supra*, *Bostock* makes clear that all that is required is an intention to take differential adverse action against an individual or group (discrimination in the literal sense)—actions that would, in turn, not have been taken “but for” the protected class status of the individual or groups affected.<sup>240</sup> As

<sup>235</sup> Cf. Oppenheimer, *supra* note 60, at 900 (employers would be liable for negligent discrimination when they “fail[] to take all reasonable steps to prevent discrimination that [they] know[] or should know is occurring, or that [they] expect[] or should expect to occur”).

<sup>236</sup> See *supra* Parts I–II.

<sup>237</sup> See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020) (emphasis added) (describing the but-for principle as being mandated by Title VII’s text, but as to intent stating only that “[i]n so-called ‘disparate treatment’ cases . . . *this Court has also held* that the difference in treatment . . . must be intentional.”).

<sup>238</sup> See *supra* Part I.

<sup>239</sup> See *Bostock*, 140 S. Ct. at 1741–43, 1745–46.

<sup>240</sup> *Id.*

described, *supra*, this formulation of intent simply serves to establish a boundary between those cases in which there is internal group membership causation (the plaintiff's membership was a cause of the defendant's actions) as compared to external membership causation (the plaintiff's group membership was a cause, but for reasons external to the defendant).<sup>241</sup> As such, even if a nominal intent requirement remains in the near term, *Bostock* makes clear that such a requirement addresses only intent to take differential adverse action against an individual or a group (discrimination in the literal sense)—*not* a self-aware intent of the role that protected class status is playing in the outcome.

Thus, there is simply no need to engraft a theory of “negligent discrimination” on disparate treatment doctrine if the but-for principle controls.<sup>242</sup> Any time a defendant targeted an individual or group for adverse treatment—and would not have done so “but for” their race, sex, religion or other protected class status—the but-for principle is violated. No additional proof of employer negligence or recklessness is required. Thus, under a but-for regime, a negligent discrimination framework becomes not only unnecessary but a potential additional obstacle to plaintiffs' success.

### C. Disparate Impact

Since the 1970s, the disparate impact paradigm—which asks whether a neutral policy or practice has a disparate impact on a protected group—has captured the imagination of many anti-discrimination law scholars and advocates.<sup>243</sup> Situating the paradigm as a preferred alternative to disparate treatment law, such scholars and advocates have contended that a disparate impact approach best effectuates anti-subordination objectives—objectives which ought to be at the core of our anti-discrimination inquiry.<sup>244</sup> Thus, they have argued that a disparate impact

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<sup>241</sup> See *supra* Part II.

<sup>242</sup> As observed in *supra* note 233, there are other places in anti-discrimination law, such as harassment, where a theory of negligence or recklessness may be important to establishing liability. But this is not true of straightforward disparate treatment claims in which vicarious liability exists.

<sup>243</sup> See, e.g., Selmi, *supra* note 74 at 734–53 (observing and critiquing the extensive scholarly focus on disparate impact).

<sup>244</sup> See, e.g., Reva Siegel, *Why Equal Protection No Longer Protects*, 49 *Stan. L. Rev.* 1111, 1144–45 (1997) (arguing this in the constitutional law context); Mark Kende & Dahlia Lithwick, *The Supreme Court Still Refuses to Acknowledge Systemic Racism*, *Slate* (July 2, 2020), <https://slate.com/news-and-politics/2020/07/washington-v-davis-supreme-court->

standard ought to be available as a matter of constitutional law (where the Supreme Court has rejected the availability of the paradigm)—and also ought to play a central role in statutory anti-discrimination law.<sup>245</sup>

But as Michael Selmi has shown, despite the emphasis placed on disparate impact by scholars and advocacy groups, disparate impact law has failed to produce the revolutionary outcomes that its outsized prominence suggests.<sup>246</sup> Even in those domains—like Title VII—where disparate impact has long been allowed, it has generated relatively few cases and resulted in few systematic reforms.<sup>247</sup> And despite long campaigns in the scholarly literature, the Supreme Court has shown no signs of moving to permit a disparate impact paradigm in the Equal Protection context—indeed, even the Court’s progressives have traditionally opposed such a move.<sup>248</sup> Thus, today, disparate impact doctrine plays only a limited role in anti-discrimination law, comprising a tiny fraction of the cases brought challenging discrimination and failing to revolutionize our workplaces, our housing, or the other contexts to which it applies.<sup>249</sup>

But while the near-term outlook for disparate impact doctrine itself may not be bright, the but-for principle—by centering a true disparate treatment principle—offers considerable opportunities to address systemic anti-subordination goals. While, as elaborated in Part I, *supra*, there remain genuine distinctions between a true “disparate treatment” standard (the but-for principle) and a true “disparate impact” standard (in which but-for differentiation does not exist), in many cases this difference is likely to be immaterial. Precisely because of the overarching nature of systems of racial, gender, disability, and other forms of oppression, it is very often the case that policies or practices that have a disparate impact on minority protected classes *would not have been adopted “but for” the protected class status of those affected.*<sup>250</sup> That is, we can say in many

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systemic-racism.html [https://perma.cc/ZT4W-BHAE] (arguing for overruling *Washington v. Davis*).

<sup>245</sup> See sources cited *supra* note 244.

<sup>246</sup> See Selmi, *supra* note 74, at 734–53; see also Berrey, Nelson, & Nielsen, *supra* note 25, at 57 (observing that “[o]nly 4% of [discrimination] cases brought a disparate impact cause of action” during the time frame studied).

<sup>247</sup> See sources cited *supra* note 246.

<sup>248</sup> See, e.g., Eyer, *supra* note 23, at 48–54 (describing the lack of objection by the Court’s race-liberals to the rejection of a constitutional disparate impact standard in *Davis*).

<sup>249</sup> See sources cited *supra* note 246.

<sup>250</sup> See *infra* notes 251–56 and accompanying text.

instances with confidence that a policy or practice with comparable impacts on the majority would not have been adopted.

There are many instances in which we can see this reality reflected in major policy decisions that have had devastating impacts for communities of color. For example, one need look no further than the dramatically divergent approaches to the crack and opioid epidemics to see that even genuine real-world problems generate dramatically different responses (punitive as opposed to remedial) when the primary communities affected are Black or white.<sup>251</sup> So too, there are good reasons to believe that the harsh policing practices implemented in predominantly minority neighborhoods would not be tolerated in white suburban communities.<sup>252</sup> Other minority-disadvantaging policies, such as restrictive voter ID laws, also seem highly unlikely to be tolerated if their impacts rested primarily on minorities instead on the white majority.<sup>253</sup> Thus, in each of these instances it should be possible for a reasonable fact-finder to conclude that the policy would *not* have been adopted if it had comparable impacts on non-minority groups.

Moreover, the potential of the but-for principle to effectuate disparate impact anti-subordination goals is not limited to the race context (though it is perhaps most self-evident there). For example, many of the policies and practices that disproportionately burden women are also policies that seem exceedingly unlikely to have been adopted if the burdened group were men.<sup>254</sup> Indeed, under the but-for principle, classic constitutional cases like *Feeney v. Personnel Administrator* should turn out differently—even in the absence of a disparate impact paradigm—since it seems exceedingly unlikely that a state employer in the 1800s or 1900s would adopt a policy that had the impact of virtually entirely excluding men from desirable civil service employment.<sup>255</sup> So too across many other

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<sup>251</sup> See, e.g., Dvorak, *supra* note 10.

<sup>252</sup> See, e.g., Alexander, *supra* note 70, at 121 (noting that “[f]rom the outset, the drug war could have been waged primarily in overwhelmingly white suburbs or on college campuses” based on actual drug crime prevalence, and going on to describe what those practices would have looked like).

<sup>253</sup> See, e.g., *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 215, 229 (4th Cir. 2016) (describing the steps that the North Carolina state legislature took to ensure that Black citizens, not white citizens, were burdened by the state’s voter ID law).

<sup>254</sup> See *infra* notes 255–56 and accompanying text.

<sup>255</sup> Indeed, the idea that a government would, even today, adopt any policy that boxed virtually all men out of desirable government positions seems implausible. At the time that the policy at issue in *Feeney* was adopted, it was surely unthinkable. See *Pers. Adm’r of Mass.*

contexts—such as ineffective policing of crimes which disproportionately affect women, or adoption or implementation of invasive policies implicating women’s health—a reasonable fact-finder may be able to conclude that the outcome would have been different “but for” the sex of those affected.<sup>256</sup>

Importantly, at the present moment, the likelihood of achieving these goals through the but-for principle seems *more* likely than through the traditionally preferred doctrine of disparate impact. As noted *supra*, the Supreme Court rejected the disparate impact doctrine in the constitutional context close to 50 years ago—and it has shown no signs of retreating from that set of holdings.<sup>257</sup> Moreover, the Court has also limited the reach of disparate impact across in some statutory contexts, finding it not to be embodied in the statutory text.<sup>258</sup> In general, disparate impact has remained a consistently controversial and politically polarizing cause of action, with many lay people and judges continuing to perceive it as not a true anti-discrimination norm.<sup>259</sup>

In contrast, disparate treatment—the idea that people ought not be treated differently based on their race, sex, or other protected class status—rests at the very core of what most people conceptualize as discrimination.<sup>260</sup> The decisions centering the but-for principle as anti-discrimination law’s core inquiry have been not only joined but authored by politically conservative justices of the Supreme Court.<sup>261</sup> Moreover, those decisions have situated the but-for principle as anti-discrimination

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v. Feeney, 442 U.S. 256, 266, 278 (1979). Note that importantly, a “but for” argument is different than the “foreseeability” argument rejected in *Feeney*. See *id.* at 278.

<sup>256</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 630–34 (2000) (Souter, J., dissenting); Caitlin Dickerson, Seth Freed Wessler & Miriam Jordan, *Immigrants Say They Were Pressured into Unneeded Surgeries*, N.Y. Times (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html> [<https://perma.cc/MY2Y-VQGC>].

<sup>257</sup> *Washington v. Davis*, 426 U.S. 229, 237–48 (1976).

<sup>258</sup> See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 280–81, 293 (2001) (noting that Title VI only prohibits disparate treatment, and finding no implied private cause of action to enforce Title VI regulations prohibiting disparate impact discrimination).

<sup>259</sup> See, e.g., Selmi, *supra* note 74, at 704–06; see also Eyer, *supra* note 9, at 1300–01 (describing results from studies showing that many people do not perceive classic disparate impact contexts, such as disparate impacts on a protected group arising from testing-based disparities, as discrimination).

<sup>260</sup> See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977).

