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SEX DISCRIMINATION FORMALISM

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Critics of antidiscrimination law have long lamented that the Supreme Court is devoted to a shallow, formal version of equality that fails to account for substantive inequities and stands in the way of affirmative efforts to remediate systemic injustice. But these criticisms are primarily focused on the Supreme Court's interpretations of race discrimination law. The Court's most recent foray into statutory sex discrimination law, Bostock v. Clayton County*, employed formalistic reasoning to move the law in an expansive direction, interpreting Title VII's sex discrimination provision to prohibit discrimination against lesbian, gay, and transgender employees. Examining post-*Bostock *developments, this Article asks whether formal equality might have more potential to advance civil rights than previously thought. It argues that "formal equality" is not a single legal inquiry; rather, in practice, it takes the form of at least three distinct tests. These tests lead to different results in different sex discrimination controversies, such as whether it is discrimination to treat someone adversely for being bisexual or nonbinary; to single out pregnancy, menstruation, breasts, or other aspects of reproductive biology for disparate treatment; to enforce sex-specific dress codes; to exclude transgender people from restrooms consistent with their gender identities; to ban gender-affirming health care; or to restrict who can change the sex designations on their identity documents. Although no formal test neatly maps onto prevailing normative theories and sociological insights about what discrimination is, in recent cases, courts have used formal tests to achieve results consistent with those theories. This account suggests that, rather than insisting that courts adopt*

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substantive tests, civil rights scholars might reconsider the virtues of formalism.

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"Equality, in the abstract, has no limits; it is forever demanding to be carried to its ultimate logical conclusions."[1]

INTRODUCTION

The law of race discrimination is mired in what critics call "formal equality": an ahistorical, decontextualized vision of equality law that ignores the social, economic, and political realities of systemic racial inequality and treats affirmative action as the moral equivalent of 1950s-style segregation.[2] As a result, antidiscrimination scholars are almost uniformly scornful of formal equality, proposing that it be replaced with more substantive definitions of discrimination attuned to context;[3] social, historical, and cultural meanings;[4] systemic and accumulated group-

[1] Kenneth L. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 39 (1977).

[2] See, e.g., Ian Haney-López, Intentional Blindness, 87 N.Y.U. L. Rev. 1779, 1784 (2012) ("[D]iscriminatory intent doctrine excludes evidence of continued discrimination against non-Whites rooted in history, contemporary practices, and social science . . . . Meanwhile, . . . colorblindness similarly closes courthouse doors to evidence showing that state actors sometimes use race to break down inequality and to foster integration."); Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1113 (1997) (criticizing "[c]ontemporary equal protection law" because it "is premised on a formal and historically static conception of 'discrimination' " focused on "classification" or "discriminatory purpose—a concept the Court has defined as tantamount to malice").

[3] See, e.g., Haney-López, supra note 2, at 1876 (proposing a "contextual intent" test).

[4] See, e.g., Issa Kohler-Hausmann, Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination, 113 Nw. U. L. Rev. 1163, 1166, 1172 (2019) (arguing for a definition that accounts for "the system of social meanings or practices" that constitute social categories such as race and sex); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 355–56 (1987) (proposing a "cultural meaning" test that "would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance" and "considering evidence regarding the historical and social context in which the decision was made and effectuated").

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based disadvantages;[5] or "costs and benefits of alternative proposals in each specific setting."[6]

By contrast to the atrophy of race discrimination law through formalism, the law of sex discrimination seems relatively vibrant. In its landmark decision in *Bostock v. Clayton County*, the Roberts Court ruled that discrimination on the basis of "sex" under Title VII of the Civil Rights Act includes discrimination against lesbian, gay, and transgender workers.[7] But that decision's reasoning is not based in any sort of contextual or historically grounded understanding of gender-based subordination.[8] Rather, it relied on a formal, sterile, individualistic concept of "but-for" causation—"if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."[9] Thus, if an employer would not fire a woman for being attracted to men, that employer may not fire a man for being attracted to men.[10] Lower courts have extended *Bostock* to new contexts, holding, for example, that it requires that schools allow transgender children to use restrooms consistent with their gender identities,[11] forbids an employer from firing an employee because her tampon triggered a security

[5] See, e.g., Richard Thompson Ford, Bias in the Air: Rethinking Employment Discrimination Law, 66 Stan. L. Rev. 1381, 1384 (2014) ("[T]he law should replace the conceptually elusive goal of eliminating discrimination with the more concrete goal of requiring employers, government officials, and other powerful actors to meet a duty of care to avoid unnecessarily perpetuating social segregation or hierarchy."); Siegel, supra note 2, at 1146 (suggesting that equal protection doctrine might require scrutiny for "facially neutral policies" that "perpetuate, or aggravate, historic patterns of race and gender inequality").

[6] See, e.g., R. Richard Banks, Class and Culture: The Indeterminacy of Nondiscrimination, 5 Stan. J. C.R. & C.L. 1, 3 (2009) ("[W]e should approach race-related policy disputes in a pragmatic manner, weighing the costs and benefits of alternative proposals in each specific setting.").

[7] 140 S. Ct. 1731, 1737 (2020).

[8] Id. at 1750–51 (denying the relevance of history and pointing out that "applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected").

[9] Id. at 1741.

[10] Id. The same argument works for the transgender employees—for example, a transgender woman may not be penalized for having traits that would be acceptable in an employee who was assigned female at birth. Id.

[11] See, e.g., infra Subsection II.A.1 (discussing *Grimm v. Gloucester County School Board*, 972 F.3d 586, 616, 619 (4th Cir. 2020) (affirming summary judgment in favor of a transgender plaintiff on equal protection and Title IX claims), *cert. denied*, 141 S. Ct. 2878 (2021)).

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scanner,[12] and bars schools from imposing dress codes requiring girls to wear skirts.[13]

This Article argues that *Bostock*'s but-for test is an example of a broader phenomenon that it describes as "sex discrimination formalism": attempts to define intentional sex discrimination according to formal, abstract, logical tests, minimizing consideration of social realities and normative values.[14] It identifies and examines abstract tests used by courts to determine what types of reasons count as intentional sex discrimination in various constitutional and statutory contexts and assesses how those tests work in particular cases. Contrary to the consensus view among civil rights scholars that formalism is anathema to equality,[15] this Article argues that recent cases relying on formal tests have expanded the reach of sex discrimination law to forms of gender inequality overlooked in the past.

One contribution of this Article is to offer a typology of formal tests of disparate treatment. Much scholarship on discrimination law assumes that there are only two modes for thinking about equality: formal and substantive, and that all formal rules are the same.[16] This Article argues

[12] See infra Subsection II.A.2 (discussing *Flores v. Virginia Department of Corrections*, No. 20-cv-00087, 2021 WL 668802, at *6 (W.D. Va. Feb. 22, 2021) (denying summary judgment in a sex discrimination case in which an employee was fired when her tampon set off a security scanner triggering the false suspicion that she was smuggling contraband)).

[13] See, e.g., infra Subsection II.A.1 (discussing *Peltier v. Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2021) (en banc) (affirming grant of summary judgment to plaintiffs on § 1983 equal protection claim and reversing grant of summary judgment to school on Title IX claim challenging discriminatory dress code)).

[14] I define discrimination formalism more precisely *infra* Section I.A. Cf. Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 254 (1977) (discussing "legal formalism" as "an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making 'legal reasoning seem like mathematics,' conveyed 'an air . . . of . . . inevitability' about legal decisions"). I do not suggest formal rules succeed at perfect abstraction or constraint; formalism is a matter of degree. See, e.g., Cass R. Sunstein, Must Formalism Be Defended Empirically?, 66 U. Chi. L. Rev. 636, 640 (1999) ("The real question is 'what degree of formalism?' rather than 'formalist or not?' ").

[15] See, e.g., supra notes 2, 4, 6 and accompanying text. But cf. Mary Anne Case, "The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 Cornell L. Rev. 1447, 1448–52 (2000) (characterizing equal protection cases on sex as standing for the formalistic rule that, when a law, on its face, treats men and women differently, it may not be based on a generalization that would be untrue for even a single individual man or woman, and arguing that, if courts took this rule seriously, it would lead "in interesting and radical directions" like marriage equality).

[16] See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Pathological Racism, Chronic Racism & Targeted Universalism, 109 Calif. L. Rev. 1107, 1111 (2021) (discussing the

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there are at least three distinct types of formal rules when it comes to intentional sex discrimination: (1) but-for causation, which asks whether mistreatment would have befallen an individual if their sex were different; (2) anticlassification rules, also referred to as "blindness,"[17] which ask whether a decision-maker acted pursuant to an explicit or implicit policy that considers sex; and (3) "similarly situated" rules, which forbid decision-makers from treating individuals of different sexes who are alike in all relevant respects differently. Importantly, these heuristics for determining discriminatory intent do not require proof of the specific motives of discriminators.[18] While ostensibly aimed at discerning the same core phenomenon—discriminatory intent—these tests have taken on lives of their own in the case law as independent legal "theories" or "claims." They most often point to the same result, but in a subset of difficult cases, the choice of formal rule can change the outcome. For example, one district judge, a Republican appointee, concluded that *Bostock*'s but-for test would not count discrimination on the basis of bisexuality as sex discrimination, but an anticlassification inquiry that requires decisions that are "blind" to sex would.[19]

Another contribution of this Article is to offer an assessment of the reach of these various formal tests, relevant to next-generation sex discrimination disputes. While scholars have debated the theoretical

"standard doctrinal account," which lumps together concerns about formal equality and anticlassification in equal protection law); cf. Aziz Z. Huq, What Is Discriminatory Intent?, 103 Cornell L. Rev. 1211, 1223–24 (2018) ("Questions of how discriminatory intent is defined and proved tend to be ancillary and subordinate to a larger critique of the ideological orientation of the doctrine.").

[17] This is a problematic metaphor, for, among other reasons, the fact that blind people do see race. See generally Osagie Obasogie, Blinded by Sight: Seeing Race Through the Eyes of the Blind (2013).

[18] Cf. Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

[19] Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 622 (N.D. Tex. 2021) (concluding that an employer who discriminates on the basis of bisexuality is not discriminating on the basis of sex under "[t]he traditional but-for 'favoritism' analyses," but is failing to act in a way that is "'blind' to sex"), *vacated sub nom.* Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 940 (5th Cir. 2023). Ideology is unlikely to be the explanation for this twist in reasoning. The district court judge, Reed O'Connor, was appointed by President George W. Bush, and is known for striking down the policies of the Biden and Obama administrations. Tierney Sneed, Judge Notorious for Anti-Obamacare Rulings Has Another Crack, CNN (Jan. 28, 2022, 7:56 AM), https://www.cnn.com/2022/01/28/politics/obamacare-reed-oconnor-biden-doj-health/index.html [https://perma.cc/H3G3-TMDH].

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potential of *Bostock*'s but-for inquiry,[20] they have not examined how judges are applying it in new contexts. Nor have they compared the but-for rule to other formal rules on the ground. In just over three years, *Bostock* has been cited by almost a thousand cases.[21] This Article discusses more than fifty cases decided since *Bostock* that are related to arguably novel or potentially controversial applications of sex discrimination doctrine.[22] It examines these decisions from the inside out,[23] endeavoring to see how their reasoning works, to take it seriously, and to hypothesize about where it might go.

This analysis reveals that courts extending sex discrimination law are foregrounding formal rules as the reasons for their decisions, not sociological arguments about the nature of discrimination or feminist or other such normative theories of the harms of discrimination.[24] Formal rules can sometimes circumvent roadblocks to antidiscrimination projects, such as judgments that traits that are unique to men or women cannot be the bases for discrimination,[25] that certain groups and

[20] Compare Katie Eyer, The But-For Theory of Anti-Discrimination Law, 107 Va. L. Rev. 1621, 1624–25 (2021) (applauding the but-for theory on the ground that it clarifies disparate treatment law and avoids the intent requirement), with Robin Dembroff & Issa Kohler-Hausmann, Supreme Confusion About Causality at the Supreme Court, 25 CUNY L. Rev. 57, 58 (2022) (arguing that *Bostock*'s but-for test is incoherent and "threaten[s] to limit the reach of antidiscrimination law"), Benjamin Eidelson, Dimensional Disparate Treatment, 95 S. Cal. L. Rev. 785, 794 (2022) (arguing that rather than clarifying disparate treatment law, the but-for theory compounds confusion, is not justified by statutory text, and leads to "untenable results"), and Guha Krishnamurthi, Not the Standard You're Looking For: But-For Causation in Anti-Discrimination Law, 108 Va. L. Rev. Online 1, 4, 11 (2022) (arguing "that the Court's simple but-for causation test, by its own lights, does not advance anti-discrimination law").

[21] According to the Westlaw database, *Bostock* had been cited by 962 federal and state cases as of October 1, 2023.

[22] This Article reviews cases through October 1, 2023.

[23] While this is a work of legal scholarship, I draw loose inspiration from anthropological methods. Cf. Annelise Riles, The Network Inside Out 6, 16, 19 (2000) (describing an ethnographic method that attempts to gain access to modern knowledge practices from within, beginning by rendering familiar and mundane artifacts visible for analysis, in contexts in which "thick description" is challenging "because the phenomena are dispersed and the cultures are many"); Annelise Riles, A New Agenda for the Cultural Study of Law: Taking on the Technicalities, 53 Buff. L. Rev. 973, 1029–30 (2005) (urging "that the cultural study of legal technology make a methodological commitment not to reduce technology to the politics, culture, history, or personalities surrounding it—that we take the agency of technological form seriously, as a subject on its own terms, as the legal engineers among us do").

[24] *Bostock* itself is an example. Cary Franklin, Living Textualism, 2020 Sup. Ct. Rev. 119, 143 n.106 (pointing out that *Bostock* could have been justified based on "antisubordinationist and anti-stereotyping arguments," but these arguments "necessitate more analytical work than the simple anticlassificationist argument, and conservatives generally reject them").

[25] See infra Subsection II.A.2.

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individuals are too blameworthy to deserve protection,[26] or that discriminatory practices are justified by tradition or convention.[27] The results are not always what would be expected based on crude measures of judicial ideology.[28] But a close look at post-*Bostock* cases reveals that rather than applying formal tests with the rigor of a philosopher, judges apply them with some plasticity, reaching situations that strike them as substantively unfair. Moreover, while courts extending sex discrimination law to new contexts often gesture to *Bostock*'s but-for inquiry, they are more likely to rely on anticlassification and similarly situated rules. A similarly situated inquiry, which asks whether people are alike in relevant respects, has been particularly prominent in transgender rights litigation.[29]

But formalism also has well-known drawbacks. Abstract tests of discrimination suffer from the flaws of all formalistic legal reasoning: they are, to varying degrees, indeterminate, requiring that judges rely on normative and empirical premises to apply them, but deny that they are doing so,[30] and they are both over- and underinclusive.[31] This Article does not make any broad claims about the causal role of formal legal reasoning in judicial decision-making—causation is complex and context specific. It is also not a brief in support of discrimination formalism as a tool of progressive politics—what tools movement lawyers of any political persuasion ought to use will depend on the circumstances. Nor does it argue that sex discrimination formalism achieves rule of law aspirations such as determinacy, predictability, or judicial constraint—particularly not in legal disputes that implicate acute ideological conflicts. Rather, this Article attempts, to the extent possible, to offer a thick description[32] of

[26] See supra note 8 (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1750 (2020)).
[27] See infra Subsection II.A.1.
[28] See, e.g., supra note 19. I note the political affiliations of judges throughout this Article.
[29] See infra Subsection II.A.1.
[30] This is a standard criticism of legal formalism. See, e.g., Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 820 (1935) ("In every field of law we should find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy.").
[31] See, e.g., Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1701 (1976) ("The more general and the more formally realizable the rule, the greater the equitable pull of extreme cases of over- or underinclusion."); Frederick Schauer, Formalism, 97 Yale L.J. 509, 510, 535 (1988) (describing formalism as "the concept of decisionmaking according to *rule*," and pointing out that "it is exactly a rule's rigidity, even in the face of applications that would ill serve its purpose, that renders it a rule").
[32] See supra note 23.

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how thin legal rules[33] operate in a discrete set of cases. It contributes to scholarly criticism of formalism in discrimination law by arguing that, like unhappy families, each of the various formal tests is problematic in its own way. It departs from those criticisms in disputing that a wholesale move toward more substantive inquiries of the sort favored by most progressive scholars would achieve those scholars' ultimate aspirations for the law. This Article does not endeavor to advance any one single theory of discrimination law, which is a "ramshackle institution, full of compromise and contradiction."[34] Rather, it adds to the evidence that a unified theory is not normatively desirable.[35]

Questions about the meaning of sex discrimination are timely as courts resolve issues involving the scope of LGBTQ+ rights after *Bostock* and the constitutionality of legal restrictions on abortion after *Dobbs*.[36] *Bostock* did not address whether its holding would apply to dress codes, restrooms, health care, and many other topics—controversies now being resolved by federal courts.[37] While transgender litigants racked up an impressive win rate through 2021,[38] results since have been mixed.[39]

[33] Cf. Toni M. Massaro, Gay Rights, Thick and Thin, 49 Stan. L. Rev. 45, 46–47 (1996) (contrasting "thin" doctrinal arguments that appeal to "principles of neutrality" with "thick" arguments that ask judges to "define, or appear to endorse," particular sexual orientations).

[34] Robert Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, 88 Calif. L. Rev. 1, 16 (2000).

[35] See, e.g., Banks, supra note 6, at 19 ("The effort to arrive at a unitary conception of discrimination would be misguided even if an authoritative single decision maker—say, the United States Supreme Court—propounded the definition. Any single definition would fail to account for the distinctive features of the various settings where claims of racial discrimination might arise."); Huq, supra note 16, at 1240 (explaining that discriminatory intent is "unavoidabl[y]" "protean and plural"); George Rutherglen, Disaggregated Discrimination and the Rise of Identity Politics, 26 Wm. & Mary J. Race, Gender & Soc. Just. 391, 394–95 (2020) (arguing that the multiplicity of plausible philosophical theories of the wrong of discrimination and "discrepancies" in legal doctrines "counsel against the quest for uniformity based on the essential nature of discrimination").

[36] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[37] Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020); id. at 1778–83 (Alito, J., dissenting) (noting these among "some of the potential consequences" of *Bostock*).

[38] Katie Eyer, Transgender Constitutional Law, 171 U. Pa. L. Rev. 1405, 1405, 1408 (2023) (surveying constitutional transgender rights cases from 2017–2021 and concluding that "recent transgender rights litigation has resulted in important and consistent victories for transgender constitutionalism in the lower and state courts").

[39] There have been significant recent losses. See, e.g., Williams ex rel. L.W. v. Skrmetti, No. 23-5600, 2023 WL 6321688, at *23 (6th Cir. Sept. 28, 2023) (reversing grants of preliminary injunctions against Kentucky and Tennessee laws barring gender-affirming health care for transgender minors); Eknes-Tucker v. Governor of Ala., No. 22-11707, 2023 WL 5344981, at *1 (11th Cir. Aug. 21, 2023) (vacating district court's preliminary injunction of

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Most notably, a 2022 en banc decision by the Eleventh Circuit rejected a "cornucopia" of formal theories advanced by a transgender student in a case over restroom access.[40] While *Dobbs* addressed equal protection issues, its statements on that question are dicta.[41] State courts are now resolving equal protection challenges to abortion bans under their own state constitutions.[42] Yet few scholars are focused "on questions of equal protection and pregnancy."[43]

This Article proceeds in four Parts. Part I defines discrimination formalism, explains its importance, and offers a typology of formal theories of disparate treatment. Part II argues that courts are relying on formalistic tests to expand sex discrimination law in several contested contexts, including debates over discrimination based on bisexuality, nonbinary gender, menstruation, genitalia, and other aspects of

Alabama law prohibiting gender-affirming health care for transgender minors); Kasper ex rel. Adams v. Sch. Bd., 57 F.4th 791, 799–800 (11th Cir. 2022) (en banc) (reversing district court's conclusions, following a bench trial, that school policy barring a transgender boy from the boys' restroom violated the Equal Protection Clause and Title IX); Fowler v. Stitt, No. 22-cv-00115, 2023 WL 4010694, at *24 (N.D. Okla. June 8, 2023) (granting motion to dismiss challenge to state policy prohibiting transgender individuals from changing the sex designations on their birth certificates), *appeal docketed*, No. 23-5080 (10th Cir. July 7, 2023); Gore v. Lee, No. 19-cv-00328, 2023 WL 4141665, at *37 (M.D. Tenn. June 22, 2023) (similar), *appeal docketed*, No. 23-5669 (6th Cir. July 26, 2023); B.P.J. v. W. Va. State Bd. of Educ., No. 21-cv-00316, 2023 WL 111875, at *10 (S.D. W. Va. Jan. 5, 2023) (denying transgender litigant's motion for summary judgment in case challenging law forbidding transgender girls from playing girls' sports in school), *argued*, No. 23-1078 (4th Cir. Oct. 27, 2023); A.H. ex rel. D.H. v. Williamson Cnty. Bd. of Educ., 638 F. Supp. 3d 821, 837 (M.D. Tenn. Nov. 2, 2022) (denying preliminary injunction in case challenging Tennessee state law barring transgender schoolchildren from using restrooms consistent with their gender identities).

[40] *Adams*, 57 F.4th at 846 n.13 (Jill Pryor, J., dissenting) (describing six distinct theories that the majority rejected).

[41] Reva B. Siegel, Serena Mayeri & Melissa Murray, Equal Protection in *Dobbs* and Beyond: How States Protect Life Inside and Outside of the Abortion Context, 43 Colum. J. Gender & L. 67, 68, 93 (2022) (noting that the parties had not asserted an equal protection claim in *Dobbs* and observing that "Justice Alito's attempt to block an equal protection claim that was not even before the Court in *Dobbs* is evidence of equality's power, not its weakness").

[42] See Planned Parenthood of the Great Nw. v. State, 522 P.3d 1132, 1198–200 (Idaho 2023) (rejecting equal protection challenges to Idaho law restricting abortion); Siegel et al., supra note 41, at 95–96 (discussing state court decisions on the right to abortion as a matter of gender equality).

[43] Siegel et al., supra note 41, at 73–74 (explaining that "[t]his is because, for decades, the question has been buried under the substantive due process doctrines regulating abortion . . . , and under federal statutes that prohibit pregnancy discrimination, including by government actors").

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reproductive biology, and sex-segregated restrooms, dress codes, and other such policies. It asks whether various formal tests have potential to further expand sex discrimination law on these issues, and explains the reasons for the appeal of formal over substantive inquiries. Part III probes the limits of sex discrimination formalism and addresses potential criticisms of formal rules. Part IV draws out lessons from this account for debates over formal equality and the future of civil rights law.

I. FORMAL TESTS OF SEX DISCRIMINATION

This Part explains what discrimination formalism is and why it is of particular importance to sex discrimination law and gender equality. It then offers a typology of formal tests of sex discrimination.

A. What Is Discrimination Formalism?

Discrimination formalism is the use of abstract rules to determine what qualifies, conceptually, as disparate treatment discrimination. This Section elaborates on what I mean by "disparate treatment," "conceptually," and "formalism." It also explains the significance of the phenomenon.

First, this Article is concerned with disparate treatment discrimination, not disparate impact. Disparate treatment is adverse "treatment 'on the ground of' a protected characteristic" such as sex.[44] Its hallmark is intent,[45] although intent is generally inferred. Courts characterize sexual harassment claims[46] and challenges to gender-based affirmative action[47] as subspecies of disparate treatment claims. Disparate impact, by contrast, "involves an apparently neutral practice or policy which puts persons belonging to a protected group at a particular disadvantage."[48]

This Article is focused on disparate treatment because U.S. courts have curtailed, if not hobbled, the disparate impact theory.[49] Notoriously, the

[44] Tarunabh Khaitan, A Theory of Discrimination Law 69 (2015) (summarizing the practice of discrimination law in common law, English-speaking jurisdictions).

[45] Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020) ("In so-called 'disparate treatment' cases like today's, this Court has . . . held that the difference in treatment based on sex must be intentional.").

[46] See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

[47] See, e.g., Johnson v. Transp. Agency, 480 U.S. 616, 631 (1987).

[48] Khaitan, supra note 44, at 73.

[49] See, e.g., Michael Selmi, Was the Disparate Impact Theory a Mistake?, 53 UCLA L. Rev. 701, 738–43 (2006) (offering an empirical analysis of disparate impact cases under Title VII).

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Supreme Court has foreclosed disparate impact claims altogether under the Equal Protection Clause.[50] Although disparate impact claims are permitted under Title VII, the theory "has produced no substantial social change" because courts have made it very difficult to prove.[51] Its main impact has been in shaping employer practices around testing.[52] Disparate impact lawsuits require statistical experts, making them "expensive" and "difficult to win."[53] The Supreme Court has erected hurdles for disparate impact claims under statutes other than Title VII as well.[54]

Second, this Article is concerned with the definition of discrimination, in terms of what sort of reasons count as discriminatory—it is not about

[50] Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979); Washington v. Davis, 426 U.S. 229, 238 (1976). Claims that government enforced a facially neutral law in a discriminatory way are still permitted, but they require a showing of discriminatory intent. See *Davis*, 426 U.S. at 241–42 (discussing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

[51] See Selmi, supra note 49, at 705; id. at 769 (explaining that "courts routinely defer to employer practices" in deciding the "business necessity" defense to disparate impact liability under Title VII). Few plaintiffs in employment discrimination cases bring disparate impact claims. Ellen Berrey, Robert L. Nelson & Laura Beth Nielson, Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality 52, 57–58 (2017) (analyzing 1,788 employment discrimination cases from 1988 to 2003 and finding only 4% of cases included disparate impact claims). That is not to say there have been no meaningful disparate impact victories. See, e.g., Freyd v. University of Oregon, AAUW, https://www.aauw.org/resources/legal/laf/past-cases/freyd-v-university-of-oregon/ [https://perma.cc/2QJ6-WGJZ] (last visited Sept. 26, 2023) (discussing a favorable 2021 settlement for plaintiff Jennifer Freyd after the Ninth Circuit reversed the district court's dismissal of her disparate impact claim alleging that a university's practice of providing "retention raises" resulted in higher salaries for men than women). But they are relatively rare.

[52] Selmi, supra note 49, at 707.

[53] See, e.g., Deborah Dinner, The Costs of Reproduction: History and the Legal Construction of Sex Equality, 46 Harv. C.R.-C.L. L. Rev. 415, 478 (2011).

[54] See, e.g., Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding there is no private right of action to bring disparate impact claims under Title VI of the Civil Rights Act of 1964, which applies to recipients of federal funds). There is little disparate impact precedent under Title IX. Compare Poloceno v. Dallas Indep. Sch. Dist., 826 F. App'x 359, 363 (5th Cir. 2020) (interpreting *Sandoval* to preclude claims for disparate impact under Title IX by private plaintiffs), with U.S. Dep't of Just., Title IX Legal Manual § 4.A.2 (2021), https://www.justice.gov/crt/title-ix#2.%C2%A0%20Disparate%20Impact [https://perma.cc/P2B6-NFKX] (setting out disparate impact standards for grant recipients).

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proof frameworks,[55] questions of mixed motives,[56] justifications,[57] or defenses.[58] Legal scholars have extensively criticized the jumble of formalistic legal doctrines that courts use to resolve proof problems in contexts in which everyone agrees on what sort of reasons would constitute sex discrimination, but there is a factual dispute about whether discriminatory reasons, or some nondiscriminatory ones, such as poor job performance or lack of qualifications, resulted in disadvantage to a plaintiff.[59] As most every critic of the decision has noted, *Bostock* muddles, if not confuses, the interpretive question of what reasons count as sex discrimination with the question of whether discrimination played a causal role in harming the plaintiff.[60] This Article asks, what possibilities are opened and closed off for civil rights law by moves such as this?

Conceptual questions are important because decisions like *Bostock*, which clarify, as a matter of law, what types of reasons are discriminatory, are unusually significant. Law and society scholars have extensively documented the failures of retail-level employment discrimination cases

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[55] See, e.g., Sandra F. Sperino, Into the Weeds: Modern Discrimination Law, 95 Notre Dame L. Rev. 1077, 1077, 1086 (2020) (arguing that in Title VII cases, "judicial energy centers on interpreting and applying an ever-growing phalanx of complicated court-created ancillary doctrines," such as the "*McDonnell Douglas* three-part burden-shifting test").

[56] See Andrew Verstein, The Jurisprudence of Mixed Motives, 127 Yale L.J. 1106, 1123 (2018) (providing a typology of four types of motive rules typically used in American law: primary motive, but-for motive, sole motive, and any motive).

[57] United States v. Virginia, 518 U.S. 515, 524 (1996) (applying intermediate scrutiny, which requires that a practice be substantially related to an important governmental interest, to sex distinctions under the Equal Protection Clause).

[58] See, e.g., 42 U.S.C. § 2000e-2(e) (allowing an employer to consider sex when it is "reasonably necessary to the normal operation of that particular business or enterprise").

[59] See, e.g., Sperino, supra note 55, at 1087–88.

[60] Bostock v. Clayton County, 140 S. Ct. 1731, 1757 (2020) (Alito, J., dissenting) (arguing that the majority "tries to cloud the issue" with its discussion of but-for causation when the real question is how to interpret the meaning of the term "discrimination"); Mitchell N. Berman & Guha Krishnamurthi, *Bostock* Was Bogus: Textualism, Pluralism, and Title VII, 96 Notre Dame L. Rev. 67, 99–101 (2021) (arguing that *Bostock* "operates the but-for machinery without regard for the difference between 'by reason of X' and 'caused by X'"); Dembroff & Kohler-Hausmann, supra note 20, at 59 (arguing that *Bostock* confuses the questions of "whether an action or policy is discriminatory" with "whether damages would have occurred but-for that discriminatory action or policy"); Eidelson, supra note 20, at 797 ("Disparate-treatment prohibitions . . . forbid taking certain actions for certain *reasons* or on certain *grounds*—not the taking of any action that, if taken, would have certain facts among its causes."); David A. Strauss, Sexual Orientation and the Dynamics of Discrimination, 2020 Sup. Ct. Rev. 203, 207 ("[T]he crucial concept in Title VII, for purposes of the issue in *Bostock*, is not causation but discrimination.").

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to effect social change.[61] But the effects of decisions like *Bostock* go beyond the numbers of cases won or lost, dismissed or settled.[62] Such decisions express moral concerns by condoning or condemning forms of bias as prejudice,[63] and can play an instrumental role in influencing public opinion about what forms of discrimination are socially acceptable.[64] On the ground, judicial interpretations of civil rights laws have been critical in providing human resources professionals with the "clout" to persuade businesses to adopt equal opportunity measures, which can then persuade their workforces that new forms of discrimination are wrong.[65] The effects extend to new contexts where they are not controlling. Much as *Bostock* insisted its holding was grounded in the text of Title VII, its rule

[61] See, e.g., Berrey et al., supra note 51, at 257–58 (analyzing 1,788 employment discrimination cases from 1988 to 2003 and concluding that "[e]ven when plaintiffs have succeeded in law . . . , the effect on the workplace has been minimal" and "in most cases, plaintiffs flat-out lose—with a small settlement, a loss on summary judgment, or a loss at trial"); Lauren B. Edelman, Working Law: Courts, Corporations, and Symbolic Civil Rights 168–215 (2016) (offering empirical evidence to show that courts uncritically accept employers' symbolic efforts at compliance with antidiscrimination law, without scrutinizing these efforts for effectiveness); Sandra F. Sperino & Suja A. Thomas, Unequal: How America's Courts Undermine Discrimination Law 163 (2017) (explaining how "federal judges have created a system of frameworks, rules, and inferences that distract them away from the central question of discrimination law and push cases toward dismissal").

[62] Whether successful discrimination cases lead to changes in the demographics of a firm depends on a number of factors. See Carly Knight, Frank Dobbin & Alexandra Kalev, Under the Radar: Visibility and the Effects of Discrimination Lawsuits in Small and Large Firms, 87 Am. Socio. Rev. 175, 196–97 (2022) (finding that Title VII litigation is most effective against "[l]arge, high-profile firms").

[63] Cf. Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1533, 1540 (2000) (arguing that equal protection doctrine "makes unconstitutional all laws that rest on certain impermissible purposes: those that express contempt, hostility, or inappropriate paternalism toward racial, ethnic, gender, and certain other groups, or that constitute them as social inferiors or as a stigmatized or pariah class" so as to "manifest expressive concerns").

[64] See, e.g., Margaret E. Tankard & Elizabeth Levy Paluck, The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes, 28 Psych. Sci. 1334, 1334, 1341–42 (2017) (offering empirical evidence that the Supreme Court's ruling in favor of same-sex marriage changed "perceptions of social norms, which have been shown to guide behavior, even when individual opinions are unchanged").

[65] Frank Dobbin, Inventing Equal Opportunity 220, 227 (2009). While there was some uncertainty before *Bostock* about legal liability for discrimination against gay, lesbian, and transgender employees, businesses are now advised by employment lawyers and human resources professionals to refrain from such discrimination and to update policies, handbooks, and training materials so as to avoid costly lawsuits. Alix Valenti, LGBT Employment Rights in an Evolving Legal Landscape: The Impact of the Supreme Court's Decision in *Bostock v. Clayton County, Georgia*, 33 Emp. Resps. & Rts. J. 3, 19–21 (2021).

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migrated quickly to new statutory domains,[66] cross-pollinated with constitutional doctrine,[67] and has even influenced interpretations of state law.[68]

And third, this Article is interested in formalism.[69] There are many definitions[70] and degrees[71] of legal formalism. Formalism generally aims to ensure predictability and stability in the law, and to constrain judges by limiting the considerations that can go into their decisions,[72] although whether it ever achieves those aims is a matter of debate. At one extreme, formalism imagines that ideal legal decision-making is a "mechanical" system in which "all cases (once properly coded) could be decided by a computer."[73] As many commentators have noted, *Bostock* is peak

[66] See, e.g., Pritchard ex rel. C.P. v. Blue Cross Blue Shield of Ill., 536 F. Supp. 3d 791, 796 (W.D. Wash. 2021) (citing *Bostock* to interpret the Affordable Care Act, which incorporates Title IX).

