SKRMETTI AND THE PROBLEM OF INCIDENTAL INTENT

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ABSTRACT

The modern Supreme Court has defined "discriminatory intent" as a strict-liability concept. It does not matter why *the government sorts people by a protected characteristic, such as race or sex; it matters only that the government* does *sort people by such a characteristic. This principle is the key holding of affirmative-action cases, such as* Students for Fair Admissions, Inc. v. President & Fellows of Harvard College. *Yet, in the recent case* United States v. Skrmetti, *the Court seemed to focus not on the question of whether the government sorted people by sex (it did), but on the question of* why *the government did so. In* Skrmetti, *the Court considered a statute that expressly sorted minors by sex to determine eligibility for gender-affirming care, and somehow concluded the statute did not discriminate on the basis of sex.*

This Article uses the framework of doctrinal structuralism, which I developed in a prior work, to demonstrate that the Skrmetti *Court appeared to be searching for a new exception to the general rule that, when the government sorts by sex, intermediate scrutiny applies. I refer to such an exception as an "incidental-intent" exception: If a decision maker sorts by a protected characteristic (sex, for example) for reasons that are incidental to the protected characteristic, that would not count as discrimination on the basis of the protected characteristic, or would not trigger heightened scrutiny.*

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The Court appears to be serious about such an exception, even though it was not fully articulated in Skrmetti. *Accordingly, the Article applies doctrinal structuralism to explore the potential doctrinal paths the Court might pursue to implement such an exception, and evaluates the (massive) implications of some of those paths for equal protection and antidiscrimination law more generally. For example, one path would understand* Skrmetti *as adopting an animus requirement, which would take antidiscrimination law back to the Jim Crow Era. And another path would read* Skrmetti *as adopting a sole-cause requirement, which would exonerate the government any time it offers a nondiscriminatory reason for its actions, thereby undermining the very idea of heightened scrutiny for suspect classifications.*

This Article concludes by proposing two less problematic paths to implement an incidental-intent exception: The best approach would be to adopt a primary- or predominant-factor causation requirement, similar to but distinct from the but-for causation requirement often used by the Court. Alternatively, though more problematic, the Court might adopt a disparate-impact requirement, along with the traditional disparate-treatment requirement, in classification cases. Either of these requirements would allow the Court to avoid finding discrimination in cases where the discrimination is incidental to some larger goal, while still holding the government accountable for most of the worst types of discrimination.

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[Man] is free to evade reality, he is free to unfocus his mind and stumble blindly down any road he pleases, but not free to avoid the abyss he refuses to see.

- Ayn Rand[1]

INTRODUCTION

In its recent *United States v. Skrmetti* decision, the Supreme Court ignored what appeared to be incontrovertible evidence of sex discrimination.[2] The case involved a Tennessee statute that prohibited gender-affirming care for minors.[3] The statute, on its face, made the availability of certain medical procedures dependent on the patient's sex.[4] Those who were born male could receive treatments that those who were born female could not, and vice versa.[5] Additionally, the legislature's statement of intent seemed to make clear that it was motivated by the sex of those seeking treatment. The legislature's stated goal was to ensure that boys appreciated being boys and girls appreciated being girls.[6] Each of these facts provided classic proof of discriminatory intent under equal protection doctrine. Yet, in an "up is down, and down is up" moment, the

1. Ayn Rand, The Objectivist Ethics, Address at the University of Wisconsin (Feb. 1961), *in* THE VIRTUE OF SELFISHNESS (1964), *reprinted in* ARI CAMPUS, https://courses.aynrand.org/works/the-objectivist-ethics/ [https://perma.cc/SM83-H4JL].

2. 145 S. Ct. 1816, 1824, 1837 (2025).

3. *See* TENN. CODE ANN. § 68-33-103(a)-(b) (2025).

4. *See id.* This Article uses the word "sex" to refer to biological or birth sex, as that is the way the word is used in equal protection doctrine. *See* Naomi Schoenbaum, *Rethinking Sex as Biology Under Equal Protection*, 58 U.C. DAVIS L. REV. 905, 908-09 (2024) (discussing how circuit courts, responding to Supreme Court cases, uniformly adopt a biological definition of "sex" for equal protection cases).

5. *Skrmetti*, 145 S. Ct. at 1873 (Sotomayor, J., dissenting) ("Physicians in Tennessee can prescribe hormones and puberty blockers to help a male child, but not a female child, look more like a boy; and to help a female child, but not a male child, look more like a girl.").

6. *See id.* at 1832 (majority opinion); TENN. CODE ANN. § 68-33-101(m) (2025) (stating that Tennessee's interests include "encouraging minors to appreciate their sex").

Court held that the statute did not discriminate on the basis of sex.[7] The Court appears to have suffered from discrimination blindness.[8]

It is possible that *Skrmetti* is simply a result-oriented decision with little precedential value.[9] But this Article suggests another possibility with more significant—and possibly more dangerous—precedential effects: that the Court was quietly carving out an exception to antidiscrimination law for a concept I will call "incidental intent."[10]

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7. *See Skrmetti*, 145 S. Ct. at 1834-35. The Court also said that the statute did not discriminate on the basis of gender identity. *See id.* at 1832-33. That conclusion seems to suffer from a similar disconnect. This Article will focus on the Court's sex discrimination holding for two reasons. First, a finding of sex discrimination would have conclusively triggered intermediate scrutiny, while a finding of gender identity discrimination would have only raised the question of whether gender identity discrimination triggers intermediate scrutiny. *Compare* United States v. Virginia, 518 U.S. 515, 555 (1996) ("'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994))), *with Skrmetti*, 145 S. Ct. at 1851-55 (Barrett, J., concurring) (declining to add transgender individuals (those with "incongruence between ... gender identity and ... sex assigned at birth") to list of protected characteristics that would trigger intermediate scrutiny (omissions in original) (quoting Brief for Respondents in Support of Petitioner at 4-5, *Skrmetti*, 145 S. Ct. 1816 (No. 23-477), 2024 WL 4003791, at *6)). Second, the concept that I will use to try to explain the Court's failure to find sex discrimination—incidental intent—likely explains and applies to both holdings.

8. My focus here is doctrinal. The *Skrmetti* case has also been criticized—and defended—on normative grounds. *See, e.g.*, *GLAD Law and NCLR Respond to the* Skrmetti *Supreme Court Ruling*, GLAD L. (June 18, 2025), https://www.gladlaw.org/glad-law-and-nclr-respond-to-the-skrmetti-supreme-court-ruling/ [https://perma.cc/7U4V-YV5Y] (criticizing); Pamela Bondi (@AGPamBondi), X (June 18, 2025, at 11:41 ET), https://x.com/AGPamBondi/status/1935362210638729531 [https://perma.cc/UJ7W-PG2T] (defending). That issue is beyond the scope of this Article.