<sup>261</sup> See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1736–37 (2020); *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1012 (2020); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 340 (2013); *Gross v. FBL Fin.*, 557 U.S. 167, 169 (2009).



law's core textual mandate—something that ought to give them considerable legitimacy among judges of all political persuasions.<sup>262</sup>

Thus, ironically, disparate treatment law—long situated as the less-preferable alternative to disparate impact—may provide the most promising avenue today for the effectuation of disparate impact objectives. Embrace of a true “disparate treatment” standard—in the form of the but-for principle—could permit meaningful interrogation of circumstances in which a policy or practice with a differential impact on a subordinated group is adopted. Because of the systematic nature of certain types of oppression in our society, it often will be the case that the majority (whites, men, majority religions, cisgender people) would not impose similarly burdensome measures were they themselves the ones impacted. As such, the but-for principle can do much (though certainly not all) of the hoped-for work of the disparate impact paradigm in effectuating anti-subordination goals—and may even be a more effective method of achieving such goals today.

#### *D. The “Motivating Factor” Paradigm*

The “motivating factor” paradigm is the final doctrinal alternative that has long attracted the attention of anti-discrimination scholars and advocates.<sup>263</sup> Under a “motivating factor” burden-shifting approach, a plaintiff need only initially show that the race or sex or other protected class status was a “substantial” or “motivating” factor, at which point the burden shifts to the defendant to prove they would have taken the same action even in the absence of protected class status's role.<sup>264</sup> Under some versions of the doctrine, such a “same action” showing would preclude liability—while in others, it would simply serve to limit the available relief.<sup>265</sup>

The appeal of motivating factor burden-shifting is perhaps unsurprising from the perspective of an anti-discrimination law advocate, since in

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<sup>262</sup> See *Bostock*, 140 S. Ct. at 1739; *Comcast*, 140 S. Ct. at 1014–15; *Nassar*, 570 U.S. at 350–52; *Gross*, 557 U.S. at 176–77.

<sup>263</sup> See Sullivan, *supra* note 74, at 358–59 (describing the extensive attention paid to “motivating factor” liability in the scholarly literature and observing that “one wonders what all the fuss is about” in view of the disappointingly small impact that “motivating factor” has had).

<sup>264</sup> See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion).

<sup>265</sup> See sources cited *supra* note 264.

theory it considerably lightens the burden of proof that rests on the plaintiff—putting the burden of *disproving* but-for causation on the defendant. Perhaps for this reason, “motivating factor” burden-shifting has—like “disparate impact”—attracted considerable support and attention, in the scholarly, litigation, and legislative contexts.<sup>266</sup> Indeed, preserving motivating factor liability has been a major project of progressive legal academics, and of the wider advocacy community—a project that has often been situated as oppositional to the but-for principle.<sup>267</sup>

But like disparate impact, the “motivating factor” paradigm has failed to generate the results for which advocates have hoped. Thus, as Charles Sullivan has shown, the “motivating factor” paradigm has failed to revolutionize outcomes in anti-discrimination law.<sup>268</sup> As a claim, motivating factor continues to be much less commonly raised than “*McDonnell Douglas*” or other but-for-focused claims.<sup>269</sup> Moreover, “motivating factor” claims face equally low levels of success where they are litigated.<sup>270</sup> As such, the motivating factor paradigm—while much heralded—has in practice had little impact on the difficulties that anti-discrimination litigants face.

But the problems stemming from the progressive focus on the “motivating factor” paradigm have not been restricted to its limited effectiveness. Problematically, the campaign to preserve motivating factor has at times leaked over into counter-productive (and inaccurate) hyperbole about the limited scope of the but-for principle. Thus, in cases like *Gross*, *Nassar*, and *Comcast*, where the Court restricted the availability of motivating factor liability—instead making the but-for principle the central required inquiry—some progressive advocates made false and damaging claims about the but-for principle.<sup>271</sup> Most notably,

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<sup>266</sup> See Sullivan, *supra* note 74, at 358–59.

<sup>267</sup> See, e.g., sources cited *supra* note 93.

<sup>268</sup> See Sullivan, *supra* note 74, at 365–66, 396–98.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> See, e.g., Congressional Black Caucus Statement on the Supreme Court Oral Arguments for *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media* (Nov. 25, 2019), <https://davis.house.gov/statements/congressional-black-caucus-statement-on-the-supreme-court-oral-arguments-for-comcast-corp> [<https://perma.cc/9MUE-73AU>]; Taylor Telford, Race Discrimination Standards Hang in the Balance as Supreme Court Takes Up Comcast Suit, *Wash. Post* (Nov. 13, 2019) (quoting Kristen Clarke, Executive Director of the National Lawyers' Committee for Civil Rights), <https://www.washingtonpost.com/business/2019/11/13/race-discrimination-standards-hang->

such advocates contended that the but-for principle would require a plaintiff to demonstrate the absence of other causal factors (i.e., that their protected class status was the sole cause), something that would make anti-discrimination cases “nearly impossible” to win.<sup>272</sup>

It is no doubt correct that a requirement to demonstrate sole cause (i.e., to disprove the absence of other causal factors) would be an insurmountable requirement for most plaintiffs. Virtually all discriminatory decision-making involves multiple impetuses as a matter of fact, making it very difficult (if not impossible) to show that class status was the *sole* cause. Thus, for example, many instances of disparate treatment by the government—indeed even many instances of “intentional discrimination,” (like, arguably, some Voter ID laws)—may still have *some* legitimate causal factors underlying them. So too in the employment context, many if not most termination cases will involve circumstances where the employee has done *something* legitimately wrong, even if that same conduct would not have resulted in the firing of a majority group employee.<sup>273</sup>

Importantly, however, the claims of anti-discrimination scholars and advocates—that the but-for standard requires a showing that protected class status was the exclusive consideration—have been wrong.<sup>274</sup> The

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balance-supreme-court-takes-up-comcast-suit/ [https://perma.cc/FS4D-YUVS]; Tracy Jan, Civil Rights Groups Slam Comcast for Trying to Weaken a Key Protection Against Racial Discrimination, Wash. Post (Oct. 2, 2019) (quoting Clarke and Sherilyn Ifill, President of the NAACP LDF), <https://www.washingtonpost.com/business/2019/10/02/civil-rights-groups-slam-comcast-trying-weaken-key-protection-against-racial-discrimination/> [https://perma.cc/VY6R-KF6E].

<sup>272</sup> See Congressional Black Caucus Statement, *supra* note 271.

<sup>273</sup> See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283–84 (1976) (finding that a race discrimination claim could proceed where allegation was that several employees, Black and white, had committed a serious infraction, but only the white employees were fired).

<sup>274</sup> The conflation by progressives of “but for” causation and sole cause standards has a long and problematic history, which appears to have arisen at least in part from misguided strategic calculations. See, e.g., Eyer, *supra* note 2, at 999 (discussing the progressive justices’ arguments in *Price Waterhouse*, which erroneously suggested that plaintiffs under the *McDonnell Douglas* paradigm are required to disprove the employer’s legitimate non-discriminatory reason, i.e., prove sole cause). However, the most recent iterations of these arguments by progressives may be explicable at least in part by efforts by defendants to harness certain ambiguous language in *Gross* and *Nassar* (“the but-for cause” instead of “a but-for cause”) to argue for a sole cause standard. As D’Andra Shu has shown, in the aftermath of *Gross* and *Nassar* defendants have tried to use—at times successfully—this language to argue in the lower courts that *Gross* required sole causation. See D’Andra Millsap Shu, *The Coming Causation Revolution in Employment Discrimination Litigation*, 42 *Cardozo L. Rev.* (forthcoming 2021) (manuscript at 2–5) (on file with author). As Shu has argued, *Bostock*—

but-for standard does not require a showing that protected class status was the sole cause, or that no other factors played a role.<sup>275</sup> Thus, the employee who committed an infraction—but would not have been fired were they outside the protected class—prevails under the but-for standard.<sup>276</sup> So too, government actions that may have some legitimate underlying justification—but would not have been taken “but for” the protected class status of those affected—will result in defendant liability under the but-for approach.<sup>277</sup> As long-standing articulations of the but-for principle (in, for example, tort law) make evident, it is simply erroneous to contend otherwise.<sup>278</sup>

Moreover, if there were any doubt on this front, the Supreme Court’s recent decision in *Bostock v. Clayton County* eliminates it.<sup>279</sup> As the Court holds in *Bostock*, under the but-for standard “a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s [protected class status] was one but-for cause of that decision, [it] is enough to trigger the law.”<sup>280</sup> As the Court properly observes, “[t]his can be a sweeping standard,” since “[o]ften, events have multiple but-for causes.”<sup>281</sup> As such, under the but-for principle, protected class status need only be one factor among many—as the Court put it in a prior decision, the “straw that broke the camel’s back.”<sup>282</sup>

At this point, it should be evident that, understood properly, the but-for principle can amply accommodate cases in which there are “mixed motives”—or more clearly stated, multiple causal factors. The mere fact that an employer may have been partially spurred to action by legitimate misconduct, or that a government entity may have responded in part to legitimate public concerns, *does not* answer the question of whether the employer or government entity has violated the but-for principle. Indeed, there are likely to be many cases in which some legitimate considerations

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which makes absolutely clear that the “but for” standard is not a sole cause standard—should lead to a reversal of these precedents. *Id.* at 27–30.

<sup>275</sup> See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020).

<sup>276</sup> *Id.*; see also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283–84 (1976).

<sup>277</sup> See, e.g., *Burrage v. United States*, 571 U.S. 204, 211 (2014).

<sup>278</sup> See, e.g., Restatement (Third) of Torts § 26 cmt. c (Am. L. Inst. 2010).

<sup>279</sup> See *Bostock*, 140 S. Ct. at 1739.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Burrage*, 571 U.S. at 211.

played a role—but in which the adverse or harmful action or policy would not have been taken “but for” the protected class status of those affected.

Thus, insofar as our concern is the need to accommodate cases in which multiple casual factors—legitimate and illegitimate—played a role, the but-for principle can comfortably accommodate such cases. While it would not necessarily bring the presumed strategic benefits of shifting the burden of proof to the defendant, those presumed strategic benefits have in fact never materialized. Moreover, as described at greater length in Part V, *infra*, continuing to endeavor to situate “motivating factor” as the central defining standard of anti-discrimination law could come with considerable risks, including the risk of accidentally instantiating a strong requirement of self-aware intent in anti-discrimination law doctrine.