[67] See, e.g., Monegain v. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 141–42 (E.D. Va. 2020) (applying *Bostock* to the Equal Protection Clause). This is typical. See, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting) ("[D]espite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases."); Case, supra note 15, at 1451 (describing how "constitutional sex discrimination law is in many ways path dependent on Title VII, which since 1964 has outlawed discrimination in employment on the basis of sex"); Richard Primus, The Future of Disparate Impact, 108 Mich. L. Rev. 1341, 1354–55 (2010) ("[C]onstitutional antidiscrimination doctrine—that is, the law of equal protection—has, in the hands of the Supreme Court, the same substantive content as Title VII's prohibition on disparate treatment.").

[68] See, e.g., Commonwealth v. Carter, 172 N.E.3d 367, 378–80 (Mass. 2021) (citing *Bostock* to interpret the Massachusetts Constitution); Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 328–29 (Tex. App. 2021) (citing *Bostock* to interpret a Texas statute).

[69] Many scholars have reflected on *Bostock*'s lessons for textualism, textualism being a species of formalism, or perhaps vice versa. See, e.g., Tara Leigh Grove, Which Textualism?, 134 Harv. L. Rev. 265, 281–82 (2020) (describing the majority opinion in *Bostock* as "formalistic textualism" as opposed to the dissent's "flexible textualism"). This Article is interested in formalism not as any interpretive modality but in the classical sense of "legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles." Thomas C. Grey, Formalism and Pragmatism in American Law 55 (2014).

[70] See, e.g., Richard H. Pildes, Forms of Formalism, 66 U. Chi. L. Rev. 607, 608 (1999) (outlining a few of the diverging meanings of legal formalism).

[71] See Sunstein, supra note 14, at 640.

[72] Hanoch Dagan, The Realist Conception of Law, 57 U. Toronto L.J. 607, 612 (2007); Schauer, supra note 31, at 547.

[73] See Grey, supra note 69, at 55 n.31; see also Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 619 (1908) (criticizing "mechanical jurisprudence born of deduction from conceptions").

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formalism.[74] The opinion abstracts away from the on-the-ground realities of discrimination, analogizing discriminatory decisions to choices in banal contexts like opening windows.[75] It does not connect its reasoning to any of the normative values that undergird the civil rights tradition,[76] is entirely agnostic as to the specific motives of discriminators,[77] disclaims any interest in consequences,[78] and cedes arguments about history to the dissents.[79]

This Article does not endeavor to settle debates about the meaning of formalism generally. Nor does it advance the argument that any of the tests of discrimination described in this Article, taken individually or collectively, perfectly achieve rule of law aspirations like judicial

[74] See, e.g., Jeannie Suk Gerson, Could the Supreme Court's Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?, New Yorker (June 27, 2020), https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action [https://perma.cc/B66Z-Y7M7] (noting the decision's "extreme formalism"); Grove, supra note 69, at 281 (characterizing *Bostock*'s reasoning as "almost algorithmic"); Daniel Hemel, The Problem with that Big Gay Rights Decision? It's Not Really About Gay Rights, Wash. Post (June 17, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/06/17/problem-with-that-big-gay-rights-decision-its-not-really-about-gay-rights [https://perma.cc/R9EC-5BVV] (characterizing *Bostock* as thinking of Title VII as a "logic problem").

[75] Compare Bostock v. Clayton County, 140 S. Ct. 1731, 1748 (2020), and id. at 1739 (analogizing between the causes of traffic accidents and the causes of employment decisions), with id. at 1773 (Alito, J., dissenting) (accusing the majority of "entirely ignoring the social context in which Title VII was enacted"), and id. at 1828–29 (Kavanaugh, J., dissenting) (arguing that "to think that sexual orientation discrimination is just a form of sex discrimination is not just a mistake of language and psychology, but also a mistake of history and sociology").

[76] Compare id. at 1745 (majority opinion) ("You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law."), with id. at 1763–65 (Alito, J., dissenting) (addressing arguments from antistereotyping principles and the analogy to discrimination on the basis of interracial relationships).

[77] Id. at 1742 (majority opinion) ("Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view.").

[78] Compare id. at 1745 (stating that "consequences that might follow a ruling for the employees" do not "allow us to ignore the law as it is"), with id. at 1778–84 (Alito, J., dissenting) (setting out eight pages of potential legal consequences and calling the majority "irresponsible" for refusing to consider them).

[79] Compare id. at 1750–52 (majority opinion) (citing a legal historian but only to support the proposition that "many now-obvious applications" of the statute's logic were not initially anticipated), with id. at 1767–73 (Alito, J., dissenting) (offering six pages of history of the women's rights movement and prejudices against lesbian, gay, and transgender people in support of the argument that no one in 1964 would have agreed with the majority in *Bostock*), and id. at 1776–78 (discussing legislative history), and id. at 1828 (Kavanaugh, J., dissenting) ("Seneca Falls was not Stonewall.").

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constraint, predictability, and stability.[80] Rather, by "discrimination formalism," I refer to three features of legal inquiries in the context of defining disparate treatment. First, these inquiries take the forms of rules rather than standards.[81] Second, they are simple, requiring consideration of a small number of elements. And third, they turn on easily discernible facts, eschewing direct investigation into the specific psychological states of discriminators, dynamic social consequences, or expressive meanings.[82] The tests described in this Article are not absolutely formalistic on any of these measures. Rather, they are more formalistic than alternative rules of decision that would ask judges to determine whether practices contravene the antistereotyping[83] and antisubordination[84] principles, or variations on those ideas.[85]

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[80] See infra Section III.C. For an argument that many of the crucial interpretive moves made in *Bostock* itself were exercises of judicial discretion rather than constraint, see, e.g., Franklin, supra note 24.

[81] Grey, supra note 69, at 57 (explaining that formalists prefer "objective tests" to "vague standards, or rules that require[] determinations of state of mind").

[82] Cf. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994) (explaining that, by contrast, in the context of the meaning of discrimination under the Commerce Clause, the Court has "eschewed formalism for a sensitive, case-by-case analysis of purpose and effects"). For an example of a legal inquiry into discriminatory purposes that is not formalistic, see Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (holding that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and listing at least six possible considerations).

[83] See, e.g., Macy, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5–6 (EEOC Apr. 20, 2012) (explaining that discrimination in violation of Title VII's sex discrimination prohibition occurs "any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms" including those related to "the cultural and social aspects associated with masculinity and femininity"); cf. Cary Franklin, The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law, 85 N.Y.U. L. Rev. 83, 88, 90 (2010) (discussing the "antistereotyping principle" which holds "that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles" but arguing only that it is "a key mediating principle in sex-based equal protection law," not necessarily a rule of decision).

[84] See, e.g., Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2534, 2536 (1994) ("Cases should explain, for example, that sexual harassment is actionable because it replicates, and relies upon for the efficacy of its subordination, forms of sexual domination and gender devaluation that pervade society outside the workplace.").

[85] See, e.g., Deborah Hellman, Sex, Causation, and Algorithms: How Equal Protection Prohibits Compounding Prior Injustice, 98 Wash. U. L. Rev. 481, 508–09 (2020) ("Sex-based classifications should be treated as constitutionally problematic when and to the extent that they compound prior sex-based injustice."); Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, What Taylor Swift and Beyoncé Teach Us About Sex and Causes, 169 U. Pa. L. Rev. Online 1, 10, 11 (2020) (proposing an inquiry that would ask about the social meanings

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This Article does not set out to endorse or critique legal formalism as a general matter; nor does it argue that formalistic rules are more likely to tend toward progressive or conservative causes.[86] Rather, I am interested in describing how formalist tendencies play out in the specific context of post-*Bostock* cases on the meaning of sex discrimination, and how formal tests take on lives of their own, leading, sometimes, to unexpected results that expand, rather than contract, the reach of sex discrimination law.[87] While *Bostock* offers a recent example of formalistic reasoning with respect to disparate treatment, the phenomenon is not a new one, and *Bostock*'s but-for inquiry is not the only formal test.

B. A Typology of Formal Tests of Disparate Treatment

What does it mean to intentionally discriminate because of sex? One window into how courts answer this question is sexual harassment law. Neither the Equal Protection Clause nor any of the primary statutory guarantees of nondiscrimination prohibit harassment per se. Sexual harassment is illegal not because it is sexual in content, but rather, because it is a form of disparate treatment based on sex.[88] In its 1998 decision, *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court reversed a lower court for refusing to recognize the possibility that a man could harass another man in violation of Title VII's prohibition of discrimination "because of sex."[89] The author of the *Oncale* opinion, the consummate formalist Justice Scalia,[90] described three alternative ways in which a plaintiff might demonstrate that harassment was because of

of sex categories; whether those social meanings explain an outcome; and whether they "contribute to systemic inequality" or are otherwise wrongful).

[86] Cf. Andrea Scoseria Katz, The Lost Promise of Progressive Formalism, 99 Tex. L. Rev. 679, 687 (2021) (discussing various strands of "progressive formalism" from the turn of the twentieth century, and how reformers sought to use "the law as a check on an emboldened federal bench" and "believed that the law lost its force and legitimacy if it was not frequently revisited and revised").

[87] Cf. Riles, supra note 23, at 1030 (offering a model of legal scholarship that resists "reducing [legal] form to an artifact of its historical, political, or social context," "foreground[ing] instead the form itself, as a protagonist in its own right").

[88] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (explaining that harassment is not "automatically discrimination because of sex merely because the words used have sexual content or connotations," rather, "[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed").

[89] Id.

[90] See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1178–79 (1989).

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sex.[91] These three evidentiary paths map onto three formal tests of disparate treatment that I will refer to as "but-for," "anticlassification," and "similarly situated." I endeavor here to explain these heuristics as courts understand and apply them, not as ideal or distinct theories of what counts as discrimination.

Whether or not a practice constitutes sex discrimination according to one of these formal tests is not the end of the inquiry. In equal protection law, sex classifications are subject to intermediate scrutiny, which requires that a practice be substantially related to an important governmental interest.[92] Title VII includes a bona fide occupational qualification ("BFOQ") defense, which allows an employer to consider sex when it is "reasonably necessary to the normal operation of that particular business or enterprise."[93] Title IX, which forbids sex discrimination in certain educational programs, has no such defense, but it does enumerate certain exceptions.[94]

1. But-For Cause Rules

The "but-for" test asks the factfinder to engage in a thought experiment: What would have happened to the plaintiff if "she" had been a "he"? In *Oncale*, the Court reasoned that when men harass women with "explicit or implicit proposals of sexual activity," courts and juries have reasonably inferred "those proposals would not have been made to someone of the same sex."[95] The premise of this inference is that the male harasser was heterosexual, and therefore, he would not have made sexual

[91] *Oncale*, 523 U.S. at 80–81.

[92] United States v. Virginia, 518 U.S. 515, 524 (1996). In 2000, Mary Anne Case argued that this rule is applied formalistically, forbidding any generalizations about the sexes that are not "perfect proxies" in the sense of there being no women or men who are exceptions to the generalization. See Case, supra note 15, at 1448. This "perfect proxy" version of the antistereotyping principle is relatively determinate when laws that discriminate based on sex are justified by descriptive claims about the ways men and women are, e.g., assertions that men prefer competition and women prefer cooperation. But it's not clear how it would apply to many of today's transgender rights controversies, which pertain to who counts as a "man" or "woman" for some purpose. See infra Subsection II.A.1.

[93] 42 U.S.C. § 2000e-2(e).

[94] 20 U.S.C. § 1681(a)(1)–(9) (exceptions for certain programs such as traditionally single-sex schools); id. § 1686 ("living facilities"); id. § 1688 (requiring neutrality as to abortion).

[95] 523 U.S. at 80. As one early and influential court of appeals decision explained in affirming a woman's claim that she was a victim of sex discrimination when she was subjected to unwanted advances from her male supervisor: "but for her gender she would not have been importuned." Barnes v. Costle, 561 F.2d 983, 989 (D.C. Cir. 1977).

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advances toward another man.[96] *Bostock* describes this as "a straightforward rule": discrimination occurs "if changing the employee's sex would have yielded a different choice by the employer."[97] Philosophers call this a "counterfactual" because it asks a jurist to imagine what would have happened if the facts were different.[98]

The antecedents of *Bostock*'s but-for test are 1970s Supreme Court decisions on causation in constitutional discrimination cases dealing with what courts would later call the "mixed motives" problem[99]: the extent to which discriminatory purposes must result in injury to plaintiffs to require that courts take remedial action.[100] The idea here might be corrective justice.[101] But cases like *Oncale* and *Bostock* ask a different counterfactual question—not what would have happened in the absence of discriminatory purposes, but rather, what would have happened if the plaintiff's sex were different.[102]

[96] *Oncale* concluded that "[t]he same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual." 523 U.S. at 80. This went sideways. See Jessica A. Clarke, Inferring Desire, 63 Duke L.J. 525, 525 (2013) (surveying troubling cases applying *Oncale*'s direction to search for evidence of a harasser's sexual orientation).

[97] Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020).

[98] A counterfactual test is "one that compares how the world is after our actions with how the world would have been if, contrary to fact, we had not done the actions in question." Michael Moore, For What Must We Pay? Causation and Counterfactual Baselines, 40 San Diego L. Rev. 1181, 1183 (2003). Counterfactual reasoning is the subject of much debate in philosophy. See, e.g., id.

[99] See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989).

[100] Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 n.21 (1977) (stating that, under the Equal Protection Clause, in the event a government entity has an impermissible racial purpose, the burden shifts to the government to "establish[] that the same decision would have resulted even had the impermissible purpose not been considered" because otherwise, the plaintiff could "no longer fairly . . . attribute the injury complained of to improper consideration of a discriminatory purpose"); see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286–87 (1977) (articulating the same test and discussing "other areas of constitutional law" in which "this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused").

[101] Another antecedent might be the principle that damages in discrimination cases should restore an individual to the position they would have been in were it not for discrimination. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

[102] See supra note 60 (collecting sources critical of *Bostock*'s conflation of causes, statuses, and/or reasons). I note that this conflation predates *Bostock*—the Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.* read the term "because of" in another discrimination statute to mean "by reason of," which it interpreted to require " 'but-for' cause" because Congress had not specified another causation standard. 557 U.S. 167, 176 (2009).

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David Strauss has called this inferential method of discerning discriminatory intent "reversing the groups."[103] The test can be operationalized at the individual level.[104] For example, consider a scenario in which, after *Oncale*, a male harasser who identifies as gay targeted the male plaintiff out of sexual attraction. The but-for test asks courts to use logic to determine if the plaintiff would have been harassed if "he" were a "she." The test might also be operationalized at a group level, for example, in equal protection cases in which courts could ask, "suppose the adverse effects of the challenged government decision fell on . . . men instead of women. Would the decision have been different?"[105] Concessions by decision-makers about how the counterfactual scenario would be addressed might help courts resolve such cases.[106]

2. Anticlassification Rules

Anticlassification rules define discrimination as practices that categorize, sort, or distinguish individuals based on some forbidden ground, whether explicitly or implicitly. These rules originate in constitutional doctrine positing that certain classifications are "suspect"[107] or "quasi-suspect"[108] by nature and therefore require special

[103] See David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 958 (1989) (arguing that this approach "corresponds with the way discriminatory intent is commonly understood"); id. at 958 n.72 (asserting that this counterfactual inquiry explains footnote 21 of *Arlington Heights*).

[104] Katie Eyer has argued that a simple but-for test should replace the complicated proof frameworks courts have devised in *all* Title VII cases. Eyer, supra note 20, at 1661. Unfortunately, courts are not inclined to do this. See, e.g., Coleman v. Morris-Shea Bridge Co., No. 18-cv-00248, 2020 WL 6870450, at *9 (N.D. Ala. Nov. 23, 2020) (holding that *Bostock* does not do away with the *McDonnell Douglas* framework).

[105] Strauss, supra note 103, at 957. Courts are not inclined to do this either. Id. at 953.

[106] But it would be the rare case in which decision-makers would offer any such concessions. Cf. id. at 953 (explaining that the "reverse the groups" inquiry usually "leads to speculative or meaningless questions").

[107] See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.").

[108] See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (explaining that sex is a "quasi-suspect" classification because "[r]ather than resting on meaningful

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justification. They also operate in statutory contexts in which courts identify "facial classifications" as forms of discrimination that are not permitted unless a statutory defense applies.[109] This inquiry roughly maps onto *Oncale*'s holding that harassment may be discriminatory when it takes the form of "sex-specific and derogatory terms."[110] Anticlassification rules find discrimination in policies entailing a "sex classification" or "gender line,"[111] for example, a law that, on its face, prefers men to women as administrators of estates.[112] Such rules trigger scrutiny even if they apply to only a subset of men or women, such as a law differentiating between unwed fathers and unwed mothers,[113] or a policy barring only women who are capable of bearing children from certain jobs.[114] Anticlassification rules also find discrimination in gender line-drawing that applies to both men and women, such as a prison's policy of not employing any guard of the "opposite sex" as the inmates in a particular facility.[115]

considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women").

[109] See, e.g., UAW v. Johnson Controls, Inc., 499 U.S. 187, 197 (1991) ("The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender.").

[110] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (positing that harassment may be sex discrimination if the harasser used "sex-specific and derogatory terms" that demonstrate the harasser's "general hostility to the presence of women in the workplace"). But no showing of "malevolent motive" is required if a court accepts that there is a facial classification. *UAW*, 499 U.S. at 188; see also Nathan v. Great Lakes Water Auth., 992 F.3d 557, 566 (6th Cir. 2021) (reasoning that *Oncale* does not require a showing of sex-based animus or desire). In Title VII harassment cases, courts often examine whether the "statements or acts" of a supervisor "had either an explicit or implicit connection to the employee's protected characteristic(s)." Suzanne B. Goldberg, Discrimination by Comparison, 120 Yale L.J. 728, 779 (2011).

[111] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

[112] Reed v. Reed, 404 U.S. 71, 75–76 (1971) (holding that the Equal Protection Clause pertains to legislation that affords "different treatment" to "persons placed by a statute into different classes").

[113] *Morales-Santana*, 137 S. Ct. at 1686 (holding that a law setting forth different standards for determining the U.S. citizenship of children of unwed citizen mothers and unwed citizen fathers did not meet the requirements of intermediate scrutiny).

[114] *UAW*, 499 U.S. at 191–92, 197 (holding that a challenge to a policy excluding fertile women, but not fertile men, from certain jobs to protect fetuses from lead exposure was a claim for disparate treatment, not disparate impact).

[115] Dothard v. Rawlinson, 433 U.S. 321, 325 n.6 (1977) (concluding that even though the policy applied to both men and women, it constituted "overt" and "explicit[]" discrimination against women and had to be justified by Title VII's BFOQ defense). In *Dothard*, the Court also noted the policy's discriminatory effects, excluding women from seventy-five percent of the relevant jobs. Id. at 332 n.16.

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In many cases, but-for and anticlassification tests are likely to reach the same results.[116] Anticlassification rules, however, unlike but-for tests, do not require comparison. To see this, it is helpful to consider Benjamin Eidelson's "dimensional account" of discrimination under Title VII.[117] This account recognizes a decision as discriminatory when it disfavors an individual "because of properties . . . they possess partly in virtue of how they stand in the dimensions enumerated in the statute," such as sex.[118] Thus, rather than asking whether a woman would have been treated differently if she were a man, this account would ask whether the plaintiff was treated differently because of some property that characterizes her in terms of her sex. Those properties could include being a woman, not being a man, having a different sex from the majority of the business's male customers, having the same sex as the majority of the business's female customers, having a different sex than her spouse, and so forth.[119]

But courts do not apply any sort of philosophically rigorous test to determine whether classification has occurred—instead, they ask questions such as whether a policy can "be stated without referencing sex,"[120] whether the trait that is the basis for discrimination can be defined "without using the words man, woman, or sex (or some synonym),"[121] or whether the criterion is "inextricably bound up with sex."[122] Anticlassification rules might ask whether opportunities were allocated behind a metaphorical "veil of ignorance"[123] or with "blindness" to bases like sex.[124] On an anticlassification theory, the question of the *extent* to

[116] But see *UAW*, 499 U.S. at 192, 199 (noting that a fertile man was also a plaintiff in the case, arguing his claim stemmed from the fact that he was "denied a request for a leave of absence for the purpose of lowering his lead level because he intended to become a father," but holding that the employer's rule was nonetheless sex discrimination because it did not apply to men "in the same way").

[117] Eidelson, supra note 20, at 791.

[118] Id.

[119] Id. at 809–14.

[120] Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017).

[121] Bostock v. Clayton County, 140 S. Ct. 1731, 1746 (2020).

[122] Id. at 1742.

[123] Strauss, supra note 60, at 208 ("A veil of ignorance test demands a kind of impartiality, comparable to that required of, say, an umpire in a game, who must act as if she does not know the team affiliations of the players, even though she obviously does."); Post, supra note 34, at 12 (discussing the application of the "veil of ignorance" from John Rawls, *A Theory of Justice* 136 (1971), to antidiscrimination law).

[124] Post, supra note 34, at 11 (discussing the "trope of blindness"). The ideal is the orchestra audition in which musicians sit behind a screen so that reviewers must evaluate them based

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which a classification played a causal role in a decision-making process—whether as a but-for cause, a motivating factor, a predominant factor, or a sole cause[125]—is a distinct question. It may be ignored,[126] may go to standing,[127] or may go to damages.[128]

3. Similarly Situated Rules

I refer to a third type of test as "similarly situated" rules. These rules reflect the ancient maxim that likes be treated alike.[129] With respect to

on their music alone. See Claudia Goldin & Cecilia Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715, 716 (2000). This does not mean failing to notice the trait that is a forbidden ground for discrimination; it means treating it as "truly no more significant than eye color or hair color." R. Richard Banks, Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse, 48 UCLA L. Rev. 1075, 1123 (2001).

[125] See Verstein, supra note 56, at 1134–42 (discussing four potential standards for determining motive).

[126] The Supreme Court ignores causation when it regards the harms of discrimination as expressive rather than material. See, e.g., Leslie Kendrick & Micah Schwartzman, The Etiquette of Animus, 132 Harv. L. Rev. 133, 153 (2018) (pointing out that the Supreme Court altogether ignored the question of "mixed motives" in a religious animus case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)); Reva B. Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 Yale L.J. 1278, 1334–35 (2011) (pointing out that the Supreme Court ignored the question of whether any individual plaintiff was denied a promotion because of reverse discrimination in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), a Title VII race discrimination case).

[127] See, e.g., Anjelino v. N.Y. Times Co., 200 F.3d 73, 90 (3d Cir. 1999) (concluding that men alleging they would not have been injured "but for" the defendant's practices of discriminating against women had standing to sue).

[128] See, e.g., 42 U.S.C. § 2000e-5(g) (explaining that if an employee demonstrates that a forbidden ground was a "motivating factor" for some adverse employment action under Title VII's § 2000e-2(m), but the employer demonstrates that it would have made the same decision even absent the impermissible motive, the employee is not entitled to reinstatement, back pay, or other such damages); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (explaining that, in terms of back pay, Title VII "requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination" (quoting 118 Cong. Rec. 7168 (1972))).

[129] See, e.g., Aristotle, Nicomachean Ethics 1131a-1131b (Terence Irwin trans., Hackett Publ'g Co. 3d ed. 2019). This idea runs through American discrimination law. See, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020) ("To 'discriminate against' a person, then, would seem to mean treating that individual worse than others who are similarly situated."); Dawson v. Steager, 139 S. Ct. 698, 705 (2019) (stating that "discrimination" is "something we've often described as treating similarly situated persons differently"). Some scholarship defines "formal equality" as this similarly situated principle. See, e.g., Katharine T. Bartlett, Gender Law, 1 Duke J. Gender L. & Pol'y 1, 2 (1994).

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Title VII, a "similarly situated" inquiry is the "default methodology" for determining if intentional discrimination occurred.[130] Plaintiffs demonstrate discrimination by identifying a "comparator": an employee who is "like" the plaintiff in all relevant respects except for sex but was treated more favorably.[131] *Oncale* proposed such a rule for harassment cases: a third heuristic for proving that harassment is sex discrimination is "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[132]

Similarly situated and but-for rules may seem to be two sides of the same coin,[133] but in some situations, they differ in operation and results.[134] The similarly situated test asks *factual* questions (Was the plaintiff, a man, treated differently than similarly situated women? Or, at the group level, were men and women treated differently despite being similarly situated?), while the but-for test asks *counter*factual ones (What would have happened if the plaintiff had been a woman rather than a man? Or, at the group level, would this policy have been implemented if it affected women rather than men?).[135] This distinction can make a difference in practice. But-for rules are capable of identifying discrimination in single-sex workplaces, where there are no comparable different-sex employees—a scenario that arises in same-sex harassment cases—while similarly situated rules, which require an actual "comparator," cannot.[136] But-for rules ask judges to imagine hypothetical

[130] Goldberg, supra note 110, at 745–47.

[131] Id. at 744–47.

[132] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998).

[133] Evidence that a defendant gave preferential treatment to similarly situated individuals of a different sex often goes to but-for cause. See, e.g., Doe v. Trs. of Dartmouth Coll., 615 F. Supp. 3d 47, 59 (D.N.H. 2022) (holding that a male plaintiff could show sex was the "but-for cause" of a college's erroneous decision to expel him for sexual assault if he produced evidence that the college discredited his testimony due to his intoxication at the time of the event in question, but that the college did not discredit the testimony of intoxicated female students in other cases).

[134] I am not interested in whether, as a theoretical or logical matter, these two tests are equivalents; this Article is interested in how they play out in doctrine.

[135] In *Oncale,* the Court described this inquiry as separate from the counterfactual but-for test: Would the presumably heterosexual male harasser have bothered the plaintiff if "she" had been a "he"? See supra notes 95–96 and accompanying text.

[136] See, e.g., Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009–10 (7th Cir. 1999) (noting that "proof that men and women were treated differently in the workplace . . . may be difficult, if not impossible, to obtain when the plaintiff and his harasser work in the kind of single-sex work environment that the Supreme Court confronted in *Oncale*" but nonetheless holding that the plaintiff could survive summary judgment by presenting sufficient evidence for a jury to conclude his harasser "might be sexually oriented toward members of the same sex," which

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scenarios in which nothing changes about the plaintiff except sex, an exercise that may sometimes raise more questions than answers.[137] Similarly situated rules, by contrast, focus attention on what *similarity* means in context; for example, what does it mean for the performance of two law firm associates to be similar? Unlike but-for tests, similarly situated rules do not permit judges to presume away controversies over what similarity means by positing a counterfactual world in which nothing has changed except the sex of the plaintiff.

Similarly situated rules are the least formalistic of these three tests, in that decisions about what traits render two individuals or groups similarly situated sometimes lack guideposts.[138] In easy cases, similarity may be functional and quantifiable, i.e., a case in which a law firm admits to making layoff decisions based on hours billed, and two law firm associates, a man and woman, billed the same number of hours, but only the woman was laid off. In harder cases, determining what similarity means requires answering more complex normative questions, such as, how much should a law firm adjust for the fact that a woman associate took time off for the birth of a child in calculating her hours billed? Another judgment call—on which the Supreme Court has no consistent answer—is known as the "most favored nation" problem—what to do when a protected class member is treated less favorably than some, but not all, comparable individuals or classes.[139] Yet another area of confusion is whether similarly situated inquiries go to the question of whether sex discrimination occurred, or to the question of whether that

"leaves ample room for the inference that Jemison harassed Shepherd because Shepherd is a man"); see also Goldberg, supra note 110, at 759–61.

[137] See supra note 106 and accompanying text.

[138] See, e.g., Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 538 (1982) (going so far as to conclude that problems like this are reasons to abandon the whole concept of equality).

[139] See, e.g., Dawson v. Steager, 139 S. Ct. 698, 705 (2019) (holding that, under a statute that forbids "discrimination" against federal retirees in tax treatment, "the relevant question isn't whether federal retirees are similarly situated to state retirees who *don't* receive a tax benefit; the relevant question is whether they are similarly situated to those who *do*"); Young v. United Parcel Serv., Inc., 575 U.S. 206, 236 (2015) (Alito, J., concurring) (explaining that the majority had rejected a "most favored employee" interpretation of the Pregnancy Discrimination Act that would find discrimination in any case in which "an employer treats pregnant women less favorably than some but not all nonpregnant employees who have similar jobs and are similarly impaired"); Nelson Tebbe, The Principle and Politics of Equal Value, 121 Colum. L. Rev. 2397, 2399 (2021) (describing "most favored nation" treatment for religious objectors in the Supreme Court's shadow docket decisions on COVID regulations and arguing it reflects a new theory of discrimination).

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discrimination was justified by important interests.[140] The similarly situated test could be a descriptive inquiry, keyed to the question of causation or classification, or a normative one, keyed to the question of proportionality. But courts often treat this test as a distinct formal inquiry, keyed to some circular, nonspecific, or untheorized notion of "discrimination."[141]

Notwithstanding these features, similarly situated inquiries at least point judges to the question of similarity, a question that is generally more amenable to structured resolution than questions about motives, effects, or principles like antistereotyping or antisubordination.

II. THE REACH OF SEX DISCRIMINATION FORMALISM

Courts have deployed the various formal tests for determining discrimination to expand the reach of sex discrimination law into domains in which they have refused to venture in the past due to substantive concerns. Formalistic rules, because they are blunt, can call into question once-accepted social practices based on sex that may, on closer examination, be unjustified. This Part offers a close reading of recent sex discrimination cases to demonstrate how judges have invoked various formal tests—but-for cause, anticlassification, and similarly situated rules—to expand the law in novel and controversial directions.

A. Sex Discrimination Formalism in New Contexts

Philosophically and sociologically inclined scholars have proposed that the law adopt nuanced, contextual, socially attuned definitions that capture how sex discrimination functions and what is morally wrong about it.[142] But if courts were to adopt these inquiries, it is by no means

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[140] See, e.g., Rostker v. Goldberg, 453 U.S. 57, 69–70, 78–79 (1981) (holding that the requirement that only men register for the draft was not sex discrimination because it was based on the rule that women could not serve in combat positions—a rule not challenged in the litigation—that meant men and women were not "similarly situated" with respect to the draft, and refusing to clarify how the case fit into the tiers of scrutiny framework).

[141] See, e.g., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) ("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.' ").

[142] See, e.g., Dembroff et al., supra note 85, at 12 (arguing that rather than hiding behind abstractions like metaphysical notions of causation, "we ought to be honest" that the question the law is deciding "is which of the limits, expectations, norms, and roles imposed on the basis of sex classification ought to be tolerated and which ought to be changed"); Post, supra note

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clear that they would apply them in the ways these scholars would prefer. The record suggests otherwise.

In her efforts to advance sex equality law in the 1970s, Justice Ginsburg was wary of a rule that would ask judges to identify those practices that subordinate women, because she "was profoundly skeptical of the Justices' ability to 'know[] [it] when [they] see it.'"[143] If given latitude to determine social meanings, many courts will not see the operation of sex stereotypes or gender subordination.[144] Even when ugly biases are explicit, courts often find ways to ignore or diminish them.[145] Here's a recent example: in litigation over a West Virginia law excluding transgender girls from sports, there was evidence the law's cosponsor had endorsed social media posts "that advocated for physical violence against girls who are transgender, compared girls who are transgender to pigs, and called girls who are transgender by a pejorative term."[146] Yet the court thought the record insufficient to find "animus."[147] This is not

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34, at 38–39 (criticizing anticlassification principles and arguing that discrimination law should explicitly "reorient itself around the project of purposively reshaping the social practices of race and gender"); see also supra notes 4–6 (collecting scholarly proposals that the law focus on context, expressive meanings, effects, and competing interests with respect to race and discrimination generally).

[143] Franklin, supra note 83, at 121; id. at 121 n.206 (quoting Ruth Bader Ginsburg, Gender and the Constitution, 44 U. Cin. L. Rev. 1, 15 (1975), as "paraphrasing Justice Stewart's famous observation about obscenity in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)").

[144] See, e.g., Sylvia Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1005 (1984) ("The determination of what reinforces or undermines a sex-based underclass is exceedingly difficult."); see also Goldberg, supra note 110, at 794–95 (arguing judges have difficulty identifying sex stereotyping outside a few widely agreed-upon examples).

[145] In Title VII doctrine, lower federal courts have invented a "stray remarks" doctrine that allows them to interpret away overtly biased statements in determining whether intentional discrimination occurred. Jessica A. Clarke, Explicit Bias, 113 Nw. U. L. Rev. 505, 540–47 (2018) (discussing examples); see, e.g., Ferrand v. Credit Lyonnais, No. 02-cv-05191, 2003 WL 22251313, at *10 (S.D.N.Y. Sept. 30, 2003) (granting summary judgment for the employer despite evidence that a supervisor had referred to the female plaintiff with "such epithets as 'bitch,' 'cunt,' 'whore,' 'slut' and 'tart'"), *aff'd*, 110 F. App'x 160 (2d Cir. 2004). The "stray remarks" doctrine is one of any number of defendant-friendly heuristics that courts have adopted to dismiss evidence of discrimination. See Sperino & Thomas, supra note 61, at 59–86.

[146] B.P.J. v. W. Va. State Bd. of Educ., No. 21-cv-00316, 2023 WL 111875, at *4 (S.D. W. Va. Jan. 5, 2023). There was also evidence that the "problem" the bill was designed to address—"transgender students playing school sports and creating unfair competition or unsafe conditions"—had never occurred in West Virginia. Id.

[147] Id. ("While the record before me does reveal that at least one legislator held or implicitly supported private bias against, or moral disapproval of, transgender individuals, it does not contain evidence of that type of animus more broadly throughout the state legislature.").