9. It is also possible that the Court was hoping to employ a Jedi mind trick, such that its readers would simply believe what they were told: There is no discrimination here. *See* STAR WARS: A NEW HOPE (EPISODE IV), Disney+, at 43:41-43:43 (Lucasfilm Ltd. 1977) ("These aren't the droids you're looking for."). These possibilities are beyond the scope of this Article, which will take seriously what the Court said it was doing.

10. Professor Spann uses the phrase "incidental intent" peripherally in footnotes in two pieces. *See* Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 596 n.77 (2015) [hereinafter *Good Faith Discrimination*]; Girardeau A. Spann, *Neutralizing* Grutter, 7 U. PA. J. CONST. L. 633, 650 n.87 (2005) [hereinafter *Neutralizing* Grutter]. In each piece, he uses the phrase to describe the second part of a dichotomy posed by the Court in *Personnel Administrator v. Feeney* between (1) intent to sort by a protected characteristic (disparate treatment), which is required to trigger heightened scrutiny, and (2) a negligence-like awareness of potential or likely disparate effects (foreseeable disparate impact), which is insufficient to trigger heightened scrutiny. *See* 442 U.S. 256, 279 (1979). Professor Spann seeks to collapse the *Feeney* dichotomy, seeking a more expansive definition of intent than the Court has adopted. *See Good Faith Discrimination*, *supra*, at 596; *Neutralizing* Grutter, *supra*, at 650 n.87. *See generally* David Benjamin Oppenheimer, *Negligent Discrimination,* 141 U.

Incidental intent takes as its baseline the Court's longstanding definition of discriminatory intent: sorting people by a protected characteristic, such as sex.[11] However, if we drill down deeper, we can see that not all sorting is the same. In typical discrimination cases, decision makers sort for purposes that are closely (and usually obviously) related to the sorting. For example, a decision maker might sort people by sex as a proxy for something like life expectancy,[12] or the likelihood of irresponsible behavior at certain ages.[13] Similarly, though hopefully rarer, a decision maker might sort in order to harm or subordinate a group—the concept of animus.[14] In all of these typical examples, the point of sorting by sex is to sort by

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PA. L. REV. 899 (1993) (arguing for an expansive, negligence-like definition of intent in Title VII). In this Article, I do not address the possibility or desirability of expanding the Court's current definition of intent. Rather, I argue that the Court is looking for a more restrictive definition of intent than it has historically adopted—one which would exclude what I call "incidental intent." Thus, I use the phrase "incidental intent" to describe types of intent that the Court has historically recognized and now seeks to limit, rather than types of intent the Court has historically (and consistently) rejected.

The word "incidental" also shows up in other areas of constitutional antidiscrimination law, but to describe effect, rather than intent. *See* Free Speech Coal., Inc. v. Paxton, 145 S. Ct. 2291, 2306 (2025) (applying intermediate scrutiny in free speech case where law has "only an incidental effect on protected speech" (citing Boy Scouts of Am. v. Dale, 520 U.S. 640 (2000)); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (where a law is neutral and generally applicable, the law is not subject to strict scrutiny even if there is an incidental effect on a particular religious practice); Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 39 (1st Cir. 2005) ("[I]ncidental effect, cannot suffice to trigger strict scrutiny under the dormant Commerce Clause." (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970))). These uses of the word seem to suggest, like *Feeney,* that heightened scrutiny will not apply in these other areas of constitutional law based solely on effect, as opposed to intent, even where such intent might be foreseeable.

11. *See* Martin Katz, Bostock *and the Limits of Textualism: A Doctrinal Structuralist Approach*, 66 WM. & MARY L. REV. 1389, 1400 (2025). Many commentators have criticized or defended the Court's requirement of discriminatory intent. *See, e.g.*, *infra* note 50. Such debates are beyond the scope of this Article, which takes the Court's pre-*Skrmetti* doctrinal choices as they are. Below, I will address the arguments for and against the Court's sorting-based definition of intent, which is a formal equality concept. *See infra* Part I.B.

12. *See, e.g.,* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 704-05 (1978) (describing how the department used sex as a proxy for life expectancy).

13. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 191-92, 210 (1976) (finding that the state relied on sex-based discrepancies in drunk driving arrests and traffic injuries to set different drinking ages for men and women).

14. *See infra* note 45 and accompanying text. For a good summary of the traditional forms of intent, see Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORN. L. REV. 1211, 1219 (2018) (discussing animus and group superiority, classification, including as a proxy for a lawful goal, and implicit and structural bias). The roles of implicit and structural bias are beyond the scope of this Article.

sex (perhaps with the additional goal of hurting or subordinating one sex).

But other times, a decision maker might sort for reasons that seem more tangential—or incidental—to the sorting or to the group being sorted. For example, consider the Tennessee statute at issue in *Skrmetti*, which certainly sorts by sex, and thus satisfies the Court's standard definition of intentional sex discrimination.[15] But the legislature seemed to sort people by sex, not as an end in itself, or even as a means to accomplish a goal directly related to sex (such as using sex as a proxy, or to express animus), but rather as a means to address a different issue: gender identity,[16] or possibly medical safety.[17]In other words, Tennessee's sex-based classification seemed to be instrumental, or incidental, to its ultimate goal.[18]

Faced with a statute like this, the *Skrmetti* majority seemed to resist the traditional equal protection logic that merely sorting by sex should always trigger heightened scrutiny in equal protection doctrine.[19] In response, the Court appears to have quietly created an exception for incidental intent, such that it does not count as discrimination, and thus does not trigger heightened scrutiny. This Article will argue that this is the best way to understand what otherwise seems to be inexplicable discrimination blindness in *Skrmetti*.

If the Court was struggling with incidental intent in *Skrmetti*, we can expect it to do so again, and for lower courts and litigators to engage in similar struggles. For example, in the current Term, the Court will evaluate whether sex plays a (possibly incidental) role in transgender athletic bans.[20] And many other sexual orientation and

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15. TENN. CODE ANN. §§ 68-33-101 to -103 (2025); *see* Katz, *supra* note 11, at 1400.

16. *See* § 68-33-101(m) ("This state has a legitimate, substantial, and compelling interest in encouraging minors to appreciate their sex."). Of course, sex and gender identity may be inextricably linked. *See* Katz, *supra* note 11, at 1400. I will address this issue below. *See infra* notes 24, 150 and text accompanying notes 20-21.

17. *See* § 68-33-101(m) ("This state has a legitimate, substantial, and compelling interest in ... prohibiting medical procedures that are harmful, unethical, immoral, experimental, or unsupported by high-quality or long-term studies.").

18. Whether "incidental intent" is in fact a problem is an open question. I will address this issue below. *See infra* Part II.

19. *See* United States v. Skrmetti, 145 S. Ct. 1816, 1829-34 (2025).