#### V. HEADWINDS TO RESOLVING THE THEORETICAL CRISIS IN ANTI-DISCRIMINATION LAW

The foregoing Parts have made the case that there is a long-standing theoretical crisis in anti-discrimination law—arising from the conflation of “disparate treatment” and “discriminatory intent”—and that now is the time to address it. As laid out in Parts II–IV, the Supreme Court’s recent cases—centering the but-for principle as the central defining feature of anti-discrimination law—provide considerable potential to do so. But it is important to acknowledge that there remain significant potential headwinds to such a project—including the entrenched views of many of those most committed in theory to expanding anti-discrimination protections. This Part takes up potential obstacles to resolving the theoretical crisis in anti-discrimination law, addressing in turn, likely progressive headwinds to a but-for project, potential legal headwinds, and likely sites of judicial resistance to refocusing anti-discrimination law around the but-for principle.

##### *A. Progressive Headwinds*

Without the buy-in of those committed to strengthening the protections of anti-discrimination law—anti-discrimination advocates and scholars—it is clear that a but-for-centered approach to revitalizing anti-discrimination law will not succeed. Indeed, while the growth of the but-for principle in anti-discrimination law may be inexorable (as evidenced by progressives’ failure to stop its spread), its *effects* and *application* within anti-discrimination law will not be. If anti-discrimination scholars

and advocates do not take up the opportunity to define the significance and proper application of the but-for principle, it is likely not only that the opportunity to resolve the theoretical crisis at the heart of discrimination law will be missed—but that discrimination defendants and conservative judges will define the but-for principle in ways that restrict anti-discrimination litigants' claims.<sup>283</sup>

This outcome is of course not inevitable. Anti-discrimination law scholars and advocates can seize the initiative in defining the significance and proper application of the but-for principle. So why might progressive scholars and advocates eschew this opportunity? This Part recognizes that embracing the but-for principle would run counter to a long-standing set of commitments that many scholars and advocates have embraced: commitments to oppose textualism, to oppose anti-classificationist anti-discrimination regimes, and most fundamentally to oppose the but-for principle itself.<sup>284</sup> Thus, embracing the potential of the but-for principle will require anti-discrimination scholars and advocates to abandon—or at least moderate—long-standing commitments, across a host of domains.

This Part suggests that while adhering to intellectual and doctrinal commitments is important, in this instance doing so would be ill-advised. Continuing to eschew the but-for principle because of its tension with existing progressive commitments is unlikely to do anything to further those commitments, but would sacrifice considerable opportunities for addressing the widespread pathologies in anti-discrimination law. Thus, the future of anti-discrimination law may depend in part on anti-discrimination scholars' and advocates' willingness to be flexible in recognizing the opportunities that the current moment does—and does not—present for the reform of anti-discrimination law.

### *1. Opposition to Textualism*

One of the most obvious potential obstacles to progressive embrace of the but-for principle is the Supreme Court's grounding of the but-for principle in textualism.<sup>285</sup> What is a strength of the but-for principle in its ability to provide effective arguments in the courts, becomes a weakness

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<sup>283</sup> See, e.g., *Pelcha v. MW Bancorp, Inc.*, 998 F.3d 318, 324 (6th Cir. 2021).

<sup>284</sup> Others have also written about progressive concerns about the but-for principle and possible responses to them, see Jessica Clarke, *The Virtues of Formal Causation* 54 (Feb. 13, 2021) (unpublished manuscript) (on file with author).

<sup>285</sup> See generally *supra* Part II (describing the Supreme Court's treatment of the "but for" principle as arising from the plain text of anti-discrimination law).

in attracting progressive adherents. Because textualism has long been associated with conservative individuals and conservative causes—and because many progressive scholars have devoted their life’s work to critiquing textualism—many progressive commentators remain committed to opposing textualism.<sup>286</sup> Thus, it is common to hear progressive commentators critique textualism, to opine that it cannot produce determinate outcomes, and to argue that it does not reflect the reality of federal judicial practice.<sup>287</sup>

This opposition to textualism is especially heightened in the context of the but-for principle itself, since many progressive scholars are on record articulating the view that the Court was *wrong* in cases like *Gross* and *Nassar* in suggesting that the but-for principle follows as a matter of plain textual meaning.<sup>288</sup> Rather, many progressive scholars suggested that the words “because of [protected class status]” did not necessarily connote but-for causation, but instead connoted a “motivating factor” burden-shifting paradigm.<sup>289</sup> Thus, not only have many progressives committed themselves to critiquing textualism as a methodology, many have specifically articulated the view that the core premise that makes the but-for principle so potentially powerful—its textualist grounding—is an illusion.

Thus, it should perhaps come as no surprise that even in the aftermath of *Bostock*—a major victory for progressive textualism and for the but-for principle—some progressives continued to question the premise of

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<sup>286</sup> See, e.g., Doug Kendall & Jim Ryan, *The Case for New Textualism, Democracy* (2011), <https://democracyjournal.org/magazine/21/the-case-for-new-textualism/> [<https://perma.cc/LA7V-3U65>] (making this observation and arguing against this tendency). Note that there is a sizeable and growing group of progressives who disagree with this perspective, including this author. See, e.g., Katie Eyer, *Progressive Textualism* (articulating a normative theory of progressive textualism) (unpublished manuscript).

<sup>287</sup> See *id.*; see also, e.g., Scott Fruehwald, *Pragmatic Textualism and the Limits of Statutory Interpretation: Dale v. Boy Scouts of America*, 35 *Wake Forest L. Rev.* 973, 991–92 (2000) (collecting critiques of textualism); Cary Franklin, *Living Textualism*, 2020 *S. Ct. Rev.* (forthcoming 2021) (manuscript at 4–8) (on file with author) (critiquing textualism in the context of a critique of *Bostock*).

<sup>288</sup> See, e.g., Brief for Employment Law Professors as Amici Curiae at 5–13, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (No. 12-484); Brief for Employment Law Professors as Amici Curiae at 4–10, *Comcast v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 2561 (2020) (No. 18-1171). In the interest of full disclosure, this author joined the aforementioned brief in *Nassar*, although my views on the proper textual interpretation of the statutory language under review there have shifted since that time.

<sup>289</sup> See Brief for Employment Law Professors as Amici Curiae at 6, *Nassar*, 570 U.S. 338 (No. 12-484).

whether textualism truly accounted for the outcome, or whether the opinion truly represented an unambiguous victory. Instead, some who supported the outcome in *Bostock* nevertheless seemed at pains to validate the *dissents*' contentions: that the but-for principle did not produce determinate outcomes, and that text was inadequate to resolve the case.<sup>290</sup> Others critiqued the opinion as a covert effort to sneak textualism into anti-discrimination law, with the purpose of hastening affirmative action's demise.<sup>291</sup> In short, long-standing commitments are, and perhaps ought to be, difficult to set aside, and for many scholars and advocates point away from a full-throated embrace of textualism and the but-for principle.

But this Article suggests that allowing opposition to textualism to stand as a barrier to the potential of the but-for principle is misguided. One need not accept all of the claims of textualism's defenders in order to harness the potential of textualism as a methodology.<sup>292</sup> Anti-discrimination law is an area in which the courts have strayed obviously and considerably from the legal texts they are charged with interpreting—with consistently anti-plaintiff results.<sup>293</sup> The but-for principle provides important

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<sup>290</sup> See, e.g., Franklin, *supra* note 287, at 4–8; Mitchell N. Berman & Guha Krishnamurthi, *Bostock* was Bogus: Textualism, Pluralism, and Title VII 97 Notre Dame L. Rev. (forthcoming 2022) (manuscript at 28–30) (on file with author); Anuj Desai, Text Is Not Enough, 93 U. Colo. L. Rev. (forthcoming 2021) (manuscript at 2–4) (on file with author); In Lieu of Fun, *supra* note 101, <https://youtu.be/zbxMG9Y9eB4?t=2622> [<https://perma.cc/RBF5-YQ9M>]. But cf. Eyer, *supra* note 101, at 73–80 (arguing before *Bostock* that textualism compelled the result the Court ultimately reached); Grove, *supra* note 100, at 267–69 (2020) (suggesting that *Bostock* was a legitimate application of textualism, but helps demonstrate that there are two forms of textualism, one of which, “formalistic textualism,” is much more likely to lead to determinate results); Andrew Koppelman, *Bostock*, LGBT Discrimination, and the Subtractive Moves, 105 Minn. L. Rev. Headnotes 1, 8–38 (2020) (describing *Bostock* as clearly correct on the text, and describing why the “subtractive moves” made by the dissenters and some lower court judges in similar contexts are contra-textual). Of course, several conservatives also critiqued *Bostock* as an application of textualism. In addition to the dissenters, see, e.g., Josh Blackman & Randy Barnett, Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases, Nat'l Rev. (June 26, 2020), <https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/> [<https://perma.cc/P5K9-XSZ7>].

<sup>291</sup> See, e.g., Cass Sunstein, Gorsuch Paves Way for Attack on Affirmative Action, Bloomberg (June 17, 2020), <https://www.bloomberg.com/opinion/articles/2020-06-17/gorsuch-gay-rights-opinion-targets-affirmative-action> [<https://perma.cc/PH4Z-N6WN>].

<sup>292</sup> As I am developing more fully in other forthcoming work, I believe there are important reasons to embrace textualism as a normative matter. See Eyer, *supra* note 286. But one need not embrace this normative perspective in order to see the strategic utility of textualism as a legal methodology.

<sup>293</sup> See *supra* Part III.



opportunities to remediate this, and to resituate anti-discrimination law around a true disparate treatment paradigm.<sup>294</sup> In a world in which it is clear that the Supreme Court is not going to reverse course and abandon the idea that the but-for principle is centrally important and textually mandated, it is not clear what might be gained by continuing to critique the principle's premises (as opposed to harnessing it).

Moreover, more generally, the time may have come for progressives to cut loose of their long-standing opposition to textualism. Textualism is the ascendant method of statutory interpretation at the Supreme Court.<sup>295</sup> As progressive Justice Elena Kagan has observed one could even claim that “we are all textualists now.”<sup>296</sup> It is important for progressives to be insiders to the conversation about what textualism entails, both as a matter of theory, and in its application to individual cases.<sup>297</sup>

## 2. *Opposition to Anti-Classificationist Approaches to Anti-Discrimination Law*

A second set of progressive commitments that the but-for principle comes up against is the long-standing progressive opposition to anti-classification approaches, animated in considerable part by fears over the future of affirmative action. Starting as early as the 1960s, and expanding in the 1970s, progressive advocates and scholars began to recognize that anti-classificationist approaches like colorblindness—or today, the but-for principle—could pose a risk to measures intended to remediate both historical and current discrimination.<sup>298</sup> Most obviously, affirmative action, in which minority groups may be given an advantage in admissions or employment (in order to account for historical and contemporary discrimination or to ensure diversity), are in obvious tension with an unstinting anti-classificationist perspective (and with the but-for principle).<sup>299</sup>

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<sup>294</sup> See *supra* Parts III–IV.

<sup>295</sup> See Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. Balt. L. Rev. 413, 421–22 (2019).