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anomalous.[148] Psychological research demonstrates that Americans resist attributing events to discrimination because it jars with their beliefs that American society is fundamentally meritocratic and people get what they deserve.[149] Accordingly, discrimination plaintiffs face worse odds in court than most other types of litigants.[150]

Formal tests, which are ostensibly heuristics for divining discriminatory intent, but require no direct evidence of mental states, do not ask judges to attribute specific motives to decision-makers. Thus, they may sometimes allow discrimination law to capture implicit or subconscious forms of bias, negligence, and selective indifference,[151] but without the onerous statistical requirements or deferential defenses of disparate impact law.[152] Anticlassification rules do this by calling into question rules or policies that formally categorize individuals based on sex, regardless of the classifier's ultimate motive or effects.[153] But-for rules do it by analogizing discrimination to physical forces that cause

[148] Clarke, supra note 145, at 523–47 (cataloguing examples).

[149] Katie R. Eyer, That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law, 96 Minn. L. Rev. 1275, 1303–11, 1317–18 (2012) ("[T]he psychological literature on the perception of discrimination shows an across-the-board tendency for people to decline to make attributions to discrimination . . . . Psychological scholars have found, moreover, considerable experimental support for the conclusion that this phenomenon is driven by a tension between commonly held beliefs about discrimination and meritocracy and the recognition of discrimination claims.").

[150] Id. at 1282–85 (collecting empirical research on poor outcomes for discrimination plaintiffs and noting that "[d]iscrimination plaintiffs fare far worse than virtually every other category of federal litigants, including even many categories of plaintiffs who face notoriously difficult legal standards (such as ERISA plaintiffs and habeas corpus litigants)").

[151] Cf. Eyer, supra note 20, at 1626–27 (making a similar point with respect to but-for rules but going further to suggest they altogether supplant intent requirements). Whatever the statutory interpretation arguments for this move might be, see, e.g., id. at 1691–700, courts are unlikely to overtly abandon the intent requirement after the Supreme Court has so recently and repeatedly reaffirmed it. See, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020) ("In so-called 'disparate treatment' cases [under Title VII], this Court has . . . held that the difference in treatment based on sex must be intentional."); Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (reaffirming the holding of *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979), that, in an Equal Protection challenge, "[p]urposeful discrimination requires more than 'intent as volition or intent as awareness of consequences'; it involves a decisionmaker's undertaking a course of action 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group"). But, as this Part demonstrates, formal tests of discrimination can circumvent some of the more limiting interpretations of the intent requirement.

[152] See supra notes 50–54 and accompanying text.

[153] See supra note 110 (explaining that a showing of some specific form of intent is not required when there is a "facial classification").

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individual harm.[154] Similarly situated rules do it by focusing on "treatment rather than intent."[155]

In both constitutional and statutory contexts, soft arguments about social meanings, context, and substantive equality have often been marshalled to shelter existing political and economic arrangements from the challenge posed by sex discrimination law. This Section argues that by contrast, formal tests have been cited to expand sex discrimination law in three categories of disputed contexts: (1) discrimination based on the logic of complementarity—that men and women should be subject to formally different standards that are substantively equitable, such as separate restrooms and dress codes, or different types of health care;[156] (2) discrimination based on differences in reproductive biology, such as menstruation, breasts, or genitalia; and (3) discrimination based on traits that entail rejection of the relevance of sex categories, such as bisexuality and nonbinary gender.

This Section does not make any broad claims about the causal role of formal legal reasoning vis-à-vis other explanations for judicial behavior, such as ideology, social norms, or a jurist's own views about morality and utility.[157] Nor does it make any general argument about whether judges come to decisions by following formal tests to their logical ends, or if judges merely deploy formal tests rhetorically to justify outcomes they prefer for other reasons. I argue only that recent decisions relying on formal tests have found sex discrimination in some contexts in which courts relying on substantive tests in the past have not; that formal tests make possible certain analytic moves and foreclose others; and that courts

[154] See supra note 75 and accompanying text.

[155] Dawson v. Steager, 139 S. Ct. 698, 704 (2019) (holding, in interpreting a statute that forbids discrimination against federal officers, that "treatment rather than intent is what matters"); id. at 703 (rejecting the argument that a state tax rule did not discriminate because the state intended only "'to give a benefit to a narrow class of state retirees,' not to harm federal retirees").

[156] Cf. Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence, 30 Harv. J.L. & Gender 461, 492–93 (2007) (discussing how historically courts have upheld "legislatures' limitation of marriage to different-sex couples by suggesting that different-sex marriage is necessary and appropriate because women and men play opposite and complementary roles within marriage, again, simply by virtue of their gender").

[157] Cf. Jessica A. Clarke, How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong, 98 Tex. L. Rev. Online 83, 112 (2019) (offering a multifactorial explanation for the evolution of circuit case law leading to *Bostock*, including the accretion of precedents on sex stereotypes, the rise of textualism, changes to medical and public opinions, and the decline of formal sex distinctions in the workplace).

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have found that different formal tests lead to different outcomes with respect to particular sex discrimination controversies.

What follows is not an attempt to bring coherence to the post-*Bostock* muddle: just an effort to identify throughlines. This Section explains how but-for, anticlassification, and similarly situated logics are cropping up in sex discrimination controversies after *Bostock*, and hypothesizes about further directions in which courts may take those formal inquiries.

1. Complementarity: Restrooms, Dress Codes, and Health Care

As Justice Alito's dissent pointed out, *Bostock*'s formal inquiry has radical potential to disrupt sex-based practices in a number of contexts, such as restrooms, dress codes, and health care.[158] Prior to *Bostock*, some courts held that commonly accepted and traditional practices of sex segregation were not discrimination at all—even when they caused harm to transgender people and gender nonconformers. Thus, courts avoided subjecting these practices to analysis to determine whether they might meet the requirements of a statutory defense or exception, or in the equal protection context, whether they might be substantially related to an important government interest. These courts understood themselves to be applying substantive definitions of discrimination keyed to the identification of stereotyping and subordination, or the idea that equality requires that men and women be treated in different, but complementary, ways. Formal rules can make traditional and community standards irrelevant to the determination of whether a practice "discriminates," forcing defendants to offer practical justifications for harmful exclusions.

Prior to 2016, most every court to consider the issue had held that it was not sex discrimination to bar a transgender woman from using the women's restroom, or a transgender man from using the men's restroom.[159] For example, in the 2007 case, *Etsitty v. Utah Transit*

[158] Bostock v. Clayton County, 140 S. Ct. 1731, 1778–83 (2020) (Alito, J., dissenting).

[159] See, e.g., Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 493–94 (9th Cir. 2009) (holding that an employer set out a nondiscriminatory justification for firing a transgender woman when it proffered evidence that it banned her from using the women's restroom for safety reasons); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1219, 1228 (10th Cir. 2007) (similar); Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657 (W.D. Pa. 2015) (rejecting equal protection and Title IX challenges by a transgender university student who was barred from using restrooms and locker rooms that were consistent with his gender identity); cf. Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982) (quoting the district court's conclusion that Title VII did not "require the courts to ignore anatomical classification" in determining sex, because such an approach

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Authority, Krystal Etsitty, a transgender woman, worked as a bus driver for the Utah Transit Authority until she was fired due to "concern about the possibility of liability for [the Authority if an] employee with male genitalia was observed using the female restroom."[160] A Tenth Circuit panel consisting of two Democratic appointees and one Republican appointee accepted, for the sake of argument, Etsitty's claim that she suffered sex discrimination as "a biological male who was discriminated against for failing to conform to social stereotypes about how a man should act and appear."[161] But it held that the Authority's reason for firing Etsitty—for using the women's restroom—was nondiscriminatory.[162] The court reasoned that "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."[163] To hold otherwise would be to call into question all forms of "reasonable regulation[]" that differentiate between men and women.[164] Prior to *Bostock*, most courts refused to read antidiscrimination statutes to threaten the "long-held tradition"[165] or "cultural preference for restroom designation based on biological gender."[166]

Before *Bostock*, courts drew on similar reasoning to allow employers to enforce different dress and grooming requirements for men and women. In 2006, an en banc panel of the Ninth Circuit, in an opinion signed by four Republican and three Democratic appointees, held that an employer could fire a woman for refusing to wear makeup, even though

would lead to "limitless" problems, such as "which restroom should plaintiff use?"). But see Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. 02-cv-01531, 2004 WL 2008954, at *3 (D. Ariz. June 3, 2004) (holding that a transgender woman had stated a claim for sex discrimination based on an employer policy restricting her from the women's restroom). Courts began to shift course after the Obama Department of Education issued a 2015 opinion letter in favor of transgender students. See, e.g., Carcaño v. McCrory, 203 F. Supp. 3d 615, 636–39, 645 (M.D.N.C. 2016) (holding that transgender plaintiffs were likely to succeed on Title IX but not on equal protection challenge to North Carolina "bathroom bill").

[160] *Etsitty*, 502 F.3d at 1219.

[161] Id. at 1223. The Tenth Circuit rejected the argument that Title VII prohibits discrimination based on a "person's status as a transsexual." Id. at 1221.

[162] Id. at 1224.

[163] Id.

[164] Id. at 1225.

[165] Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015); see supra note 159 (discussing the evolution of case law).

[166] Goins v. West Grp., 635 N.W.2d 717, 723 (Minn. 2001). In *Goins*, the Minnesota Supreme Court held that an employer could prohibit a transgender woman from using the women's restroom even though the legislature had gone so far as to bar discrimination based on gender identity. Id. at 722–23; see also Hispanic AIDS F. v. Est. of Bruno, 792 N.Y.S.2d 43, 47 (N.Y. App. Div. 2005) (citing *Goins* to reach a similar result).

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there was no makeup requirement for men.[167] The court reasoned that the dress code was not discriminatory because it equally burdened men, who had to keep their hair short.[168] In the 1970s, courts commonly rejected Title VII challenges to rules requiring that men, but not women, have short hair.[169] In an influential 1975 case, *Willingham v. Macon Telegraph & Publishing Co.*, the Fifth Circuit reasoned that such grooming codes are permitted because "both sexes are being screened with respect to a neutral fact, i.e., grooming in accordance with generally accepted community standards of dress and appearance."[170] The court thought that hair-length requirements had only a trivial impact on the employment prospects of men,[171] and the purpose of Title VII was to avoid the subordination of women to men, or vice versa, not to "maximiz[e] individual freedom by eliminating sexual stereotypes."[172] In 2014, the Seventh Circuit summarized the "principle that emerges" from these cases to be that "sex-differentiated standards consistent with community norms may be permissible to the extent they are part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike."[173]

Bostock explicitly declined to address restrooms, locker rooms, and dress codes or any other such controversial topics,[174] but it undermines the reasoning behind these decisions. In *Bostock*, the Court noted that many of the practices that it now seems obvious are banned by Title VII—

[167] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1105–06 (9th Cir. 2006) (en banc). Three Democratic appointees and one Republican appointee dissented. Id. at 1114 (Pregerson, J., dissenting).

[168] Id. at 1109.

[169] See, e.g., Willingham v. Macon Tel. & Pub. Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc).

[170] Id. The court rejected the plaintiff's but-for causation argument, that "were he a girl with identical length hair and comparable job qualifications, he (she) would have been employed." Id. at 1088.

[171] Id. at 1091–92.

[172] Id. at 1092 ("Neither sex is elevated by these regulations to an appreciably higher occupational level than the other. We conclude that Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities." (quoting Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973))).

[173] Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 580–81 (7th Cir. 2014) (stating that a school policy requiring short hair for male athletes may be permitted under the Equal Protection Clause if "the hair-length policy is just one component of a comprehensive grooming code that imposes comparable although not identical demands on both male and female athletes").

[174] Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020).

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such as job ads calling only for women or men, sexual harassment, and policies treating women with children worse than men with children—were widely considered to be socially acceptable in the years after the law was passed.[175] *Bostock* also rejected the argument that an employer who fires both gay men and lesbians has not discriminated because it imposes "equal" burdens on men and women.[176]

Although *Bostock* did not address restrooms, most courts to consider it since have concluded that it is sex discrimination to deny a transgender person access to facilities consistent with his or her gender identity.[177] The leading case is *Grimm v. Gloucester County School Board*, in which two Obama appointees on the Fourth Circuit reasoned that a high school could not exclude Gavin Grimm, a transgender boy, from the boys' restroom.[178] The school had classified by sex because the policy could not be implemented "without referencing" the sex Grimm was assigned at

[175] Id. at 1752.

[176] Id. at 1742.

[177] See, e.g., M.C. ex rel. A.C. v. Metro. Sch. Dist., 75 F.4th 760, 764 (7th Cir. 2023) (affirming grant of preliminary injunction on equal protection and Title IX grounds); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593–94 (4th Cir. 2020) (affirming summary judgment on equal protection and Title IX claims), *cert. denied*, 141 S. Ct. 2878 (2021); Hobby Lobby Stores, Inc. v. Sommerville, 186 N.E.3d 67, 81 (Ill. App. 2021) (following *Grimm* to interpret Illinois law); N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 557 (Minn. Ct. App. 2020) (interpreting the Minnesota Constitution). But see Kasper ex rel. Adams v. Sch. Bd., 57 F.4th 791, 796 (11th Cir. 2022) (en banc); Texas v. EEOC, 633 F. Supp. 3d 824, 829–36 (N.D. Tex. 2022) (decision by Trump appointee granting summary judgment in case seeking declaratory judgment against EEOC enforcement); Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 624–25 (N.D. Tex. 2021) (similar decision by George W. Bush appointee), *vacated sub nom.* 70 F.4th 914, 940 (5th Cir. 2023). In one case, a Trump appointee declined to grant a preliminary injunction for the plaintiff but also declined to grant the defendant's motion to dismiss the plaintiff's equal protection claim. A.H. ex rel. D.H. v. Williamson Cnty. Bd. of Educ., 638 F. Supp. 3d 821, 834–37 (M.D. Tenn. 2022) (denying plaintiff's motion for a preliminary injunction); A.H. ex rel. D.H. v. Williamson Cnty. Bd. of Educ., No. 22-cv-00570, 2023 WL 6302148, at *3–5 (M.D. Tenn. Sept. 27, 2023) (denying defendant's motion to dismiss plaintiff's equal protection claim under Rule 12(b)(6) but dismissing Title IX claim). A number of decisions before *Bostock* but after North Carolina's highly politicized 2016 "bathroom bill" also came out in favor of transgender litigants. See, e.g., Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1046–50 (7th Cir. 2017); Jessica A. Clarke, Sex Assigned at Birth, 122 Colum. L. Rev. 1821, 1878 n.329 (2022) (discussing cases).

[178] *Grimm*, 972 F.3d at 616. A George H.W. Bush appointee dissented. Id. at 627 (Niemeyer, J., dissenting).

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birth,[179] and it constituted discrimination under *Bostock*'s but-for test,[180] because, but-for his sex assigned at birth, Grimm would not have been excluded from the boys' restroom and forced to use a single-stall restroom.[181] But the Fourth Circuit did not rely on the anticlassification and but-for tests alone.

The blunt force of these tests, especially in the Title IX context, would challenge a school's ability to enforce any policy keeping boys out of the girls' restroom, or vice versa.[182] To avoid this result, the Fourth Circuit accepted Grimm's argument that his challenge was only to the policy as applied to exclude him from the boys' restroom, not to the very existence of sex-segregated restrooms.[183] It reasoned that the exclusion caused Grimm a unique form of *harm* because it branded him, as a transgender student, "with a scarlet 'T'" and identified him as having "gender identity

[179] Id. at 616 (majority opinion) (noting the school "defined ['biological gender' for restroom purposes] as the sex marker on his birth certificate"). The Seventh Circuit reached a similar conclusion. *Whitaker*, 858 F.3d at 1051 ("Here, the School District's policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate. This policy is inherently based upon a sex-classification and heightened review applies."); see also *A.C.*, 75 F.4th at 771 (reaffirming *Whitaker*'s reasoning after *Bostock*). Grimm also advanced an antistereotyping theory as a second-line argument about why the policy was subject to intermediate scrutiny, *Grimm*, 972 F.3d at 609–10, as well as the argument that transgender status is a quasi-suspect class, id. at 610–13. *Whitaker*, decided by the Seventh Circuit before *Bostock*, gave more emphasis to antistereotyping in its analysis of Title IX. *Whitaker*, 858 F.3d at 1048–50 (relying on pre-*Bostock* Seventh Circuit precedents on sex stereotyping).

[180] With reasoning echoing *Bostock*, the court explained, "[e]ven if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions." *Grimm*, 972 F.3d at 616. The Fourth Circuit noted, but did not adopt, a possible antistereotyping theory under Title IX as well. Id. at 617 n.15.

[181] Id. at 618.

[182] Title IX has no exceptions for important governmental interests or anything like the BFOQ. 20 U.S.C. § 1681 et seq. However, Title IX does not forbid "separate living facilities for the different sexes." Id. § 1686. Its implementing regulations construe it to allow separate restrooms. 34 C.F.R. § 106.33. But neither the statute nor its regulations specify how "girls" or "boys" are to be defined for restroom purposes.

Much as all-gender restrooms may be the best policy solution to this problem, and I think they are, Jessica A. Clarke, They, Them, and Theirs, 132 Harv. L. Rev. 894, 981–83 (2019), no court has interpreted the Constitution or any statute forbidding sex discrimination to require them. To be sure, the law has required tremendous architectural changes to restrooms to accommodate people with disabilities, but that was the result of a specific command from Congress, enforced by the Executive Branch. See, e.g., U.S. Dep't of Just., 2010 ADA Standards for Accessible Design 165, 168, 171 (2010), https://archive.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf [https://perma.cc/7SZB-72QR].

[183] *Grimm*, 972 F.3d at 618.

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issues,"[184] resulting in stress, shame, stigmatization, and even physical injury after he developed urinary tract infections as a result of avoiding the restroom at school.[185] This move, sensitive to stigma, effects, social context, and maybe even the balance of the equities, is not very formalistic.[186] And not all judges agree with this account of the harm.[187] In its en banc decision against a transgender student in *Adams v. School Board*, the Eleventh Circuit refused to apply *Bostock*'s but-for test because it would eliminate the school's ability to enforce restroom sex segregation in every case.[188] It saw no principled way to rule for Drew Adams, the transgender boy in that case, without allowing cisgender girls to use the boys' restroom.[189] That was because it regarded the harm to Adams as no different from that experienced by any "biological female" who "*felt* that she . . . had been discriminated against" by "not being able to access the bathrooms reserved for biological males."[190]

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[184] Id.

[185] Id. at 617.

[186] Some scholars have argued the qualitative difference in harm is what allows transgender students, but only transgender students, to challenge restroom segregation, and that balancing tests help here. See, e.g., Michael C. Dorf, What's Wrong (and One Thing That's Right) with an 11th Circuit Ruling Allowing a Florida School District's "Biological Sex" Restroom Policy, Dorf on L. (Jan. 3, 2023), http://www.dorfonlaw.org/2023/01/whats-wrong-and-one-thing-thats-right.html [https://perma.cc/47MN-NAMZ] (interpreting intermediate scrutiny as a balancing test, and concluding that, "[w]hile the privacy interest is weak in all cases, keeping cisgender boys out of girls' bathrooms and cisgender girls out of boys' bathrooms does no or de minimis harm to those cisgender students; thus, even a weak privacy interest suffices to outweigh the nonexistent or de minimis harm to cisgender students").

[187] A similar debate has played out in cases excluding transgender girls and women from girls' and women's sports. Compare B.P.J. v. W. Va. State Bd. of Educ., No. 21-cv-00316, 2023 WL 111875, at *9 (S.D. W. Va. Jan. 5, 2023) ("[D]espite her repeated argument to the contrary, transgender girls are not excluded from school sports entirely. They are permitted to try out for boys' teams, regardless of how they express their gender."), with Hecox v. Little, 79 F.4th 1009, 1029 (9th Cir. 2023) ("The argument . . . that the Act does not discriminate against transgender women because they can still play on men's teams is akin to the argument . . . that same-sex marriage bans do not discriminate against gay men because they are free to marry someone of the opposite sex." (citation omitted)).

[188] Kasper ex rel. Adams v. Sch. Bd., 57 F.4th 791, 814 n.7 (11th Cir. 2022) (en banc) (observing that the but-for test would "swallow" regulations carving out sex-segregated restrooms from Title IX's reach).

[189] Id. at 808 (characterizing Adams's challenge as necessarily "about the constitutionality and legality of separating bathrooms by biological sex because it involves an individual of one sex seeking access to the bathrooms reserved for those of the opposite sex").

[190] Id. at 814 n.7 (emphasis added).

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To address this argument, *Grimm* turned explicitly to a similarly situated test.[191] *Grimm* reasoned that the transgender plaintiff, Gavin Grimm, was just like all other boys in every respect relevant to using the restroom—"consistently, persistently, and insistently" expressing his identity as a boy;[192] "wear[ing] boys' clothing;"[193] and in every other way holding himself out as a boy to his community.[194] Based on these similarities, the Fourth Circuit concluded that the view that transgender boys do not belong in the boys' restroom due to their reproductive biology is based in "stereotypic notions."[195] It applied the same reasoning to its analysis under Title IX,[196] which has been interpreted to permit separate restrooms for boys and girls.[197] It held that in the Title IX context, discrimination "mean[s] treating that individual worse than others who are similarly situated," and Grimm was treated worse than other boys, because he was not permitted to use restrooms consistent with his gender identity.[198] In *Adams*, the Eleventh Circuit did not see it the same way; it regarded Drew Adams, a transgender boy similar in all relevant ways to Gavin Grimm, to be a boy only in his "genuinely held belief."[199]

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[191] Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618 (4th Cir. 2020) (noting that "*Bostock* expressly does not answer this 'sex-separated restroom' question").

[192] Id. at 594.

[193] Id. at 598.

[194] Id. at 610 ("The overwhelming thrust of everything in the record—from Grimm's declaration, to his treatment letter, to the amicus briefs—is that Grimm was similarly situated to other boys, but was excluded from using the boys restroom facilities based on his sex-assigned-at-birth.").

[195] Id. at 610 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

[196] Id. at 618.

[197] See supra note 182. By contrast, the Seventh Circuit reasoned that the term "sex," as used in Title IX and its regulations, could not be limited to assignments at birth or chromosomal makeup. M.C. ex rel. A.C. v. Metro. Sch. Dist., 75 F.4th 760, 770 (7th Cir. 2023) (finding dictionary definitions of "sex" to be "inconclusive" and reasoning that chromosomal definitions of sex "do not account for the complexity of the necessary inquiry"). In a prior case, the Seventh Circuit responded to the argument that defining boys and girls based on "gender identity" would allow a student to "'unilaterally declare' his gender," by reasoning that the plaintiff "ha[d] a medically diagnosed and documented condition" and "[s]ince his diagnosis, he ha[d] consistently lived in accordance with his gender identity," a decision that "was not without cost or pain." Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1050 (7th Cir. 2017).

[198] *Grimm*, 972 F.3d at 618 (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020)).

[199] Kasper ex rel. Adams v. Sch. Bd., 57 F.4th 791, 803 n.6 (11th Cir. 2022) (en banc) (holding that the policy met intermediate scrutiny because it was justified by privacy concerns but expressing "serious questions" about whether Adams was "similarly situated" because he "remained both biologically and anatomically identical to biological females"). Since Adams

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But even the *Adams* court, which rejected almost every other argument made by the transgender plaintiff, could not deny that restroom sex segregation violated the anticlassification rule for purposes of the Equal Protection Clause.[200] The result was to force the Florida school to explain how its policy met the intermediate scrutiny standard—an inquiry that calls for functional analysis of ends rather than formal arguments about means.[201] In *Adams*, the Eleventh Circuit concluded the school's restroom policy was justified by the "sex-specific privacy interests" of boys who used urinals or areas outside of restroom stalls to undress.[202] The court framed the question as whether these privacy concerns were a legitimate reason for segregating restrooms at all; it did not ask whether it was legitimate for the school to endorse and enforce the view of some community members that Adams was a "biological girl" whose presence in the boys' restroom constituted an invasion of privacy.[203] A dissenting judge found this perplexing.[204] By contrast to *Adams*, in the majority of

had undergone a double mastectomy, the court's reference to anatomy must have been about "external genitalia." Id. at 798 ("Because Adams was still just a teenager who had not yet reached the age of maturity, Adams could not undergo additional surgeries to rework external genitalia."). In any event, the Eleventh Circuit regarded biological sex to be a property that is not changeable by any medical procedure and does not include gender identity. Id. at 807–08.

Other judges, who take seriously the idea that, for example, transgender girls might qualify as girls in some contexts, are concerned about line-drawing problems with respect to what sorts of medical treatment might be required for a transgender girl to count as a girl. In a recent case challenging a ban on transgender girls from girls' sports, a Clinton appointee rejected a "similarly situated" argument, noting that the plaintiff's discovery responses suggested that she "really argues that transgender girls are similarly situated to cisgender girls for purposes of athletics at the moment they verbalize their transgender status, regardless of their hormone levels." B.P.J. v. W. Va. State Bd. of Educ., No. 21-cv-00316, 2023 WL 111875, at *8 (S.D. W. Va. Jan. 5, 2023).

[200] 57 F.4th at 806.

[201] United States v. Virginia, 518 U.S. 515, 533 (1996) (holding that government must demonstrate that sex discrimination "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'").

[202] 57 F.4th at 806.

[203] See also West v. Radtke, 48 F.4th 836, 851 (7th Cir. 2022) (holding that Title VII's BFOQ defense and intermediate scrutiny would allow a prison to prohibit guards who are transgender men from strip searching male inmates, because "a prisoner's right to be free from highly invasive intrusions on bodily privacy by prison employees of the opposite sex—whether on religious or privacy grounds—does not change based on a guard's transgender status").

[204] *Adams*, 57 F.4th at 854 n.22 (Jill Pryor, J., dissenting) ("What do the personal beliefs of 'certain' individuals in the School District [who object to transgender students' usage of restrooms consistent with their gender identities on privacy and safety grounds] have to do with whether the policy actually furthers the asserted privacy and security interests or is

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recent restroom cases, courts have not been satisfied with invocations of time-honored and commonly accepted practices or vague concerns about privacy or safety.[205] Instead, they have pointed to the lack of evidence that transgender-inclusive restroom policies resulted in increases in, or even any specific incidents of, privacy violations, assaults, or other forms of restroom misconduct.[206] Empirical arguments of this sort are not persuasive to jurists who take it as normatively unproblematic, if not mandated by long-accepted social practice, for a school to regard transgender boys as girls when it comes to restrooms.[207] To be sure, this dispute rests on the resolution of empirical and normative questions that cannot be settled by formal logic—but at least anticlassification rules direct both sides to articulate their positions.

As for dress codes, in *EEOC v. R.G. & G.R. Harris Funeral Homes*, one of the lower court decisions consolidated in *Bostock*, the defendant funeral home asserted that it had fired a transgender woman, Aimee

instead founded on stereotypic biases and assumptions?"). It's not perplexing if we fill in the majority's intermediate scrutiny reasoning with its conclusion, stated elsewhere, that Adams was not a "boy" in any way relevant to the dispute. See supra note 199 and accompanying text.

[205] See, e.g., Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1052 (7th Cir. 2017) ("[T]he School District's privacy argument is based upon sheer conjecture and abstraction."); Clarke, supra note 177, at 1878 n.329 (collecting cases). Tradition alone cannot justify sex classifications. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 673–74 (2015) (explaining that, under coverture, wives were traditionally subordinate to husbands, and "invidious sex-based classifications in marriage remained common through the mid-20th century," but "[r]esponding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage"); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725–26 (1982) (explaining that the purpose of heightened scrutiny is "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women").

[206] See, e.g., Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 614 (4th Cir. 2020) (describing privacy concerns as "based upon sheer conjecture and abstraction" in light of "the growing number of school districts across the country who are successfully allowing transgender students such as Grimm to use the bathroom matching their gender identity, without incident"); Clarke, supra note 177, at 1887–89 (summarizing arguments from various cases).

[207] The majority of the Eleventh Circuit was not impressed that Adams had used the boys' restroom his freshman year without incident or complaint. Cf. *Adams*, 57 F.4th at 840 (Jill Pryor, J., dissenting).

By contrast, in *Grimm*, the Fourth Circuit thought it was relevant that "Grimm used the boys['] restrooms for *seven weeks* without" any privacy complaints. 972 F.3d at 614.

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Stephens, because she refused to comply with its dress code for men.[208] Judge O'Connor, a George W. Bush appointee, rejected the argument, reasoning that under Sixth Circuit precedent, enforcement of the dress code for men constituted discrimination that would not have occurred "but for" Stephens's sex.[209] After *Bostock*, Judge O'Connor was persuaded to change his mind, perhaps because *Bostock* explicitly declined to reach dress code questions.[210] By contrast, a district judge appointed by Obama concluded that a dress code that prevented a transgender woman "from expressing her gender through feminine dress and appearance in a manner that did not conform with the sex listed on her birth certificate" was a form of sex discrimination.[211]

[208] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 850–51 (E.D. Mich. 2016), *rev'd and remanded*, 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

[209] Id. at 853 ("[A]n employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." (quoting Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004))). Accordingly, Judge O'Connor concluded that the Sixth Circuit was unlikely to follow the Ninth Circuit's decision in *Jespersen*. Id. The district judge also held that the claim was in violation of the Funeral Home's right to religious freedom under the Religious Freedom Restoration Act, id. at 854, but the Court of Appeals reversed that holding, *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 590, and the issue was not appealed to the Supreme Court.

[210] Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 624 (N.D. Tex. 2021) (O'Connor, J.) (holding that "Title VII does not prohibit sex-specific dress codes" after observing that "*Bostock* explicitly reserved judgment" on dress code questions), *vacated sub nom.* Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 940 (5th Cir. 2023); see also Texas v. EEOC, 633 F. Supp. 3d 824, 831–36 (N.D. Tex. 2022) (decision by Trump appointee concluding that dress codes pertain to conduct, and *Bostock* does not extend beyond status).

[211] Monegain v. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 143 (E.D. Va. 2020). In that case, the employer had implemented a special dress code just for the plaintiff. Id. at 128 (observing that, under her dress code, the plaintiff "was not allowed to wear dresses, skirts, heels, jeans with any decoration, or, oddly, collars, but was required to always wear a bra and was required to wear a uniform to all [company] meetings"). A few other post-*Bostock* cases decided by Obama appointees involve discriminatory dress code enforcement as evidence of harassment. See Sarco v. 5 Star Fin., LLC, No. 19-cv-00086, 2020 WL 5507534, at *7–9 (W.D. Va. Sept. 11, 2020) (denying summary judgment in a sexual orientation harassment case in which plaintiff alleged, among other things, "that the office singled him out in giving him additional work that did not involve client interactions and that his superiors were more stringent in applying or adapting the office dress code to penalize his choices in clothing"); Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (holding that the fact that a transgender woman "was subject to a stricter dress code than other female and cisgender employees" supported her claims of harassment and discriminatory termination under Title VII).

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No court has yet resolved whether a plaintiff like Darlene Jespersen, who does not identify as transgender or allege that her employer's dress code conflicts with her gender identity, could prevail in a Title VII case after *Bostock*.[212] In *Jespersen v. Harrah's Operating Co.*, the Ninth Circuit did not regard the harm of requiring a presumably cisgender woman to wear makeup to be material, characterizing Jespersen's aversion to makeup as idiosyncratic.[213] However, Title VII's text, read literally, forbids an employer from "discharg[ing] any individual . . . because of . . . such individual's sex."[214] A but-for test would assist a plaintiff like Jespersen, who is willing to be fired rather than conform with sex-specific requirements.[215] Under the but-for test, as applied in *Bostock*, Jesperson would not have been discharged if she were a man. A dissent in *Jesperson*, applying a version of the "reverse the groups" test, noted that although most "American women" are used to wearing makeup, anyone who is not so accustomed would find the requirement demeaning and intrusive.[216] Some early Title VII decisions

[212] Aimee Stephens did not challenge her employer's sex-specific dress code. *R.G. & G.R. Harris Funeral Homes*, 201 F. Supp. 3d at 851 ("[T]he Funeral Home's sex-specific dress code policy *has not* been challenged by the EEOC in this action. Rather, the dress code is only being injected because the Funeral Home is using its dress code as a *defense* to the Title VII sex-stereotyping claim asserted on behalf of Stephens.").

[213] 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc) ("The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement."). The court also noted that Jespersen had failed to present evidence that "it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short." Id. at 1110. In any event, an employer that wanted to require makeup for women could remedy the problem of unequal costs by providing women with a small stipend.

[214] 42 U.S.C. § 2000e-2(a) (making it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex"). A plaintiff unwilling to be fired might contest the dress code as going to "terms, conditions, or privileges of employment," perhaps as part of a pattern of harassment. See supra note 211 (discussing such cases).

[215] *Bostock* did not resolve whether the phrase "otherwise . . . discriminate" limits the term "discharge," 42 U.S.C. § 2000e-2(a), such that the discharge must be discriminatory in some substantive sense of that term. Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020) ("Accepting . . . for argument's sake" that "[b]y virtue of the word *otherwise*, . . . Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.").

[216] 444 F.3d at 1117–18 (Kozinski, J., dissenting) ("If you are used to wearing makeup—as most American women are—this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for

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took the approach that all separate men's and women's dress codes violate the statute, and looked to the BFOQ defense to determine whether such dress codes were justified.[217]

Post-*Bostock*, the Fourth Circuit, sitting en banc, declined to apply anything like *Jespersen*'s equal burdens test in the context of Equal Protection and Title IX challenges to a charter school dress code requiring that girls wear skirts.[218] The Fourth Circuit saw the skirt requirement as an obvious sex classification, regardless of the rules for boys.[219] It observed that the equal burdens inquiry and similar tests "rely heavily on precedent from the 1970s affirming the validity of dress codes based on 'traditional' notions of appropriate gender norms" and are inconsistent with the intermediate scrutiny standard, which requires that sex-based classifications serve important governmental interests.[220] The court was unimpressed by the asserted interests behind this particular dress code, which the school founder unabashedly admitted were to preserve "'traditional roles' for boys and girls" and "chivalry" defined as "a code of conduct where women are . . . regarded as a fragile vessel that men are supposed to take care of and honor."[221] In ruling on the equal protection claim, the Fourth Circuit ignored the school's argument that no girl suffered any harm because the school's "female students ha[d] achieved academic and extracurricular success."[222] With respect to Title IX, the

example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench.").