20. *See* Jackson *ex rel.* B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542, 550, 564 (4th Cir. 2024), *cert. granted sub nom.*, West Virginia v. Jackson *ex rel.* B.P.J., No. 24-43, 2025 WL 1829164, at *1 (U.S. July 3, 2025) (mem.); Hecox v. Little, 104 F.4th 1061, 1068 (9th Cir.

gender identity discrimination cases wending their ways through the courts raise the question of whether sex discrimination plays a necessary (but possibly incidental) role in sexual orientation and gender identity discrimination.[21]

The problem is that if *Skrmetti* was trying to address incidental intent,[22] its reasoning was conclusory and unhelpful. The majority opinion, in not so many words, held only that "there is no sex discrimination here."[23] The Court therefore provides few if any clues as to how the opinion should be understood and applied, and no guidance as to how to distinguish incidental from nonincidental discrimination. Worse, as this Article will show, some of the doctrinal paths that might be used to flesh out this distinction are normatively fraught, or even downright dangerous for antidiscrimination law. This Article seeks to avoid these outcomes.

In this Article, I will use a framework I developed in an earlier piece, called doctrinal structuralism,[24] to examine the possible ways in which we might understand *Skrmetti*'s discrimination

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2023), *cert. granted*, No. 24-38, 2025 WL 1829165, at *1 (U.S. July 3, 2025) (mem.). The Court has also issued emergency orders in cases involving the military's transgender ban and the requirement that passports reflect holders' birth sex, and may address those cases on the merits. *See* United States v. Shilling, 145 S. Ct. 2695, 2695 (2025) (mem.); Trump v. Orr, 146 S. Ct. 44, 46 (2025). These cases, too, could involve the issue of incidental intent to sort by sex.

21. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020) (holding that sexual orientation and gender identity discrimination cannot occur without sex discrimination). For cases that implicate this principle, see, for example, *Fowler v. Stitt*, 104 F.4th 770, 788 (10th Cir. 2024), *vacated*, 145 S. Ct. 2840 (2025), which states: "Plaintiffs contend that because the Policy discriminates based on transgender status, it necessarily discriminates on the basis of sex as well. This argument relies on the Supreme Court's reasoning in *Bostock* .... [W]e agree with Plaintiffs that *Bostock*'s reasoning applies here."

22. I do not take a position on whether this was the majority's conscious goal in *Skrmetti* (that is, they wanted to surreptitiously create, or lay the seeds to later create, an incidental-intent exception) or simply something that the majority was struggling with and either failed to articulate or define. The result would be the same: We can expect to see future doctrinal movement towards such an exception by the Court, or by lower courts and by litigants trying to understand and apply *Skrmetti*.

23. *Skrmetti*, 145 S. Ct. at 1830 ("SB1 clearly does not classify on the basis of sex.").

24. *See* Katz, *supra* note 11, at 1396. That piece focuses on *Bostock*'s holding that sexual-orientation and gender-identity discrimination are always sex discrimination, and argues that (1) the Court reached the right conclusion for the wrong reason, and (2) *Bostock*'s holding should extend beyond Title VII to other antidiscrimination doctrines, including equal protection. *See id.* at 1398. The *Skrmetti* Court's holding that there was no discrimination on the basis of gender identity eliminated the need to consider *Bostock*, because that holding obviated the question of whether gender identity discrimination is a form of sex discrimination under the Equal Protection Clause. *See Skrmetti*, 145 S. Ct. at 1834-35.

blindness—its conclusion that there is no sex discrimination here.[25] Doctrinal structuralism allows us to identify and evaluate the possible explanations for the Court's conclusion. The framework suggests that the Court was looking for an incidental-intent exception. The framework also helps us understand the doctrinal paths by which this quest might proceed, along with the doctrinal and normative consequences that lie along each of those paths.

Part I of this Article will use doctrinal structuralism to map the key antidiscrimination concepts of intent and causation that might apply in *Skrmetti*, and the normative implications of the choices available for each concept. Part II will use this map to evaluate *Skrmetti.* It will demonstrate the problems with the Court's explanations for why it found no discrimination, and suggest that the Court appears to have been seeking an incidental-intent exception. Part III will evaluate five doctrinal paths that the Court—or future courts—might follow to create and implement an incidental-intent exception.

This Article rejects some of those paths. For example, one path—an animus requirement—would represent a major doctrinal reversal, contradicting the Court's recent colorblindness pronouncements in affirmative-action cases,[26] and would render problematic forms of discrimination unactionable. Similarly, another path, a sole-cause requirement, has been repeatedly and correctly rejected by the Court in equal protection, and most other antidiscrimination doctrines, and would insulate almost any government action from antidiscrimination claims.[27] In contrast, some causation doctrines other than sole cause, such as but-for causation, and particularly a

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25. *See Skrmetti*, 145 S. Ct. at 1830.

26. *See* Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2188 (2023) (Thomas, J., concurring) ("Properly understood, our precedents have largely adhered to the Fourteenth Amendment's demand for colorblind laws.").

27. *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes."); Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) ("[S]ince we know that the words 'because of' do not mean 'solely because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." (emphasis omitted)), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2), *as recognized in*, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 337 (2020).

primary- or predominant-cause test, seem less dangerous, and may make sense as a way of defining an incidental-intent exception.[28] And one final path, requiring disparate impact, as well as disparate treatment, to trigger heightened scrutiny in certain cases might present less significant doctrinal and normative consequences than some of the other alternatives.

The Article concludes by urging future courts to address the issue of incidental intent through either a primary-factor test or a limited disparate-impact requirement.

I. A DOCTRINAL STRUCTURAL MAP OF INTENT, CAUSATION, AND PROOF IN EQUAL PROTECTION

In an earlier work, I developed an analytical framework I call doctrinal structuralism.[29] This framework starts with the recognition that certain doctrines, such as antidiscrimination law, have a well-defined structure containing (1) a defined series of decision points, and (2) a limited range of options for each decision point.[30] This approach allows us to understand the choices that courts make at each point within a doctrine, and the normative implications of each choice. It also allows us to compare choices across doctrines, such as Title VII and equal protection law (it turns out that, within antidiscrimination law, those choices tend to be fairly consistent).[31]

Antidiscrimination doctrines prohibit a decision maker from taking an adverse action against a person because of the person's membership in a protected group.[32] Violation of this principle

28. "Primary" and "predominant" tend to be used interchangeably to describe the same causal concept. *See* Martin Katz, *A Rosetta Stone for Causation*, 127 YALE L.J.F. 877, 905 (2018), https://www.yalelawjournal.org/forum/a-rosetta-stone-for-causation [https://perma.cc/B3B9-PU88]; *see also* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1134-35 (2018). In this Article, I will often use the terms collectively to describe a single concept in order to sweep in both of the words that tend to be used.

29. *See* Katz, *supra* note 11, at 1396.