<sup>296</sup> Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 793 & n.10 (2018).

<sup>297</sup> See Katie Eyer, *Progressive Textualism and LGBTQ Rights*, SCOTUSblog (June 16, 2020), <https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/> [<https://perma.cc/74P9-WZ9H>].

<sup>298</sup> See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over *Brown**, 117 Harv. L. Rev. 1470, 1535–36 (2004).

<sup>299</sup> See *id.* at 1535.

But if this is the concern animating a reluctance of progressives to embrace the but-for principle, this too seems misguided. Affirmative action is already regarded as disparate treatment in the constitutional context—and likely will continue to be so regarded, regardless of the but-for principle.<sup>300</sup> And the exemption for bona fide affirmative action plans in the Title VII context was, at its origins, explicitly contra-textual (and thus would be potentially vulnerable to challenge in today’s textualist era, regardless of the but-for principle).<sup>301</sup> Finally, as scholars such as Stacy Hawkins have shown, most cases defended under traditional affirmative action plans today lose in any event—whereas diversity programs (in which protected class status may not be a but-for cause) are far less likely to result in successful “reverse discrimination” claims.<sup>302</sup> In short, the outcomes that might be feared for affirmative action from adopting an anti-classification approach have largely already come to pass and are unlikely to be reversed by eschewing the but-for principle.

Moreover, as some have observed, the next set of battles regarding color-blindness are likely to center on race-intentional remedial policies that do not explicitly classify, and here a turn to the but-for principle could have benefits for preserving such policies. Such race-intentional policies—such as, for example, government programs intended to reduce racial disparities in health outcomes, efforts to locate schools in geographical locations that promote integration, or indeed disparate impact doctrine itself—seek to achieve racially egalitarian goals without formally racially classifying.<sup>303</sup> Such race-intentional (but non-

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<sup>300</sup> See *Richmond v. J.A. Croson*, 488 U.S. 469, 505 (1989).

<sup>301</sup> See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201 (1979).

<sup>302</sup> See, e.g., Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, 83 *Fordham L. Rev.* 2457, 2467–69 (2015).

<sup>303</sup> Unlike programs like affirmative action in which an identifiable person may be treated differently based on their race, in the context of race-intentional policies, no specifically identifiable individuals are treated differently. Thus, for example, while the decision to site a school in a geographic location that will produce the maximum amount of racial integration may have a partial racial motivation, it does not treat individuals—or groups—differently based on race. Cf. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) (noting that “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”).

classifying) policies are a central part of our societal and governmental efforts to address racial inequities, and thus credible civil rights law challenges to them could be catastrophic.

To date, most courts (including the Supreme Court) have shown little appetite for characterizing such race-intentional policies as a form of intentional discrimination.<sup>304</sup> But as scholars such as Professor Kim Forde-Mazrui have observed, such race-intentional policies might appear to be in jeopardy, since the Supreme Court has articulated the view that it does not matter for constitutional scrutiny purposes whether government acts with an intent to hurt or benefit a protected group.<sup>305</sup> Since non-classifying actions taken with an intent to harm African Americans would no doubt demand strict scrutiny, this syllogism suggests that non-classifying actions taken with an intent to benefit African Americans must survive such scrutiny as well.<sup>306</sup>

But the logic of this syllogism appears questionable if we view the issue through the lens of the but-for principle. Thus, for example, a program designed to reduce racial disparities in health outcomes may have been adopted with a purpose to benefit African Americans, but it is unlikely that it is actually disparate treatment, i.e., that it would not have been adopted “but for” the race of those affected.<sup>307</sup> Indeed, if whites systematically experienced disproportionately high levels of infant and maternal mortality, infectious disease deaths, neglect of their pain complaints, and other health disparities, it seems quite unlikely that government would not take steps to remediate that situation.

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<sup>304</sup> Over the last several decades, impact litigation organizations have repeatedly asked the Supreme Court to take up this issue and squarely address it, and it has declined to do so. See Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. Pa. L. Rev. 537, 600 n.292 (2014) (collecting petitions for certiorari review on this issue). Even in cases where the question arguably was squarely presented, a majority of the Court has shown itself to be uninterested in taking it up. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (in an opinion not joined by any other member of the Court, arguing that the Court should take up the issue of whether disparate impact doctrine—a form of race-intentional action—is unconstitutional under the Equal Protection Clause).

<sup>305</sup> See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 Geo. L.J. 2331, 2333–34 (2000).

<sup>306</sup> *Id.*

<sup>307</sup> It is important to note that this is only true for—and I am only focused herein on—programs that also do not explicitly racially distinguish at the individual level. (So, in the example given above, the assumption is that the program makes its services available to all, even though its objective may be to remediate racial disparities). Where programs explicitly racially distinguish among individuals in eligibility criteria, they would fall under the logic of the Supreme Court’s affirmative action opinions instead.

So too, non-classifying integration-promoting measures seem much more obviously acceptable under a but-for approach than under an intent approach. For example, a school district may in some sense be said to have racial intent in situating a school in a neighborhood that will maximize integration—but it seems a much more difficult claim to suggest that their actions were disparate treatment, i.e., that they would not have been taken “but for” the race of those affected. As such, with the exception of contexts where government for political reasons puts the brunt of its integrationist measures on minority communities—something that *ought* to be impermissible—the but-for principle generally would find no liability for race-intentional but non-classificationist integration measures.

Thus, while progressives’ chariness of anti-classificationist approaches in anti-discrimination law arose from legitimate concerns about preserving race conscious remedial measures, eschewing the but-for principle is unlikely to meaningfully further that project today. Current conditions already place affirmative action in jeopardy regardless of whether the but-for principle is embraced by progressives.<sup>308</sup> And the but-for principle is likely to be *superior* to the current conceptually confused regime for the fights over race-intentional but non-classifying remedial measures that are yet to come. In short, progressive embrace of the but-for principle seems unlikely to hasten the demise of race conscious remedial measures and would afford considerable opportunities for reforming the rest of anti-discrimination law.

### *3. Opposition to the But-For Principle*

The final commitment that may make progressives reluctant to embrace the potential of the but-for principle is of course opposition to the but-for principle itself. As described *supra*, the foundational cases that have recognized the but-for principle as the central textual principle of anti-discrimination law—*Gross*, *Nassar*, and *Comcast*—were all cases in which progressives vigorously opposed the outcome.<sup>309</sup> Instead, progressives have argued for the application (or at least availability) of a

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<sup>308</sup> See *supra* notes 300–02 and accompanying text.

<sup>309</sup> See *supra* Part II and Sections IV.D, V.A.

“motivating factor” burden-shifting paradigm.<sup>310</sup> This Part suggests that, although progressives may have had good reasons for once arguing for a “motivating factor” paradigm, those reasons ought not deter progressives from embracing the but-for principle today.

As an initial matter, it appears clear that outside of certain specific circumstances—where the law quite clearly calls for a “motivating factor” standard—most anti-discrimination law claims will today be subject to the but-for principle.<sup>311</sup> Indeed, the most recent case holding that “but for” is required, *Comcast*, was a unanimous decision, joined by all of the progressive Justices on the Court.<sup>312</sup> Even Justice Ginsburg mostly joined the opinion, acknowledging that precedent has held that the but-for principle has an important role in anti-discrimination law.<sup>313</sup> As such, it seems unlikely that there is much to be gained by continuing to argue for “motivating factor” as the preferred standard, outside of the context of explicit statutory language.

As importantly, however, it is not at all clear today that “motivating factor” is a superior alternative to “but for.” As described at greater length in Section V.B, *infra*, the very wording of the “motivating factor” standard (using the language of “motive”) offers opportunities for defendants to argue that the law demands a showing of self-aware intent—something that could have devastating effects for the contexts in which it is applied. While those familiar with the history of the Civil Rights Act of 1991 will surely be aware that this was not the intent of Congress (instead Congress’s intent was to *lower* the burdens on anti-discrimination litigants), there are already Supreme Court cases that reflect this understanding of the “motivating factor” provision.<sup>314</sup> As such, as elaborated in Part V.B., progressives ought to be seeking to *cabin*, not expand, the application of the “motivating factor” standard in the law.

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<sup>310</sup> See *supra* Section IV.D; see also Hillel J. Bavli, Causation in Civil Rights Legislation, 73 Ala. L. Rev. (forthcoming 2021) (manuscript at 3–5) (on file with author) (arguing against the but-for causation standard, and suggesting that the “NESS” approach to causation be adopted instead in anti-discrimination law).

<sup>311</sup> See sources cited *supra* notes 90, 96–105, 124 and accompanying text.

<sup>312</sup> *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1011–12 (2020).

<sup>313</sup> *Id.* at 1019 n.\* (Ginsburg, J., concurring in part).

<sup>314</sup> See *infra* notes 346–50 and accompanying text. But cf. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020) (recognizing that this part of the Civil Rights Act of 1991 was simply intended to impose a lower standard of causation).

But even if this concern did not exist, it is far from clear that “motivating factor” burden-shifting is indeed superior to “but for.” As discussed *supra*, Charles Sullivan has shown that the “motivating factor” provision has not had the on-the-ground effects that advocates had hoped.<sup>315</sup> “Motivating factor” cases do not succeed at materially higher rates, and the lion’s share of anti-discrimination claims continue to be raised under other paradigms (most notably the *McDonnell Douglas* paradigm, which the Supreme Court has made clear is associated with “but for”).<sup>316</sup> As Professor Sullivan details, advocates have been reluctant to bring motivating factor claims because of concerns that juries will “spli[t] the baby” (finding for the plaintiff on “motivating factor” but for the defendant on “but for”)—something that would leave the plaintiff effectively without relief.<sup>317</sup> And judges have struggled to understand or embrace the concept of what it might mean to find liability based on something short of but-for causation.<sup>318</sup>

Moreover, it is also important to note that there is far less daylight between the “motivating factor” approach and the but-for approach than progressives have traditionally suggested. As described in Part IV, *supra*, progressives have at times suggested that the but-for principle demands something akin to “sole” causation—perhaps to make their case for why “motivating factor” is so urgent.<sup>319</sup> But this is false. Just like under the motivating factor approach, under “but for,” protected class status need only be one consideration of many. As the Supreme Court put it, “a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s [protected class status] was one but-for cause of that decision, that is enough to trigger the law.”<sup>320</sup>

In short, while progressives may once have had good reasons for thinking it was important to fight the turn to “but for,” those reasons have passed. “Motivating factor” has proved to be both less powerful, and more risky than its proponents initially envisioned. And the turn to “but for” is here to stay. Thus, today, there is little to be gained—and much to be lost—by declining to embrace the potential of the but-for approach.

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<sup>315</sup> See Sullivan, *supra* note 74, at 365–66, 396–98.