[217] See, e.g., Aros v. McDonnell Douglas Corp., 348 F. Supp. 661, 664–65 (C.D. Cal. 1972); Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1359 (C.D. Cal. 1972); Roberts v. Gen. Mills, Inc., 337 F. Supp. 1055, 1056–57 (N.D. Ohio 1971); see also EEOC Decision No. 71-1529, 3 Fair Empl. Prac. Cas. 952, 953–54 (1971). In *Jespersen*, the employer did not assert a BFOQ defense—likely because its dress code served no business imperative. In fact, the casino abandoned the dress code after Jespersen filed suit. 444 F.3d at 1114 n.2 (Pregerson, J., dissenting).

[218] Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 125 n.13 (4th Cir. 2022) (en banc). The majority opinion was signed by nine Democratic appointees.

[219] Id. at 125 (noting, in the equal protection context, that "[a] state actor's imposition of gender-based restrictions on one sex is not a defense to that actor's gender-based discrimination against another sex"); id. at 130 (noting, in the Title IX context, that "[d]iscriminating against members of both sexes does not eliminate liability, but 'doubles it'" (quoting *Bostock*, 140 S. Ct. at 1741)).

[220] Id. at 125 n.13.

[221] Id. at 125 (quoting Baker Mitchell, founder of Charter Day School). After instructing that this message had "potentially devastating consequences for young girls," the court informed the school that if it wished to continue discriminating, it "must do so as a private school without the sanction of the state or this Court." Id. at 126.

[222] Id. at 124 (mentioning this argument).

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court cited *Bostock*, not for its but-for test, but for the proposition that the school could not impose a dress code based on the rationale that it had separate but equal burdens for boys and girls.[223]

Formal rules are also rising in prominence in legal disputes regarding gender-affirming health care after *Bostock*. These cases involve laws passed by state legislatures banning certain forms of care for transgender minors[224] and insurance coverage refusals for both transgender minors and adults.[225] While substantive theories, such as those based on animus against transgender identities[226] or sex stereotyping,[227] appear in several lower court decisions in favor of transgender plaintiffs, these rationales do not attract bipartisan support.[228] The highest profile success for

[223] Id. at 130 (quoting *Bostock*, 140 S. Ct. at 1741). The Fourth Circuit remanded the Title IX claim because the district court had not previously considered whether the plaintiffs "are treated 'worse' than similarly situated male students if the plaintiffs are harmed by the requirement that only girls must wear skirts, when boys may wear shorts or pants." Id. at 130–31. It noted that "harm . . . may include 'emotional and dignitary harm.' " Id. at 129.

[224] Compare Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022) (affirming grant of preliminary injunction against an Arkansas law prohibiting certain forms of gender-affirming health care for minors), with Williams ex rel. L.W. v. Skrmetti, No. 23-5600, 2023 WL 6321688, at *23 (6th Cir. Sept. 28, 2023) (reversing grants of preliminary injunctions against Kentucky and Tennessee laws barring gender-affirming health care for transgender minors), and Eknes-Tucker v. Governor of Ala., No. 22-11707, 2023 WL 5344981, at *16 (11th Cir. Aug. 21, 2023) (vacating district court's preliminary injunction of Alabama law prohibiting gender-affirming health care for transgender minors).

[225] See, e.g., Dekker v. Weida, No. 22-cv-00325, 2023 WL 4102243, at *12 (N.D. Fla. June 21, 2023) (judgment for plaintiffs after a bench trial in case challenging refusal by Florida's Medicaid system to pay for certain medically necessary treatments for gender dysphoria).

[226] M.H. v. Jeppesen, No. 22-cv-00409, 2023 WL 4080542, at *12 (D. Idaho June 20, 2023) (Patricco, Mag. J.), *appeal docketed*, No. 23-35485 (9th Cir. July 19, 2023); Doe v. Ladapo, No. 23-cv-00114, 2023 WL 3833848, at *9–10 (N.D. Fla. June 6, 2023) (Clinton appointee); Lange v. Houston County, 608 F. Supp. 3d 1340, 1355 (M.D. Ga. 2022) (Obama appointee); Kadel v. Folwell, 620 F. Supp. 3d 339, 376 (M.D.N.C. 2020) (Obama appointee), *aff'd on other grounds sub nom.* Kadel v. N.C. State Health Plan for Tchrs. & State Emps., 12 F.4th 422 (4th Cir. 2021); Brandt v. Rutledge, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021) (Obama appointee), *aff'd on other grounds*, 47 F.4th 661 (8th Cir. 2022).

[227] See Koe v. Noggle, No. 23-cv-02904, 2023 WL 5339281, at *16 (N.D. Ga. Aug. 20, 2023) (Biden appointee); Doe 1 v. Thornbury, No. 23-cv-00230, 2023 WL 4230481, at *4 (W.D. Ky. June 28, 2023) (Obama appointee); Hammons v. Univ. of Md. Med. Sys. Corp., No. 20-cv-02088, 2023 WL 121741, at *7 (D. Md. Jan. 6, 2023) (Clinton appointee); *Kadel*, 620 F. Supp. 3d at 376 (Obama appointee); Boyden v. Conlin, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018) (Obama appointee).

[228] See, e.g., Williams ex rel. L.W. v. Skrmetti, No. 23-cv-00376, 2023 WL 4232308, at *19 n.37 (M.D. Tenn. June 28, 2023) (decision by Trump appointee granting preliminary injunction in favor of transgender plaintiff but declining to address a stereotyping theory due the availability of more formal grounds), *rev'd*, No. 23-5600, 2023 WL 6321688 (6th Cir. Sept. 28, 2023).

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transgender litigants challenging restrictions on gender-affirming health care is *Brandt v. Rutledge*, a decision by a unanimous panel of the Eighth Circuit consisting of two Democratic appointees and one Republican appointee.[229] That panel applied a but-for theory, concluding that an Arkansas health care ban discriminates on the basis of sex because "a minor born as a male may be prescribed testosterone or have breast tissue surgically removed, for example, but a minor born as a female is not permitted to seek the same medical treatment."[230] It is not clear, however, that a but-for test would see every application of a gender-affirming health care ban as discrimination—for example, one magistrate judge rejected a but-for theory in a case in which a transgender man sought insurance coverage for a hysterectomy.[231] That judge thought it was not the case that the plaintiff "is being denied a surgical procedure due to his natal sex that would be permitted if his natal sex were different. [The plaintiff's] natal sex is female and the surgical procedure he seeks, a hysterectomy, is ordinarily allowed for natal females."[232]

But rather than trying to answer this sort of counterfactual question, most courts, including *Brandt*, have simply applied anticlassification reasoning, noting that the health care bans "cannot be stated without referencing sex."[233] As one district judge put it: "If one must know the

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[229] 47 F.4th at 669. As this Article was going to press, the Eighth Circuit granted en banc review of the district court's order permanently enjoining Arkansas's gender-affirming health care ban for minors. Brandt v. Rutledge, No. 21-cv-00450, 2023 WL 4073727 (E.D. Ark. June 20, 2023), *hearing en banc granted sub nom.* Brandt v. Griffin, No. 23-2681 (8th Cir. Oct. 6, 2023).

[230] *Brandt*, 47 F.4th at 669 ("[M]edical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex."). Several out-of-circuit district court decisions have followed *Brandt*'s reasoning on this point. See *Koe*, 2023 WL 5339281, at *15 (Biden appointee); *Thornbury*, 2023 WL 4230481, at *3 (Obama appointee); *Dekker*, 2023 WL 4102243, at *10–11 (Clinton appointee); K.C. v. Individual Members of Med. Licensing Bd., No. 23-cv-00595, 2023 WL 4054086, at *8–9 (S.D. Ind. June 16, 2023) (Trump appointee); *Ladapo*, 2023 WL 3833848, at *7 (Clinton appointee). District courts applied but-for reasoning in this context even before *Bostock*. See, e.g., Kadel v. Folwell, 446 F. Supp. 3d 1, 14 (M.D.N.C. 2020) (Obama appointee).

[231] Toomey v. Arizona, No. 19-cv-00035, 2020 WL 8459367, at *4 (D. Ariz. Nov. 30, 2020), *report and recommendation adopted in part, rejected in part*, No. 19-cv-00035, 2021 WL 753721 (D. Ariz. Feb. 26, 2021). The district court did not adopt this reasoning. Id.

[232] Id.

[233] *Brandt*, 47 F.4th at 670 (quoting Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017)); *Koe*, 2023 WL 5339281, at *15 n.19 (similar reasoning from Biden appointee); *Williams*, 2023 WL 4232308, at *15 n.28 (similar reasoning from Trump appointee); *K.C.*, 2023 WL 4054086, at *8 (same). The Arkansas law, for example, prohibits "'gender transition procedures,' which are defined as

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sex of a person to know whether or how a provision applies to the person, the provision draws a line based on sex."[234] Many decisions also reason that these health care policies differentiate among patients based on transgender or cisgender status, and such classifications are always a type of sex discrimination after *Bostock*.[235] If such classifications are forbidden, an insurer that covers medically necessary hysterectomies for cisgender individuals could not refuse to cover them for transgender individuals.

Similarly situated inquiries, however, have had poor results for transgender litigants. The Sixth and Eleventh Circuits, in panels made up of Republican appointees, declined to apply heightened scrutiny to health care bans enacted by Alabama, Kentucky, and Tennessee.[236] These courts refused to adopt *Bostock*'s but-for inquiry because no Supreme Court precedent required that they extend *Bostock* beyond Title VII.[237] They

procedures or medications that are intended to change 'the individual's biological sex.'" *Brandt*, 47 F.4th at 669 (quoting Ark. Code Ann. § 20-9-1501(6)(A)). In the contexts of denials of treatment for "gender dysphoria," courts have reasoned that "[g]ender dysphoria cannot be understood without referencing sex or a synonym." Pritchard ex rel. C.P. v. Blue Cross Blue Shield of Ill., No. 20-cv-06145, 2022 WL 17788148, at *6 (W.D. Wash. Dec. 19, 2022) (quoting Kadel v. Folwell, No. 19-cv-00272, 2022 WL 11166311, at *4 (M.D.N.C. Oct. 19, 2022)) (Reagan appointee).

[234] *Dekker*, 2023 WL 4102243, at *11 (Clinton appointee).

[235] See, e.g., *Williams*, 2023 WL 4232308, at *16–19 (Trump appointee); *Dekker*, 2023 WL 4102243, at *11 (Clinton appointee); M.H. v. Jeppesen, No. 22-cv-00409, 2023 WL 4080542, at *11 (D. Idaho June 20, 2023) (Patricco, Mag. J.), *appeal docketed*, No. 23-35485 (9th Cir. July 19, 2023); *Ladapo*, 2023 WL 3833848, at *8–9 (Clinton appointee); Hammons v. Univ. of Md. Med. Sys. Corp., No. 20-cv-02088, 2023 WL 121741, at *8–9 (D. Md. Jan. 6, 2023) (Clinton appointee); *Pritchard*, 2022 WL 17788148, at *6 (Reagan appointee); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1147 (M.D. Ala. 2022) (Trump appointee), *vacated sub nom.* Eknes-Tucker v. Governor of Ala., No. 22-11707, 2023 WL 5344981 (11th Cir. Aug. 21, 2023).

Some cases also reason that transgender people qualify as a suspect class independent of the connection to sex discrimination. See, e.g., *Williams*, 2023 WL 4232308, at *13; *Dekker*, 2023 WL 4102243, at *12–13; Brandt v. Rutledge, No. 21-cv-00450, 2023 WL 4073727, at *31 (E.D. Ark. June 20, 2023) (Obama appointee); *Ladapo*, 2023 WL 3833848, at *9; Fain v. Crouch, 618 F. Supp. 3d 313, 323 (S.D. W. Va. 2022) (Clinton appointee).

The Sixth and Eleventh Circuits rejected the arguments that the bans constituted discrimination against transgender people as an independent suspect class or were the results of constitutionally forbidden animus on the part of legislators. Williams ex rel. L.W. v. Skrmetti, No. 23-5600, 2023 WL 6321688, at *18–19 (6th Cir. Sept. 28, 2023); *Eknes-Tucker*, 2023 WL 5344981, at *17.

[236] *Eknes-Tucker*, 2023 WL 5344981, at *16; *Williams*, 2023 WL 6321688, at *23.

[237] *Eknes-Tucker*, 2023 WL 5344981, at *16; *Williams*, 2023 WL 6321688, at *16. The Sixth and Eleventh Circuits explained away their own precedents to that effect as having to do with stereotypes rather than "biological" differences between the sexes. *Eknes-Tucker*,

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brushed aside anticlassification arguments, characterizing the laws' use of the "word 'sex'" as incidental and instrumental to the nondiscriminatory aim of banning gender-affirming care for minors of both sexes.[238] That the states banned different hormones for boys and girls evinced not discrimination but rather the complementarity of the sexes, "a lasting feature of the human condition."[239] The premise of this argument may be a descriptive claim: that because of their biological differences, children assigned male and female at birth are not similarly situated with respect to hormone therapies.[240] Arkansas put it more normatively: "[A]dministering testosterone to a male should be considered a different procedure than administering it to a female because the 'procedure allows a boy to develop normally' whereas for a girl it has the effect of 'disrupting normal development.'"[241] In *Brandt*, the Eighth

2023 WL 5344981, at *17 ("Insofar as [the ban] involves sex, it simply reflects biological differences between males and females, not stereotypes associated with either sex."); *Williams*, 2023 WL 6321688, at *18 (making this point among other arguments).

[238] *Williams*, 2023 WL 6321688, at *14 ("The Acts mention the word 'sex,' true. But how could they not?"); see also *Eknes-Tucker*, 2023 WL 5344981, at *16 ("[I]t is difficult to imagine how a state might regulate the use of puberty blockers and cross-sex hormones for the relevant purposes in specific terms *without* referencing sex in some way."). The Sixth Circuit characterized the plaintiffs' version of the anticlassification rule as positing that "any reference to sex in a statute dictate[s] heightened review," and it rejected any such rule because it would require intermediate scrutiny of any law that referred to abortion, prostate cancer, breastfeeding, and so forth. *Williams*, 2023 WL 6321688, at *14. But see Kadel v. Folwell, 620 F. Supp. 3d 339, 379 (M.D.N.C. 2022) (positing that the question is whether the law classifies based on a concept that can be explained "without reference to sex, gender, or transgender status" and stating that "[p]regnancy can be explained without reference to sex, gender, or transgender status").

[239] *Williams*, 2023 WL 6321688, at *14; *Eknes-Tucker*, 2023 WL 5344981, at *16 ("The cross-sex hormone treatments for gender dysphoria are different for males and for females because of biological differences between males and females—females are given testosterone and males are given estrogen.").

[240] This argument frames bans as depending on diagnosis (gender dysphoria) or type of care (gender-affirming or cross sex), rather than sex (assignment as male or female at birth). See, e.g., *Eknes-Tucker*, 2023 WL 5344981, at *16 (holding that the "rule . . . applies equally to both sexes: it restricts the prescription and administration of puberty blockers and cross-sex hormone treatment for purposes of treating discordance between biological sex and sense of gender identity for *all* minors"). A district court judge appointed by Biden described this reframing as "cosmetic" and argued it was inconsistent with the Eleventh Circuit's decision in *Adams* that a restroom policy triggered intermediate scrutiny. Koe v. Noggle, No. 23-cv-2904, 2023 WL 5339281, at *16 (N.D. Ga. Aug. 20, 2023) ("The bathroom policy in *Adams* could just as easily have been characterized as one that 'bans cross-sex bathroom use for minors of both sexes.'").

[241] Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022). The Sixth Circuit framed it differently, characterizing the bans as treating similarly situated boys and girls the same way

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Circuit rejected Arkansas's similarly situated argument because it thought the state had "conflate[d] the classifications drawn by the law with the state's justification for it."[242] Applying intermediate scrutiny, the court concluded that substantial medical evidence supported the district court's finding that the challenged forms of treatment conformed with recognized standards of care.[243] In *Williams v. Skrmetti*, by contrast, the Sixth Circuit narrowly construed the Supreme Court's intermediate scrutiny doctrine to hold that only those sex classifications that a court first concludes "perpetuate[] invidious stereotypes or unfairly allocate[] benefits and burdens" receive any further scrutiny.[244]

In sum, after *Bostock*, many courts are issuing decisions that call into question practices that establish different but complementary rules for the sexes and are relying on formal tests of discrimination to do so.[245] Social meaning, antisubordination, and even antistereotyping inquiries have long been used to shield these practices from any scrutiny.

by "reasonably limiting potentially irreversible procedures until they become adults." *Williams*, 2023 WL 6321688, at *15. A dissenting judge disagreed; she read the texts of the statutes to disallow only treatments regarded as "'inconsistent with' how society expects boys and girls to appear." Id. at *30 (White, J., dissenting) (quoting Tenn. Code. Ann. § 68-33-103(a)).

[242] 47 F.4th at 670.

[243] Id. at 671.

[244] 2023 WL 6321688, at *16.

[245] Four post-*Bostock* cases thus far have addressed laws forbidding transgender girls and women from playing girls' and women's sports. Hecox v. Little, 79 F.4th 1009, 1021 (9th Cir. 2023) (decision by three Democratic appointees affirming district court's conclusion, on a motion for a preliminary injunction, that a law barring transgender girls from girls' sports "discriminates against transgender women by categorically excluding them from female sports, as well as on the basis of sex by subjecting all female athletes, but no male athletes, to invasive sex verification procedures to implement that policy"); E.M. ex rel. A.M. v. Indianapolis Pub. Schs., 617 F. Supp. 3d 950, 965–66 (S.D. Ind. 2022) (granting a preliminary injunction and concluding plaintiff was likely to succeed on Title IX claim because *Bostock* holds that discrimination on the basis of transgender status is sex discrimination, and the law bars transgender girls from girls' sports but not transgender boys from boys' sports); Doe v. Horne, No. 23-cv-00185, 2023 WL 4661831, at *1, *19 (D. Ariz. July 20, 2023) (granting a preliminary injunction against enforcement of an Arizona law barring transgender girls from sports on the grounds that plaintiffs were likely to succeed on their equal protection and Title IX challenges, because the laws were sex classifications and intended to exclude transgender girls); B.P.J. v. W. Va. State Bd. of Educ., No. 21-cv-00316, 2023 WL 111875, at *7 (S.D. W. Va. Jan. 5, 2023) (denying plaintiff's motion for summary judgment because, "[g]iven [plaintiff's] concession that circulating testosterone in males creates a biological difference in athletic performance, I do not see how I could find that the state's classification based on biological sex is not substantially related to its interest in providing equal athletic opportunities for females").

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2. Difference: Reproductive Biology

One somewhat surprising application of sex discrimination formalism post-*Bostock* is the idea that singling out aspects of reproductive biology for disfavorable treatment is sex discrimination.[246] This is surprising because, in the past, courts have declined to apply but-for tests in this context and have sometimes pointed to the lack of a sex classification or similarly situated comparator to conclude that laws that turn on differences in reproductive biology are not discrimination.[247] In holding otherwise, recent decisions apply formal inquiries in new ways.

Consider *Flores v. Virginia Department of Corrections*, in which an employee of a correctional facility was fired after her tampon showed up on a security scanner, leading to suspicion that she might be smuggling drugs into the facility.[248] The defendant argued it fired her for a

[246] Nathan v. Great Lakes Water Auth., 992 F.3d 557, 561–63, 566 (6th Cir. 2021) (holding that comments from female supervisors about a female plaintiff's breast size could be part of a pattern of harassment because of "sex"); Flores v. Va. Dep't of Corr., No. 20-cv-00087, 2021 WL 668802, at *6 (W.D. Va. Feb. 22, 2021) (denying motion to dismiss on ground that termination of correctional employee due to "suspicion of contraband" resulting from her tampon usage was discrimination because of sex under the "but for" test); Corbitt v. Taylor, 513 F. Supp. 3d 1309, 1312 (M.D. Ala. 2021) (differentiation based on genitalia is sex classification). Perhaps I shouldn't be surprised. Some courts reached similar conclusions before *Bostock*. See, e.g., C.V. ex rel. C.V. v. Waterford Twp. Bd. of Educ., No. 087260, 2023 WL 5920142, at *12 (N.J. Sept. 12, 2023) (collecting pre-*Bostock* cases supporting an "automatic[]" rule that "[w]henever a harasser engages in sexual touching of any other person's genitals or other sex-specific anatomy, that harassing conduct targets aspects of a victim's anatomy that are inextricably linked to their sex and, in that respect, is necessarily 'because of' sex" and reaffirming this interpretation of New Jersey sexual harassment law after *Bostock*); Hall v. Nalco Co., 534 F.3d 644, 647–49 (7th Cir. 2008) (holding that termination for use of in vitro fertilization ("IVF") is sex discrimination because IVF is undergone exclusively by those with "childbearing capacity" and is therefore "treatment of a person in a manner which but for that person's sex would be different"). Notwithstanding the lack of any statutory amendment, regulations implementing Title IX have interpreted sex to include pregnancy since 1980. 34 C.F.R. § 106.40(b) (1980).

[247] See, e.g., Coleman v. Bobby Dodd Inst., Inc., No. 17-cv-00029, 2017 WL 2486080, at *2 (M.D. Ga. June 8, 2017) (rejecting the argument that termination of a woman for heavy menstrual bleeding pre-menopause was sex discrimination because it was on account of a "uniquely feminine condition[]" and pointing to the plaintiff's failure to allege "that male employees who soiled themselves and company property due to a medical condition, such as incontinence, would have been treated more favorably"); Katherine T. Bartlett, Pregnancy and the Constitution: The Uniqueness Trap, 62 Calif. L. Rev. 1532, 1555 (1974) (discussing cases holding that beards, breasts, and pregnancy, because they are unique to each sex, cannot be the bases for discrimination).

[248] 2021 WL 668802, at *1. Specifically, on the day in question, Flores walked through the security camera a first time wearing a tampon, walked out a second time without one, and then back through a third time with another tampon, leading to anomalous images. Id. at *6.

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nondiscriminatory reason: "suspicion of contraband."[249] Judge Thomas Cullen, a Trump appointee, rejected this argument, concluding that "*but for* Flores's menstruation and use of a tampon—conditions inextricable from her sex and her child-bearing capacity—she would not have been discharged."[250]

One way to understand the court's logic here might be that it sees this as but-for causation one step removed: the employer discriminated based on tampon use due to menstruation, a condition that would not have occurred "but for" the fact that the plaintiff was a woman.[251] But this variation on the "but for" test would reach, for example, a situation in which "an employee might lack a credential that the employer could legitimately require for a promotion because someone else had treated her differently, on account of her sex, at an earlier point in her career—another employer, a school, or her family."[252] In such a circumstance, her sex would be the but-for cause of her mistreatment. But as Strauss notes, "Title VII has never been interpreted to require employers to undo all the consequences of past differential treatment by others."[253] At best, this employee would have a disparate impact claim.[254] Alternatively, perhaps what the *Flores* court meant is something akin to the "arising out of" concept from disability law; that a condition with a tighter causal nexus to a protected status, such that it is a manifestation of that status, may not be a basis for discrimination (absent sufficient justification).[255]

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[249] Id. at *5.

[250] Id. at *6.

[251] Cf. Eidelson, supra note 20, at 826–27 (discussing an analogous theory of caste as national origin discrimination in Guha Krishnamurthi & Charanya Krishnaswami, Title VII and Caste Discrimination, 134 Harv. L. Rev. F. 456, 472 (2021)); Noah D. Zatz, Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent, 109 Colum. L. Rev. 1357, 1361 (2009) (theorizing a type of discrimination called "external" status causation, when an individual's protected trait, such as having a disability, leads to that individual's inability to meet work requirements (such as reaching in the case of a wheelchair user), which then leads to an adverse workplace decision against that worker).

[252] Strauss, supra note 60, at 207.

[253] Id. And under the Equal Protection Clause, another actor's discrimination might justify further discrimination. Rostker v. Goldberg, 453 U.S. 57, 78–79 (1981) (holding that all-male draft was justified by exclusion of women from combat).

[254] See Zatz, supra note 251, at 1383 (arguing that both disparate treatment and impact can be understood in terms of causation).

[255] See Equality Act of 2010, c. 15, § 15 (UK) ("A person (A) discriminates against a disabled person (B) if–(a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim" unless "A shows that A did not know, and could not

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It seems more likely, however, that the *Flores* court's reference to but-for causation pointed to the fact that the plaintiff wouldn't have been fired but for the tampon security alert incident.[256] The *Flores* court wasn't interested in counterfactuals or comparisons. It refused to require that the plaintiff meet a "similarly situated" test by pointing to a man in the workplace who was suspected of contraband for a similar reason but not terminated.[257] It noted that the closest comparison it could imagine was "fecal incontinence" requiring "anal plugs," that could affect any individual regardless of sex and might show up on the scanner triggering suspicion of contraband.[258] The court dismissed this comparison, reasoning that "fecal incontinence" is "hopefully short-lived," unlike menstruation, which "is a normal physiological cycle that women, in their reproductive years, experience approximately one quarter of the time."[259] It was also relevant to the *Flores* court that the correctional institute had no good reason to suspect Flores of smuggling drugs; they did a search and found no drugs, they knew their scanners picked up tampons, and Flores went so far as to *show* the security officers she was in fact menstruating.[260] The explanation for what happened here could be the institution's neglect of how the security scanner in question impacted women or mindless rule-following—but the court thought sex discrimination was a reasonable explanation as well.

reasonably have been expected to know, that B had the disability."). U.S. courts have interpreted disability law not dissimilarly, concluding, for example, that firing an employee because she might be contagious is the same thing as firing her for having an impairment, and requiring the employer to show that contagiousness renders the employee unqualified for the job. See, e.g., Sch. Bd. v. Arline, 480 U.S. 273, 282 (1987) (rejecting the argument that "the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case" in which the plaintiff's "contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis").

[256] Flores v. Va. Dep't of Corr., No. 20-cv-00087, 2021 WL 668802, at *6 (W.D. Va. Feb. 22, 2021) ("*[B]ut for* Flores's menstruation and use of a tampon—conditions inextricable from her sex and her child-bearing capacity—she would not have been discharged.").

[257] Id. ("At oral argument, Flores's counsel clarified that she was not trying to bring a 'comparator' claim, because the fact that menstruation is inapplicable to men demonstrates that Flores was in fact treated differently because of an inherently female characteristic.").

[258] Id. at *5 n.6.

[259] Id.

[260] Id. at *1; id. at *6 ("[E]ven after (1) being presented with evidence that Flores was on her period, (2) receiving a reasonable explanation for the anomalous images, and (3) being given an opportunity to contact the manufacturer or consult other subject-matter expertise, VDOC still discharged Flores for 'suspicion of contraband.'").

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In another reproductive biology case, *Nathan v. Great Lakes Water Authority*, male and female coworkers harassed a woman with ridicule directed at the size of her breasts, by telling her, for example, that her "breasts were so big, it looked like [she] could trip over them," and "that she 'needed a more supportive bra.'"[261] Applying *Bostock*'s but-for test, a panel of the Sixth Circuit consisting of two George W. Bush appointees and one Clinton appointee recognized that it was "entirely possible that someone might also ridicule a man because of the size of his breasts."[262] Indeed, the reasons could be similar to the reasons women are harassed for breast size (anti-fat prejudice) or different (violations of particular gendered appearance norms). Nonetheless, the court concluded that "a jury could easily infer that [the plaintiff's] alleged harassers would not have made similar comments to a man because the harassers chose to specifically target [her] breasts with their ridicule."[263] The court did not fill in what that jury's reasoning would be.

In *Corbitt v. Taylor*, district judge Myron Thompson, a Carter appointee, was asked to decide the constitutionality of an Alabama rule requiring that transgender women obtain genital surgery before changing their driver license sex designations from male to female.[264] The court reasoned, "[b]y making the content of people's driver licenses depend on the nature of their genitalia, the policy classifies by sex; under Equal Protection Clause doctrine, it is subject to an intermediate form of heightened scrutiny."[265] The court noted that this policy was extraordinarily harmful—one plaintiff, who could not afford surgery, lost her job and was "nearly killed" by coworkers when her license exposed her transgender status.[266] But the harm was not what made it a sex classification. Taking a page from the Supreme Court's race discrimination jurisprudence,[267] the opinion reasoned that the fact that it

[261] 992 F.3d 557, 566–67 (6th Cir. 2021). The harassment impacted the plaintiff such that she sought breast reduction surgery. Id. at 563.

[262] Id. at 566. This could be based on the view that he was "insufficiently masculine," and it would also count as sex discrimination under *Bostock*. Id.

[263] Id.

[264] 513 F. Supp. 3d 1309, 1312 (M.D. Ala. 2021).

[265] Id. at 1312. The court relied on a medical expert's definition of "sex" as "the sum of the anatomical, physiological, and biologically functional characteristics of an individual that places them in the categories male, female, or along a spectrum between the two." Id. at 1314.

[266] Id. at 1313–14.

[267] See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J.) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

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was a sex classification was what made it a sex classification.[268] The opinion eschewed reliance on expressive meanings or subjective harm, citing a Justice Thomas concurrence in a desegregation case for the proposition that "all state-imposed race classifications are subject to strict scrutiny, regardless of whether the classifications cause 'feelings of inferiority' or produce '[p]sychological injury or benefit.'"[269] While the court foregrounded the formal anticlassification rule, it did not neglect normative arguments. Its opinion also connected the rights of the transgender women to the value of liberal individualism, noting that, through its policy, Alabama "sets the criteria by which it channels people into its sex classifications . . . , denying the women who are plaintiffs in this case the ability to decide their sex for themselves instead of being told who they are by the State," a practice that would raise obvious constitutional concerns "[i]f the policy pertained to race or religion instead of sex."[270] By contrast, in two recent identity document cases in which judges have framed the classification in question as between transgender and cisgender individuals, rather than men and women, plaintiffs have lost.[271]

[268] *Corbitt*, 513 F. Supp. 3d at 1314.

[269] Id. (quoting Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995)).

[270] Id. at 1314–15.

[271] In one case challenging a state agency's refusal to amend birth certificate sex designations, a judge appointed by Trump declined to engage with any formal sex discrimination argument, reasoning instead that no heightened scrutiny applied because transgender people are not a suspect class. Fowler v. Stitt, No. 22-cv-00115, 2023 WL 4010694, at *22 (N.D. Okla. June 8, 2023), *appeal docketed*, No. 23-5080 (10th Cir. July 7, 2023). In a second case, the plaintiffs argued the law in question constituted harmful discrimination against transgender people as compared to cisgender people, not that it had to be justified under intermediate scrutiny because it classified people as male or female in a way that caused harm. Gore v. Lee, No. 19-cv-00328, 2023 WL 4141665, at *10 (M.D. Tenn. June 22, 2023), *appeal docketed*, No. 23-5669 (6th Cir. July 26, 2023). Judge Eli Richardson, a Trump appointee, concluded the statute did not constitute disparate treatment of transgender people because everyone was classified based on "external genitalia" at birth and no one, transgender or cisgender, was permitted to change that classification based on their current gender identity. Id. at *23. However, in a different case, Judge Richardson was persuaded that a Tennessee ban on gender-affirming health care for minors was sex discrimination, because, whether a medical procedure was banned by the law "require[d] the ascertainment of whether the minor's sex at birth is consistent with that minor's (gender) identity." Williams ex rel. L.W. v. Skrmetti, No. 23-cv-00376, 2023 WL 4232308, at *14 (M.D. Tenn. June 28, 2023), *rev'd*, No. 23-5600, 2023 WL 6321688 (6th Cir. Sept. 28, 2023). One explanation for these results may be that the less the legal arguments resemble those of *Bostock*, the less constrained judges perceive themselves to be by that decision's reasoning.

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Decisions recognizing tampon, breast, and genitalia discrimination as sex discrimination may seem to be in tension with the Supreme Court's conclusion that pregnancy discrimination is *not* categorically sex discrimination.[272] In two cases from the 1970s, *Geduldig v. Aiello*,[273] an equal protection decision, and *General Electric Co. v. Gilbert*,[274] a Title VII one, the Supreme Court held that a comprehensive disability benefits program could exclude pregnancy-related disabilities without discriminating based on sex. In *Geduldig*, the Court applied an anticlassification theory, reasoning that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[275] The Court characterized the classification as "divid[ing] potential recipients into two groups—pregnant women and nonpregnant persons."[276] The problem was, "[w]hile the first group is exclusively female, the second includes members of both sexes."[277] These cases are from the 1970s, but many conservative jurists continue to regard their reasoning to be correct,[278] and *Geduldig* was cited by the Supreme Court in *Dobbs* in 2022.[279]

Eidelson's dimensional account is clarifying here. On a dimensional account, being red (or not red), for example, defines a crayon along the dimension of color.[280] And so it would be color discrimination to choose to draw with only red crayons, or only crayons that are not red. Being a woman, or not being a woman, defines a person along the dimension of sex. But being pregnant, or not being pregnant, does not define a person along the dimension of sex in the same way. Not being pregnant has

[272] But see Katie Eyer, Transgender Equality and *Geduldig* 2.0*,* 55 Ariz. St. L.J. 475, 505 (2023).

[273] 417 U.S. 484, 496–97 (1974).

[274] 429 U.S. 125, 145 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

[275] 417 U.S. at 496 n.20. The reason this analysis occurs in a footnote may have been that *Geduldig* was decided before the Supreme Court had held that heightened scrutiny applies to sex-based classifications. Craig v. Boren, 429 U.S. 190, 199 (1976).

[276] *Geduldig*, 417 U.S. at 497 n.20.

[277] Id.

[278] Franklin, supra note 24, at 181–83 (collecting sources).