30. *See id.* at 1396-97. As I noted in my earlier work, the defined choice points and limited range of the options can, at least in conjunction with certain interpretive theories, serve to limit judicial discretion. *See id.*

31. *See id.* at 1398.

32. *See, e.g.*, 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for

triggers either liability or a justification requirement which, if not satisfied, will result in liability.[33]

At its highest level, this structure requires answers to four questions: (1) what counts as an adverse action, (2) which groups are protected, (3) what is the required connection between the adverse action and the protected group, and (4) what justifications, if any, are available?

In most cases, including *Skrmetti*, the first and second questions are relatively straightforward. It is not hard to conclude that denying a person medical care they seek is an adverse action, or that certain groups, such as those defined by sex, are protected groups. Similarly, in equal protection doctrine, the fourth question as to available justifications is clear, at least for groups the Court has already identified as protected. For example, decision makers who discriminate on the basis of sex must justify their actions under intermediate scrutiny, which requires showing that their actions were substantially related to an important purpose.[34]

It is generally the third question—the required connection between the adverse action and the protected group (often described as a "because of" requirement)[35] that raises the most complex

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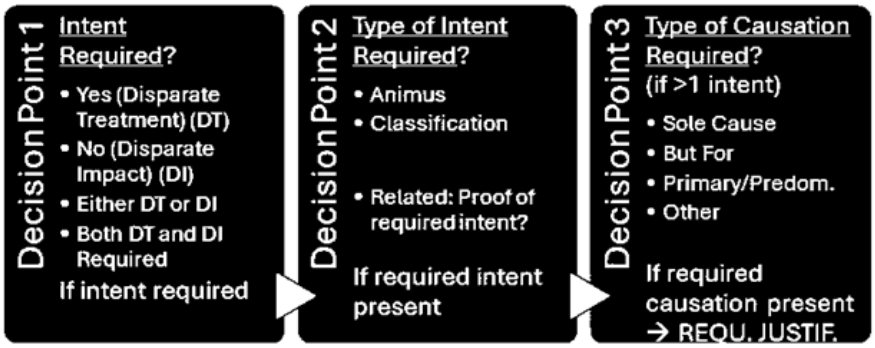
employment in any way which would ... adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."). *See generally* 29 C.F.R. §§ 1604.1-1606.8 (2024) (establishing federal guidelines on discrimination because of sex, religion, and national origin).

33. *See* 42 U.S.C. § 2000e-2(e) (providing that employers may hire individuals or classify employees on the basis of religion, sex, or national origin when such classification is "a bona fide occupational qualification reasonably necessary to [the business's] normal operation"); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213-14, 218-20 (1995) (describing the Court's heightened scrutiny of classifications imposing adverse consequences on marginalized groups).

34. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). *Skrmetti* left open the question of whether gender identity discrimination would trigger intermediate scrutiny. United States v. Skrmetti, 145 S. Ct. 1816, 1832-33 (2025) ("This Court has not previously held that transgender individuals are a suspect or quasi-suspect class. And this case, in any event, does not raise that question because SB1 does not classify on the basis of transgender status.").

35. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020); Burrage v. United States, 571 U.S. 204, 212-13 (2014). The Equal Protection Clause does not use the words "because of," but instead requires "equal protection of the laws." U.S. CONST. amend. XIV, § 1. However, the Court has long interpreted this language to require that the challenged adverse action occurred because of the protected characteristic. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) ("The California insurance program does not exclude anyone from benefit eligibility *because of* gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities." (emphasis added)).

doctrinal issues. These issues include: (1) whether the doctrine requires intent, and, if so, (2) how to define intent, and (3) how to handle a decision maker who had more than one type of intent, one of which was illegal (for example, intent to discriminate based on sex) and one or more of which was legal (for example, intent to discriminate against dangerous medical treatments). This part of the doctrinal structural framework can be illustrated as follows:[36]



The illustration clarifies the decision points within this segment of antidiscrimination law, as well as the limited set of choices available at each decision point.

The remainder of this Part will address the possible answers to each of these questions, the choices historically made by the Court, and some of the normative implications of those choices.[37]

A. Decision Point One: Is Intent Required? (Disparate Treatment v. Disparate Impact)

Fundamentally, there are two possible answers to the question of what it means to say that an adverse action occurred "because of" a person's membership in a group. First, "because of" can require a particular mindset by the decision maker, generally called intent (a

36. On Decision Point 3, the illustration focuses on the three types of causation that might be relevant to the *Skrmetti* case, and does not flesh out the "other" types of causation. For an exhaustive list of causation options, see Katz, *supra* note 28, at 900-02.

37. This Part relies heavily on Katz, *supra* note 11.

disparate-treatment doctrine).[38] Alternatively, "because of" can require only a statistical connection, or correlation, between the adverse consequences and the group, such that members of the group are disproportionately harmed by a decision, regardless of whether the decision maker intended such disproportionate harm (a disparate-impact doctrine).[39]

With two possible meanings of "because of," there are four possible doctrinal options: An antidiscrimination doctrine can require (1) disparate treatment (intent), (2) disparate impact (effect), (3) either disparate treatment *or* disparate impact, or, (4) both disparate treatment *and* disparate impact.

The Court has been unequivocal that equal protection is a disparate-treatment doctrine. Heightened scrutiny, such as intermediate scrutiny in sex discrimination cases,[40] applies only when a government decision maker *intentionally* discriminates against a protected group.[41] As we will see below, some courts and commentators have suggested the possibility that equal protection requires *both* disparate treatment *and* disparate impact to trigger

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38. *See* J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1395 (2003). Sometimes, writers use other words to describe this concept, including "purpose," "motive," or "motivation." The more common convention, and the one I will use in this Article, is to refer to this concept as "intent."

39. *See id.* at 1396-97. A third possible definition of "because of" relates to so-called accommodation doctrines, which arguably have elements of both disparate treatment and disparate impact. *See id.* at 1401 fig. 2. Because there are no accommodation issues in *Skrmetti*, I do not address accommodation doctrines in this doctrinal structural map.

40. In this Article, I use the term "heightened scrutiny" to denote both intermediate scrutiny and strict scrutiny, as opposed to the rational basis test.

41. *Cf.* Washington v. Davis, 426 U.S. 229, 239 (1976) (explaining that in racial discrimination cases, to which the Court applies strict scrutiny, the Court has "not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory *purpose*, is unconstitutional *solely* because it has a racially disproportionate impact" (first emphasis added)). This requirement has been the subject of a great deal of criticism, including arguments about the role of disparate-impact doctrine in addressing the continuing effects of past disparate treatment and the ability to address current disparate treatment that might be hard to prove. *See, e.g.*, David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOU. L. REV. 1033, 1071, 1076-104 (2019). However, the Court has continued to reaffirm the intent requirement. *See, e.g.*, Students for Fair Admission, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2208 (2023) (Gorsuch, J., concurring) ("The provision of Title VI before us ... 'prohibits only *intentional* discrimination.'" (emphasis added) (quoting Alexander v. Sandoval, 532 U.S. 275, 280 (2001))). The debate over whether disparate treatment should be required to trigger heightened scrutiny is beyond the scope of this Article.

heightened scrutiny. But there is no doubt that, at the very least, disparate treatment, and thus intent, is required.