<sup>316</sup> *Id.* at 366 & n.42, 379; Eyer, *supra* note 2, at 981 n.73.

<sup>317</sup> Sullivan, *supra* note 74, at 396–97.

<sup>318</sup> *Id.* at 383–87.

<sup>319</sup> See *supra* notes 271–72 and accompanying text.

<sup>320</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020).

*B. Legal Headwinds*

Even if anti-discrimination scholars and advocates wholly embrace the but-for principle, there will of course remain legal obstacles to using the principle to effectuate the project described herein. As described in Part I, *supra*, there is ample case law that uses the language of “intent” or “purpose” and thus could provide a basis for arguments that a strong form of intent is indeed a legal requirement. And the process of using the but-for principle to attempt to dismantle the network of technical doctrinal rules that have been engrafted onto the anti-discrimination law inquiry will surely not be easy. Moreover, some anti-discrimination statutes, including Title VII, also include language that could complicate the argument that “but for” is the central defining inquiry in anti-discrimination law.

This Section takes up those various legal obstacles and suggests that—while they are real—they are not different in kind from those that any major project of anti-discrimination law reform would face. Moreover, because the project of resolving the theoretical crisis in anti-discrimination law will necessarily be an iterative and multi-sided one, it should not be viewed as an all or nothing affair. Rather, there are likely to be many small victories—and many small losses—as the civil rights community attempts to resituate anti-discrimination law around a true disparate treatment standard, i.e., the but-for principle. It is important to recognize that just as the conceptual crisis in anti-discrimination law took many years to create, so too it is likely to take years to resolve. Current cases offer the opportunity to begin that movement—and to secure incremental victories for anti-discrimination litigants—but they will require consistent and strategic action to produce their most significant results.

*1. Case Law*

There are two fronts on which case law may stand as an obstacle to the project described herein: (1) case law may be used to argue that the but-for principle is *not* in fact the central defining principle of anti-discrimination law (and that, for example, a strong form of self-aware intent requirement exists); and (2) case law may be used to object to the *application* of the but-for principle, suggesting that precedent demands a different, more technical approach. As set out below, this second category of case law should not be viewed as a reason not to pursue the but-for

project. Indeed, the very reason why a textualist but-for principle is important is the opportunities it offers for dismantling this network of technical anti-plaintiff rules. And the first set of obstacles, while real, would extend to *any* effort to resolve the conceptual crisis in anti-discrimination law. Thus, while the project of resolving the conceptual crisis in anti-discrimination law will surely be arduous and contested, contemporary trends in the case law offer the best opportunity that has existed for doing so in the modern history of anti-discrimination law.

*a. Precedential Obstacles to Centering “But For”*

As described in Part I, *supra*, the conceptual crisis in anti-discrimination law has arisen from the conflation of “disparate treatment” and “intentional discrimination” in the Supreme Court’s doctrine.<sup>321</sup> As such, there are ample cases that use the language of “discriminatory intent” or “purpose”—even as they simultaneously situate disparate treatment as the standard.<sup>322</sup> These cases no doubt will provide an opportunity for those who might oppose a but-for-centered disparate treatment law to argue the resolution of anti-discrimination law’s conceptual crisis suggested herein is foreclosed.

But it is important to note that *any* effort to resolve the conceptual crisis in anti-discrimination law would run up against this difficulty—even one that sought to resolve the conceptual crisis in favor of an “intent” or “purpose” standard. As a variety of scholars have observed, there are significant parts of the Supreme Court’s case law that are *also* irreconcilable with a true “intent” or “purpose” standard.<sup>323</sup> Precisely because the doctrine has been conceptually confused—conflating “disparate treatment” with “discriminatory intent”—the full body of what the Supreme Court has said and done cannot be fully reconciled with *either* a pure “disparate treatment” standard or a pure “intent” approach.<sup>324</sup>

But as described in Part II, *supra*, recent Supreme Court case law has tilted toward situating a true “disparate treatment” standard—the but-for

<sup>321</sup> See *supra* notes 55–57 and accompanying text.

<sup>322</sup> See *supra* notes 42–44 and accompanying text.

<sup>323</sup> See, e.g., Green, *supra* note 27, at 401–03, 415–17; Banks & Ford, *supra* note 40, at 1082–84; Selmi, *supra* note 60, at 287–89; Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 Conn. L. Rev. 979, 983 (2008); see also *supra* notes 38–46 and accompanying text (discussing this issue in depth).

<sup>324</sup> See sources cited *supra* note 323.



principle—as the textualist core of anti-discrimination law. As illustrated by the plaintiffs’ success in *Bostock*, this offers considerable opportunities for arguing that a disparate treatment standard must be dispositive. While this argument is not likely to succeed in every case, as described in Part III it offers myriad everyday possibilities for scholars, litigants, and social movement actors to argue that the conceptual core of disparate treatment law is indeed a “disparate treatment” principle—that the law has been violated if the outcome would have been different “but for” the protected class status of those affected. While not every case that raises this argument is likely to prevail, simply making this the widespread message of anti-discrimination advocates and scholars is precisely what is needed to ultimately effectuate systematic reform.

Importantly, as described in Parts II and III, no sweeping Supreme Court decision is necessary in order to allow advocates to adopt this approach. Existing cases—including recent cases such as *Gross*, *Nassar*, *Comcast*, and *Bostock* (as well as older cases like *Manhart* and *McDonald*)—offer ample opportunity to argue that the but-for principle is already the central defining inquiry of anti-discrimination law.<sup>325</sup> As described in Part III, moreover, the potential uses of this argument range from individual trial-level litigants arguing that technical doctrines cannot be used to dismiss their claim, to Supreme Court advocates arguing for the abolition of a major doctrinal obstacle to plaintiffs’ success. And while some cases are likely to succeed—and others to lose—the but-for principle could at a minimum provide some relief *now* for the many anti-discrimination litigants for whom technical doctrines currently pose deep obstacles to success.

Moreover, it is precisely this iterative process—of making multi-sited arguments that a true disparate treatment standard lies at the core of anti-discrimination law—that is likely to ultimately be necessary to resolve the conceptual crisis in anti-discrimination law. The conceptual crisis in anti-discrimination law has been long-standing, and we are not going to fix it overnight. Rather, like most other important movements in the law, it will take time, patience, effort, and consistent messaging to help shift the discourse—and the law—to an unqualified embrace of the but-for principle. Importantly, just as the same-sex marriage movement saw losses along the way, this movement too is unlikely to see unstinting

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<sup>325</sup> See *supra* notes 80–92, 98–103 and accompanying text.

victory.<sup>326</sup> But as the Supreme Court's decision in *Bostock* makes clear, even shy of achieving its ultimate goals, a "but for" movement may produce important reforms (big and small) for anti-discrimination litigants.

*b. Precedential Obstacles to Applying "But For"*

As described above, a project of resolving the conceptual crisis in anti-discrimination law is likely to face precedent-based challenges even in establishing "but for" as the law's central focus. But even taking for granted that the but-for principle applies, there will be a second level of precedent-based arguments that are sure to be raised in individual cases, as the but-for principle comes into conflict with the network of technical rules that the courts have engrafted onto anti-discrimination law. As set out below, this is not a reason for failing to pursue the project of resolving the conceptual crisis in anti-discrimination law—indeed, it should be seen as the central reason *for* undertaking such a project.

As described in Parts I–II, the consequence of the theoretical crisis in anti-discrimination law has been judicial law-making run amok. Without any central defining principle with which to oppose the hyper-technicalization of disparate treatment law, advocates and scholars have mounted only relatively uncoordinated and ineffective opposition to these developments.<sup>327</sup> Especially in the lower courts, the factual question of discrimination often plays a *de minimis* role in resolving cases, with the central focus of the courts and the parties directed at a set of technical requirements instead.<sup>328</sup> Under these technical rules, plaintiffs typically lose—even if they have presented evidence from which a "reasonable jury" could conclude that discrimination took place.<sup>329</sup>

There is thus ample precedent, especially at the circuit court level, which can be used to argue that a simple focus on the but-for principle is inappropriate in anti-discrimination cases. Rather, defendants will argue—and some judges may continue to accept—there are numerous

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<sup>326</sup> It is perhaps too easy to forget that the campaign for marriage equality spanned five decades and involved innumerable losses before the 2015 decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015). Ultimately, those losses were all a part of the important iterative transformation of society that allowed *Obergefell* to occur. See, e.g., Anthony Michael Kreis, *Marriage Demosprudence*, 2016 U. Ill. L. Rev. 1679, 1709–11 (2016).

<sup>327</sup> See *supra* note 77 and accompanying text.

<sup>328</sup> See *supra* notes 61–63 and accompanying text.

<sup>329</sup> See *supra* note 118 and accompanying text.

technical inquiries that are instead required as a matter of judicial precedent. But this is not a reason for failing to pursue a but-for-centered project—indeed, it is the reason why such a project is so urgently needed. Without a textualist but-for project, there are far fewer bases for pushing back on this precedent and suggesting that it is inappropriate. But the but-for principle itself provides a straightforward, intuitive, and textually grounded basis for suggesting that these precedents are impermissible.<sup>330</sup>

As set out in Part III, *supra*, the logic behind the “but for” challenge to technical anti-discrimination precedents—and the high levels of summary judgment that they are used to justify—is straightforward. The Supreme Court has said that the textual center of anti-discrimination law is the *factual* question of whether the individual would have fared better “but for” their protected class status.<sup>331</sup> The technical doctrines that derogate from this have no grounding in the statutory text.<sup>332</sup> Many bear little or no relationship to the factual question of whether *this particular plaintiff* experienced discrimination.<sup>333</sup> Thus, the but-for principle offers considerable opportunities to argue that such doctrines are both contra-textual and illegitimate.

While again, these arguments are unlikely to succeed in every case, they can provide the foundation for a movement that could ultimately thoroughly dismantle the obstacles to anti-discrimination litigants’ success. And for each anti-discrimination individual litigant, they offer at least some opportunity to argue that the facts and circumstances of their case—rather than a network of technical rules—are important. For those who persuade the judge in their case to allow their case to go forward—because on all of the facts and evidence a reasonable jury could conclude they were treated differently—this opportunity matters.

## 2. *Statutory Language*

As described above, one of the principal strengths of using the but-for principle as the vehicle for resolving the conceptual crisis in anti-discrimination law is its textual grounding. As the Supreme Court has held, the plain meaning of the causation language that appears at the heart of most anti-discrimination laws—“because of” or “by reason of” or “on

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<sup>330</sup> See *supra* note 94 and accompanying text.

<sup>331</sup> See *supra* note 137 and accompanying text.

<sup>332</sup> See *supra* note 9 and accompanying text.