[279] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022) (citing *Geduldig* for the proposition that the theory that the Fourteenth Amendment guarantees the right to abortion "is squarely foreclosed by [the Court's] precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications").

[280] Eidelson, supra note 20, at 828.

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nothing to do with a person's sex.[281] It might be true that all pregnant people are women, on one definition of women.[282] But that doesn't mean discrimination on the basis of pregnancy is the same as discrimination against women. All police officers are human, but discrimination against police officers isn't discrimination against humans.[283] One court, in an attempt to reconcile *Geduldig* and *Bostock*, put it another way: "Pregnancy can be explained without reference to sex, gender, or transgender status."[284]

And so a dimensional account wouldn't seem to help with pregnancy. But would a substantive definition of discrimination that focused on intentions, effects, or social meanings? Surely in the 1970s (if not today),

> the myriad job-related regulations that disadvantage pregnant women . . . not only cannot help but affect a woman's decision to enter or return to the labor force, but also serve as a constant reminder to every woman of society's judgment that she does not really belong in the labor force, but rather at home bearing and raising children.[285]

However, the *Geduldig* Court didn't regard the disability insurance scheme in question as having unfair effects on women as a group, because while women put in only 28% of disability insurance funds, they were receiving back 38% of benefits, even without pregnancy coverage.[286] It did not remark on expressive harms.

There's another anticlassification argument, however, that is about definitions rather than dimensions—it would posit that rules that draw

[281] Id. at 829 ("[N]ot only is *not being pregnant* not grounded in a person's sex; it does not even entail anything about a person's sex.").

[282] Of course, transgender men and nonbinary people get pregnant. See Jessica A. Clarke, Pregnant People?, 119 Colum. L. Rev. F. 173, 176–86 (2019).

[283] Eidelson, supra note 20, at 824 (borrowing an example from Berman & Krishnamurthi, supra note 60, at 88). Eidelson explains that this is because there are no nonhumans who are police officers, just like there are no men (assuming a particular definition of men) who are pregnant—so the "genus" categories in these examples (humans; women) are "logically superfluous"; all that matters are the "species" categories (police officers; pregnant people). Id. at 825.

[284] Kadel v. Folwell, 620 F. Supp. 3d 339, 379 (M.D.N.C. 2022).

[285] Bartlett, supra note 247, at 1535.

[286] Geduldig v. Aiello, 417 U.S. 484, 497 n.21 (1974); see Dinner, supra note 53, at 429–30 (explaining how the decision cabined disparate impact liability). The dissent, by contrast, saw the disability policy as creating a "double standard" by covering all potential disabilities suffered exclusively by men, but refusing to fully compensate women for pregnancy. *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting). It noted that the State could have, but did not, charge contribution rates based on individual actuarial risk assessments. Id. at 499 n.2.

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lines based on any traits that *define* members of the class count as classifications. Thus, if sex is defined, in part, based on differences in reproductive biology,[287] classifications based on any trait that falls into that category count as sex discrimination. As Justice Stevens put it in his dissent in *Gilbert*: "[b]y definition" any rule that singles out the risk of pregnancy for adverse treatment "discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."[288] For Justice Stevens, the problem was that sex could not be explained without the potential capacity for pregnancy. Although this view was expressed in dissent, that does not mean it is not the law, because, as the Supreme Court has recognized, in enacting the Pregnancy Discrimination Act of 1978, Congress "not only overturned the specific holding in *General Electric Co. v. Gilbert*, but also rejected the test of discrimination employed by the Court in that case."[289] Justice Stevens's interpretation accords with language in *Bostock* to the effect that traits "inextricably bound up" with sex count as sex.[290] Even Justice Alito, who dissented in *Bostock*, might agree, although he would seem to limit it to those features "biologically tied" to sex.[291] *Flores*, which referred to tampon usage and menstruation as "inextricable" from "sex and . . . childbearing capacity" could be interpreted as relying on this sort of definitional anticlassification argument.[292] *Nathan* also leaned heavily

[287] This is not to say this is how sex ought to be defined in every legal context. See, e.g., Clarke, supra note 182, at 933–36 (arguing for contextual definitions).

[288] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 161–62 (1974) (Stevens, J., dissenting). Justice Stevens rejected the characterization of the program as classifying between "pregnant women and nonpregnant persons" and argued that because it was an insurance program, it classified "between persons who face a risk of pregnancy and those who do not." Id. at 161 n.5. Unlike the relationship between, say, police officers and humans, the relationship between those at risk of pregnancy and women, in terms of discrimination, is no mere species of a superfluous genus category—the social reality that women as a category are partially defined by their potential for pregnancy is what drives much discrimination against women. Compare id., with supra note 283. Because this paper is about the travel of thin legal arguments, I will not elaborate on this point here.

[289] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983) (citation omitted). Congress thought the dissents had it right. Id. at 676, 678 (quoting legislative history). But see AT&T Corp. v. Hulteen, 556 U.S. 701, 704–05 (2009) (holding there could be no liability for pregnancy discrimination before the Pregnancy Discrimination Act's enactment date).

[290] Bostock v. Clayton County, 140 S. Ct. 1731, 1742 (2020).

[291] Id. at 1761 n.16 (Alito, J., dissenting).

[292] Flores v. Va. Dep't of Corr., No. 20-cv-00087, 2021 WL 668802, at *6 (W.D. Va. Feb. 22, 2021).

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on the conclusion that insulting comments about having large breasts are "sex specific and derogatory."[293]

Could formal equality arguments have potential in the context of abortion? Substantive arguments about invidious intent or even stereotypes have run into judicial opposition. Following *Geduldig*, the *Dobbs* Court reasoned that regulations on abortion are not sex classifications, and therefore, to trigger equal protection scrutiny, challengers would have to show they were enacted "to effect an invidious discrimination against" women.[294] The Court thought that rather than sexism, such laws were obviously motivated "by a sincere belief that abortion kills a human being."[295] The majority refused to question the "good faith of abortion opponents"[296] or the assertion that abortion restrictions protect "maternal health and safety."[297] In rejecting an equal protection challenge to an Idaho abortion statute, the Idaho Supreme Court was offended by the challengers' antistereotyping argument, which it construed as insulting to men by implying that fathers do not assist with parenting.[298] Substantive arguments about subordination and harmful effects have succeeded in persuading some state courts to interpret their constitutions to protect rights to abortion as a matter of equality in the past.[299] But these arguments don't resonate with conservative jurists.

[293] Nathan v. Great Lakes Water Auth., 992 F.3d 557, 567 (6th Cir. 2021).

[294] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245–46 (2022) (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)).

[295] Id. at 2256 (citing judicial decisions from the late nineteenth and early twentieth century); see also id. at 2246 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 273–74 (1993), for the proposition that the "'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women"). Moreover, the Court expressed skepticism that it could ever divine the intentions of legislators, id. at 2255–56, or that sexism might have been a legislative motive in the nineteenth century, id. at 2256 ("Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?").

[296] Id.

[297] Id. at 2284 (concluding the asserted interest was legitimate for purposes of rational basis review).

[298] Planned Parenthood of the Great Nw. v. State, 522 P.3d 1132, 1198–200 (Idaho 2023) ("Petitioners' argument here is . . . specious because it relies on gender-based stereotypes by assuming all fathers are misogynistic, absentee, disinterested, unwilling to support the mother through pregnancy, uninvolved in parenting, and unwilling to stay home if needed while the mother works.").

[299] State v. Planned Parenthood of Alaska, 28 P.3d 904, 908, 910 (Alaska 2001) (holding that "[b]y providing health care to all poor Alaskans except women who need abortions, the challenged regulation violates the state constitutional guarantee of 'equal rights, opportunities, and protection under the law'" and explaining that "we look to the real-world effects of

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During the oral argument in *Dobbs*, Justice Barrett suggested that the potential burdens of motherhood were obviated by the fact that in some places, a person could anonymously give up their baby for adoption.[300] She conceded that pregnancy was "an infringement on bodily autonomy" but thought the infringement was not uniquely problematic, considering that infringements on bodily autonomy happen in "other contexts, like vaccines."[301]

Some formal equality arguments for abortion rights don't seem to be going anywhere either. In *Dobbs*, the Supreme Court ignored an anticlassification argument raised by amici—that the literal text of the abortion statute in question referred to women.[302] The Idaho Supreme Court rejected the "[o]nly women are capable of pregnancy" argument, reasoning that "[t]his is not sex-based discrimination against women any more than a law regulating unlicensed vasectomies or prostate treatments would be discriminatory against men."[303] That court thought the issue was

government action to determine the appropriate level of equal protection scrutiny"); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 854–56 (N.M. 1998) (applying a "searching judicial inquiry" to "classifications based on the unique ability of women to become pregnant and bear children" due to the history of biological and paternalistic justifications for laws that discriminate against women and the "profound health consequences" of unwanted pregnancies); Doe v. Maher, 515 A.2d 134, 159–60 & n.54 (Conn. Super. Ct. 1986) (holding that a regulation restricting abortion funding violated the state's Equal Rights Amendment, citing scholarship on the "subordination of women," and quoting Anatole France: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread").

[300] Transcript of Oral Argument at 56–57, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf [https://perma.cc/9KDJ-UP8Z] ("[I]t doesn't seem to me to follow that pregnancy and then parenthood are all part of the same burden.").

[301] Id.

[302] Siegel et al., supra note 41, at 79–80 (discussing the argument, made in the authors' amicus brief in *Dobbs*, that "Mississippi's abortion ban explicitly classifies by sex in the text of the statute itself, which prohibits physicians from performing an abortion on 'a maternal patient' after fifteen weeks" and "[o]ther recently enacted abortion bans expressly name the 'woman' or 'pregnant woman' they target and regulate").

[303] *Planned Parenthood of the Great Nw.*, 522 P.3d at 1198. The court did not explain why a regulation singling out vasectomies for disfavor shouldn't be subjected to heightened scrutiny. To be clear, Idaho did not implement a licensing requirement for abortion, it banned abortion. Idaho Code § 18-622 (2020) (providing that "every person" other than the "pregnant woman" "who performs or attempts to perform an abortion" commits a felony, except in certain cases of rape, incest, or risks of death for the pregnant person or fetus).

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that men and women were not "*similarly situated*" in the abortion context, thus, there could be no sex classification.[304]

Other similarly situated inquiries,[305] however, might have overlooked relevance to debates over abortion,[306] such as arguments that states do not require fathers to undertake health risks or bodily harms comparable to unwanted pregnancy[307] and forced childbirth.[308] The state would not

[304] *Planned Parenthood of the Great Nw.*, 522 P.3d at 1198; see also Planned Parenthood S. Atl. v. State, No. 23-cv-000896, 2023 WL 5420648, at *5 n.8 (S.C. Aug. 23, 2023) (summarily rejecting equal protection challenge based on *Dobbs* and the proposition that "equal protection is not implicated when a law 'realistically reflects the fact that the sexes are not similarly situated in certain circumstances' " (citation omitted)); Planned Parenthood of the Heartland, Inc. v. Reynolds, 975 N.W.2d 710, 743 (Iowa 2022) (rejecting equal protection argument because "[w]omen and men are not similarly situated in terms of the biological capacity to be pregnant").

[305] Cf. Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 786 (3d Cir. 1990) (remanding Title IX sex discrimination case involving pregnant student denied admission to honor society for consideration of evidence that school did not deny admission to male student who engaged in premarital sex).

[306] The argument I am referring to was originated by philosopher Judith Jarvis Thompson in the 1970s. Judith Jarvis Thomson, A Defense of Abortion, 1 Phil. & Pub. Affs. 47, 55–59 (1971). Thomson analogized compelled childbirth to a person forcibly attached for nine months to a life support machine connected to a famous violinist, because only that person's blood can keep the violinist alive. Id. Expanding on the point, law professor Donald Regan argued that anti-abortion laws violate the Equal Protection Clause because "they treat pregnant women in a way which is at odds with the general tenor of samaritan law." Donald H. Regan, Rewriting *Roe v. Wade*, 77 Mich. L. Rev. 1569, 1570 (1979). Many prominent constitutional theorists have endorsed versions of this argument over the years. See, e.g., Suzanna Sherry, Women's Virtue, 63 Tul. L. Rev. 1591, 1593 (1989); Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 31 (1992); Laurence H. Tribe, Abortion: The Clash of Absolutes 129–35 (1990); Robin West, West, J., Concurring in the Judgment, *in* What *Roe v. Wade* Should Have Said 121, 130 (Jack M. Balkin ed., 2005). A few scholars have recently urged its revival. See, e.g., Noya Rimalt & Karin Carmit Yefet, Rethinking the Choice of "Private Choice" in Conceptualizing Abortion: A Response to Erwin Chemerinsky and Michele Goodwin's *Abortion: A Woman's Private Choice*, 95 Tex. L. Rev. *See Also* 133, 144 (2017). Thanks to Mary Anne Case for reminding me of this line of argument.

[307] See, e.g., Regan, supra note 306, at 1579–82 (cataloguing physical consequences of normal pregnancy, including nausea, vomiting, exhaustion, frequent urination, carpal tunnel syndrome, nosebleeds, edema, backache, pelvic pain, mastitis, changes to body shape, irritability, depression, and potentially permanent varicose veins, hemorrhoids, bladder weakness, scarring, and more).

[308] See, e.g., Khiara Bridges, When Pregnancy Is an Injury: Rape, Law, and Culture, 65 Stan. L. Rev. 457, 485 (2013) ("[C]hildbirth is widely . . . understood as an intensely traumatic physical event. There is pain. There is blood."); Michele Goodwin, If Embryos and Fetuses Have Rights, 11 Law & Ethics Hum. Rts. 189, 190 (2017) ("Given that a woman is fourteen times more likely to die by carrying a fetus to term than terminating the pregnancy through a legal abortion, can law morally justify a woman to risk her life to incubate a fetus?").

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require an unwilling father to donate bone marrow to his dying child, even if he were the only potential donor.[309] What is different about pregnancy?[310] Is "[t]he failure to see it in this way . . . simply a product of the perceived naturalness of the role of women as childbearers—whether they want to assume that role or not"?[311] The outcomes of challenges to state abortion laws may be predetermined by ideology or considerations of judicial role. But courts might at least be asked to reckon with the argument that abortion bans require sacrifices of a sort only ever asked of "mothers."

Formal equality arguments have thus been used by courts to reach discrimination on the bases of differences in reproductive biology, with implications for sex discrimination issues including menstruation,[312] menopause,[313] infertility, and genitalia, and possibly pregnancy and abortion.

[309] States have codified rights to refuse medical treatment without exceptions for situations in which medical procedures for non-gestational parents would save the lives of their children. See, e.g., Idaho Code § 39-4501 et seq. Nor does the common law provide for any such exceptions. See Curran v. Bosze, 566 N.E.2d 1319, 1345 (Ill. 1990) (stating that half-siblings had no obligation to undergo blood tests to determine if they could donate life-saving bone marrow); McFall v. Shimp, 10 Pa. D. & C. 3d 90 (Allegheny Cnty. Ct. 1978) (refusing to order relative who was only potential match to undergo further tests to determine if he could donate life-saving bone marrow); Regan, supra note 306, at 1569–74.

[310] Philosophers debate whether there is an important distinction between abortion, which is active, and a refusal to donate bone marrow, which is passive. See, e.g., Rosalind S. Simson, What Does the Right to Life Really Entail? A Framework for Depolarizing the Abortion Debate, 14 Conn. Pub. Int. L.J. 107, 118–20 (2014) (collecting sources). This point overlooks not only the fact that the activity entailed in "labor" is more extensive than that required for most abortions, but also that states compel pregnant people to engage in many other forms of "activity" to maintain fetal health, on penalty of prosecution. See, e.g., Priscilla A. Ocen, Birthing Injustice: Pregnancy as a Status Offense, 85 Geo. Wash. L. Rev. 1163, 1178–79 (2017).

[311] Sunstein, supra note 306, at 32.

[312] See, e.g., Margaret E. Johnson, Asking the Menstruation Question to Achieve Menstrual Justice, 41 Colum. J. Gender & L. 158, 159 (2021) (discussing menstruation as a site of discrimination and harassment).

[313] See, e.g., Naomi Cahn, Justice for the Menopause: A Research Agenda, 41 Colum. J. Gender & L. 27, 28 (2021) ("The average woman will spend almost as many years 'post-menopause' as they will menstruating, . . . [b]ut legal issues relating to perimenopause, menopause, and post-menopause are just beginning to surface, prompted by the movement towards menstrual justice, feminist jurisprudence, and developments in the law of aging.").

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3. Rejection: Bisexuality and Nonbinary Gender

One last category of post-*Bostock* sex discrimination controversies involve those individuals who, in some way, reject the relevance of sex, such as individuals who are bisexual or queer, in the sense of not exclusively being attracted to people of one sex,[314] and those who are nonbinary, meaning they do not exclusively identify as men or women.[315] But-for causation and similarly situated tests are unlikely to cover these scenarios, at least not categorically. But some variations on anticlassification rules do.

One criticism of *Bostock*, from the perspective of those who seek to expand sex discrimination law, is that it is debatable whether, or under what conditions, its but-for test covers bisexuality, queerness, and nonbinary gender.[316] For example, if a worker were fired for being bisexual, changing that worker's sex (however one defines sex) would not yield a different choice by the employer. Whether the worker is a man, a woman, or nonbinary, they will be fired on account of being bisexual.[317] Perhaps, if the employer is acting based on disapproval of same-sex relationships, then a bisexual woman in a relationship with a woman could argue she would not have been fired were she a man. But what if she were not in a relationship with a woman? What if the employer's aversion to bisexuality is not about particular relationships, but rather, is based in common stereotypes, for example, that bisexuality entails promiscuousness or indecisiveness?[318] As for nonbinary gender, what if an employer fires a nonbinary individual because that employer believes

[314] GLAAD, Glossary of Terms: LGBTQ, GLAAD Media Reference Guide (11th ed.), https://www.glaad.org/reference/terms [https://perma.cc/8UZU-ZGVQ] ("Queer. An adjective used by some people, particularly younger people, whose sexual orientation is not exclusively heterosexual (e.g. queer person, queer woman). Typically, for those who identify as queer, the terms lesbian, gay, and bisexual are perceived to be too limiting and/or fraught with cultural connotations they feel do not apply to them.").

[315] GLAAD, Glossary of Terms: Transgender, GLAAD Media Reference Guide (11th ed.), https://www.glaad.org/reference/trans-terms [https://perma.cc/2EC8-UBH6].

[316] See, e.g., Eidelson, supra note 20, at 819–20; Krishnamurthi, supra note 20, at 11–12.

[317] Eidelson, supra note 20, at 819–20; Krishnamurthi, supra note 20, at 11–12.

[318] See, e.g., Christina Dyar, Sheri Levy, Bonita London & Ashley Lytle, An Experimental Investigation of the Application of Binegative Stereotypes, 4 Psych. Sexual Orientation & Gender Diversity 314, 314 (2017) (experimental study reporting that "bisexual individuals are more likely to be perceived as sexually irresponsible and to be expected to change their sexual orientation identity in the future compared with heterosexual and lesbian/gay individuals").

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that nonbinary is not a "real" gender identity?[319] Assuming sex refers to assignments at birth,[320] this would not be sex discrimination under a but-for test, because it doesn't matter what the worker was assigned at birth; that worker would be fired.

Perhaps this is all academic. To be sure, most litigants and courts may not care to work through these logical puzzles and will simply assume that *Bostock* forbids all discrimination based on "sexual orientation" which would include bisexuality and queer orientations,[321] and "gender identity," which would include nonbinary gender.[322] Particularly in harassment cases, it may be obvious that mistreatment of bisexual, queer, or nonbinary plaintiffs is related to a plaintiff's perceived failures to conform with expectations for their sex assigned at birth.[323] This has not uniformly been the case, however. Conservative movement lawyers have pointed out the problem in impact litigation brought by churches and

[319] See, e.g., Clarke, supra note 182, at 910–14 (discussing this among other reasons for discrimination against nonbinary people).

[320] I don't think this assumption is correct, but some courts might. See Eidelson, supra note 20, at 821–22 (arguing that discrimination on the basis of nonbinary gender would qualify as sex discrimination on the ground that "according to several historians and linguists, the word 'sex' as used in 1964 encompassed the kinds of social identities that we today group under 'gender,' not merely the physical differences that we today group under 'sex' ").

[321] See, e.g., Crowe v. Wormuth, 74 F.4th 1011, 1036 (9th Cir. 2023) (stating, in Title VII case brought by bisexual employee, that "[t]he Supreme Court has now held that sexual orientation discrimination is actionable under Title VII" but granting summary judgment for the employer on ground that employee did not have sufficient evidence that his bisexuality motivated his termination); Gonzales v. Odessa Coll., No. 23-cv-00020, 2023 WL 4687945, at *1 (W.D. Tex. July 6, 2023), *report and recommendation adopted*, No. 23-cv-00020, 2023 WL 4687935 (W.D. Tex. July 21, 2023) (denying motion to dismiss Title VII claim brought by bisexual plaintiff alleging she was replaced by a straight employee); Avis v. Festus R-VI Sch. Dist., No. 23-cv-00663, 2023 WL 3816664, at *3 (E.D. Mo. June 5, 2023) (summarizing *Bostock* as prohibiting "discrimination based on sexual orientation," which would include discrimination against a plaintiff "because he is a bisexual male," in opinion granting *in forma pauperis* status); Avis v. Hillsboro R-3 Sch. Dist., No. 22-cv-00596, 2022 WL 3026919, at *2 (E.D. Mo. Aug. 1, 2022) (in a case alleging discrimination on the basis of "bisexuality," noting that, under *Bostock*, "Title VII . . . protects an employee from employer discrimination on the basis of sexual orientation").

[322] See, e.g., Lammers v. Pathways to a Better Life, LLC, No. 18-cv-01579, 2021 WL 3033370, at *2 (E.D. Wis. July 19, 2021) (denying summary judgment in a case involving a nonbinary plaintiff alleging sex discrimination in which the parties did not dispute the plaintiff's membership in the protected class).

[323] See, e.g., L.O.K. v. Greater Albany Pub. Sch. Dist. 8J, No. 20-cv-00529, 2022 WL 2341855, at *15 (D. Or. June 28, 2022) (holding that harassment of an intersex and nonbinary child violated Title IX because "the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions" (citation omitted)).

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Christian-owned businesses seeking to prevent the Equal Employment Opportunity Commission from enforcing *Bostock* against them, with one argument being that employers are still permitted to discriminate against bisexual employees.[324] In one case, George W. Bush appointee Judge O'Connor agreed that *Bostock*'s but-for test did not forbid discrimination on the basis of bisexuality.[325] But he also read *Bostock* to entail a rule that requires employment decisions be "'blind' to sex."[326] Because, in Judge O'Connor's view, "bisexual conduct" entailed some degree of "homosexual[ity]," it was sex discrimination to forbid it.[327]

It's hard to make much sense of this last sentence.[328] But Judge O'Connor might have been onto something with the reference to "blindness." There is anticlassification language in *Bostock* that would cover bisexuality. For example, it is impossible to define bisexuality "without using the words man, woman, or sex (or some synonym)."[329] *Bisex*uality would be meaningless without two sex categories.[330] Like being gay or transgender, bisexuality is "inextricably bound up with sex."[331] Moreover, in addition to making it illegal to discriminate against

[324] See, e.g., Reply Brief of Appellants/Cross-Appellees Braidwood Management, Inc. et al. at 3–4, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023) (No. 22-10145) ("[S]o long as that employer discriminates against male and female bisexuals on equal terms" "[c]hanging the biological sex of the employee or job applicant would *not* in any way affect the employer's actions."). For background on Jonathan Mitchell, attorney for plaintiffs, see Jeannie Suk Gerson, The Conservative Who Wants to Bring Down the Supreme Court, New Yorker (Jan. 5, 2023), https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court [https://perma.cc/6ZUV-UQXH].

[325] Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 622 (N.D. Tex. 2021) ("[A] male can be bisexual, and a female can be bisexual, so an employer does not favor one biological sex over the other by discriminating against bisexuals. The traditional but-for 'favoritism' analyses would stop here."), *vacated sub nom. Braidwood Mgmt., Inc.*, 70 F.4th at 940.

[326] Id. at 618.

[327] Id. at 622. The court reasoned that "[a]n individual who is bisexual inherently identifies as homosexual to some extent, even if they also identify as heterosexual, because bisexuality is some combination of the two orientations," and "[t]herefore, . . . a policy that prohibits *only* bisexual conduct also inherently targets sex." Id.

[328] The parties did not try to make sense of it on appeal. See Combined Response and Reply Brief for Appellees/Cross Appellants at 47, *Braidwood Mgmt., Inc.*, 70 F.4th 914 (making something like a but-for argument instead).

[329] Bostock v. Clayton County, 140 S. Ct. 1731, 1746 (2020).

[330] This is precisely why many people prefer the term "queer." See supra note 314. But even if we define that term as not exclusively being attracted to men or women, or as attractions that do not depend on sex categories—it remains inexplicable without sex categories—its very meaning depends on negating the relevance of conventional sex categories.

[331] *Bostock*, 140 S. Ct. at 1742.

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a person because of "such individual's . . . sex,"[332] Title VII includes a provision that makes it unlawful to discriminate when the plaintiff demonstrates that "sex," not just the plaintiff's own sex, "was a motivating factor."[333] One recent district court opinion relied on this language to allow a teacher to proceed on her Title VII claims alleging discrimination based on "her association with, and advocacy for, members of the LGBTQ+ community."[334] And Title IX[335] and the Equal Protection Clause[336] include no language limiting their provisions to "such individual's" sex.

Does this go too far? Justice Alito criticized the *Bostock* majority for defining "sex" to include anything "intertwined" with that concept, which could support an interpretation of Title VII that would bar the refusal to hire someone "with a record of sexual harassment in prior jobs."[337] The very idea of sex discrimination, of which sexual harassment is a subspecies, is, like bisexuality, inexplicable without categories like men and women.[338] To avoid this outcome, Justice Alito argued that the

[332] 42 U.S.C. § 2000e-2(a)(1). The First Circuit has held that this language could cover certain associational claims after *Bostock*. Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 274 (1st Cir. 2022) (holding that "[i]f an employer discriminates both against Black employees based on their race and against non-Black employees based on their status as non-Black people associating with Black people, that employer 'doubles rather than eliminates Title VII liability,' " but the plaintiffs' allegations of race discrimination when their employer fired them for wearing Black Lives Matter masks in violation of a store rule forbidding masks with slogans were not plausible (quoting *Bostock*, 140 S. Ct. at 1742–43)).

[333] 42 U.S.C. § 2000e-2(m). It is a partial defense to § 2000e-2(m) if the employer can demonstrate that it would have made the same decision even absent the impermissible motive. Id. § 2000e-5(g)(2)(B). *Bostock* did not rely on the "motivating factor" provision. *Bostock*, 140 S. Ct. at 1740.

[334] MacDonald v. Brewer Sch. Dep't, No. 22-cv-00024, 2023 WL 167668, at *6–7 (D. Me. Jan. 12, 2023) ("[T]he omission of the qualifying phrase 'because of such individual's' from § 2000e-2(m) indicates that a plaintiff could succeed on an associational or advocacy theory under that provision without a showing that the discrimination was 'because of' her own protected characteristic."); see also Jessica A. Clarke, Protected Class Gatekeeping, 92 N.Y.U. L. Rev. 101, 114 (2017) (arguing for this interpretation of § 703(m)).

[335] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

[336] See, e.g., *MacDonald,* 2023 WL 167668, at *17 (allowing equal protection claims to proceed based on sex discrimination due to teacher's "LGBTQ+ advocacy and association with LGBTQ+ individuals").

[337] 140 S. Ct. at 1761 (Alito, J., dissenting).

[338] Cf. Sydnie M. Cobb, Harvard Law Professors Split on Legal Reasoning Behind Dropping Social Group Sanctions, Crimson (July 2, 2020), https://www.thecrimson.com/article/2020/7/2/sanctions-ending-legal-experts-split/ [https://perma.cc/QX6S-4CFQ] (discussing

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majority had "graft[ed] onto Title VII some arbitrary line separating the things that are related closely enough [to sex] and those that are not," such as the principle that sex includes only those matters that are "not relevant to employment decisions," such as sexual orientation, but not having a record of sexual harassment.[339] The dissent asserted Title VII includes no such policy.[340] But that's not right. Title VII includes a BFOQ defense allowing sex discrimination when the employer can show it is a bona fide occupational qualification.[341] Title VII's text, not to mention its legislative history, are fairly read to demonstrate Congress intended the statute to preserve a "merit-based workplace" that encourages employers to make decisions based on factors relevant to the job rather than extraneous sex-related considerations.[342] A candidate's record of sexual harassment is undoubtedly relevant to many jobs.[343] Likewise, equal protection law allows consideration of sex if the justification is "exceedingly persuasive,"[344] and Title IX compels schools to ensure educational opportunities are not foreclosed based on sex, which they cannot do if they ignore sexual harassment.[345]

I will not dispute that these formalistic arguments are messy, and they veer into substance. But would some more straightforwardly substantive principle offer a cleaner answer to the question whether sex discrimination law forbids discrimination based on bisexuality, queer orientations, and nonbinary gender? Consider the associational discrimination principle—that an individual should not face

debate over whether *Bostock* disallows Harvard University from penalizing students who are members of groups that discriminate on the basis of sex).

[339] *Bostock*, 140 S. Ct. at 1761 (Alito, J., dissenting).

[340] Id.

[341] 42 U.S.C. § 2000e-2(e)(1) (allowing discrimination on the basis of an individual's sex if sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"). One wrinkle here is that the text of the BFOQ defense only seems to allow an employer to discriminate on the basis of an *individual's* sex.

[342] William N. Eskridge Jr., Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections, 127 Yale L.J. 322, 335 (2017).

[343] Screening out candidates with records of sexual harassment is no easy task. Jessica Clarke, If You Fire Someone for Sexual Harassment, What do You Say if You're Called for a Reference?, Harv. Bus. Rev. (Mar. 27, 2018), https://hbr.org/2018/03/if-you-fire-someone-for-sexual-harassment-what-do-you-say-if-youre-called-for-a-reference [https://perma.cc/3ZGM-JS2F].

[344] United States v. Virginia, 518 U.S. 515, 524 (1996).

[345] See, e.g., Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 641 (1999) (holding that Title IX does not allow a school board to "remain idle in the face of known student-on-student harassment in its schools").

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discrimination based on associations with people of particular sexes.[346] There was such an argument floating through the cases leading up to *Bostock*.[347] It works by analogy to the prohibition on interracial marriage struck down by the Supreme Court in *Loving v. Virginia*.[348] The but-for test creates problems for the associational argument—if an employer who despises Black people fires a White man for his marriage to a Black woman, changing the White man's race to Black (or anything else) hardly improves his prospects for continued employment.[349] Similarly situated arguments are also trouble—if both the White husband and the Black wife are punished, it might not look like race discrimination.[350] Anticlassification arguments work better—perhaps we could say the employer is operating under an implicit anti-Black policy that captures within its sweep some White people.[351] But in the litigation leading up to *Bostock*, some courts saw a disjuncture: "[A]nti-miscegenation policies are motivated by racism, while sexual orientation discrimination is not rooted in sexism."[352] Of course, many sociologists, and some entire

[346] For a summary of case law on this, see Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 272 (1st Cir. 2022) ("In the typical associational discrimination claim, an employer purportedly disapproves of a social relationship between an employee and a third party on the basis of a protected characteristic and has taken an employment action based on that disapproval.").

[347] Zarda v. Altitude Express, Inc., 883 F.3d 100, 126 (2d Cir. 2018) (en banc), *aff'd sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 347–49 (7th Cir. 2017) (en banc).

[348] *Zarda*, 883 F.3d at 126 (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

[349] Courts almost uniformly reject this but-for argument. See, e.g., Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) (collecting cases supporting the proposition that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race").

[350] It didn't look that way to the Supreme Court in 1883. Pace v. Alabama, 106 U.S. 583, 585 (1883) (upholding a law criminalizing certain forms of interracial intimacy against equal protection challenge on the ground that "[t]he punishment of each offending person, whether white or black, is the same"), *overruled by* McLaughlin v. Florida, 379 U.S. 184, 188 (1964). *McLaughlin* held that the classification between "interracial and intraracial couples" had to be subjected to equal protection scrutiny. 379 U.S. at 190–91 ("Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation.").

[351] See, e.g., Johnson v. Univ. of Cincinnati, 215 F.3d 561, 577 (6th Cir. 2000) (holding that a White man could sue under Title VII alleging he was the victim of discrimination due to his "advocacy of women and minorities").

[352] *Zarda*, 883 F.3d at 126; see also *Hively*, 853 F.3d at 367–68 (Sykes, J., dissenting) (quoting *Loving*, 388 U.S. at 11, for the proposition that anti-miscegenation laws are "designed to maintain White Supremacy" and reasoning that "[n]o one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex"). Justice Alito's *Bostock* dissent made this point as well. 140 S. Ct. at 1765 (Alito, J., dissenting).

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gender studies departments, would disagree.[353] But jurists on all sides of the *Bostock* issue were uninterested in this argument.[354]

What about a theory based in animus or expressive meanings?[355] Perhaps, if the facts were on their side,[356] a bisexual or nonbinary plaintiff could argue they were fired due to homophobia or transphobia, which are forbidden motives post-*Bostock*, or are demeaning and degrading bases for treating individual workers. In a 2023 case, the Ninth Circuit held that a man could bring a Title VII harassment claim on the ground that his employer unrelentingly played music that was "sexually graphic" and "violently misogynistic"[357]—conduct that could qualify as discrimination due to anti-female animus, regardless of the genders of those harmed by it.[358] But how would this precedent apply in the contexts of hiring, firing, and promotion decisions based on LGBTQ+ status? To the extent that such decisions are explained at all, they are generally justified by religious and political commitments. Would the expression of such commitments strike judges as harmful in the same way that violent misogyny does?