B. Decision Point Two: The Definition of Intent (Classification v. Animus)

For disparate-treatment doctrines—those requiring intent—the next question is: What is the meaning of intent? Two options tend to be used in modern antidiscrimination law.[42]

First, intent can mean simply intent to sort people by group membership. This definition can be thought of as classification. Note that classification is not an instrumental concept. That is, intent to sort, by itself, counts as intent. The Court does not need to inquire into why a decision maker chose to sort.

Alternatively, disparate-treatment doctrine could adopt an instrumental definition of intent, in which sorting counts as intent only if it is done for a particular reason—generally, a bad reason.[43] For example, the definition of intent might require a desire to hurt a group, or to establish or communicate a group's superior or inferior status. This definition tends to be referred to as an animus requirement.[44]

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42. There is a third possible definition of intent: a negligence-like definition based on the foreseeability that an action will have a disparate impact. *See* supra note 10. However, the Court has squarely rejected this definition since 1979. S*ee supra* note 10. So, I do not consider it here.

43. It is possible in theory to adopt an instrumental definition of intent that is based on good reasons. For example, a decision maker might sort by race or sex to achieve educational benefits that are understood as being salutary. *See, e.g., Students for Fair Admissions, Inc.*, 143 S. Ct. at 2166 (agreeing that diversity in higher education is a good thing). However, in such cases, the Court tends to evaluate the good reason either as (1) a causation doctrine (which I will discuss below), *see infra* Parts III.B-D, or (2) a justification under the appropriate level of scrutiny. *See Students for Fair Admissions, Inc.*, 143 S. Ct. at 2166-67; Doe v. Ladapo, 676 F. Supp. 3d 1205, 1217-18 (N.D. Fla. 2023) ("One can survive—but cannot avoid—intermediate scrutiny by saying there is a good reason for treating a male and female differently."). Accordingly, I do not address the possibility of an instrumental definition of intent that is based on good reasons.

44. *See* Cary Franklin, *Discriminatory Animus*, *in* A NATION OF WIDENING OPPORTUNITIES 29, 35 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015). As a logical matter, instrumental definitions of intent might incorporate good reasons for sorting (such as a desire to create a good learning environment for one group), as well as bad reasons for sorting (such as a desire to communicate group inferiority). In this Article, consistent with common usage, I use the word "animus" to refer to bad reasons for sorting.

The normative stakes in choosing between classification and animus are high. Animus is generally seen as worse than classification.[45] This type of intent was prevalent during slavery, Reconstruction, and the Jim Crow Era, and there is widespread agreement today that such intent is extremely problematic. So it certainly makes sense to treat animus as a prohibited intent.

But there are also strong normative reasons why we might want mere classification to trigger an antidiscrimination law, even in the absence of animus. First, animus may be hard to prove. Applying heightened scrutiny to classification, which is easier to prove, may help to "smoke out" animus.[46]

Second, we might want to trigger heightened scrutiny based on mere classification for prophylactic, or "closer look" reasons. There may be instances where, upon first glance, there does not appear to be animus, but where we might want courts to take a closer look to be sure. For example, a public school might conclude that certain students learn better in a single-sex environment.[47] Or prison officials may conclude that the best way to avoid certain types of race-based violence is to separate prisoners by race.[48] Such decisions do not seem to be based on animus. Yet we would almost certainly want courts to look carefully at such decisions to ensure that they are not based on stereotypes or even animus. This is one reason why equal protection doctrine provides heightened scrutiny based on mere classification in such cases.[49]

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45. *See id; see also, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 444, 446-47 (1985) (recognizing that classifications may sometimes rest on "real and undeniable differences," but emphasizing that government action grounded in "a bare ... desire to harm a politically unpopular group" is impermissible (omission in original) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))). In fact, animus is so problematic that the Court tends to strike down laws based on animus even under the most permissive level of scrutiny, the rational basis test. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634-35 (1996); *Moreno*, 413 U.S. at 537-38.

46. *See* Johnson v. California, 543 U.S. 499, 506 (2005). But the Court has been clear that heightened scrutiny applies even if there is no evidence of animus or stereotyping. *See id.* at 505; *see also* Franklin, *supra* note 44, at 31-35 (discussing animus in civil rights law).

47. *See* United States v. Virginia, 518 U.S. 515, 534-35 (1996).

48. *See Johnson*, 543 U.S. at 507-09.

49. *See id.* at 509 (holding that strict scrutiny applies to racial segregation intended to avoid violence in prisons); United States v. Virginia, 518 U.S. at 515, 555-56 (holding that intermediate scrutiny applies to single-sex schools); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 168-69, 171 (2015) (applying strict scrutiny in free speech doctrine, both because classifying speech by its content is problematic in and of itself, and because such sorting may

A third normative argument for choosing a classification requirement, as opposed to an animus requirement, is that there may be something inherently wrong with classification, even if it is clear that the decision maker harbors no animus.[50] We tend to see these arguments made in the area of affirmative action. In cases involving racial preferences in, say, contracting or education, the government tends to be motivated by factors such as addressing the continuing effects of past discrimination or optimizing an educational environment, which are hard to understand as animus.[51] Yet, the Court has been clear that equal protection doctrine does not depend on animus. In such cases, heightened scrutiny applies any time the government sorts by race. This represents adherence to a classification definition of intent and the related colorblindness norm.[52]

The Court has provided several good normative reasons for using a classification norm in affirmative action cases, including the divisiveness of using race-based classifications, a preference for individual justice over group-based justice, the dangers of stigmatizing minority group members, and resentment from majority group members.[53] There are also several good normative reasons to

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suggest that the government is engaging in viewpoint discrimination, or animus against speech with a particular viewpoint); Tuan Anh Nguyen v. INS, 533 U.S. 53, 60-62 (2001) (holding that intermediate scrutiny applies to a statute treating fathers differently than mothers for purposes of determining the citizenship of their children, which might implicate stereotyping); Craig v. Boren, 429 U.S. 190, 191-92, 210 (1976) (statute setting higher age for men to drink did not appear to be based on animus, but Court applied intermediate scrutiny).

50. *See, e.g.*, Jessica A. Clarke, *Scrutinizing Sex*, 92 U. CHI. L. REV. 1, 5 (2025) ("[A]ll sex classifications, like all race-based ones, ought to trigger heightened scrutiny, regardless of the purposes or effects of those classifications.").