<sup>333</sup> See *supra* note 61 and accompanying text.

the basis of”—is the but-for principle.<sup>334</sup> But there is also other language in some anti-discrimination law statutes which may complicate arguments that the but-for principle rests at the center of anti-discrimination law, or that its principles should extend to all anti-discrimination law claims.<sup>335</sup> As set out below, while such language ought to be addressed by advocates and scholars with care, it need not and should not be read to interfere with the idea that the but-for principle is anti-discrimination law’s central defining inquiry. While the language of the anti-discrimination laws varies, this Subsection focuses on Title VII of the Civil Rights Act of 1964, as its wording forms the basis for many of the other contemporary anti-discrimination laws.<sup>336</sup>

Title VII’s statutory text prohibits discrimination “because of . . . race, color, religion, sex, or national origin.”<sup>337</sup> Thus, as the Supreme Court recognized in *Bostock*, it falls squarely within the Court’s holdings that “the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of’”—and that those terms further connote “the ‘simple’ and ‘traditional’ standard of but-for causation.”<sup>338</sup> As such, Title VII can be situated as a key example of the central textual significance of the but-for principle to anti-discrimination law.<sup>339</sup> And Title VII plaintiffs—including both those who raise status-based claims and those who raise retaliation claims—ought to be able to take advantage of the arguments that the but-for principle makes available.<sup>340</sup>

But there is also other language within Title VII that could be used to argue for a contrary proposition—and specifically, that plaintiffs must show that defendants possessed self-aware intent. The words “intent,” “motive” or “discriminatory purpose” (or cognate terminology) appear multiple times in Title VII—and several times more in the statutory provision in which Title VII’s damages provisions are codified, 42 U.S.C. § 1981a.<sup>341</sup> Most of the places in which such language appears do not pose a significant challenge to arguing that the but-for principle is the central

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<sup>334</sup> See *supra* notes 125–27 and accompanying text.

<sup>335</sup> See *infra* notes 341–64 and accompanying text.

<sup>336</sup> See, e.g., Anita S. Krishnakumar, *Dueling Canons*, 65 *Duke L.J.* 909, 940 (2016) (noting that Congress has often used Title VII as the template for newer anti-discrimination laws).

<sup>337</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>338</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346, 350, 360 (2013)).

<sup>339</sup> *Id.*

<sup>340</sup> See 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a).

<sup>341</sup> See 42 U.S.C. § 2000e, *et seq.*; 42 U.S.C. § 1981a.

defining feature of Title VII disparate treatment claims. Rather, the language typically appears in the context of collateral or minor issues that do not modify Title VII's central proscriptions.<sup>342</sup> However, there are a few statutory provisions that—while not clearly in conflict with a but-for-centered project—could potentially be used to argue against it, especially if anti-discrimination law scholars and advocates are not careful in addressing them.

Ironically, the most potentially problematic of the references in Title VII to “motive” or “intent,” is the very “motivating factor” language that progressives successfully argued for in 1991.<sup>343</sup> Under 42 U.S.C. § 2000e-2(m), added as part of the Civil Rights Act of 1991, “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”<sup>344</sup> Those familiar with the history of this provision's enactment will know that it was not intended to introduce a new “motive” requirement, but rather, as the Court recognized in *Bostock*, to institute a more “forgiving” causation standard.<sup>345</sup> But that has not stopped anti-discrimination defendants—and some Justices of the Supreme Court—from seizing upon the “ordinary meaning” of the word “motive” to argue that this provision connotes a requirement of motive or intent in the colloquial sense.<sup>346</sup>

Although some progressives—who continue to champion the “motivating factor” provision—have been reluctant to view this “colloquial reading” concern as a genuine risk, Supreme Court opinions suggest otherwise.<sup>347</sup> Indeed, the Supreme Court has *already* suggested that a textualist reading of the “motivating factor” provisions requires a showing of “motive” in the colloquial sense, including in the recent cases of *Staub v. Proctor Hospital* and *EEOC v. Abercrombie & Fitch Stores*.<sup>348</sup> Thus, for example, in *Staub*, the Court specifically pointed to the colloquial meaning of “motive” as the key reason why the Court could

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<sup>342</sup> See, e.g., 42 U.S.C. § 2000e-2(h) (granting a safe harbor to “bona fide seniority or merit system[s],” except where those systems are the result of an “intention to discriminate”).

<sup>343</sup> See *supra* note 76.

<sup>344</sup> 42 U.S.C. § 2000e-2(m); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020).

<sup>345</sup> *Bostock*, 140 S. Ct. at 1739–40.

<sup>346</sup> See *Staub v. Proctor Hosp.*, 562 U.S. 411, 418–19 (2011); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

<sup>347</sup> See sources cited *supra* note 346.

<sup>348</sup> *Id.*

not find that military service was a *motivating factor* in a higher level manager's actions in a cat's paw case (since a higher level manager relying on biased inputs from subordinates is not "motivated" by protected class status—though protected class status might be a "causal factor").<sup>349</sup> So too, in *Abercrombie*, the Court relied repeatedly on the colloquial meaning of "motive" in finding that an employer was indeed "motivated" by an employee's "religious practice" when it refused to hire an individual who it suspected required religious accommodation.<sup>350</sup> Thus, if the "motivating factor" provision is controlling, it would arguably require a showing of "motive" in the colloquial sense.

Fortunately, there are strong reasons to believe that the "motivating factor" provision does *not* automatically control adjudication of Title VII cases. The lower courts have long treated the motivating factor and "because of" provisions of Title VII as *alternatives*, rather than a singular standard that must be read in concert—meaning that each is an available way of bringing a discrimination claim.<sup>351</sup> The Supreme Court adopted this approach in *Bostock*, finding that it did not need to grapple with the meaning of the motivating factor provision because Title VII's "because of" provision—and its but-for principle—were adequate to resolve the case.<sup>352</sup> If this approach is taken, then the motivating factor provision should be of little concern to a but-for-centered project. Regardless of how the motivating factor provision is ultimately construed, it will define only the contours of an alternative to "but for," not the scope of what those who choose the but-for approach will be required to demonstrate.

But despite *Bostock*'s important holding on this front, it is critical for scholars and advocates to be aware of the continuing risk that the motivating factor provision could pose if not treated with care. There is language in some of the Supreme Court cases suggesting—contrary to *Bostock*—that the motivating factor provision could be read to define how Title VII's "because of" language should be applied.<sup>353</sup> While this reading of the statute by no means inexorably follows from its text, if adopted it

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<sup>349</sup> See *Staub*, 562 U.S. at 418–19. Though the Court went on to find for the plaintiff, it did so on a rationale considerably more complex and difficult for a plaintiff to meet than a simple "but for" standard. See *id.* at 422.

<sup>350</sup> See *Abercrombie*, 135 S. Ct. at 2033.

<sup>351</sup> See, e.g., *Ponce v. Billington*, 679 F.3d 840, 844–45 (D.C. Cir. 2012); see also *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (characterizing § 2000e-2(m) as creating an "alternative" means of proving an unlawful employment practice).

<sup>352</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020).

<sup>353</sup> See, e.g., *Abercrombie*, 135 S. Ct. at 2032.

could considerably complicate arguments that the but-for principle represents Title VII's central defining principle (or that that principle does not entail a showing of "motive" or self-aware intent). Moreover, progressives—who have viewed the "motivating factor" provision favorably and thus have pursued arguments that it *should* be universally applied—may still be inclined to view such a development favorably, not seeing the substantial risks that it could bring.<sup>354</sup> Thus, it is important for advocates and scholars to proceed with care in ensuring that "motivating factor" language—within Title VII and other statutes—is treated as an available *alternative*—but not the exclusive defining standard for anti-discrimination litigants' claims.

The other set of statutory references to "purpose," "intent," or "motive" that seem at first blush to be most problematic for a but-for-centered anti-discrimination law are those that appear in the provision defining the availability of damages for Title VII, § 1981a.<sup>355</sup> In that provision, added by the Civil Rights Act of 1991, Congress specified that compensatory and punitive damages should be available in cases of "intentional discrimination," language which could be read to suggest that intent must be proven in order to secure damages relief.<sup>356</sup> However, Congress also went on to immediately define what it meant by "intentional discrimination"—"not an employment practice that is unlawful because of its disparate impact."<sup>357</sup>

As set out above, the but-for principle—and indeed any true disparate treatment standard—remains a disparate treatment claim, "not an employment practice that is unlawful because of its disparate impact."<sup>358</sup> Moreover, as *Bostock* articulates, even "intentional discrimination" can be conceptualized in a way that is fully consistent with the "but for" principle, i.e., an intentional employer action that discriminates in the literal sense of differentiating, that would not have been taken but-for protected class status.<sup>359</sup> Thus, while the language of § 1981a is potentially confusing—and may have reflected Congress's own conceptual conflation of disparate treatment and discrimination effectuated with discriminatory intent—it should not pose a bar to the

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<sup>354</sup> See, e.g., Sullivan, *supra* note 74, at 360 n.15.

<sup>355</sup> See 42 U.S.C. § 1981a.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*; see *supra* notes 32–38 and accompanying text.

<sup>359</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020).

recovery of damages on any true disparate treatment claim (including but-for claims).

Finally, there is language in the original enforcement provisions of Title VII, § 2000e-5(g)(1) (still applicable today) which provides that “[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . .”<sup>360</sup> Though in theory one possible interpretation of this language is that discriminatory intent must be proven to secure *any* relief, even equitable relief, § 2000e-5(g)(1) has never been understood in this way.<sup>361</sup> On the contrary, Title VII has always been understood to permit injunctive relief and other § 2000e-5(g)(1) remedies even for disparate impact claims.<sup>362</sup> Thus, it seems clear this language does not impose a showing of self-aware intent at the liability stage in order for § 2000e-5(g)(1) remedies to be available.<sup>363</sup> Rather, § 2000e-5(g)(1)’s requirement of “intentional” action should be understood similarly to the way that *Bostock* situates intent—simply as a requirement for intentional undertaking of an unlawful employment practice on the part of the defendant.<sup>364</sup>

### *C. Judicial Headwinds*

As described above, while there are legal arguments that can be raised against a but-for project of reforming anti-discrimination law, there are also many potential legal avenues for success. But it is important to acknowledge that “law” itself may not be the only obstacle that the project of resolving anti-discrimination law’s theoretical crisis is likely to face in the courts. Rather, the existing attitudes and beliefs of judges are also likely to serve as a potential barrier to reform. In particular, judges’ beliefs that summary judgment is important to preserve judicial resources,

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<sup>360</sup> 42 U.S.C. § 2000e-5(g)(1).

<sup>361</sup> See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421–23 (1975).

<sup>362</sup> *Id.* at 422–23.