What about, then, an antistereotyping principle? This one would say, for example, that it is unlawful sex discrimination for an accounting firm to tell a woman that if she wants to make partner she needs to tone down

[353] For a summary of a few of the reasons why, see Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 234–57 (1994).

[354] See, e.g., *Zarda*, 883 F.3d at 126 (citing Koppelman, supra note 353, but concluding "the Court need not resolve this dispute because the amici supporting defendants identify no cases indicating that the scope of Title VII's protection against sex discrimination is limited to discrimination motivated by what would colloquially be described as sexism"); id. at 161 (Lynch, J., dissenting) ("Title VII does not prohibit 'misogyny' or 'sexism,' nor does it undertake to revise individuals' ideas (religious or secular) about how families are best structured.").

[355] I would classify tests that turn on forbidden mental states or expressive meanings as substantive. See supra note 81 and accompanying text (discussing what makes a formal rule formal).

[356] But see supra notes 318–19 and accompanying text (discussing plausible reasons apart from homophobia and transphobia for opposition to bisexuality and nonbinary gender).

[357] Sharp v. S&S Activewear, L.L.C., 69 F.4th 974, 981 (9th Cir. 2023) (reversing grant of motion to dismiss). For example, the court noted that the plaintiffs alleged "the songs' content denigrated women and used offensive terms like 'hos' and 'bitches,'" "glorifie[d] prostitution," and "described extreme violence against women." Id. at 977. The panel consisted of a George W. Bush, Clinton, and Trump appointee.

[358] Id. at 981.

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the "macho" behavior and take "a course at charm school."[359] But what, if not but-for cause, is the principle that makes sex stereotyping discriminatory? Judges left to answer this question on their own may choose restrictive rules.[360] According to Judge Gerard Lynch, an Obama appointee who dissented from the Second Circuit's pre-*Bostock* opinion recognizing the Title VII claim of a gay employee: "[t]he key element here is that one sex is systematically disadvantaged in a particular workplace," such as the woman in the male-dominated accounting firm, or a man looking for a job as a social worker, a profession dominated by women.[361] In *Jespersen*, the Ninth Circuit interpreted the antistereotyping principle to apply only when the rules in question caused certain types of harm, such as "objectively inhibit[ing] a woman's ability to do the job" or "stereotyp[ing] women as sex objects."[362]

In *Bostock*, the Supreme Court disagreed with these limiting interpretations, illustrating the point with a hypothetical example: "[A]n employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both*

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[359] See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). But see Case, supra note 15, at 1448–49 (advancing a more formalistic version of the antistereotyping principle in constitutional law).

[360] I don't mean to be too pessimistic about antistereotyping theories; they worked in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 346–47 (7th Cir. 2017) (en banc), a case leading up to *Bostock*. See Clarke, supra note 157, at 116–17 (describing how, prior to *Bostock*, some courts searched in vain to find principles that would differentiate sex stereotypes from sexual orientation stereotypes, and upon finding that task led to perverse and confusing results, the Seventh Circuit adopted a categorical rule that discrimination based on sexual orientation is based in sex stereotypes). After *Bostock*, courts have held that sex discrimination law prohibits discrimination because of perceived sexual orientation based on this principle. Grabowski v. Ariz. Bd. of Regents, 69 F.4th 1110, 1116 (9th Cir. 2023) (holding that Title IX forbids "discrimination on the basis of perceived sexual orientation, as opposed to actual sexual orientation"); Roberts v. Glenn Indus. Grp., Inc., 998 F.3d 111, 120–21 (4th Cir. 2021) (Title VII).

[361] Zarda v. Altitude Express, Inc., 883 F.3d 100, 158 & n.26 (2d Cir. 2018) (en banc) (Lynch, J., dissenting).

[362] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006). But see Mary Anne Case, Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of *Price Waterhouse v. Hopkins*, and the Prospect of ENDA, 66 Stan. L. Rev. 1333, 1357–58 (2014) ("Jespersen testified that being forced to be feminine and 'wear makeup' actually interfered with her ability to be an effective bartender (which sometimes required her to deal with unruly, intoxicated guests) because it 'took away [her] credibility as an individual and as a person.'").

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cases the employer fires an individual in part because of sex."[363] The Court observed that "[n]o one" denies that this is sex discrimination.[364] But why?[365] Is it about systemic disadvantages for gender nonconformers? Is it about the individual liberty to be free from the constraints of gender roles and judged on one's own merit? Some combination of these principles? Formal rules do not require judges to explicitly address these normatively freighted questions.

What about another hypothetical employee, Casey, who is fired for being nonbinary, although the employer is not aware of or concerned about the sex Casey was assigned at birth? Is it sex discrimination to insist that Casey fit one of two standard molds: masculine or feminine?[366] While I am unaware of any such real cases, recent experience suggests courts saying yes would be more likely to foreground anticlassification *rules*—an employer who insists on sex roles is classifying based on sex[367]—and to background anticlassification *principles* such as individualism, libertarianism, or merit.[368]

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[363] Bostock v. Clayton County, 140 S. Ct. 1731,1741 (2020). To put it another way, imagine Hannah applied to be a mechanic and Bob applied to be a secretary, and the employer refused to hire either one, arguing that all employees must comply with "workplace gender roles of the 1950s." Id. at 1748. Holding constant Hannah's "bucking of 1950s gender roles," she would still not get the job if she were a man. Id.

[364] Id. at 1749.

[365] The Supreme Court's answer was to gesture to the way the but-for test had been applied by past precedents on "sexual stereotypes." Id. (asserting that to create a different rule for sexual orientation "would create a curious discontinuity in our case law, to put it mildly"). Another possibility is the principle of party presentation—that courts do not reach issues not raised by the parties—and no party argued that the Bob/Hannah hypothetical did not violate Title VII. See United States v. Sineneng-Smith, 140 S. Ct. 1575, 1578–79 (2020). But the Court framed the issue as a question of logic rather than waiver or forfeiture.

[366] See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31392 (May 18, 2016) (stating that prohibited "[s]ex stereotypes can also include a belief that gender can only be binary and thus that individuals cannot have a gender identity other than male or female").

[367] There is a good argument that "sex" as used in Title VII encompasses what we would today call gender. See, e.g., William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, The Meaning of *Sex*: Dynamic Words, Novel Applications, and Original Public Meaning, 119 Mich. L. Rev. 1503, 1550–58 (2021).

[368] The most high profile case in favor of a nonbinary plaintiff to date—Dana Zzyym, who challenged the Trump Administration State Department's refusal provide them with a passport with an "X" designation rather than an "M" for male or an "F" for female—evaded sex discrimination questions altogether, and instead pushed the State Department to come up with a rational explanation for its policy as a matter of administrative law, which it had trouble doing. Zzyym v. Pompeo, 958 F.3d 1014, 1018 (10th Cir. 2020) (concluding that, in denying Zzyym a passport with an X designation due to reasons unsupported by the administrative record, the State Department acted in an "arbitrary and capricious manner" and remanding for

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In sum, neither formal rules nor substantive principles offer easy answers to questions about whether sex discrimination law prohibits discrimination based on bisexual and queer sexual orientations or nonbinary gender identities, but anticlassification inquiries have more potential to extend the law to these contexts than but-for rules.

B. Reasons for the Appeal of Form Over Substance

Why might formal rules have more appeal in cases expanding sex discrimination law than the substantive principles favored by scholars?[369] While principles like antistereotyping and antisubordination are compelling and useful ways to explain many strands of sex discrimination doctrine, courts are increasingly resistant to adopting them as controlling inquiries, for reasons related to both ideology and concerns about institutional role.

Setting aside cases on religion,[370] there are relatively few disparate treatment cases from the Roberts Court that arguably foreground substantive rather than formal legal standards.[371] The most notable are the two marriage equality decisions, *United States v. Windsor*[372] and

the State Department to "reconsider the policy based only on the two reasons supported by the record"). Zzyym ultimately received a passport with an X after the Biden administration was persuaded to change State Department policy. Lambda Legal Client Dana Zzyym Receives First U.S. 'X' Passport, Lambda Legal (Oct. 27, 2021), https://lambdalegal.org/newsroom/co_20211027_dana-zzyym-receives-first-us-passport-with-x-gender-marker/ [https://perma.cc/H5RF-EEUD].

[369] See supra notes 4–6, 83–85 and accompanying text.

[370] Religion is an area of discrimination law with bespoke rules, not always formalistic. See, e.g., Tebbe, supra note 139.

[371] Justice Breyer's majority opinion in *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135 (2008), is the only one I can find that reached a result that was not and cannot be explained by any of the prevailing formal tests. In that case, the challenged law disadvantaged certain older employees because it made disability benefits contingent on a formula for eligibility for pensions, and the determination of pension eligibility took age into account. Id. at 139. The unusual circumstance in this case was that the age discrimination law permitted employers to condition pension eligibility based on age. Id. Rather than applying any formal test, the majority considered six factors related to purposes and effects. Id. at 143–48. Four Justices—including both Scalia and Ginsburg—dissented, attacking this methodology. Id. at 151–52 (Kennedy, J., dissenting) ("This is a straightforward act of discrimination on the basis of age."). *Ricci v. DeStefano*, a reverse discrimination race case, is better explained by normative principles than formal tests. See, e.g., Siegel, supra note 126, at 1325–32 (explaining *Ricci v. DeStefano*, 557 U.S. 557 (2009), as more about moderate Justices' interests in social cohesion than anticlassification). Note that both these cases restricted minority-protective efforts.

[372] 570 U.S. 744, 770 (2013) (holding that "[t]he avowed purpose and practical effect of the [Defense of Marriage Act] are to impose a disadvantage, a separate status, and so a stigma

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Obergefell v. Hodges.[373] These opinions reflect the particular views of the Court's long-time swing vote, Justice Kennedy, who was attentive to the harms of subordination and second-class citizenship, but *not* gender stereotypes.[374] Yet it is not clear that the marriage equality decisions have any import outside that context because they "blend liberty and equality in novel and ambiguous ways" that resist replication.[375]

Justice Kennedy no longer sits on the Supreme Court, and *Bostock*, unlike the marriage equality cases, included no mentions of disrespect, stigma, or subordination. Because the Supreme Court's membership had become more conservative by the time of *Bostock*, many civil rights advocates regarded such concepts as nonstarters.[376] The word "stereotypes" appears in *Bostock* only twice, both times in hypothetical examples supporting the majority's reasoning with respect to the application of its but-for cause test.[377] Judges appointed by Republican presidents ruling in favor of sex discrimination plaintiffs in novel ways after *Bostock* have not generally been inclined toward stereotyping theories.[378] Rightward ideological drift is not limited to the Supreme

upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States").

[373] 576 U.S. 644, 675 (2015) (holding that "this denial to same-sex couples of the right to marry works a grave and continuing harm" in that it "serves to disrespect and subordinate them").

[374] See Russell K. Robinson, Unequal Protection, 68 Stan. L. Rev. 151, 201–02 (2016) (discussing the contingency of these opinions on Justice Kennedy's presence on the Court, and how his "failure to acknowledge the unusual nature of his doctrinal moves in the sexual orientation cases and to name and situate that level of scrutiny may make them particularly vulnerable to rewriting").

[375] Id. at 158.

[376] As the coauthor of one amicus brief in *Bostock* explained: "We play the cards we are dealt. [We] knew that Justice Gorsuch was our audience . . . . The formal sex discrimination argument does not rely on the more controversial argument based on antisubordination (which I do not believe Justice Gorsuch would have accepted)." Andrew Koppelman, *Bostock* and Textualism: A Response to Berman and Krishnamurthi, 98 Notre Dame L. Rev. Reflection 89, 111 (2022); see also Franklin, supra note 24, at 143 n.106 (similar).

[377] Bostock v. Clayton County, 140 S. Ct. 1731, 1742, 1749 (2020). One could read *Bostock* as doing away with any stereotyping theory independent of but-for causation. Id. at 1749 (seeming to assert that a situation in which an "[e]mployer hires based on sexual stereotypes" is governed by the "[s]imple test" of but-for causation). That's not what the Court was asked to determine in *Bostock*, nor does *Bostock* hold that but-for causation is the only meaning of discrimination under Title VII.

[378] In transgender rights cases, they adopt formal theories instead. See, e.g., Williams ex rel. L.W. v. Skrmetti, No. 23-cv-00376, 2023 WL 4232308, at *19 n.37 (M.D. Tenn. June 28, 2023) (Trump appointee), *rev'd*, No. 23-5600, 2023 WL 6321688 (6th Cir. Sept. 28, 2023); K.C. v. Individual Members of Med. Licensing Bd., No. 23-cv-00595, 2023 WL 4054086, at

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Court; Republican presidents appointed more than half of federal appellate court judges, and only a somewhat smaller share of trial judges.[379] This development means that decisions that appeal to judges from both political parties are more likely to attract consensus and resist appeal, making it less likely that courts will adopt socially aware, substantive rules of the sorts advanced by progressive scholars with respect to discrimination.[380]

Apart from ideology, courts are unlikely to explicitly adopt principles directed at systemic injustice, stereotypes, or balancing of interests as controlling inquiries due to concerns about institutional competence. As Suzanne Goldberg explains, courts in recent discrimination cases exhibit an "antisociological bent": the sense that "while [they] may be well equipped to sift among empirical facts, they are less institutionally suited, both in terms of training and resources, for deep investigation and analysis of social norms."[381] In the 1970s, the liberal Justice Brennan called discrimination "a social phenomenon encased in a social context" that "unavoidably takes its meaning from the desired end products of the relevant legislative enactment."[382] And in 1989, the pragmatic Justice O'Connor admitted that but-for inquiries called for "conjecture," creating

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*8 (S.D. Ind. June 16, 2023) (Trump appointee); Pritchard ex rel. C.P. v. Blue Cross Blue Shield of Ill., No. 20-cv-06145, 2022 WL 17788148, at *6 (W.D. Wash. Dec. 19, 2022) (Reagan appointee). There may be more room for stereotyping theories in cases that do not involve transgender plaintiffs. See Nathan v. Great Lakes Water Auth., 992 F.3d 557, 566 (6th Cir. 2021) (panel consisting of two Republican and one Democratic appointee observing that "sex stereotyping" could be an independent "basis for liability" under Sixth Circuit precedent).

[379] John Gramlich, Biden Has Appointed More Federal Judges than Any President Since JFK at this Point in his Tenure, Pew Rsch. Ctr. (Aug. 9, 2022), https://www.pewresearch.org/fact-tank/2022/08/09/biden-has-appointed-more-federal-judges-than-any-president-since-jfk-at-this-point-in-his-tenure/ [https://perma.cc/JRW4-SLAU].

[380] In general, federal civil rights cases fare worse when the judge was appointed by a Republican. See, e.g., Ryan Hübert & Ryan Copus, Political Appointments and Outcomes in Federal District Courts, 84 J. Pol. 908, 908–19 (2022) (using data set of 70,000 civil rights cases filed in courts in the Ninth Circuit, and concluding that, for cases filed between 2009 and 2016, assignment to a Republican appointee increased pro-defendant outcomes by 7.4 percentage points); John Friedl & Andre Honoree, Is Justice Blind? Examining the Relationship Between Presidential Appointments of Judges and Outcomes in Employment Discrimination Cases, 38 Cumb. L. Rev. 89, 91–96 (2007) (finding a statistically significant effect in 652 published Title VII summary judgment decisions in samples from 2000 to 2007).

[381] Goldberg, supra note 110, at 791–93; see Zatz, supra note 251, at 1434 (arguing that courts are reticent to adopt "elaborate and empirically contingent" explanations of how individual instances of discrimination "connect . . . to an ultimate concern with group relations").

[382] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting).

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dilemmas that had to be resolved with recourse to the "policy considerations" that undergird Title VII.[383] These views, which were not majority opinions even in their own eras, connected sociological and normative inquiries into discrimination with purposivism, a methodology of statutory interpretation that has long since been out of favor.[384] In 2016, the Eleventh Circuit put it this way: "[W]e—and courts generally—are tasked with interpreting Title VII, a statute enacted by Congress, and not with grading competing doctoral theses in anthropology or sociology."[385]

Moreover, courts are concerned that substantive tests that lack limiting principles ask them to effect broad social change of the redistributive variety. In the constitutional context, "a presumption prohibiting all decisions that stigmatize or cumulatively disadvantage particular individuals would affect an enormously wide range of practices important to the efficient operation of a complex industrial society."[386] In equal protection cases, courts are wary of intruding into the prerogatives of more politically accountable branches of government,[387] and concerned about overreach.[388] In Title VII cases, courts do not wish to serve as "hyper-regulators of the workplace given the background commitments, both ideological and doctrinal, that typically favor employer autonomy."[389] Often, they do not even see themselves as enforcing the

[383] Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (quoting Wex S. Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 67 (1956)).

[384] See, e.g., John F. Manning, The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power, 128 Harv. L. Rev. 1, 73 (2014) ("[T]he Court's predominant approach to statutory interpretation has, for the past quarter century, been textualist.").

[385] EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1034 (11th Cir. 2016) (rejecting the EEOC's argument that refusing to hire a Black woman because she wore her hair in dreadlocks constituted race discrimination).

[386] Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 11 (1976) (explaining that society loses little from abolishing race-dependent practices because "[r]ace correlates so weakly with the legitimate characteristics for which it might be used as a proxy," and that the same idea explains the expansion of antidiscrimination law to encompass sex). This explains the relative ease by which courts have expanded equality law to sexual orientation and gender identity as well.

[387] See, e.g., Washington v. Davis, 426 U.S. 229, 246–48 (1976).

[388] See Jed Rubenfeld, The Anti-Antidiscrimination Agenda, 111 Yale L.J. 1141, 1143–44 (2002) (arguing that many of the Supreme Court's constitutional cases "cannot be taken seriously in their own doctrinal terms" but can be explained as "an effort, sometimes overt but sometimes covert as well, to find constitutional grounds for invalidating laws perceived to take antidiscrimination ideology too far").

[389] See, e.g., Goldberg, supra note 110, at 793.

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civil rights tradition.[390] These concerns explain why courts are wary of "free-form, or even relatively unstructured" inquiries into discrimination.[391] Formal equality, by contrast, seems to cost society little,[392] and administering formal tests is well within the competence of the judiciary. In particular, the view that the interpretation of texts is at the center of the judicial craft may incline judges toward anticlassification rules that ask them whether the text of a law is or is not "facially" neutral.[393]

III. THE LIMITS OF SEX DISCRIMINATION FORMALISM

Thus, discrimination formalism, as this Article defines it, has the potential to expand sex discrimination law to novel contexts. Yet it also has significant limitations, particularly if courts were to settle on just one formal test as the sole and definitive metric of discrimination. Formal tests of discrimination, like all formal rules, are bound to be both underinclusive—missing some examples of discrimination that many plausible normative theories would include, and at the same time overinclusive—including some things as discrimination when no plausible normative theory of what discrimination is would agree. And those formal tests often prove indeterminate—unable to generate reliable results about what is or is not discrimination unless judges import their own empirical assumptions or normative values—to varying degrees in different contexts. This is true of but-for causation, anticlassification, and similarly situated rules, but in different ways that are worth paying attention to.

A. Underinclusivity

Critics are correct that formal tests of discrimination are woefully underinclusive—not reaching many forms of inequality that are

[390] See, e.g., Elizabeth M. Schneider, The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. Pa. L. Rev. 517, 564 (2010) ("Many judges apparently tend to view these cases as petty, involving whining plaintiffs complaining about legitimate employment or institutional matters, rather than important civil rights issues.").

[391] Goldberg, supra note 110, at 791.

[392] Brest, supra note 386, at 11.

[393] See, e.g., Fain v. Crouch, 618 F. Supp. 3d 313, 326 (S.D. W. Va. 2022) ("The Court looks to the language of the policy to determine whether it is facially neutral or whether it explicitly references gendered or sex-related terms.").

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normatively troubling, such as demands to assimilate and intersectional discrimination.

1. Assimilation Demands

One type of discrimination that formal rules usually fail to reach are what I'll call "assimilation demands"[394]: requirements for conformity with institutional structures designed to serve a modal individual who was historically a member of the dominant or majority group, such as straight men with wives at home. Formal rules rarely work to challenge the neoliberal institutional arrangements that are frequent targets of progressive critique, and when they do, any change they create is partial and incremental.

Consider, for example, *Ayanna v. Dechert, LLP*, a case in which a law firm associate, a man named Ariel Ayanna, was terminated after taking leave when his wife became pregnant and experienced a mental health emergency.[395] Ayanna reported that after returning from leave, he was assigned to work with a partner who treated him with hostility, monitored him more closely than other associates, and, after his wife was briefly hospitalized, stopped assigning him work.[396] He argued this was on account of the firm's culture, which was "dominated by a traditional male 'macho' stereotype that promotes relegating family responsibilities to women."[397] But Ayanna had no evidence of specific firm policy statements or even remarks as to informal policy to support the theory that the firm was engaged in sex-based classification.[398] So an

[394] Some have characterized these and other systemic and subtle forms of discrimination as "second generation." See, e.g., Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458 (2001). This generational metaphor may have some utility in describing regulatory strategies, id. at 568, but it can be misleading as a matter of historical description—"[f]irst generation discrimination has not disappeared," and "second generation bias often coexisted with first generation bias, even in the early stages of the civil rights era." Id. at 468. I would resist the assertion that racial bias, for example, is now a problem of the "second generation" sort that cannot ever be addressed with formal rules.

[395] 914 F. Supp. 2d 51, 52 (D. Mass. 2012). The judge in this case was appointed by President George H.W. Bush.

[396] Id. at 52–53.

[397] Id. at 56.

[398] Id. at 56 ("His broad claims about the 'macho' culture at Dechert, without any facts specifically showing instances of discrimination against him, are inadequate to support a finding that he was fired due to his gender."); cf. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 120–21 (2d Cir. 2004) (refusing to require evidence "that the defendants treated similarly situated men differently" in a case in which defendants admitted to sexist views, including the belief "that a woman cannot 'be a good mother' and have a job that

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anticlassification rule was unavailing. On top of that, the firm had evidence that it had also fired a woman who "was unable to obtain adequate work assignments when she returned from maternity leave."[399] Thus, a similarly situated rule would not cover this scenario. Ayanna had no but-for argument: if he were a woman, he would still have been fired for taking leave.[400] This example demonstrates how but-for and similarly situated rules permit discriminators to evade liability by leveling down: applying the same harsh standards to all.[401] Only anticlassification rules provide any chance of success.

Anticlassification rules, however, run into their own limits. Consider *Campbell v. Bruce*, in which plaintiffs were two transgender women inmates in a men's prison.[402] The plaintiffs argued that the prison's showers, which featured privacy screens that shielded inmates' bodies from view below the waist, but not above, discriminated against them by failing to cover their "female breasts."[403] One plaintiff alleged "she was singled out for discriminatory treatment when she received a conduct report for using a blanket to cover the shower door."[404] The judge, an Obama appointee, acknowledged the problem: "Because plaintiffs have female breasts, they feel exposed in the showers in a way that their cisgender counterparts probably don't."[405] But the plaintiffs had no evidence the showers were designed "for the purpose of discriminating on account of plaintiffs' gender identity" or "with the intention of putting transgender women prisoners at risk or causing them humiliation or

requires long hours"). However, some judges do not see sexism even when it is staring them in the face. See supra note 145.

[399] *Ayanna*, 914 F. Supp. 2d at 56.

[400] Id. at 57 (observing that the applicable statute prohibits only sex discrimination, not discrimination on the basis of "caregiver status"). Notwithstanding the historical and social associations of women with caregiving, the court construed "caregiver status" as distinct from sex. In addition to his sex discrimination claim, Ayanna also brought a retaliation claim under the Family and Medical Leave Act, which survived the firm's motion for summary judgment. Id. at 56. The court thought the record suggested the partner who supervised Ayanna "may have disfavored him because [he] prioritized his family over his employment responsibilities." Id. at 56–57.

[401] Compare Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 231 (1964) (holding that a county could not close all schools to evade desegregation), with Palmer v. Thompson, 403 U.S. 217 (1971) (refusing to invalidate decision by city to close all public pools to evade desegregation).

[402] No. 17-cv-00775, 2019 WL 4758367, at *1 (W.D. Wis. Sept. 30, 2019).

[403] Id. at *10.

[404] Id.

[405] Id.

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distress."[406] Therefore, the court saw the plaintiffs' claim as one for disparate impact, and disparate impact claims are not available under the Equal Protection Clause.[407] Unlike *Nathan v. Great Lakes Water Authority*, the breast harassment case, or *Flores v. Virginia Department of Corrections*, the tampon contraband case, both decided after *Bostock*,[408] the court did not ask if "but for" their sex (whether sex assigned at birth or gender identity) the inmates would have been subjected to humiliation and distress.[409] Perhaps what differentiates the privacy screens in *Campbell* from the scanners in *Flores* was that the *Flores* court thought it unreasonable that a prison would choose a security scanner that registered false positives for tampons, which half the population may use at some point in their lives, while transgender women are a much smaller percentage of the population.[410] This reasoning is more about substantive, group-based patterns of subordination than formal equality, which would give no reason to distinguish between choices that harm transgender as opposed to cisgender women.

In general, similarly situated rules are underinclusive in that they may assist subordinated group members only to the extent that those subordinated group members are able and willing to adhere to traditional standards set by and for the dominant group.[411] An example is a law firm, like the one in *Ayanna*, in which women can make partner, but only if their personal circumstances resemble those of the ideal working men of the late twentieth century, who had no caretaking or other household responsibilities and were available to engage in work during almost all

[406] Id. (internal quotation omitted).

[407] Id.

[408] See supra Subsection II.A.2 (discussing *Nathan v. Great Lakes Water Authority*, 992 F.3d 557, 561–63 (6th Cir. 2021), and *Flores v. Virginia Department of Corrections*, No. 20-cv-00087, 2021 WL 668802, at *6 (W.D. Va. Feb. 22, 2021)).

[409] I can come up with any number of but-for arguments. But for their sexes assigned at birth, these inmates would likely not have been in the men's prison. But for their gender identities, they would likely not have had bodies that were not sufficiently concealed by the prison's shower privacy screens.

[410] See supra note 259 (discussing the reasoning of *Flores*, 2021 WL 668802, at *5 n.6, that menstruation "is a normal physiological cycle that women, in their reproductive years, experience approximately one quarter of the time").

[411] See, e.g., Catharine A. MacKinnon & Kimberlé W. Crenshaw, Reconstituting the Future: An Equality Amendment, 129 Yale L.J.F. 343, 351 (2019) ("Requiring the sexes to be 'similarly situated' before a discrimination claim can be brought also serves to evade the reality that social discrimination often prevents women from being situated similarly to men in the first place.").

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their waking hours.[412] Similarly situated rules may fail to register mistreatment of disadvantaged group members as discrimination when that mistreatment is based on unique aspects of their experiences, such as pregnancy, that make it hard to draw comparisons.[413] With respect to transgender rights, protection of transgender men and women only to the extent that they adhere to conventional expectations for male or female identity leaves out those who experience gender outside the binary or in other nontraditional ways.[414] These limitations are real.

Yet most landmark civil rights litigation has historically involved a vanguard of "but for" plaintiffs—just like the mainstream "but for" a single marginalized characteristic.[415] Formal tests of discrimination are often criticized not just for being limited, but also for reinforcing dynamics of assimilation, making it more difficult to pursue radical or structural reform.[416] But the path of social change is not linear or predictable, let alone determined by legal arguments in particular cases on behalf of, for example, transgender boys who want to be treated like the other boys at school. Sometimes assimilative legal arguments can open space for more radical change in the longer term by allowing people to live *somewhat* unconventional lives, slowly expanding the aperture of convention, and allowing change to proceed incrementally.[417]

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[412] Cf. Joan C. Williams, Keynote Address: Want Gender Equality? Die Childless at Thirty, 27 Women's Rts. L. Rep. 3, 4 (2006) (describing the "ideal worker template framed around the lives of men, starting to work in early adulthood and working, full-time and full force, for forty years without a break").

[413] See, e.g., Bartlett, supra note 247, at 1555 (calling this "the uniqueness trap"); Goldberg, supra note 110, at 761–64 (discussing Title VII cases on pregnancy and breastfeeding).

[414] See Clarke, supra note 177, at 1880–87 (discussing the problems with legal arguments that posit "that individual's immutable, binary, medically verified, and socially accepted gender identity" is their sex for all purposes); id. at 1881 n.336 (collecting legal scholarship levying similar critiques).

[415] This turn of phrase is Devon Carbado's. See, e.g., Devon W. Carbado, Black Rights, Gay Rights, Civil Rights, 47 UCLA L. Rev. 1467, 1506 (2000) (discussing how legal challenges to the military's Don't Ask Don't Tell Policy relied on a "strategy . . . to present a 'but for' gay man—a man, who, but for his sexual orientation, was just like everybody else, that is, just like every other white heterosexual person").

[416] See, e.g., Libby Adler, Gay Priori 58 (2018) ("Once you have been treated the same, just as you asked, what do you have left to complain about?").

[417] See, e.g., Douglas NeJaime, Differentiating Assimilation, 75 Stud. L., Pol. & Soc'y 1, 1–2 (2018) (arguing that "claims that appeared assimilationist—demanding inclusion in marriage and parenthood by arguing that same-sex couples are similarly situated to their different-sex counterparts—subtly challenged and reshaped legal norms governing parenthood, including marital parenthood"); see also Clarke, supra note 182, at 903

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2. Intersectionality

Another way in which all three types of formal rules are often underinclusive is the intersectionality problem: discrimination at the intersections of dynamics like sexism and racism, which takes unique forms not reducible to one dynamic alone.[418] Consider *Lam v. University of Hawai'i*,[419] a case regarded as the high-water mark of intersectionality jurisprudence, which demonstrates that only anticlassification tests have the potential to reach intersectional forms of discrimination, and only when discriminators are explicit about their prejudices. In that case, the district court dismissed an Asian woman's employment discrimination claim, reasoning that the defendant had treated an Asian man more favorably, disproving the possibility of race discrimination, and a White woman more favorably, disproving the possibility of sex discrimination.[420] The Ninth Circuit reversed, criticizing the district court for its formalistic understanding of "racism and sexism as separate and distinct elements amenable to almost mathematical treatment."[421] There was direct evidence in that case that decision-makers harbored biases against Asian people and women—one had gone so far as to say he thought the position should be filled with a man, to cater to what he perceived to be "Japanese cultural prejudices."[422] Here we have an overt statement of intent to classify; but in many cases, plaintiffs find no such statements to point to, and even when they do, courts explain them away.[423]

There is a way in which *Bostock*'s logic is intersectional, recognizing the entanglement of biases based on sex and opposition to gay, lesbian, and transgender identities. However, but-for and similarly situated tests more often stand in the way of intersectional claims.[424] Discrimination

(explaining how the legalization of same-sex marriage made possible legal recognition of nonbinary gender).

[418] See, e.g., Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 140.

[419] 40 F.3d 1551, 1561 (9th Cir. 1994).

[420] Id.

[421] Id.

[422] Id. at 1560 ("There was also evidence that another white male professor had stated that, given Japanese cultural prejudices, the PALS director should be male.").

[423] See supra note 145.

[424] See, e.g., Goldberg, supra note 110, at 764–66 (collecting examples). One post-*Bostock* case touted the validity of claims of "[i]ntersectional discrimination." Frappied v. Affinity Gaming Black Hawk, 966 F.3d 1038, 1049 (10th Cir. 2020). That case overturned a Tenth

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cases were always hard to win due to proof problems,[425] and are even harder for plaintiffs alleging discrimination on more than one ground.[426] Formal tests don't often help. But neither have courts been inclined to adopt more substantive tests, notwithstanding decades of scholarship on the topic.[427]

B. Overinclusivity

In addition to being underinclusive, sex discrimination formalism is also overinclusive in important ways—picking up as discrimination some social phenomena that strike many people as nondiscriminatory—most notably gender-conscious efforts to remedy inequality and employment decisions based on sexual attraction or lack thereof. These are reasons not to insist on any single theory of discrimination. They are not reasons to reject formal equality outright or in every context. The demise of affirmative action is the result of changes to the composition of the Supreme Court and a broader ideological struggle over the meaning of equal protection, not just formalism. And despite the ascendance of formalism in other sex discrimination contexts, courts continue to refuse to extend formal equality to every manifestation of sexual attraction in the workplace because it strikes them as unfair.

Circuit precedent requiring—in a disparate impact case alleging discrimination on grounds of both age and sex—evidence that the entire subclass of older men received preferential treatment. Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1204 (10th Cir. 1997). *Bostock* may have helped the Tenth Circuit to see the error of its ways, but this "entire subclass" requirement was just as incorrect an interpretation of disparate impact law before *Bostock* as it is after. See, e.g., Connecticut v. Teal, 457 U.S. 440, 455 (1982) (holding, in a disparate impact case, that "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group"). The *Frappied* court affirmed the dismissal of the plaintiffs' "Title VII sex-plus-age disparate treatment claim" for lack of evidence that men over forty received preferential treatment—demonstrating the trouble with similarly-situated rules. 966 F.3d at 1053.

[425] See supra note 61.

[426] See, e.g., Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger & Scott R. Eliason, Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation, 45 Law & Soc'y Rev. 991, 992 (2011) (finding that intersectional claimants fare worse in litigation).

[427] Serena Mayeri, Intersectionality and Title VII: A Brief (Pre-)history, 95 B.U. L. Rev. 713, 730–31 (2015) ("Twenty years later, judicial opinions containing thoughtful analysis of intersectional claims remain few and far between; legal theory and scholarship on intersectionality continue to vastly outpace actual Title VII doctrine.").

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1. Remedial Projects?

One reason progressives resist formal equality and insist on substantive tests is to preserve remedial programs for women, such as affirmative action.[428] To be sure, formal tests of discrimination lend themselves to challenges to remedial programs. The Supreme Court's *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*) decision invalidated university affirmative action programs at Harvard and the University of North Carolina on equal protection grounds, reasoning that the programs classified students based on race and could not survive strict scrutiny.[429] Justice Gorsuch concurred to argue that, under Title VI of the Civil Rights Act, a but-for test would also invalidate those universities' affirmative action plans.[430] Questions remain about the extent to which affirmative action is permitted in other contexts.[431] But the resolution of those questions is unlikely to hinge on whether courts adopt formalistic or substantive definitions of discrimination in areas such as LGBTQ+ rights or harassment law.