51. *See* Joy Milligan, *Animus and Its Distortion of the Past*, 74 ALA. L. REV. 725, 737-42 (2023).

52. *See, e.g.*, Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2166 (2023) (racial classification in education); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (racial classification in contracting); *see also* Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987) (sex classification in employment); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (sex classification in education).

53. *See City of Richmond*, 488 U.S. at 493 ("Classifications based on race carry a danger of stigmatic harm.... [They] lead to a politics of racial hostility."); *id.* at 509 (emphasizing a preference for individual-based justice); *Students for Fair Admissions*, 143 S. Ct. at 2198 (Thomas, J., concurring) (asserting that affirmative action "stamp[s]" minorities "with a badge of inferiority" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring))); *id.* at 2199 (describing the harm to racial groups who do not benefit from affirmative action). It is beyond the scope of this Article to evaluate the normative arguments

decline to use a classification norm in these cases.[54] But interestingly—and importantly—the judges and commentators who argue most strenuously against applying a classification norm in affirmative action cases do not seem to object to the idea of applying heightened scrutiny based on mere classification in nonaffirmative action cases.[55] In other words, outside of affirmative action, most courts and commentators easily conclude that classification, in and of itself, is normatively problematic.

Once we select a definition of intent, a final issue related to intent is how to prove intent (generally, classification).[56] The simplest scenario is one in which a law discriminates on its face. That is, when a law (1) expressly sorts by a protected characteristic, and (2) allocates benefits or burdens based on that characteristic, then there is no doubt that the law—or the legislature that wrote the law—has engaged in classification.

A second type of evidence can prove intent nearly as unequivocally as facial discrimination: legislative statements of intent. Note that such statements are not merely the statement of a single legislator, such as those one might find in the legislative record. Such single-legislator statements might not shed much light on the intent of the other legislators.[57] But statements of legislative intent

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for or against a mere classification requirement in affirmative action cases. The point is to illustrate the normative stakes of this choice. For a good discussion of the normative reasons for proscribing classification in nonaffirmative action, as well as affirmative action cases, see Clarke, s*upra* note 50, at 63-74.

54. *See, e.g.*, *Students for Fair Admissions*, 143 S. Ct. at 2225-30 (Sotomayor, J., dissenting) (arguing that the Framers rejected colorblindness language and that during Reconstruction Congress passed laws that were not colorblind); *id.* at 2234-37 (suggesting that affirmative action is still needed to remedy systemic inequities that still exist today); *id.* at 2264-71 (Jackson, J., dissenting) (asserting that there is a moral difference in affirmative action cases between hurting a group which has benefited in the past and helping a group which has been harmed in the past).

55. *See generally id.* at 2225-30 (Sotomayor, J., dissenting); *id.* at 2264-71 (Jackson, J., dissenting).

56. *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977) (listing several ways to prove intent); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (setting out a burden-shifting framework for proving intent in Title VII discrimination cases); Martin Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 117 (2007) (explaining the pretext method of proving intent).

57. *See* Conroy v. Aniskoff, 507 U.S. 511, 519-20 (1993) (Scalia, J., concurring in the judgment) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.... But there are many other faces in the crowd, most of which, I think, are set

are generally adopted by a majority of the legislators, and thus effectively serve as a collective admission of intent.[58]

Though there are myriad other ways to prove intent,[59] where there is facial discrimination or a legislative statement of intent—as there were in *Skrmetti*[60]—it is generally unnecessary to consider other methods of proof.

C. Decision Point Three: Causation in Multiple-Intent Cases (the But-For Test in Equal Protection)

The next decision point in disparate-treatment doctrine addresses the question of what happens when a decision maker has more than one type of intent, one of which is illegal, and the other of which is legal.[61] Suppose, for example, that a city denies a zoning variance to a housing project based on two intents: a desire to prevent racial integration (illegal) and a desire to avoid multifamily housing in a particular neighborhood (legal).[62] In such a case, the question becomes whether the illegal intent (preventing racial integration) caused the decision in question (denial of the zoning permit). To answer this question, we need to know which causal test to use. Several tests are available.

If the law adopts a sole-cause test for intent, then the mere existence of a second (legal) intent would defeat an equal protection claim. However, the Court has rejected a sole-cause test in virtually every antidiscrimination doctrine, including equal protection.[63]

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against today's result.").

58. *See, e.g.*, TENN. CODE ANN. § 68-33-101 (2025).

59. *See generally* Leon Friedman, *Intent, Purpose and Motivation in Constitutional Litigation*, 15 TOURO L. REV. 1607 (1999) (explaining approaches to proving intent across different doctrines).

60. *See* United States v. Skrmetti, 145 S. Ct. 1816, 1835-36 (2025).

61. Actually, there are two doctrinal paths to address cases in which a decision maker has legal—as well as illegal—intent. First, the decision maker can try to use the legal intent as a justification for the illegal intent under the appropriate level of scrutiny. Under this path, it tends to be difficult for the decision maker to prevail—which is why the *Skrmetti* Court seems to want to avoid it. Second, and the subject of this Part, the decision maker can argue that its illegal intent did not cause the decision in question (that is, the adverse action).

62. This example is intentionally similar to the case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, a key case on causation in equal protection doctrine. 429 U.S. 252, 255-58 (1977) (summarizing underlying facts).

63. *See, e.g.*, *id.* at 265 ("[The Court] does not require a plaintiff to prove that the

Rather, in equal protection doctrine (and in many other doctrines), the Court has adopted a but-for test of causation.[64] This test requires that the illegal intent (such as preventing racial integration) was necessary to—that is, a but-for cause of—the decision (denial of the permit), such that the decision to deny the permit would not have occurred without the illegal intent. As with the sole-cause test, a but-for test may exonerate illegal intent (such as intent to sort by race or sex) in certain situations, but only where the second (legal) intent plays a threshold qualitative role: The second (legal) intent must be independently sufficient to cause the decision.[65]

Other doctrines adopt other causal tests, including a primary- or predominant-factor test (which I will collectively refer to as a primary-cause test),[66] which requires that the illegal factor carried more weight in the decision-making process than the legal factor.[67]

As a normative matter, like sole-cause or but-for causation, the primary-cause test has the effect of sometimes exonerating decision makers who engaged in illegal intent. But unlike a sole-cause test, this only happens where the legal intent plays a threshold quantitative role: The legal intent must have been the decision maker's primary motivation; that is, carried greater causal weight than the causal weight of the illegal intent. Like the but-for test, this is normatively much less problematic than a sole-cause test.

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challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern.").

64. *See id.* at 270 & n.21 (adopting the same-decision test); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 502-03 (2006) (explaining why the same-decision test is a but-for test).

65. *See* Katz, *supra* note 64, at 501-02. Because, as noted below, but-for causation cannot be applied to create an incidental-intent exception, *see infra*, Part III.C., I do not focus here on the normative aspects of this test. For a discussion of the normative implications of choosing a but-for standard, see Katz, *supra* note 64, at 512-27.