<sup>363</sup> *Id.*

<sup>364</sup> See *supra* Section II.B. Given the wording of this provision, what is required is only for an employer to have “intentionally engag[ed] in an unlawful employment practice,” not for such practice to have been taken “but for” protected class status. See 42 U.S.C. § 2000e-5(g)(1). Thus, this provision covers but-for discrimination, but also extends more broadly to, for example, policies intentionally adopted by an employer which have a disparate impact.



judges' propensity to engage in common law rulemaking in anti-discrimination law, and the hostility that some judges have toward anti-discrimination claims, are all likely to pose obstacles to efforts to reorient anti-discrimination law around the but-for principle. While these attitudes and beliefs are by no means universally held—and would pose an obstacle to virtually any meaningful project of anti-discrimination reform—they are important to be cognizant of in addressing a project of but-for-centered reform.

### *1. Not Enough Summary Judgment*

As discussed in Part III, *supra*, one of the *benefits* of a but-for focused project of anti-discrimination reform is that it should dramatically lessen the use of technical rules by lower court judges to dismiss anti-discrimination law claims.<sup>365</sup> Currently, many discrimination cases are dismissed—typically at summary judgment—based on technical rules that bear scant resemblance to the factual question of whether discrimination took place.<sup>366</sup> The but-for principle offers an opportunity to contest this common practice by arguing instead that the simple factual question of discrimination ought to control. Is there sufficient evidence for a reasonable jury to conclude that the outcome would have been different “but for” the plaintiff’s protected class status? If so, summary judgment must be denied.

But what is a benefit from the perspective of revitalizing anti-discrimination law will surely be a drawback from the perspective of some judges. Indeed, some judges have been surprisingly explicit in the context of anti-discrimination law in articulating the view that it is *important* to have rules that allow judges to grant summary judgment with some regularity.<sup>367</sup> Thus, one likely obstacle to a project focused simply on the factual question of discrimination is that some judges will perceive such an approach as not allowing a sufficiently high rate of summary judgment against discrimination plaintiffs.

It is important to observe as an initial matter that this judicial concern has no grounding in the law, and indeed is highly problematic as a matter of neutral legal requirements. There is one summary judgment standard, and that standard requires that summary judgment be denied wherever a

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<sup>365</sup> See *supra* Section II.B.

<sup>366</sup> See *supra* notes 150–52.

<sup>367</sup> See, e.g., *Lewis v. City of Union City*, 918 F.3d 1213, 1226 (11th Cir. 2019) (en banc).

reasonable jury could find for the plaintiff on the issue under consideration.<sup>368</sup> The Supreme Court has made clear, moreover, that there is no basis for varying the question or standards under consideration at different procedural stages of the litigation—something that is clearly violated in the case of the technical standards that the lower courts apply to dismiss discrimination claims.<sup>369</sup> Moreover, to the extent that the view of judges is that the summary judgment must be available in *discrimination* cases in particular, this, of course, violates the requirements of trans-substantivity that are a basic premise of the Federal Rules of Civil Procedure.<sup>370</sup> Finally, there is no textual basis in Title VII (or other anti-discrimination laws) for the summary-judgment-promoting doctrines that the lower courts have embraced—and indeed such doctrines are in conflict with the plain text insofar as they distract from the core question of whether discrimination was “because of . . . [protected class status].”<sup>371</sup>

But even assuming that a desire to preserve the regular availability of summary judgment was a legally legitimate basis for adopting (or rejecting) standards of anti-discrimination law, it is far from clear that the concerns that have animated judges in wishing to ensure the availability of summary judgment are factually warranted. Leaving aside for the moment distaste for anti-discrimination cases (an issue discussed at length in Subsection V.C.3, *infra*), the most common justification offered for the need for the availability of summary judgment is judicial resources.<sup>372</sup> Specifically, it is common to hear claims that judges need to award summary judgment in a certain portion of cases because the courts do not have the resources to try a much higher proportion of claims.<sup>373</sup> Thus, summary judgment might be thought of as an unfortunate but necessary reality of the modern legal system in which the volume of cases exceeds the judicial capacity.<sup>374</sup>

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<sup>368</sup> See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149–50 (2000).

<sup>369</sup> See, e.g., *Comcast v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).

<sup>370</sup> See generally *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (holding that the imposition of higher procedural standards on particular classes of federal claims must come through amendment of the federal rules, not judicial action).

<sup>371</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>372</sup> See, e.g., *Thomas*, *supra* note 175, at 177.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

But this factual assumption appears to be unwarranted, or at a minimum, overblown. Most discrimination cases that survive summary judgment *do not* go to trial—rather, most parties settle.<sup>375</sup> This reflects the reality that there are strong incentives *for the parties* not to take cases to trial, even when they can.<sup>376</sup> As such, a shift to fewer awards of summary judgment would no doubt result in some greater frequency of trials, but not nearly to the extent that might be assumed.<sup>377</sup> Rather, the principal effect of fewer awards of summary judgment would be to permit a higher number of settlements, on more favorable terms, to discrimination plaintiffs.<sup>378</sup>

Moreover, whatever marginally increased trial burden that results from a but-for approach is likely to be partially or wholly offset by dramatically *decreased* summary judgment burdens.<sup>379</sup> Currently, judges (and the parties) spend many hours addressing arguments based on the complicated technical threads of anti-discrimination doctrine at summary judgment.<sup>380</sup> As Judge Nancy Gertner has observed, where summary judgment is granted (as it often is in discrimination cases), judges ordinarily write an opinion justifying this decision—a task that cumulatively consumes considerable judicial resources.<sup>381</sup> In contrast, as both Justice Gorsuch and Justice Kavanaugh observed as Court of Appeals judges, a simpler, more factually-focused approach preserves resources, and thus benefits “courts and litigants alike.”<sup>382</sup> Thus, while a but-for focused approach to anti-discrimination law is likely to result in a somewhat greater number of trials, it is also likely to preserve judicial resources at the summary judgment stage.

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<sup>375</sup> See Berrey, Nelson & Nielsen, *supra* note 25, at 63.

<sup>376</sup> There are risks to both parties of going to trial, even following the denial of a summary judgment motion. For the plaintiff, they must face the risk of losing the case and walking away with nothing, whereas for the defendant, they must face the risk of substantially more onerous conditions (financial or otherwise) being imposed on them at trial (if they lose) than they might be able to negotiate in a settlement.

<sup>377</sup> See Thomas, *supra* note 175, at 177–79.

<sup>378</sup> See Thomas, *supra* note 175, at 178 n.165.

<sup>379</sup> See *id.* at 178.

<sup>380</sup> *Id.*

<sup>381</sup> See Nancy Gertner, *Losers’ Rules*, 122 *Yale L.J. Online* 109, 113 (2012).

<sup>382</sup> *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1226 (D.C. Cir. 2008); see also *Walton v. Powell*, 821 F.3d 1204, 1212 (10th Cir. 2016) (critiquing the tendency to overlay complex legal frameworks on the discrimination inquiry at summary judgment, and noting that “summary judgment [is] supposed to be that—summary”).

Finally, it is important to note that not all judges share the perspective that the inquiry at summary judgment in discrimination cases ought to be technically oriented and promote the availability of summary judgment awards. For example, as then-Judge Gorsuch put it in rejecting the application of technical rules to First Amendment retaliation claims (in favor of a straightforward factual approach):

[T]oday motions practice, and especially summary judgment motions practice, seems to have assumed a place near the center of the legal universe: almost no one makes it to trial anymore. With that development surely comes a strong temptation to anoint summary judgment with unique significance and adorn it with special rules and procedures. But the truth is summary judgment was supposed to be that—summary. Not a maddening maze. Not a paper blizzard. Not a replacement for the trial as the preferred means for resolving disputes.<sup>383</sup>

Ultimately, while judicial perception of the need for rules that would permit summary judgment in discrimination cases is a real obstacle, it would stand as an obstacle to *any* project of anti-discrimination reform. But strong, indeed overwhelming, legal arguments exist for opposing such a view—and even from a pure policy perspective, it is far from clear that reducing awards of summary judgment in discrimination cases would pose a challenge for judicial resources.

## 2. *Rule Creep*

A second likely judicial obstacle to a project of recentering anti-discrimination law around the but-for principle is what I refer to as “rule creep.” As observed in Part III, *supra*, some circuits (including most notably the U.S. Court of Appeals for the Seventh Circuit) have *already* in theory adopted a simple, factually focused approach to anti-discrimination claims.<sup>384</sup> But a review of recent cases reveals that in many instances this has not stopped judges from reattaching technical rules to the new, ostensibly straightforward, factual inquiry.<sup>385</sup> This “rule creep” could pose a genuine risk to a project of but-for focused reform, insofar

<sup>383</sup> *Walton*, 821 F.3d at 1212.

<sup>384</sup> See, e.g., *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

<sup>385</sup> See, e.g., *Khowaja v. Sessions*, 893 F.3d 1010, 1014–16 (7th Cir. 2018); *El-Saba v. Univ. of S. Ala.*, 738 F. App’x 640, 646–48 (11th Cir. 2018).

as it may render ineffectual even decisions situating the but-for principle as the central anti-discrimination law inquiry.

The reasons for this “rule creep” are no doubt varied, and likely include both the considerations described *supra* (perceived need for elevated levels of summary judgment) and *infra* (judicial disfavor for anti-discrimination law claims).<sup>386</sup> But in addition to those two motivators, it appears that judges are simply most comfortable with the use of common law rules in the anti-discrimination law context. Thus, judges appear to be uncomfortable with undertaking an inquiry unguided by technical rules, and simply stating their view of whether a reasonable jury—based on all the facts and circumstances—could or could not find discrimination.<sup>387</sup> In part, perhaps because of habit—and the long practice of evaluating anti-discrimination claims via technical paradigms—judges appear eager, even where instructed otherwise, to apply technical precedents to “resolve” the claim, rather than taking ownership over their own factual judgment.<sup>388</sup>

To some extent, this attraction to technical rules may reflect genuine concerns that a factually-focused inquiry will not lead to determinate results. Indeed, there is ample research suggesting that people of different backgrounds and beliefs do perceive discrimination differently based on the very same facts.<sup>389</sup> Thus, there can be no doubt that different judges may reach different outcomes—even when presented with the very same evidence—about whether a reasonable jury could conclude that discrimination, as a factual matter, took place.<sup>390</sup> Thus, one might imagine that technical rules could serve an important protective purpose for *plaintiffs*—ensuring that cases would survive summary judgment where they meet certain technical requirements, regardless of whether a judge believes discrimination took place.