With respect to the Equal Protection Clause, most antisubordination theorists would prefer a contextual definition of discrimination that would not subject remedial efforts like affirmative action to strict scrutiny.[432] But the Supreme Court has repeatedly foreclosed that argument in the

[428] See, e.g., Krishnamurthi, supra note 20, at 19–20.

[429] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2154 (2023).

[430] That concurrence reasoned that Title VI of the Civil Rights Act independently bars race-based affirmative action. Id. at 2208 (Gorsuch, J., concurring). It argued that *Bostock*'s causal definition of discrimination applies to Title VI, and therefore schools are not permitted to award a "'plus' to applicants from certain racial groups but not others," id., when those awards "might tip an applicant into [an] admitted class," id. (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 170 (1st Cir. 2020)).

[431] *SFFA* did not even resolve whether consideration of race is prohibited in every university admissions context. See 143 S. Ct. at 2176 ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."); see also id. at 2166 n.4 (holding that the opinion does not reach military academies because they may have "potentially distinct interests").

[432] See, e.g., Haney-López, supra note 2, at 1876 (advocating a "contextual intent" test or another new approach that would not consider race-based remedial action and racial discrimination to be equivalent); Julie Suk, Discrimination and Affirmative Action, *in* Routledge Handbook of the Ethics of Discrimination 394, 400, 404 (Kasper Lippert-Rasmussen ed., 2017) (arguing that the harm of discrimination is in "its creation of oligarchic political, economic, and social institutions" and "[t]he unfairness of affirmative action should be understood as morally analogous to takings, not to discrimination").

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context of race,[433] and even judges who were willing to uphold affirmative action plans prior to the *SFFA* decision refused to see it any other way.[434] In the equal protection context, the trigger for strict scrutiny is classification; a White plaintiff challenging an affirmative action plan does not have to demonstrate that but for the plan, or but for the fact that she was White, she would have gained admission.[435] Nor is that plaintiff asked to point to a similarly situated minority group member who was admitted.[436] The Court conceives of the harm, at least for purposes of standing, to be "the inability to compete on an equal footing."[437] One

[433] See, e.g., *SFFA*, 143 S. Ct. at 2162 (summarizing precedent as holding that strict scrutiny applies to "racial classification," including when the purpose of classification is "remediating specific, identified instances of past discrimination that violated the Constitution or a statute"); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 307–08 (2013) ("It is . . . irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny . . . ."); Grutter v. Bollinger, 539 U.S. 306, 326–30 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995))); see also Sonja Starr, The Magnet-School Wars and the Future of Colorblindness, 76 Stan. L. Rev. (forthcoming 2024) (manuscript at 11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4354321 [https://perma.cc/XK9V-422M] ("Means-colorblindness is now black-letter law: all racial classifications in government's treatment of individuals are subject to strict scrutiny. The Court is unlikely to abandon that view anytime soon . . . .").

[434] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 189–90 (D. Mass. 2019) (Obama appointee rejecting the argument that affirmative action is not a racial classification subject to strict scrutiny on the ground that "the Supreme Court has consistently used strict scrutiny when reviewing school admissions programs that consider race"), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023).

[435] Ryan H. Nelson, Injury in Fiction, 66 Vand. L. Rev. En Banc 153, 162 (2013) (criticizing the *Fisher* litigation for this reason); see Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.").

[436] In *SFFA*, the Court noted statistical evidence suggesting that Asian American students who were "similarly situated" to Black students in terms of their academic records had lower chances of admission than Black applicants to Harvard. 143 S. Ct. at 2156 n.1. But this was only in response to a dissent—a footnote to the factual assertion that the University's "review committee may also consider the applicant's race." Id. at 2156.

[437] *Ne. Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 666. Because plaintiffs in these cases generally seek injunctive relief in terms ending the offending policy rather than individualized damages, courts rarely ask but-for questions. Cf. Texas v. Lesage, 528 U.S. 18, 22 (1999) (per curiam) (remanding for consideration of injunctive relief in reverse discrimination case in which White plaintiff wouldn't have gotten into the program even absent affirmative action).

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might explain this rule as reflecting not formalism but a substantive commitment to a view of equality as evaluation based on a particular type of individual merit.[438] Perhaps formalism, in the form of but-for or similarly situated rules that required reverse discrimination plaintiffs to do more than just point to a policy, would shut down challenges.[439] But the current Supreme Court isn't likely to adopt any such rules.[440]

Cases on gender-based affirmative action under the Equal Protection Clause are no different, at least with respect to the classification as the trigger.[441] It was of no matter that California designed its corporate board gender quota law so as to allow companies to comply by adding board seats rather than displacing men—a federal court concluded that *shareholders* had standing to challenge the law's gender classification.[442] The degree of scrutiny these programs are held to, however, might matter.[443] In the 1970s, the Court upheld a handful of laws that relied on sex classifications for remedial purposes, applying an inchoate contextual inquiry that asked whether those policies advanced antiquated gender roles or aimed to compensate for discrimination against women.[444] In

[438] See, e.g., Louis Michael Seidman, The Ratchet Wreck: Equality's Leveling Down Problem, 110 Ky. L.J. 59, 90 (2022) ("The rule makes more sense, though, if one thinks of equality as an independent, non-instrumental good.").

[439] But see Regents of Univ. of California v. Bakke, 438 U.S. 265, 320 (1978) (Powell, J.) (observing that school failed to carry burden to prove "that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted").

[440] Cf. *SFFA*, 143 S. Ct. at 2157–59 (2023) (rejecting other standing arguments).

[441] See, e.g., Vitolo v. Guzman, 999 F.3d 353, 359 (6th Cir. 2021) (reasoning that "[i]t does not matter that the plaintiffs might not otherwise qualify for priority consideration" with respect to both race and sex discrimination challenges to an affirmative action policy).

[442] Meland v. Weber, 2 F.4th 838, 845 (9th Cir. 2021) ("[I]f Meland's allegations that SB 826 'requires or encourages' him to discriminate on the basis of sex are plausible, then he has suffered a concrete personal injury sufficient to confer Article III standing.").

[443] A federal court applying intermediate scrutiny recently denied a preliminary injunction against a California law mandating gender diversity on corporate boards, Meland v. Weber, No. 19-cv-02288, 2021 WL 6118651, at *4–8 (E.D. Cal. Dec. 27, 2021), while a California state court, applying strict scrutiny, struck down the same law after trial. Verdict, Crest v. Padilla, No. 19 STCV 27561 (Cal. Super. May 13, 2022).

[444] Compare Califano v. Webster, 430 U.S. 313, 317, 320 (1977) (upholding Social Security Act provision giving women who reached the age of sixty-two before 1975 more benefits than men because the policy served the "important governmental objective" of "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women"), Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) (upholding naval policy protecting female, but not male officers from mandatory discharge for want of promotion on the ground that women were more likely to be passed over for promotion because they were restricted from combat and sea duty), and Kahn v. Shevin, 416 U.S. 351, 353, 355 (1974) (upholding $500 Florida property tax exemption for widows because

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1996, the Court suggested such policies would not fail intermediate scrutiny, a lower standard than strict scrutiny.[445] But courts treat the level of scrutiny as independent from the test used to decide whether any heightened scrutiny is triggered. In the context of gender, there are good reasons to be wary of any test that makes that trigger less sensitive. There remain gender-based policies that purport to be remedial but do little more than reinforce stereotypes, for example, a school that refused to allow boys to join the dance team—policies rightfully subjected to heightened scrutiny.[446]

Title VII affirmative action is a different story, but it's likely to have the same ending. The Supreme Court has characterized affirmative action plans in the Title VII context as "a nondiscriminatory rationale" for employment actions,[447] consistent with the views of scholars who prefer a substantive definition of discrimination. But should the Supreme Court revisit Title VII affirmative action, it seems unlikely to survive. *United*

"[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs," and therefore "spousal loss" imposed a "disproportionately heavy burden" on wives), with Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982) (striking down a policy excluding men from nursing school because, "[r]ather than compensate for discriminatory barriers faced by women, [the] policy . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job").

[445] Compare United States v. Virginia, 518 U.S. 515, 533–34 (1996) ("Sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, to advance full development of the talent and capacities of our Nation's people." (citations and quotation marks omitted)), with City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) (holding that, under strict scrutiny, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota"). See also Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) (pointing out "the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves").

[446] See, e.g., Bao Xiong ex rel. D.M. v. Minn. State High Sch. League, 917 F.3d 994, 1001 (8th Cir. 2019) (concluding that boys seeking to join dance team were likely to prevail on merits of claim that school violated Equal Protection Clause).

[447] Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987). In interpreting Title VII, the Supreme Court has upheld affirmative action plans designed to address a "manifest imbalance" in race or sex in "traditionally segregated job categories," so long as those plans do not "unduly infring[e]" the interests of other employees. Id. at 631–32 (quoting United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979)). The plans must also be temporary. Id. at 625. The Court has not spoken on whether other purposes, such as diversity, might justify affirmative action under Title VII. See Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996) (holding that diversity cannot justify an affirmative action plan under Title VII).

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Steelworkers v. Weber, the 1979 Supreme Court decision that first interpreted Title VII to allow voluntary affirmative action, relied in part on arguments about the "spirit" of the statute rather than its text.[448] Justice Gorsuch's concurrence in *SFFA*, while it did not mention *Weber*, made clear that he regards *Weber*'s reasoning to be incorrect.[449] While that concurrence attracted only one other signatory, if a Title VII case were to arise, Justice Gorsuch's view is likely to find more adherents on the Court, because *Weber*'s purposive orientation toward statutory interpretation has long been out of favor,[450] and to the extent that Title VII affirmative action protects group rather than individual rights,[451] it has always been an anomaly.[452] Perhaps it will be some time before a case challenging affirmative action under Title VII reaches the Supreme Court, because employers are loathe to admit that they made any employment decisions on the basis of diversity considerations, and majority-group plaintiffs have trouble demonstrating but-for causation or finding similarly situated comparators.[453] On the other hand, some judges are already applying

[448] See *Weber*, 443 U.S. at 194 ("'[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers,' and, thus, the prohibition against racial discrimination in [Title VII] must be read against the background of the legislative history of Title VII and the historical context from which the Act arose." (citation omitted)).

[449] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2209 (2023) (Gorsuch, J., concurring) (arguing that Title VI and Title VII should be read the same way, and that, in accord with *Bostock*, Title VI does not permit institutions to use race as a causal factor in admissions decisions).

[450] See, e.g., Manning, supra note 384, at 23.

[451] There are individualistic justifications for race-conscious remedial programs. See, e.g., Benjamin Eidelson, Respect, Individualism, and Colorblindness, 129 Yale L.J. 1600, 1607 (2020) (arguing that "in a society characterized by racial bias, attending to race will often be *necessary* to treating a person respectfully as an individual—because race will mediate evidential connections between her record of choices or achievements and what the Court calls 'her own essential qualities'"); Noah D. Zatz, Special Treatment Everywhere, Special Treatment Nowhere, 95 B.U. L. Rev. 1155, 1179 (2015) (offering a theory of affirmative action that uses "race or sex as a partial proxy for individual harm").

[452] See, e.g., Connecticut v. Teal, 457 U.S. 440, 453–54 (1982) ("The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee."); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708–09 (1978) ("The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.' The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." (citation omitted)).

[453] See, e.g., Tomaszewski v. City of Philadelphia, 460 F. Supp. 3d 577, 594 (E.D. Pa. 2020) (decision by Reagan appointee denying summary judgment because a reverse discrimination

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something more like anticlassification rules in this context, allowing claims to go forward.[454]

Programs like affirmative action that are perceived as allocating zero-sum benefits based on race or gender will inevitably be difficult to justify to conservative courts.[455] Abandoning formal equality in the sex discrimination context will not preserve long-shot or long-term arguments for affirmative action.

2. Sexual Attraction?

Another context in which formal definitions of discrimination may sweep too broadly is by categorizing all actions motivated by sexual attraction, or lack thereof, as discriminatory. It is not apparent why decisions based on sexual desire would offend the principles behind antidiscrimination law,[456] although they may very well offend the principles behind rules against nepotism or fraternization.[457] Vicki

plaintiff "produced no evidence connecting the City's diversity initiative, or any purported racial or gender preferences, to the [defendant's] recommendation not to hire plaintiff").

[454] See, e.g., Powers v. Broken Hill Proprietary (USA), Inc., No. 21-cv-01334, 2022 WL 17097437, at *8–9 (S.D. Tex. Nov. 21, 2022) (decision by George H.W. Bush appointee denying summary judgment in Title VII case in which an employer's diversity program included an aspirational goal of increasing female employees in the company by 3% and management was instructed that bonus pay was in part dependent on achieving gender balance in hiring and departures, which the court characterized as "direct evidence of discriminatory animus"); Boyd v. Medtronic, PLC, No. 17-cv-01588, 2019 WL 2448567, at *7 (N.D. Ala. June 12, 2019) (decision by George W. Bush appointee denying summary judgment on a man's claim that his gender was a motivating factor in his termination because "a reasonable jury could infer a connection between [the male plaintiff's] termination and [the employer's] goal of reaching fifty-percent female representation in management").

[455] Another controversial question is whether facially neutral policies or decisions that were motivated by goals like integration or diversity are discriminatory. One way to understand *Ricci v. DeStefano*, 557 U.S. 557 (2009), in which the court held that it was disparate treatment for a city to throw out a promotional exam for all candidates because the results of that exam would have favored White and Hispanic over Black candidates, is that the Supreme Court applied a "reverse the groups" test, and thought that, had Black candidates succeeded in disproportionate numbers on the exam, it would not have been thrown out. But this is not the best way to understand *Ricci*. See, e.g., Siegel, supra note 126, at 1325–32 (explaining *Ricci* as about avoiding racial divisiveness and balkanization). In any event, it seems unlikely that any developments in sex discrimination law are going to influence coming race-neutral-but-conscious controversies. Cf. Starr, supra note 433, at 11–20 (discussing the complex landscape of legal doctrine applicable to those controversies).

[456] See, e.g., Clarke, supra note 96, at 595–616 (arguing that sexual desire should play no role in sexual harassment doctrine).

[457] Mary Anne Case, A Few Words in Favor of Cultivating an Incest Taboo in the Workplace, 33 Vt. L. Rev. 551, 555 (2009). For an argument that sexual relationships between

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Schultz has criticized interpretations of sexual harassment law as ferreting out inappropriate desire, rather than discrimination, arguing that the American "commitment to workplace asexuality is" not just a result of puritanism, but "even more directly, a legacy of our historic commitment to a certain conception of organizational rationality" that must purge intimacy from the workplace in the interests of efficiency.[458] Schultz argues that the result has been to displace attention from structural problems such as gendered workplace caste systems and to contribute to a dehumanized view of the workplace "as a sterile zone in which workers suspend all their human attributes," not just sexuality but also disability, aging, caregiving, and community.[459]

None of this is important to formal tests. Formal tests, if taken seriously, would pick up two types of actions based in sexual desire, "paramour preference" and "paramour aversion," that courts usually ignore. In the classic paramour preference case, a straight male supervisor shows favoritism for a female employee on account of his sexual attraction to her, to the disadvantage of her male coworker, who brings suit.[460] In the paramour aversion cases, a straight married male supervisor fires a woman subordinate to whom he is attracted, to satiate his wife, his family, or his conscience.[461] In cases involving gay or straight

students and teachers run afoul of pedagogical values, see Amia Srinivasan, Sex as a Pedagogical Failure, 129 Yale L.J. 1100 (2020).

[458] Vicki Schultz, The Sanitized Workplace, 112 Yale L.J. 2061, 2063–64 (2003).

[459] Id. at 2069.

[460] See, e.g., Maner v. Dignity Health, 9 F.4th 1114, 1118–19 (9th Cir. 2021) (rejecting the "paramour preference" theory after *Bostock* and noting its holding is consistent with the "consensus view" among courts). There are many permutations on this scenario—all of them still losers after *Bostock*. See, e.g., Friel v. Mnuchin, No. 20-2714, 2021 WL 6124314, at *1 (3d Cir. Dec. 28, 2021) (straight man fired for consensual romantic relationship with married female supervisor); Whetstine v. Woods Servs., No. 21-cv-02289, 2022 WL 221526, at *5 (E.D. Pa. Jan. 24, 2022) (woman supervisor took adverse actions against another woman due to jealousy of her relationship with a male co-employee); Hubbard v. Evolution Wireless, Inc., No. 19-cv-00234, 2021 WL 6333363, at *1, *3 (E.D. Tenn. Dec. 14, 2021) (bisexual male plaintiff alleged heterosexual male supervisor gave preferential treatment to female employees due to romantic relationships).

[461] Nelson v. Knight, 834 N.W.2d 64, 65 (Iowa 2013) (holding that a "male employer [may] terminate a long-time female employee because the employer's wife, due to no fault of the employee, is concerned about the nature of the relationship between the employer and the employee"); Tenge v. Phillips Mod. Ag Co., 446 F.3d 903, 907, 910 (8th Cir. 2006) (termination of woman who engaged in sexually suggestive behavior that threatened supervisor's wife was not sex discrimination); Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 904 (11th Cir. 1990) (woman who was object of boss's son's attraction fired not because of sex discrimination, but rather, because the boss's "motives and intentions were

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supervisors, the choice of paramour is, at least in part, dependent on sex, just like in the classic sexual harassment scenario.[462]

But courts have never seen it that way. Applying the but-for test in a case involving a female paramour saved from a round of layoffs, the Ninth Circuit concluded that "[t]he motive behind the adverse employment action is the supervisor's special relationship with the paramour, not any protected characteristics of the disfavored employees" and "[c]hanging the sex of the complaining employees would not yield a different choice by the employer because the identity of the favored paramour would remain the same."[463] But in the classic paramour preference case, the disadvantaged male employee argues that, but for his sex, he would have been eligible for his supervisor's affections, and that, as a man, he lost a chance to compete for preferential treatment.[464] If an employer had an open policy stating that one worker would receive a spot entitling her to special protection against layoffs, but only women would receive consideration for that spot, that would plainly be discrimination. This is true even if no man in the office would have won the spot under a gender-neutral rule.[465] It is true even if factors other than sex were determinative in the selection of the favored employee.[466] But courts do not see workplace romances as sex discrimination unless the male supervisor has a series of relationships with women in the office, all of whom receive preferential treatment.[467]

to protect his son . . . from himself, if not from the advances of an adventurous woman, to quiet his daughter-in-law, and to preserve whatever he could of a conventional family unit environment for his grandchild").

[462] See supra notes 95–96 and accompanying text (describing the but-for test in harassment law).

[463] *Maner*, 9 F.4th at 1122 ("To determine whether an employer discriminated based on sex in violation of Title VII, we ask 'if changing the employee's sex would have yielded a different choice by the employer.' In the 'paramour preference' scenario, the answer is no." (citation omitted)).

[464] One court rejected the theory even though the male plaintiff in question was bisexual. *Hubbard*, 2021 WL 6333363, at *10.

[465] Under Title VII's § 703(m), if a plaintiff demonstrates sex was even a single motivating factor for an adverse employment decision, liability attaches. If the plaintiff demonstrates "motivating factor" liability, the defendant may avoid most Title VII remedies if it can show it would have made the same decision even in the absence of discrimination. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g). This is only a partial defense, however. See also supra note 435 (discussing lenient rules for standing in affirmative action cases).

[466] There can be multiple but-for causes. See, e.g., Verstein, supra note 56, at 1137 n.112. For example, a car crash may have occurred because two drivers both ignored stop signs.

[467] See, e.g., Miller v. Dep't of Corr., 115 P.3d 77, 90 (Cal. 2005) ("[A]n employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that

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In a paramour aversion case, the but-for argument is easier: the female plaintiff argues that, but for her sex, she would not have been the object of her straight male boss's affections. An anticlassification test might cover these scenarios as well, insofar as supervisors often admit that their desire was premised on the target's sex.[468] In the words of *Bostock*, sexual desire, at least for straight and gay people, is "inextricably bound up" with sex.[469] It doesn't matter if the supervisor's ultimate goal in firing the attractive employee was to avoid the temptation of an extramarital affair, because "to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex."[470] To be sure, attraction occurs for many personal and idiosyncratic reasons beyond just the target's sex.[471] But in the early years of sexual harassment law, defendants often argued that sexual harassment was personal and had no relationship to the victim's sex for this very same reason—an argument the doctrine overcame.[472] The only thing that differentiates a paramour aversion case from a classic sexual harassment scenario is that there were no *unwelcome* advances. But unwelcomeness on the part of the victim has nothing to do with whether the employer acted because of sex in firing her.[473]

The logical application of formal tests in the paramour context doesn't seem consistent with the purposes of discrimination law. It is perhaps for

widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment."). The same goes in paramour aversion cases. Sztroin v. PennWest Indus. Truck, LLC, No. 17-cv-00665, 2017 WL 4355575, at *4 (W.D. Pa. Oct. 2, 2017) (holding that "jealousy is not a lawful explanation for termination under Title VII where the spouse was not jealous of a particular plaintiff but rather was jealous of an entire gender").

[468] Appellees' Brief at 1, 10–11, 44, Nelson v. Knight, 834 N.W.2d 64 (Iowa 2013) (No. 11-1857) (discussing male supervisor's professed attraction to female subordinate on account of "her breasts" and "body").

[469] Bostock v. Clayton County, 140 S. Ct. 1731, 1742 (2020).

[470] Id.

[471] Whether a similarly situated test would apply would depend on how the court framed the relevant similarities: Is the comparison strictly about job performance? Or does having a flirtatious or sexual relationship with a superior render the paramour not similarly situated to other employees for purposes of, for example, layoffs?

[472] Catharine A. MacKinnon, Sexual Harassment: Its First Decade in Court (1986), *in* Feminism Unmodified: Discourses on Life and Law 103, 106–08 (1987) (discussing how harassment that is personal may also be because of sex).

[473] Unwelcomeness, or subjective severity or pervasiveness, goes to the harm of harassment in terms of altering a victim's "conditions . . . of employment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting 42 U.S.C. § 2000e-2(a)(1)). But in paramour cases, harm is usually not at issue, because someone was fired, not hired, or denied a promotion.

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this reason that courts refuse to follow formal tests to overinclusive ends in these cases.

C. Indeterminacy, Incoherence, and Masking

By this point in the Article, I have no doubt that you will have found yourself in disagreement with the way this author, other scholars, or judges have gone about applying the various formal tests of discrimination to different scenarios. You might imagine reasonable arguments for extending formal rules to cover all the scenarios discussed in this Article.[474] I do not pretend that formal definitions of discrimination are determinate: in other words, that they will supply reliably predictable and uncontroversial answers in every subset of discrimination cases. Nonetheless, the choice to take one or another formal test seriously can open up or close down doctrinal possibilities,[475] and judges regard formal tests as enhancing the legitimacy of their decisions and within their institutional competence to apply.[476] I agree with those critics who argue that formal tests are often indeterminate, and even, in some cases, incoherent. Worse yet, on account of this indeterminacy, judges may resolve difficult questions based on empirical and normative premises they may not state openly or do not even realize they are relying on. Thus, scholars have criticized formal tests for leading to less candid, transparent, and accountable judicial decision-making.[477] These criticisms have validity, to different degrees and with different implications, with respect to each of the formal tests.

Bostock's but-for inquiry is particularly susceptible to the charge of indeterminacy and incoherence.[478] Even legal philosophers who agree

[474] See text accompanying supra note 1. For arguments extending causation rules more broadly, see generally Eyer, supra note 20; Zatz, supra note 251.

[475] See supra Section II.A.

[476] See supra Section II.B.

[477] See, e.g., Dembroff et al., supra note 85, at 12 ("Precisely what the courts must decide, then, is which of the limits, expectations, norms, and roles imposed on the basis of sex classification ought to be tolerated and which ought to be changed. . . . [W]e ought to be honest that this question—and not a metaphysical question about causality—is what we fundamentally are debating in these cases."); Ford, supra note 5, at 1414–15 ("Greater honesty about the limitations of civil rights laws might help convince a skeptical public of the need for other egalitarian policies."); Post, supra note 34, at 32–36 (arguing in favor of a sociological approach that would invite courts "explicitly to state and defend the grounds for [their] conclusions" to "facilitate[] public review and critique" so that judges are "accountable for their actual judgments").

[478] See, e.g., Dembroff et al., supra note 85, at 5–8.

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with *Bostock*'s ultimate outcome cannot agree about whether the majority or the dissent was correct about how to apply its counterfactual inquiry, as an abstract matter.[479] However, there are any number of arguments about which side is correct based on considerations such as precedent, social experience, and values—submerged premises of Justice Gorsuch's opinion.[480] Moreover, as critics have pointed out, the but-for method of detecting discrimination is flawed because it assumes a variable like sex can be manipulated while holding all other things constant.[481] But "[s]ex features cannot be isolated from their social meanings."[482] Take, for example, a paramour aversion case like *Nelson v. Knight*, in which a married male dentist fired a female dental assistant, twenty years his junior, on the advice of his pastor that his attraction to her was destroying his marriage.[483] What would have happened if the attractive assistant, Melissa Nelson, had been a man named Melvin Nelson instead? Would we have to hold everything constant and assume that the male dentist, Dr.

[479] Compare Berman & Krishnamurthi, supra note 60, at 101–07, with Koppelman, supra note 376, at 96–110. The argument is too intricate to be usefully summarized here, but Koppelman concludes: "Perhaps our disagreement simply displays the deepest flaw of the new textualism: that reading the words of a statute without regard to context yields deep indeterminacy, and so betrays the promise to constrain judicial discretion." Koppelman, supra note 376, at 113.

[480] See, e.g., Eskridge et al., supra note 367, at 1559 (explaining how the *Bostock* majority addresses the problem of the indeterminacy of the but-for comparison by invoking a hypothetical sex-stereotyping scenario involving two characters, masculine Hannah and feminine Bob, who are both protected against discrimination, a result that seems obvious only because of the antistereotyping principle from the Supreme Court's decision in *Price Waterhouse*); Franklin, supra note 24, at 184–95 (explaining how resolution of textualist controversies in *Bostock* were determined by common-sense understandings that LGBTQ+ people violate gender norms as well as precedents such as those recognizing sex stereotyping and same-sex harassment as forms of sex discrimination).

[481] Dembroff et al., supra note 85, at 6 ("Anytime we imagine changing *just* the 'trait' of sex (we assume they imagine the 'trait' of sex consists in a person's reproductive sex features, e.g., changing a penis to a vagina), but holding constant the complained-of trait (e.g., 'wearing a dress' or 'presumed sexual attractions to males'), we are *necessarily* changing the meaning of the trait in light of the sex features (now, for example, the person is gender *conforming* with respect to sexuality and dress)."); see also Kimberly Yuracko, Gender Nonconformity and the Law 31, 33 (2016) (inquiries that ask whether "a woman [is] being penalized for possessing a trait that a man is not penalized for possessing, and vice versa," become "a game of indeterminate nominalism whose outcome depends on how one names the relevant trait at issue and frames the cross-sex comparison"). For illustrative examples in the context of race, see Banks, supra note 6, at 16–17.

[482] Dembroff et al., supra note 85, at 6.

[483] 834 N.W.2d 64, 66 (Iowa 2013); Mary Sanchez, Another View: Iowa Court Shows that Equality Between the Sexes Really Isn't, Des Moines Register, Jan. 2, 2013, 2013 WLNR 93954.

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Knight, would still have been attracted to her, now him? Would Mrs. Knight have seen Melvin Nelson as more of a threat to her marriage because it would have led her to suspect her husband was gay?[484] Or must we hold constant the fact that Dr. Knight was straight,[485] in which case Mrs. Knight might have seen her husband's flirtatious texts to Melvin as harmless, nonthreatening homosocial banter? It seems impossible to resolve these questions with anything approaching objectivity, because how a counterfactual is formulated is "a conceptual judgment call with normative implications."[486]

When applied at the group level, or to specific practices, the problems with but-for causation multiply.[487] Take health care coverage exclusions. If a transgender man had been assigned male at birth, would he have developed secondary sex characteristics that are inconsistent with his gender identity? Would he now be seeking gender-affirming care? How can courts answer this question without making assumptions? If a transgender man had been assigned male at birth, many things about his life might be different. This is why courts don't ask these questions; they ask instead whether the health care coverage rules "cannot be stated without referencing sex."[488] Or take abortion. How would a state treat abortion if historically it had primarily been men, rather than women, who got pregnant and bore children? As Strauss explains, "there is simply no way for a court reliably to answer th[at] question."[489] Answers are to be found only in science fiction.[490] Moreover, in an important way, the

[484] At her deposition, Jeanne Knight testified that she would have been threatened if a man had "approache[d] [her] husband in a manner that is so personal and sexual" as Melissa Nelson did. Appellee's Brief at 44–45, *Nelson*, 834 N.W.2d 64 (No. 11-1857). But Nelson denied that she had done any such thing, and because *Nelson v. Knight* was decided at summary judgment, the court had to accept Nelson's version of the facts as true. 834 N.W.2d at 69 (characterizing the issue in the case as "whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss's spouse views the relationship between the boss and the employee as a threat to her marriage").

[485] Knight did not dispute that he was exclusively attracted to women, nor did he claim he would have been attracted to Nelson if she had been a man. Appellee's Brief at 42, *Nelson*, 834 N.W.2d 64 (No. 11-1857) (not disputing Nelson's claim that "since Dr. Knight is heterosexual, he would not have been attracted to her if she had not been a woman").

[486] Dembroff et al., supra note 85, at 6.

[487] See Strauss, supra note 103, at 971.

[488] See supra note 233.

[489] Strauss, supra note 103, at 993.

[490] Cf. I. Glenn Cohen, The Science, Fiction, and Science Fiction of Unsex Mothering, Harv. J. L. & Gender (2012), https://journals.law.harvard.edu/jlg/2012/02/unsex-mothering-respons

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question is meaningless: "[I]f we hypothesize a world in which human 'men' bear children, and human 'women' have never had the capacity to bear children—we are no longer speaking of 'women' and 'men' in a way in which we have ever used those terms."[491] This is why similarly situated inquiries might have more potential in this context, to the extent that there is room for legal argument about abortion.[492]

Anticlassification rules are somewhat more determinate, insofar as there is agreement on what counts as a sex classification. But the Supreme Court has never defined sex[493] or what counts as a "facial" classification.[494] Title VII and other such statutes lack anything approaching a comprehensive definition. There are no simple "objective" definitions for phenomena like sex, which are historically, culturally, and in every other way contextual phenomena involving interactive social processes that make meaning from real and imagined physical distinctions between people. This leads to indeterminacy—what traits must a decision-maker be blind to, and what traits may be considered?[495] How are anticlassification theories, designed to scrutinize the very fact of classification, supposed to work in situations in which sex distinctions are permitted, or unchallenged, like the restroom cases, and transgender litigants instead challenge the definitions of "men" and "women" that exclude them?[496] Does sex include ideas sometimes referred to as sex roles, gender norms, gender identity, and gender expression?[497] In such

es-i-glenn-cohen/ [https://perma.cc/E8BQ-GDFH] (discussing Marge Piercy, *Woman on the Edge of Time* (1976)).

[491] Strauss, supra note 103, at 994.

[492] See supra notes 305–11 and accompanying text.

[493] Nor has it defined many other traits that are forbidden grounds for discrimination, although it has on occasion identified other types of classifications that are sufficiently similar to count as "proxies." See, e.g., Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661, 689 (2010) (rejecting an organization's argument that it was not discriminating on the basis of sexual orientation status by excluding "anyone who engages in 'unrepentant homosexual conduct' ").

[494] MacKinnon & Crenshaw, supra note 411, at 349 n.19 ("There is no doctrinal test for what is facial and what is not.").

[495] Cf. Eidelson, supra note 20, at 837–38 ("[A] vital, neglected, and potentially difficult question for a textualist account of disparate-treatment law is whether each of the relevant determinable properties is to be understood in a coarse-grained or a spectral sense.").

[496] See Laura Lane Steele, Sex-Defining Laws and Equal Protection, 112 Calif. L. Rev. (forthcoming 2024) (manuscript at 5) (on file with author) (arguing that the Supreme Court's "canonical" sex discrimination cases "involved laws that treated 'women' as a group, differently from 'men' as a group," not how the state defines male and female).

[497] For an argument that it must, see Eskridge et al., supra note 367, at 1550–58.

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instances, courts must make judgments about factual circumstances and normative values; anticlassification rules do not give direct answers.

Similarly situated rules may work reasonably well in those few contexts where decisions are made based on "relatively determinate criteria," for example, "a garden-variety employment discrimination claim, such as a claim that an employer refuses to promote women employees even though it promotes men who have the same qualifications."[498] But what happens when there is cultural and political contestation over what makes things similar? Take, for example, public nudity laws. Courts have generally upheld laws that permit men, but not women, to expose their chests in public.[499] Until recently, many courts applied a similarly situated rule to hold that these laws need not be subjected to any special scrutiny.[500] These courts reframed the statute's prohibition on the exposure of female breasts at a higher level of generality. The Washington Supreme Court reasoned that the law "applies alike to men and women, requiring both to cover those parts of their bodies which are intimately associated with the procreation function."[501] Thus, women's breasts are not similarly situated to men's chests. This reasoning is not wrong, but it circumvents any critical reflection on what makes body parts "intimate." It explicitly invokes the culturally contingent taboo around exposure of female breasts.[502] It neglects feminist arguments that public nudity laws of this sort reinforce the view that women's breasts are inherently sexualized and their function defined by the male gaze, rather than by women themselves.[503] The Seventh

[498] Strauss, supra note 103, at 1009–10. But see Goldberg, supra note 130, at 735 (discussing how courts have ratcheted up the requirements for employment discrimination plaintiffs to prove that someone outside their protected class was treated preferentially).