66. Sometimes, this is also described as a "predominate"-cause test. *See supra* note 28.

67. *See* Katz, *supra* note 28, at 881, 899 fig. 8; *see also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (holding, in a free speech case, that a "finding as to 'predominate' intent ... is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression."). Courts and commentators sometimes use the word "predominate" to describe this causal concept, despite that fact that this is a verb. *See, e.g.*, *id.* "Predominant" is the adjective, and thus a better descriptor for a cause. But the concepts are identical.

This Part has used doctrinal structuralism to map out the key decision points in antidiscrimination laws, the range of options available at each decision point, and the normative stakes for each option. The next Part will apply this framework to understand *Skrmetti*'s apparent discrimination blindness, concluding that the Court was concerned about incidental intent.

II. UNDERSTANDING *SKRMETTI*'S CONCERN WITH INCIDENTAL INTENT

As noted above, *Skrmetti* seemed to ignore obvious proof of sex discrimination.[68] Tennessee's statute made eligibility for certain medical procedures dependent on sex (facial intent),[69] and also stated that its purpose was to encourage "appreciat[ion]" of birth sex (a legislative admission of intent).[70] Yet, despite this classic proof of intent to discriminate on the basis of sex, the Court concluded that there was no sex discrimination.[71] This Part will employ doctrinal structuralism to explore (and reject) the Court's explanations for its conclusion, suggesting that the Court seemed to be looking for an incidental-intent exception.

The Court offers two explanations for its discrimination blindness, neither of which makes sense. First, the Court provides a (pointless) lecture on facial discrimination, noting that merely using the word "sex" does not make a statute facially discriminatory.[72] This is, of course, true.[73] To be facially

68. *See supra* text accompanying notes 4-7.

69. *See* TENN. CODE ANN. § 68-33-103(a)-(b) (2025); United States v. Skrmetti, 145 S. Ct. 1816, 1873 (2025) (Sotomayor, J., dissenting) ("Physicians in Tennessee can prescribe hormones and puberty blockers to help a male child, but not a female child, look more like a boy; and to help a female child, but not a male child, look more like a girl.").

70. § 68-33-101(m).

71. *See Skrmetti*, 145 S. Ct. at 1829 ("[Tennessee's statute] does not classify on any bases that warrant heightened review.").

72. *See id*. ("This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny." (citing Tuan Anh Nguyen v. INS, 533 U.S. 53, 64 (2001))). *See also*, Connerly v. State Pers. Bd., 92 Cal. App. 4th 16, 45 (2001) ("[A] law prohibiting discrimination on the basis of race or gender would be race and gender conscious but would not invite strict scrutiny.").

73. This is why statutes that call for the collection of sex- or race-based data are not considered facially discriminatory. *See* Govind Persad, *Against a Medical Exception to Equal Protection*, 83 WASH. & LEE L. REV. (forthcoming 2026) (manuscript at 5) (on file with author)

discriminatory, a statute must go beyond mentioning sex; it must also sort by sex and allocate benefits or burdens by sex.[74] However, the statute in *Skrmetti* did exactly those things: It made access to medical care dependent on one's sex.[75] So the Court's lecture on the meaning of facial discrimination does nothing to explain its conclusion. Moreover, the Court's rather lame attempt to explain away the statute's facial discrimination does nothing to refute the powerful proof of nonfacial discrimination in legislative statement of intent.

The other reason offered by the Court for its conclusion that the Tennessee statute did not sort by sex is that the statute could not have discriminated based on sex because it discriminated on two other bases: age and medical use.[76] As a logical assessment of intent (decision point 2 in the graphic above),[77] this conclusion is obviously flawed. Having one (legal) intent hardly precludes having another (illegal) intent. This position is also flawed as a psychological matter. Unless we believe that decision makers are psychologically incapable of considering multiple goals, the fact that a decision maker had one intent (such as intent to classify by age or medical

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("[P]olicies that reference protected class identity, but do not treat individuals differently based on protected class membership, do not trigger heightened scrutiny. For instance, 'wholesale' policies that consider protected category demographics at the population level do not trigger heightened scrutiny as classifications, unlike 'retail' policies that treat individuals differently based on their protected class membership." (footnotes omitted)); *see also, e.g.*, Morales v. Daley, 116 F. Supp. 2d 801, 814 (S.D. Tex. 2000) (discussing "distinction between collecting demographic data so that the government may have the information it believes at a given time it needs in order to govern, and governmental use of suspect classifications without a compelling interest").

74. *See Skrmetti*, 145 S. Ct. at 1874 (Sotomayor, J., dissenting) (explaining that a statute requiring alimony payments from husbands, but not from wives, warranted heightened scrutiny because it imposed "a burden [a husband] would not bear were he female." (quoting Orr v. Orr, 440 U.S. 268, 273 (1979))); *see also* Griffith v. El Paso County, 129 F.4th 790, 845 (10th Cir. 2025) (Tymkovich, J., dissenting) ("The touchstone of the Equal Protection scrutiny analysis is not whether sex factors into a policy or law, as the majority claims, but whether it discriminates based on sex by ascribing different benefits or burdens to the sexes. Put another way, it is differential treatment—not mere classification—that triggers heightened scrutiny." (emphasis omitted) (citing Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 953 (1996) (Rogers, J., concurring in part))).

75. *Skrmetti*, 145 S. Ct. at 1872-73 (Sotomayor, J., dissenting) ("[The statute] plainly classifies on the basis of sex .... [S]ex determines access to the covered medication.").

76. *See id.* at 1829 (majority opinion) ("[The statute] does not classify on any bases that warrant heightened review.").

77. *See supra* Part I.B.

use) has nothing to do with whether the decision maker had another type of intent (such as to classify by sex). Psychology and law both reject the idea that decision makers are so limited.[78] So, it simply makes no sense to say that having an alternative legal intent (age discrimination or medical use discrimination) precludes one from having an illegal intent (sex discrimination).[79]

The extreme weakness of these two explanations suggests that something else is going on. Some clues may be provided by the Court's second attempted justification, which focuses on legal forms of intent (age and medical use). This suggests that the Court is struggling, albeit unsuccessfully, with the relationship between legal and illegal types of intent.[80]

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78. *See* Din Bandhu, M. Murali Mohan, Noel Anurag Prashanth Nittala, Pravin Jadhav, Alok Bhadauria & Kuldeep K. Saxena, *Theories of Motivation: A Comprehensive Analysis of Human Behavior Drivers*, 244 ACTA PSYCHOLOGICA, Apr. 2024, at 1, 1, https://www.sciencedirect.com/science/article/pii/S0001691824000544.?ref=pdf_download&Fr=RR-2&rr=9baed766da16367d [https://perma.cc/8TYC-DWGV] ("Human behavior is influenced by a complex interplay of numerous factors. These include biological determinants, psychological factors, social and cultural elements, economic and environmental factors, as well as external stressors that play a significant role in shaping how individuals interact and respond to their environment."); Vladas Griskevicius & Douglas T. Kenrick, *Fundamental Motives: How Evolutionary Needs Influence Consumer Behavior*, 23 J. CONSUMER PSYCH. 372, 373 (2013), https://www.sciencedirect.com/science/article/pii/S1057740813000259?Fr=RR-2&ref=pdf_download&rr=9baed933fdcc3b7d [https://perma.cc/NJW5-2K7P] ("But an important insight from an evolutionary perspective is that behavior has *both* proximate and ultimate causes. People often have multiple motives for a behavior, even if they are not always aware of the ultimate reasons for their choices."); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature or administrative body operating under broad mandate made a decision motivated solely by a single concern.").