But while this may have been the premise on which some of the existing technical rules were adopted, today those technical rules operate overwhelmingly to disfavor plaintiffs, offering judges the opportunity to

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<sup>386</sup> See *supra* Subsection V.C.1 (addressing the perception among some judges that there is a need for doctrine that will allow elevated levels of summary judgment) and *infra* Subsection V.C.3 (discussing general judicial disfavor for anti-discrimination law claims).

<sup>387</sup> I have had adjudicators of discrimination cases express this view to me in informal conversations about this project and prior work on the *McDonnell Douglas* paradigm.

<sup>388</sup> See sources cited *supra* notes 385–87 and accompanying text.

<sup>389</sup> See, e.g., Russell K. Robinson, Perceptual Segregation, 108 *Colum. L. Rev.* 1093, 1106–39 (2008).

<sup>390</sup> See *id.* at 1106–39, 1155–56, 1164–66.

justify awarding summary judgment, but not denying it.<sup>391</sup> Indeed, the only arguably “technical” rule that meaningfully benefits anti-discrimination plaintiffs today—the “pretext” rule—is a rule that the Supreme Court has made clear is not “technical” at all, but rather simply arises from the straightforward factual inferences that are permissible where a litigant is not truthful.<sup>392</sup> (So, just as in other areas of the law, if a defendant lies in the discrimination context, this can allow a jury to infer guilt).<sup>393</sup> As such, the notion that anti-discrimination law’s technical rules allow for more neutral adjudication—as opposed to biasing the courts in favor of discrimination defendants—is simply unsupportable in the current legal landscape.

As such, for judges who are concerned about the potential for bias when assessing anti-discrimination law cases untethered to technical rules, it is important to emphasize that technical rules do not effectuate this purpose—but that faithful adherence to the summary judgment standards can.<sup>394</sup> At summary judgment, of course, the judge is supposed to draw all inferences in favor of the non-moving party (typically the plaintiff), and to ask only whether any reasonable jury could find in their favor.<sup>395</sup> Thus, contrary to the current technical rules (which often as a matter of law draw inferences *against* plaintiffs), the judge should think through what is the “best case” scenario for what this evidence could mean—even if the judge does not agree.<sup>396</sup> Taking seriously these summary judgment standards—something too few judges do today—would better serve the principles of neutrality and anti-bias than the current technical architecture of anti-discrimination law.

Finally, it is important to note that whatever the causes of “rule creep”—disfavor of anti-discrimination claims, or legitimate concerns about judicial biases—the strategic advocacy responses to “rule creep” should generally be the same. Just as laid out in Part III and Section V.B, *supra*, the project of resolving the theoretical crisis in anti-discrimination law will be an iterative one, and preventing “rule creep” is just one example of the need for this type of consistent advocacy. An opinion stating that the but-for standard is the central inquiry—and that technical

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<sup>391</sup> See Eyer, *supra* note 2, at 976–78.

<sup>392</sup> See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

<sup>393</sup> *Id.*

<sup>394</sup> See Sperino, *supra* note 155, at 56–67 (making this observation).

<sup>395</sup> *Id.* at 57.

<sup>396</sup> *Id.* at 65–67.

rules ought not be applied—is simply the beginning, not the end point of advocacy efforts to address the current crisis in anti-discrimination law. Rather, consistent advocacy and messaging that the inquiry must be a simple and factual one—and a willingness to eschew technical arguments even where they may appear to benefit plaintiffs—will be critical to ensuring that “rule creep” does not quietly reinstate problematic technical legal standards.

### *3. Judicial Disfavor for Anti-Discrimination Law Claims*

The final judicial obstacle to addressing the current crisis in anti-discrimination law is negative judicial attitudes about anti-discrimination law claims. As others have written, it is an open secret that some judges view anti-discrimination claims (especially employment discrimination claims) as overwhelmingly likely to be non-meritorious.<sup>397</sup> This of course has the potential to disrupt efforts to re-center anti-discrimination law around its core factual premises, as it may lead judges to believe that more summary judgment-promoting rules are required. It may also lead individual judges to misapply factually-focused standards, by awarding summary judgment even where a reasonable jury could find for a plaintiff. As set out below, this is a real concern for *all* reforms of anti-discrimination law—and not one this project can hope to fully address—but there are some steps that can and should be taken to mitigate its impacts.

As an initial matter, as described above, both anti-discrimination law and summary judgment law offer strong legal responses to the view that anti-plaintiff judicial attitudes can legitimately serve as a basis for demanding more technical summary judgment rules, or granting summary judgment where a “reasonable jury” could find otherwise. The technical standards that the courts have engrafted on the discrimination inquiry typically lack any statutory basis in anti-discrimination law—and indeed typically disrupt the textually-mandated inquiry that anti-discrimination law suggests.<sup>398</sup> Moreover, taken seriously, summary judgment standards would require judges to recognize and set aside biases about the presumptive non-meritoriousness of discrimination claims—instead, addressing each case on its own facts, drawing all inferences in

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<sup>397</sup> See, e.g., Lee Reeves, Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence, 73 *Mo. L. Rev.* 481, 519–21 (2008).

<sup>398</sup> See *supra* notes 174–82 and accompanying text.

favor of the non-movant, and asking what a reasonable jury could conclude.<sup>399</sup>

Of course, these are the summary judgment standards that apply today, and they have done little to moderate judicial enthusiasm for awarding summary judgment to discrimination defendants. But it is also important to note that the use of summary judgment in anti-discrimination law has arisen against a backdrop in which plaintiffs themselves have treated most technical rules as legitimate and dispositive, rather than pushing for a factually-focused approach.<sup>400</sup> It is not clear how judges would respond to strong and consistent arguments by plaintiffs for a factually-focused standard with meaningful application of the summary judgment standards. At a minimum, it seems possible that such arguments—as they are taken on board by individual, perhaps sympathetic judges—might help effectuate a shift in judicial culture, away from the perceived legitimacy of widespread grants of summary judgment based on technical rules.

Efforts to more directly address the sources of judicial bias against anti-discrimination claims may also be important. Whether in judicial trainings or in the context of individual cases, it is important for judges to be exposed to social science evidence on the continued prevalence of discrimination against a variety of protected groups.<sup>401</sup> As research has shown, understandings of the prevalence of discrimination is an important causal factor in whether discrimination is perceived in an individual case.<sup>402</sup> So too, an understanding of the historical roots of many contemporary discriminatory stereotypes and practices may be useful in allowing judges to “see” discrimination in individual cases.<sup>403</sup>

In addition, efforts to ensure that potentially meritorious anti-discrimination cases receive counsel, and that non-meritorious cases are not brought, are also potentially important to addressing judicial biases. While most anti-discrimination lawyers do carefully screen cases, some lawyers will file claims of questionable meritoriousness for their small dollar settlement value.<sup>404</sup> To the extent that professional networks can be

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<sup>399</sup> See *supra* notes 394–96 and accompanying text.

<sup>400</sup> See Eyer, *supra* note 2, at 1008 n.250.

<sup>401</sup> See, e.g., Joseph A. Seiner, *The Discrimination Presumption*, 94 *Notre Dame L. Rev.* 1115, 1127–46 (2019) (collecting studies).

<sup>402</sup> See, e.g., Eyer, *supra* note 9, at 1315–16.

<sup>403</sup> See, e.g., Eyer, *supra* note 31, at 1071–74.

<sup>404</sup> This observation is based on my own observations during my time as an anti-discrimination lawyer of the community of lawyers of which I was a part.



brought to bear to discourage this practice, it would benefit all anti-discrimination litigants. And efforts to increase the availability of appointed attorneys—and to ensure payment sources for those attorneys—would help to ensure that potentially meritorious claims are adequately litigated. Contrary to the assumptions of some oversimplified economic models, currently there are strong financial disincentives for attorneys to take the claims of many working class or low-income plaintiffs—and other barriers (including racial biases) may result in even meritorious claims being forced to file pro se.<sup>405</sup> Because pro se plaintiffs can rarely adequately litigate their own claims, the relative prevalence of pro se discrimination plaintiffs no doubt contributes to judicial perceptions of this category of claims as non-meritorious.<sup>406</sup>

Finally, it is important to observe that the issue of judicial biases against anti-discrimination claims is one that is not unique to the project of resolving the conceptual crisis in disparate treatment law. Rather, judicial biases against anti-discrimination claims would impact *any* project aimed at reforming anti-discrimination law. Thus, while it is important to be cognizant of such biases, and to address them to the extent possible, they are surely not a reason for inaction.

#### CONCLUSION

Millions of Americans believe that if they are treated differently based on their race, their sex, their religion, their disability, their LGBTQ status, their age, or their national origin, the law affords them a remedy. But for those who experience discrimination today, it is far from clear that this belief will be honored. The theoretical crisis in anti-discrimination law means that it remains uncertain whether a true disparate treatment principle governs anti-discrimination law in the first instance. And most courts do not even try to ask this important factual question, instead relying on technical doctrines to dismiss claims.

Today, we have a rare opportunity to return anti-discrimination law to what should be its core principles: the idea that no person ought to be

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<sup>405</sup> See, e.g., Berrey, Nelson & Nielsen, *supra* note 25, at 115–19, 121–25.

<sup>406</sup> See, e.g., Spencer G. Park, Note, Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco, 48 *Hastings L.J.* 821, 823 (1997) (finding that “civil rights” claims, including discrimination claims, were the largest substantive category of non-prisoner pro se filings); see also Berrey, Nelson & Nielsen, *supra* note 25, at 68 (describing the dramatically lower success rates that pro se discrimination litigants experience).

treated differently based on their race, sex, or other protected class status. The Supreme Court has held that a true disparate treatment principle—the but-for principle—resides at the core of anti-discrimination law. Moreover, it has made clear that this principle controls as a matter of anti-discrimination law’s plain text. This set of holdings affords myriad opportunities to argue—in both the statutory and constitutional contexts—that all disparate treatment must be proscribed.

While this objective may seem modest, in today’s legal landscape it is not. If all disparate treatment is proscribed, then it is illegitimate for courts to dismiss cases based on technical legal barriers like the *McDonnell Douglas* paradigm, the “same actor” rule, or rigid comparator requirements. If all disparate treatment is proscribed, then the courts ought not demand individualized evidence of self-aware intent to discriminate (though such evidence may certainly still be useful to show disparate treatment). If all disparate treatment is proscribed, then doctrines that routinely immunize certain actors from being held responsible for their discriminatory acts should be found illegitimate.

The but-for principle thus offers innumerable opportunities to challenge the anti-plaintiff structures of anti-discrimination law today. Simply by insisting that our commitment to prohibiting disparate treatment must be honored, we can dismantle the biased architecture of modern anti-discrimination law. But this important opportunity is not self-executing: it will take a movement for “but for” to see its full effects. Thus, whether anti-discrimination advocates and scholars embrace the but-for principle—or fail to do so—may determine the future of anti-discrimination law.