[499] State v. Lilley, 204 A.3d 198, 206–07 (N.H. 2019) (collecting cases).

[500] Id. But see Tagami v. City of Chicago, 875 F.3d 375, 380 (7th Cir. 2017) (holding that nudity ordinance triggered intermediate scrutiny but survived it); Free the Nipple v. City of Fort Collins, 916 F.3d 792, 800, 805 (10th Cir. 2019) (rejecting the argument that "invidiousness" was a threshold requirement for an equal protection claim, and affirming a district court's judgment that an equal protection challenge to a nudity ordinance was likely to succeed on the merits).

[501] City of Seattle v. Buchanan, 584 P.2d 918, 921 (Wash. 1978).

[502] See, e.g., *Lilley*, 204 A.3d at 208 ("Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts." (quoting Eckl v. Davis, 124 Cal. Rptr. 685, 696 (Cal. App. 3d 1975))). Eroticization of female breasts is not universal; different cultures and time periods have eroticized various body parts. Marilyn Yalom, History of the Breast 3 (1997).

[503] Cf. Virginia F. Milstead, Forbidding Female Toplessness: Why "Real Difference" Jurisprudence Lacks "Support" and What Can Be Done About It, 36 U. Tol. L. Rev. 273, 297

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Circuit, by contrast, applied an anticlassification rule and held that arguments about the different social meanings of male and female breasts are better considered "as a justification for this classification rather than an argument that no sex-based classification [was] at work."[504] This controversy has parallels to the one over gender-affirming health care, in which some courts apply a similarly situated rule to conclude that patients seeking "cross-sex" treatments are not similarly situated to those seeking treatments consistent with their birth sexes.[505] Reframing of the care in question at a higher level of generality allows courts to evade heightened scrutiny of the medical rationales for dissimilar treatment of gender-affirming care.[506]

Indeed, nowhere is the indeterminacy of similarly situated rules more apparent than in transgender rights controversies. The Eleventh Circuit did not attempt to evade intermediate scrutiny by reframing the restroom policy at issue in *Adams v. School Board* as a nondiscriminatory bar on "cross-sex" restroom use.[507] Rather, that case turned on how "boy" or

(2005) ("When courts assume the sexual nature of women's breasts, without considering the multiple meanings breasts can take on and the instruments of significance they may be to women, courts deny women's ability to define the meanings of their own bodies.").

[504] *Tagami*, 875 F.3d at 380. The Seventh Circuit, however, did not strike down the statute; it held that the nudity law was justified by the City's "self-evident" interest in preserving "traditional moral norms," particularly with respect to "protect[ing] unwilling members of the public—especially children—from unwanted exposure to nudity." Id. at 379. In *Free the Nipple*, the district judge disagreed, reasoning that "[t]he female breast, after all, is one of the first things a child sees" and "children do not need to be protected from the naked female breast itself but from the negative social norms, expectations, and stereotypes associated with it." Free the Nipple v. City of Fort Collins, 237 F. Supp. 3d 1126, 1131 (D. Colo. 2017), *aff'd*, 916 F.3d 792 (10th Cir. 2019). Although the result in the Seventh Circuit was no different than the results in cases that did not apply any scrutiny, the intermediate scrutiny framework had the benefit of inviting debate over whether preserving traditional norms was an important interest. In her dissent, Judge Ilana Rovner, a George H.W. Bush appointee, argued that "historical norms are as likely to reflect longstanding biases as they are reasonable distinctions." *Tagami*, 875 F.3d at 383 (Rovner, J., dissenting). She pointed out that the ordinance reinforces the view that women's breasts are necessarily sexual rather than functional, "and imposes a burden of public modesty on women alone, with ramifications that likely extend beyond the public way." Id.

[505] See supra notes 238–41 and accompanying text.

[506] See supra notes 242–44 and accompanying text.

[507] Compare Kasper ex rel. Adams v. Sch. Bd., 57 F.4th 791, 801, 803 (11th Cir. 2022) (en banc) ("The School Board's bathroom policy requires 'biological boys' and 'biological girls'—in reference to their sex determined at birth—to use either bathrooms that correspond to their biological sex or sex-neutral bathrooms. This is a sex-based classification."), with Eknes-Tucker v. Governor of Ala., No. 22-11707, 2023 WL 5344981, at *16 (11th Cir. Aug. 21, 2023) (holding that Alabama's gender-affirming care ban was not a sex classification because it "establishes a rule that applies equally to both sexes: it restricts the prescription and

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"girl" should be defined for restroom purposes. In *Adams*, the district court judge, a George W. Bush appointee, found, as a factual matter, that Drew Adams, a transgender boy, was "like any other boy" using the boys' restroom, because he "'consistently, persistently, and insistently' identifies as a boy," had "undergone extensive surgery to conform his body to his gender identity," had legal documents attesting that he is a boy, and generally "uses the men['s] bathroom wherever he goes."[508] The Eleventh Circuit disagreed, based on its own definition of sex as "unchangeable,"[509] which meant that, notwithstanding the medical treatments he underwent, Adams "remained both biologically and anatomically identical to biological females," a fact that "raise[d] serious questions about Adams's similarly situated status for purposes of the bathroom policy under review."[510] Any other definition, according to the Eleventh Circuit, would create a dilemma for schools dealing with "gender fluidity—i.e., the practice . . . in which some individuals claim to change gender identities associated with the male and female sexes and thereby treat sex as a mutable characteristic."[511] Concerns about "gender fluidity" are often linked to unsubstantiated fears that more inclusive

administration of puberty blockers and cross-sex hormone treatment for purposes of treating discordance between biological sex and sense of gender identity for *all* minors").

[508] Kasper ex rel. Adams v. Sch. Bd., 318 F. Supp. 3d 1293, 1296–97 (M.D. Fla. 2018), *rev'd and remanded*, 57 F.4th 791 (11th Cir. 2022) (en banc).

[509] *Adams*, 57 F.4th at 807. In support of this definition, the Eleventh Circuit cited the Supreme Court plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), for the proposition that sex is "immutable." *Adams*, 57 F.4th at 807. While the *Frontiero* plurality made passing reference to sex as "immutable," it did not define sex as unchangeable; rather, it set out to explain why the Constitution requires scrutiny of legal classifications based on "an immutable characteristic determined solely by the accident of birth." 411 U.S. at 686. In support of this point, it cited *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972), a case striking down a statutory classification based on illegitimacy. Illegitimacy, like sex, might sometimes be changeable through formal legal process. But that is beside the point. The point is that "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" Id. (quoting *Weber*, 406 U.S. at 175). This is why the law treats classifications based on sex assigned at birth as *suspect* rather than taking them for granted.

[510] *Adams*, 57 F.4th at 803 n.6.

[511] Id. A dissent argued that the issue of gender fluidity was not before the court. Id. at 859 (Jill Pryor, J., dissenting). A separate concurrence expressed concerns about the effects that Adams's interpretation of Title IX would have for girls' and women's sports. Id. at 817–21 (Lagoa, J., concurring).

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restroom policies will enable sexual assault, a question at the center of public debates.[512]

Thus, rather than achieving perfect judicial constraint, formal tests channel disagreements into different legal strictures. I aim to offer a provisional map of those channels, not to insist that formal rules resolve disagreements.

IV. REALISM ABOUT SEX DISCRIMINATION FORMALISM

In an ideal legal system, perhaps legislators, jurists, and regulators would be well informed of the philosophy, sociology, and history of discrimination, and they would devise, interpret, and apply ideal, contextual inquiries attuned to social meanings, systemic dynamics, and proportionality. It makes little sense to ask questions about the definition of "discrimination" in a normative vacuum. The only defensible justification for discrimination laws that single out certain grounds such as sex as prohibited bases for action, as opposed to rules that require individualized fairness in all cases, is that we are concerned about how discrimination on certain grounds perpetuates deeply troubling forms of inequality.[513] Perhaps, if judges were candid about this project, they might more clearly explain how they are resolving conflicting values, which

[512] In other cases, judges have been persuaded by evidence from school districts nationwide that inclusive restroom policies have not resulted in sexual assault. Clarke, supra note 177, at 1887 & n.372 (collecting cases). At oral argument in *Adams*, however, one judge, after being informed that intermediate scrutiny requires testing the actual justification for the policy, not hypothetical concerns, pointed to a misleading story, widely reported by right wing media, that a "gender fluid" student had committed a sexual assault in a Virginia high school's girls' restroom. Oral Argument at 37:35, *Adams*, 57 F.4th 791, https://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/18-13592_0.mp3 [https://perma.cc/6Z9G-VC25] (referring to a "news report in Virginia dealing with an assault in a girls' bathroom by a student who was born a boy and genderfluid" and asking "why . . . we discount the government's interest just because it hasn't happened . . . [i]f it's plausible, and now we know in another state it has in fact happened"). Records from the Virginia sexual assault trial reveal no evidence that the perpetrator identified as gender fluid or transgender, let alone that he asserted any such identity to gain entry to the girls' restroom. Charles Homan, How a Sexual Assault in a School Bathroom Became a Political Weapon, N.Y. Times Mag. (Aug. 8, 2023), https://www.nytimes.com/2023/08/05/magazine/loudoun-county-bathroom-sexual-assault.html [https://perma.cc/H6TL-2E39]. Nor was the assault a result of a transgender-inclusive restroom policy; at the time of the assault, the school had not adopted any such policy. Id.

[513] See, e.g., Dembroff et al., supra note 85, at 11 ("Why else would we prohibit discriminating on the basis of sex, but not shoe size, if we did not think that there was good reason to interrupt the reproduction of certain generalizations, stereotypes, and norms associated with the categories 'male' and 'female'?").

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would bring more coherence to the doctrine, render them accountable for their choices, and facilitate public critique and social and legal change.[514] Maybe, over a longer timeframe, the limitations of formal rules in this context will become more troublesome to jurists and those rules will dissolve or evolve into standards.[515]

But at the moment, sex discrimination formalism is ascendant, and decisions grounded on candid assertions of changing social norms or normative values, not encased in legal form, are rife for reversal.[516] This Part concludes with lessons from this analysis about the potential for formal equality to incrementally expand legal protection for sex discrimination plaintiffs. It suggests a pluralistic approach to the definition of discrimination, acknowledging that various formal tests may be underinclusive and indeterminate in particular contexts, and that there are some contexts that civil rights scholars would identify as problematic that no formal test is likely to reach. Sometimes, procedure can overcome these limitations. Often, solutions lie outside courts.

A. Discrimination Pluralism

Civil rights scholars ought to reconsider the potential of formal equality, reconceived not as any one single inquiry, but as multiple tests that might operate in the alternative, alongside substantive considerations. Formalistic tests may provide courts with reasons to rule in favor of civil rights claimants without threatening their legitimacy or going beyond their own sense of their institutional capabilities.[517] But the judiciary is

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[514] See supra note 477.

[515] Cf. Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577, 580 (1988) (explaining a dynamic of this sort in property law).

[516] Judge Richard Posner wrote a concurring opinion in one of the cases leading to *Bostock*, arguing that courts should engage in "judicial interpretive updating" to conform the statute with modern cultural and political beliefs about the equality of lesbian and gay people. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring). While some found Judge Posner's candor refreshing, many called it "lawless." See, e.g., Dale Carpenter, Of Loose Cannons and Loose Canons in Title VII, Volokh Conspiracy (Oct. 9, 2019, 12:11 PM), https://reason.com/volokh/2019/10/09/of-loose-cannons-and-loose-canons-in-title-vii/ [https://perma.cc/3EE7-9JBM]. No advocate raised Judge Posner's argument in the Supreme Court in *Bostock*; in fact, Bostock's attorney called Judge Posner a "loose cannon" and clarified that, "'do whatever you feel like' is not what we're asking for." Transcript of Oral Argument at 22, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 17-1618), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_2a34.pdf [https://perma.cc/HUP7-X4PY].

[517] See supra Section II.B.

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unlikely to adopt any single formal test as the essential definition of discrimination, and none of the leading tests is carefully tailored enough to encompass every harmful example of discrimination without also including some phenomena that are not, by most normative lights. Moreover, different rules may find more support in different contexts, depending on the availability of appeals to texts, histories, and precedents. This is not to say substantive considerations do not matter or ought to be masked. Although courts may foreground formal tests, that does not mean judges are not moved by normative or empirical arguments. Often, they admit as much.

As this Article demonstrates, anticlassification rules can challenge explicitly sex-based policies and subject them to the rigors of intermediate scrutiny in constitutional contexts,[518] but courts may find them to be blunt instruments in statutory contexts in which defenses are absent[519] or unavailing.[520] These rules are vulnerable to manipulation insofar as the definition of sex is malleable: it can be defined as a group-based identity to avoid coverage of pregnancy, [521] if judges think coverage of pregnancy is unfair, or it can be defined narrowly as reproductive biology at birth,[522] if judges seek to avoid recognition of transgender rights. Anticlassification rules are also dangerous to remedial projects; but the causes of the demise of affirmative action are overdetermined, and not a reason to forego formal rules that might advance gender justice in other contexts.[523]

But-for cause is also a blunt test, but its reach is more limited. But-for tests seem to have limited applications outside the context of expanding the meaning of sex discrimination to lesbian, gay, and transgender employees. Unless defendants admit to what they would do in the counterfactual scenario, but-for tests ask difficult, if not impossible, questions.[524] Moreover, but-for tests, if taken seriously, lead to answers

[518] See supra notes 200–06 and accompanying text (illustrating how, in the equal protection context, anticlassification rules force empirical and normative arguments for sex discrimination—such as convention and tradition—to the surface for scrutiny).

[519] See supra note 94 and accompanying text (Title IX).

[520] See supra note 341 (Title VII).

[521] See supra notes 272–86 and accompanying text.

[522] See supra notes 509–12 and accompanying text.

[523] See supra Subsection III.B.1.

[524] See, e.g., supra notes 230–32 and accompanying text (discussing how but-for arguments worked in cases in which defendants admitted they would not allow, for example, transgender boys to take testosterone but would allow cisgender boys to do so, but did not work in a case in which a transgender man was denied a hysterectomy, perhaps because the judge could not

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most theorists would find unappealing in contexts including bisexuality,[525] nonbinary gender,[526] and the paramour cases.[527] Nonetheless, judges often gesture toward *Bostock*'s but-for inquiry while relying instead on anticlassification and similarly situated rationales to reach results expanding sex discrimination law.[528]

Similarly situated rules are the least formal, most conservative, and least disruptive of these three types of rules—scalpels rather than bludgeons. Judges sometimes turn to these rules when they cannot take anticlassification rules to their logical ends or when they regard sex classifications to be generally permitted due to "exceedingly persuasive" justifications.[529] Sex-segregated restrooms are an example—courts are unlikely to rule that the Equal Protection Clause requires that all restrooms be all gender,[530] but they will agree, for example, that certain transgender boys are "similarly situated" to other boys, and therefore, schools violate the Equal Protection Clause in refusing to classify them as boys for restroom purposes.[531] This depends on arguments about what it means to be a boy, for purposes of restroom use—arguments that tend toward traditional and potentially stereotypical ideas. All similarly situated rules are assimilative in this way, although it is not the case that they are necessarily regressive. Whether wins for similarly situated plaintiffs forestall or advance broader social change is an empirical question, not one that can be answered in theory.

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contemplate a counterfactual scenario in which someone assigned male at birth needed a hysterectomy).

[525] See supra Subsection II.A.3.

[526] See supra Subsection II.A.3.

[527] See supra Subsection III.B.2.

[528] See, e.g., supra notes 292–93 and accompanying text (discussing *Flores v. Virginia Department of Corrections*, No. 20-cv-00087, 2021 WL 668802, at *6 (W.D. Va. Feb. 22, 2021) (tampons) and *Nathan v. Great Lakes Water Authority*, 992 F.3d 557, 567 (6th Cir. 2021) (breast-size harassment)); supra note 191 and accompanying text (discussing *Grimm v. Gloucester County School Board*, 972 F.3d 586, 593 (4th Cir. 2020) (restrooms)); supra notes 218–33 and accompanying text (discussing *Peltier v. Charter Day School, Inc.*, 37 F.4th 104, 125 n.7 (4th Cir. 2021) (en banc) (dress codes)); supra notes 233–34 and accompanying text (discussing *Brandt v. Rutledge*, 47 F.4th 661, 669 (8th Cir. 2022) and similar cases); supra note 327 and accompanying text (discussing *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 622 (N.D. Tex. 2021) (bisexuality), *vacated sub nom. Braidwood Management, Inc. v. EEOC*, 70 F.4th 914, 940 (5th Cir. 2023)).

[529] United States v. Virginia, 518 U.S. 515, 524 (1996).

[530] See supra note 182.

[531] See supra notes 182–206 and accompanying text.

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The opinions described in this Article package their holdings in terms of formal rules, and sometimes formal rules lead to surprising results, but that is not to say formal rules are doing all the work. Critics of formalism are right that all formal rules are, to different degrees, indeterminate, requiring that judges make unforced choices, whether they realize it or not.[532] This is true of sex discrimination formalism too, as this Article demonstrates through analysis of case law. In these cases, courts make choices about which formal test to apply, whether to apply tests at an individual or group level, what traits constitute sex, what traits to hold constant when doing hypothetical and real comparisons, what level of generality to frame the traits held constant at, and myriad other questions that cannot be settled by logic and can be outcome determinative. These choices may be dictated by unstated ideological and other premises.

But rather than masking their premises, as the Supreme Court arguably did in *Bostock*,[533] this study demonstrates that lower courts often make them explicit, assessing state interests on the back end of the intermediate scrutiny standard;[534] raising concerns about empirical consequences which take the form of "slippery slope" arguments;[535] or relying on normative theories about what forms of discrimination constitute impermissible gender subordination[536] or stereotyping[537] to resolve quandaries. These empirical and normative arguments are stated outright on the pages of opinions and can be contested by other courts, legal scholars, and the public.

[532] See supra note 477.

[533] See Franklin, supra note 24, at 161 (pointing to assertions in *Bostock* that its result was predetermined by a "simple test," among other denials of judicial discretion). These assertions did not hobble effective scholarly critique. See, e.g., id. at 169–95 (identifying "shadow decision points" in the *Bostock* opinion not predetermined by statutory text).

[534] See supra notes 200–06 and accompanying text.

[535] See supra notes 511–12 (discussing the role of slippery-slope concerns in *Kasper ex rel. Adams v. School Board*, 57 F.4th 791 (11th Cir. 2022) (en banc), about how allowing a transgender boy to use the boys' restroom would create dilemmas in terms of what to do about "gender fluid" children and women's sports).

[536] See, e.g., supra note 257 and accompanying text (discussing how the court in *Flores v. Virginia Department of Corrections*, No. 20-cv-00087, 2021 WL 668802 (W.D. Va. Feb. 22, 2021), rejected the defendant's argument that it would have treated a person with anal plugs with the same suspicion of contraband that it treated tampons, on account of the larger number of women potentially affected by menstruation and therefore harmed by defendant's policy).

[537] See supra note 195 and accompanying text (discussing *Grimm*'s invocation of the antistereotyping principle); supra note 480 (collecting sources discussing the role of antistereotyping principles in *Bostock*).

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B. Confronting Limitations

Civil rights scholars are also correct that disparate treatment law is underinclusive, and formal tests do not help in many instances. Formal tests seem to be more successful in the contexts of discrimination based on differences in terms of reproductive biology and sex-separated practices, and less potentially successful in the context of bisexuality and nonbinary gender. Formal tests often altogether overlook neglectful, implicit, intersectional, and many other forms of bias that contribute to systemic patterns of inequality. This Section suggests two ways these limitations might be overcome: through procedure and outside court.

1. Deferring to Juries and Settlement

One way around the indeterminacy problem created by discrimination formalism might be procedural: to allow juries to resolve indeterminacies and decide what discrimination means in context. While juries may not be inclined to come to different conclusions than judges, the prospect of a jury trial may induce defendants to settle cases or change policy—which may result in outcomes that incrementally advance the aims of civil rights scholars, such as disruption of practices that contribute to gender-based subordination and stereotyping.

To see how this works, consider, for example, *L.O.K. v. Greater Albany Public School District 8J*, an Oregon case involving an intersex and nonbinary child harassed at school.[538] The plaintiff alleged that the harassment began in third grade, when they first "stopped wearing dresses and skirts and began to wear clothes from the boys' section of the store" and came out to their teacher in a writing assignment as "genderfluid or nonbinary."[539] By fifth grade, the bullying had become more intense, in the plaintiff's own words:

> Kids constantly told me that I and other LGBTQ people were disgusting and gross. They said other really mean, hurtful things to me: for example, they told me that by being myself I was hurting other people, that God hated me, that I was going to hell, that I was the devil's spawn,

[538] See, e.g., L.O.K. v. Greater Albany Pub. Sch. Dist. 8J, No. 20-cv-00529, 2022 WL 2341855, at *2 (D. Or. June 28, 2022) (discussing allegations of harassment against plaintiff who was a "twelve-year-old child who is intersex and non-binary").

[539] Id. The teacher denied being aware of the child's gender identity, but for purposes of summary judgment, the court had to draw inferences against the moving party and assume otherwise. Id. at *9.

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> and that they were going to turn all the other kids against me and teach them to hate LGBTQ people too. They told me I was menace to society and a hinderance for being the way I was. They constantly dismissed me and told me my opinion wasn't valid about a math or science question because I was queer. They didn't say "LGBTQ" but used words like "faggot."[540]

That year "another student threatened to remove [plaintiff's] clothing to inspect their genitals, to see if they were a boy or girl."[541] The school principle told plaintiff's mother "'what do you expect us to do,' and 'we can't intervene unless there is actually violence, not just threats.'"[542] As a result of the harassment, plaintiff transferred to online school, but felt "disconnected," was neglected by teachers, and experienced a severe deterioration in mental health.[543]

With respect to L.O.K.'s Title IX claim, the district court reasoned that the statute's definition of sex discrimination "extends to situations where 'the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions.'"[544] The defendants did not argue that the harassment was not "on the basis of sex" on account of the fact that the bullies proved themselves unaware of the sex the plaintiff was assigned at birth.[545] But what if the school had raised this argument? The bullies referred to L.O.K. as "faggot," a derisive term generally reserved for gay men, evidence that their basis for targeting L.O.K. might have been their misimpression that L.O.K. was a gay man, or, more likely, their lack of knowledge about the different identities entailed in the acronym

[540] Id. at *5.

[541] Id.

[542] Id.

[543] Id. at *5–6. This was prior to the pandemic. Eventually, the plaintiff transferred to a new school district, requiring their mother to drive long distances every day. Id. at *7.

[544] Id. at *15 (quoting Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020)). L.O.K. also brought an equal protection claim. With respect to that claim, the court reasoned that "[d]iscrimination on the basis of gender presentation is subject to heightened scrutiny," citing cases reasoning that transgender status is defined based on transgression of gender norms. Id. at *9 (citing Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (citing Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000))).

[545] Defendant's Motion for Summary Judgment, *L.O.K.*, 2022 WL 2341855. The complaint contains no allegation that the bullies specifically were aware that plaintiff had intersex variations. Intersex is "a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that does not fit the typical definitions of female or male." Complaint at 2, *L.O.K.*, 2022 WL 2341855.

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LGBTQ+ and their desire to associate L.O.K with gay men to insult L.O.K.[546] *Bostock* holds that anti-gay animus is reducible to sex;[547] it shouldn't matter how L.O.K. identifies.[548] It didn't matter to the bullies. Perhaps the bullies were assuming L.O.K.'s gender identity was incongruent with their sex assigned at birth. Or perhaps the reason L.O.K. was the target of bullying was the fact that L.O.K.'s sex assigned at birth was unknown, which counts as a way of classifying them in terms of sex.[549]

In any event, it would be reasonable for a jury to conclude that the bullying would not have happened but-for the bullies' lack of knowledge of L.O.K.'s sex assigned at birth, or perhaps, it might not have occurred had L.O.K. not had an intersex condition. This is not unlike *Nathan v. Great Lakes Water Authority*, in which the Sixth Circuit thought a reasonable jury could conclude, based on the fact that harassers targeted the plaintiff with taunts about the size of her breasts, that the same harassment would not have occurred if the plaintiff had been a man.[550] The fact that the harassers targeted L.O.K. by threatening to remove their clothing to check their genitalia—a characteristic inextricable from sex—is also evidence from which a jury could reasonably infer the harassment was because of sex.

Thus, even if formal, acontextual tests might be an awkward fit for identities like nonbinary gender, queer orientations, and bisexuality,[551] procedure means it may not matter. To decide a motion for summary judgment, a trial court does not need to reach conclusions on but-for causation or any other formal test—it need only decide what a reasonable jury could infer—a relatively lenient standard.[552] Answers to hypothetical

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[546] It would be best for discrimination law not to go too far down the road of asking what goes through the minds of fifth-grade bullies when they select targets for harassment. I have argued for more objective standards in this context. Clarke, supra note 334, at 108 (arguing this is a pitfall of legal rules that ask how a plaintiff was "regarded" by harassers).

[547] Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020) ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.").

[548] See Clarke, supra note 334, at 139–40.

[549] Cf. Eidelson, supra note 20, at 809–14.

[550] See supra note 263 and accompanying text (discussing *Nathan v. Great Lakes Water Authority*, 992 F.3d 557, 566 (6th Cir. 2021)).

[551] See supra Subsection II.A.3.

[552] Cf. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148 (2000) (holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated").

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questions, like those called for by but-for tests, might very well be fact questions for juries in certain contexts.[553] Juries instructed to determine but-for causation might use their own common sense, or any number of arguments or heuristics, to resolve them. Judges often regard the resolution of similarly situated issues to be fact questions as well.[554] But denials of summary judgment do not often result in jury trials; rather, they give defendants strong incentives to settle.[555] Settlements may require institutions to implement policies clarifying, for example, that harassment on the basis of nonbinary gender is not permitted, and requiring that school officials be trained on how to respond to bullying.

2. Expanding Discrimination Law Outside Courts

While courts might be content to deny summary judgment in cases involving harassment or discrimination on the basis of bisexual, queer, or nonbinary identities, such results are less likely in cases seen as having dramatic policy implications, such as controversies over dress codes, restrooms, sports, and health care.[556] Additionally, to the extent that

[553] The distinction between legal issues that must be decided by judges and factual ones that are the realm of juries is not a "bright line," and questions about the characterization of facts often fall into a gray area, with issues "involving complex facts and vague and individualized rules" sometimes going to juries. William W. Schwarzer, Alan Hirsch & David J. Barrans, The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure, 139 Fed. R. Decisions 441, 455–59 (1992) ("[T]here is a spectrum ranging from fact to law, in which a large continuum between the two extremes is occupied by mixed questions of law and fact and by questions of ultimate fact."). Judges may regard denials of summary judgment in borderline cases "not only as conventional, but also as convenient, because it reduces judicial effort and the risk of reversal." Id. at 460.

[554] See, e.g., A.H. ex rel. D.H. v. Williamson Cnty. Bd. of Educ., No. 22-cv-00570, 2023 WL 6302148, at *4 (M.D. Tenn. Sept. 27, 2023) (noting that the issue of whether a discrimination plaintiff is similarly situated is typically a jury question).

[555] See, e.g., Elizabeth M. Schneider, The Dangers of Summary Judgment: Gender and Federal Civil Litigation, 59 Rutgers L. Rev. 705, 716 (2007) (reporting, in an assessment of gender discrimination cases, that "when summary judgment is denied, lawyers and judges report that defendants immediately offer to settle, often with far more generous settlement offers than they might have otherwise considered"). In L.O.K.'s case, however, there was no settlement and the plaintiff went on to win a jury trial. Praveena Somasundaram, A Nonbinary Student Faced Discrimination at School. A Jury Awarded Them $300K, Wash. Post (Sept. 28, 2023, 12:35 AM), https://www.washingtonpost.com/nation/2023/09/28/oregon-nonbinary-student-jury-award/ [https://perma.cc/2EX2-Q5WP].

[556] Schwarzer et al., supra note 553, at 459–60 (noting that courts are keen to construe issues as legal ones requiring resolution at summary judgment when they see them as having "policy implications" or "precedential impact" that would benefit from "consistency and reasoned resolution").

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formal tests of discrimination have hard limits—such as with respect to assimilative demands and intersectional discrimination—courts may not be the answer.

In particular, trying to use disparate treatment law to combat assimilative demands is a difficult project. Courts are reluctant to identify generally applicable demands as gendered (or racial) in all but the most obvious cases. They regard challenges to assimilative demands as belonging in the disparate impact category.[557] While it is possible to blur the divide between disparate impact and disparate treatment law at the margins, the divide between intent and impact is too firmly ensconced in the precedential firmament for courts to abandon the distinction altogether.[558] Moreover, courts are wary of extending equality law in ways that threaten too many institutional arrangements and appear redistributive—matters they regard as more appropriate for legislatures.[559]

Rather than attempting to challenge practices like these through existing discrimination law alone, arguments about substantive equality might advance private sector change and build political momentum for reforms. Proposals like paid leave and reduced working hours may be better routes to addressing the hypermasculine culture of overwork than discrimination law.[560] Similarly, with respect to complex identities, states

[557] See, e.g., EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016) (complaining, in race discrimination case in which a Black woman was not hired because she wore her hair in dreadlocks, that the EEOC "conflates the distinct Title VII theories of disparate treatment (the sole theory on which it is proceeding) and disparate impact (the theory it has expressly disclaimed)").

[558] See supra note 151.

[559] See, e.g., Deborah Dinner, Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era, 92 Ind. L.J. 1059, 1112 (2017) ("The persistent resistance to disparate-impact liability represents opposition to redistribution not only from [W]hites to racial minorities, or men to women, but also from employers to workers."). The fear that disparate impact law would "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average [B]lack than to the more affluent [W]hite" was a reason given by the Supreme Court for refusing to recognize the doctrine under the Equal Protection Clause. Washington v. Davis, 426 U.S. 229, 248 (1976).

[560] See, e.g., Joan C. Williams, Reshaping the Work-Family Debate: Why Men and Class Matter 1–2 (2010) (proposing "public supports (subsidized child care, parental leave financed at a national level, national health insurance) and workers' rights (mandated vacation time, proportional pay for part-time work, and the right to request a flexible schedule)"); Claudia Goldin, A Grand Gender Convergence: Its Last Chapter, 104 Am. Econ. Rev. 1091, 1092 (2014) (proposing "alterations in the labor market, in particular changing how jobs are structured and remunerated to enhance temporal flexibility" and to eliminate firms' incentives

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and the federal government could pass laws to specifically prohibit discrimination on bases like bisexuality and nonbinary gender identity[561] and on bases that are pretexts for intersectional forms of discrimination, such as hairstyles associated with women of color,[562] and to protect the rights to abortion, contraception, and other reproductive justice goals.[563] Piecemeal legislative efforts to fill gaps in discrimination law are time and energy consuming for social movements and good policy may be held hostage by partisan politics or made impossible by gridlock. Nonetheless, reliance on courts alone to achieve such aims is bound to lead to disappointment.

CONCLUSION

Critics are correct that formal tests are under- and overinclusive, if not empty and incoherent. They are right to expound principles, like antistereotyping and antisubordination, to ground critique of doctrine and even subtly influence its shape. But there are few footholds in the doctrine for alternative definitions of discrimination that might better reflect sociological and philosophical insights. Moreover, in the past, judges have harnessed interpretive leeway in the service of traditional views of gender, sex, and sexuality.

When I ask scholars who advocate for the replacement of formal equality with more substantive rules who their audience might be, they often respond that they think of themselves as writing for an era many decades in the future, in which a different set of Justices sit on the Supreme Court, polarization has abated, and the lower courts are

"to disproportionately reward individuals who worked long hours and who worked particular hours"); Vicki Schultz & Allison Hoffman, The Need for a Reduced Workweek in the United States, *in* Precarious Work, Women, and the New Economy: The Challenge to Legal Norms 131, 133 (Judy Fudge & Rosemary Owens eds., 2006).

[561] The Equality Act, a proposed federal law, would have prohibited discrimination on the basis of sexual orientation, defined to include bisexuality, as well as gender identity, defined to include "the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth." H.R. 5 § 1101(a)(2)–(5), 117th Cong. (2021).

[562] Many states, including California and New York, have passed CROWN Acts that forbid discrimination on the basis of hair textures and styles historically associated with women of color. N.Y. Exec. Law § 292(37); Cal. Gov't Code § 12926(w); see About, The Official CROWN Act, https://www.thecrownact.com/about [https://perma.cc/3BFS-XJ5G] (last visited Sept. 26, 2023) (listing jurisdictions that have passed similar laws). CROWN stands for "Creating a Respectful and Open World for Natural Hair." Id.

[563] See, e.g., Siegel et al., supra note 41, at 97.

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populated with jurists sympathetic to their values. But if these scholars are right that discrimination can only be defined in terms of particular social contexts and eras, then it is a strange project to devise legal rules for a time so far off, in which the pressing issues of inequality will surely be different than the ones the United States faces today.[564]

In any event, there are urgent problems for sex discrimination law now in terms of gender inequality and LGBTQ+ rights, and formal tests are being deployed by courts to challenge traditional but harmful practices that purport to apply "complementary" rules to men and women; to protect against harassment and unfair treatment based on bodily differences; and to isolate sex discrimination from its justifications so those justifications can be meaningfully examined. Critics of formal equality should not overlook these potential virtues.

[564] See Davina Cooper, Crafting Prefigurative Law in Turbulent Times: Decertification, DIY Law Reform, and the Dilemmas of Feminist Prototyping, 31 Feminist Legal Stud. 17, 38 (2023) (observing that "[u]topian fiction demonstrates how the aspirations of earlier times can prove harmful or at least anachronistic from the perspective of a future date"). A different model of thinking through radical legal reform might present unlikely new legal rules not as outcomes of analysis, the "Part IV" of the traditional law review, but rather as "Part I," the starting point for conversation, critique, experimentation, and iterative development. Cf. id. at 38.