79. Below, I will address an alternative way to conceptualize this argument by the Court: as a sole-causation requirement. *See infra* Part III.B. Because the Court does not address it that way, I treat this explanation as a potential path the Court may use in the future to try to implement an incidental-intent requirement.

80. Before *Skrmetti*, a decision maker's legal intent tended to be addressed during the application of intermediate scrutiny, where the government can try to justify its intent to sort by sex. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197-200 (1976). But in *Skrmetti*, the majority seemed determined to avoid intermediate scrutiny. 145 S. Ct. at 1829 ("We are asked to decide whether SB1 is subject to heightened scrutiny under the Equal Protection Clause. We hold it is not. SB1 does not classify on any bases that warrant heightened review."). Presumably, this was because the government tends to lose more often when heightened scrutiny is applied. *See* Erwin Chemerinsky, *The Levels of Scrutiny Are Here to Stay (for Now at Least)*, SCOTUSBLOG: COURTLY OBSERVATIONS (Aug. 14, 2025), https://www.scotusblog.com/2025/08/the-levels-of-scrutiny-are-here-to-stay-for-now-at-least/ [https://perma.cc/X3QN-3737] ("*Skrmetti* thus again shows how likely it is that the government will win if it can convince

To understand this struggle, it is helpful to go back to a prior case in which the Court struggled with the relationship between legal and illegal intent: *Bostock v. Clayton County*.[81] In that case, employers admitted that they sorted and fired people based on their sexual orientation and gender identity. But the employers denied that they sorted those people based on their sex, as required by the statute at issue in that case.[82] The majority concluded that it is impossible to sort people by sexual orientation or gender identity without also sorting them by sex.[83] The dissent disagreed.[84] And while the dissent was ultimately unable to refute the majority's impossibility logic,[85] those Justices remained convinced that sexual orientation and gender identity discrimination were in fact distinct from sex discrimination.

The *Bostock* dissenters seemed to believe that, while sex discrimination may technically have played a role in sexual orientation or gender identity discrimination (as the majority held), this type of technical discrimination seemed quite different from more traditional concepts of discrimination. A good example of this view was articulated by Justice Kavanaugh, who, though willing to accept that, "firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex," believed that Title VII was not designed to proscribe such technical forms of sex discrimination.[86]

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a court to use rational basis review."); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006).

81. 140 S. Ct. 1731, 1739 (2020). Note that, in *Bostock*, the "legal" reason provided by the decision maker, intent to fire someone based on their sexual orientation or gender identity, *id.* at 1737-38, may have been legal under the statute at issue in that case (Title VII), though such intent has been proscribed by other laws. *See, e.g.,* COLO. REV. STAT. § 24-34-601 (2025). Also, while such intent may be legal under Title VII, most people believe that such intent is normatively problematic. *See* IPSOS LGBT+ PRIDE REPORT 2025 28 (2025) https://www.ipsos.com/en/ipsos-pride-survey-2025 [https://perma.cc/P297-XBEJ]. But whether these forms of discrimination are prohibited as a form of sex discrimination may depend on one's view of incidental intent.

82. *Bostock*, 140 S. Ct. at 1744.

83. *Id.* at 1741.

84. *See id.* at 1754-55 (Alito, J., dissenting).

85. *See* Katz, *supra* note 11, at 1419-40 (explaining why the majority's argument was correct, though for slightly different reasons than those offered by the Court).

86. *See Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., dissenting).

This issue in *Bostock* has continued to simmer. It has certainly simmered in the lower courts, where there is a split over the applicability of *Bostock* outside of Title VII.[87] And the issue came to a head—or, at least, threatened to come to a head—in *Skrmetti*. In that case, *Bostock*'s technical impossibility theory was not even necessary to prove the decision maker's intent to sort by sex. That intent was plain on the face of the statute. And had the majority acknowledged that, it would have presented the same tension as *Bostock*: how to conceptualize sex discrimination that seemed incidental to the decision maker's ultimate goal. In other words, *Skrmetti* squarely presented the issue of incidental discrimination.

Unfortunately, the majority in *Skrmetti* squarely avoided this issue, with its oblique and obviously false assertion that there was no sex discrimination. It is possible that the Court simply ignored the issue, taking a "see no evil" approach. But as Ayn Rand effectively noted in her famous quote, ignoring something is usually a poor way of dealing with it.[88]

A more productive (and more charitable) view is that the *Skrmetti* Court was effectively (though silently) trying to create an exception for incidental intent.[89] Under this view, the Court understood that the Tennessee statute sorted by sex, but sought to decouple such discrimination from heightened scrutiny. The Court readily acknowledged that, as a general matter, sex discrimination triggers heightened scrutiny.[90] So the only path out of this conundrum for the Court would be to exclude the type of discrimination in *Skrmetti* from the more general concept of sex discrimination.[91] In other

87. *See* Katz, *supra* note 11, at 1394 n.13.

88. *See supra* text accompanying note 1.

89. My goal here is not to justify the Court's decision in *Skrmetti*. Nor am I taking a position on whether the Court (1) had no idea what it was doing, (2) honestly believed there was no discrimination, (3) was dishonestly avoiding the issue, (4) was unconsciously creating an incidental-intent exception, or (5) was strategically laying the seeds to later implement an incidental-intent exception (or claim that it did so in *Skrmetti*). If even one of these things is going on, which seems to be the case, it will be important to understand the doctrinal paths to defining and implementing such an exception. And even if none of those things are going on, lower courts and litigators will continue to struggle to make sense of *Skrmetti*. Hopefully, this analysis will help them do so.

90. United States v. Skrmetti, 145 S. Ct. 1816, 1863-64 (2025) (Alito, J., concurring).

91. The question of whether incidental intent should be actionable could easily be the subject of its own article. The idea may have some appeal. As noted in the text, the dissent in *Bostock* made a strong argument that sex discrimination used to identify those who are

words, the Court appears to have been searching for an incidental-intent exception to the general rule that sex-based sorting triggers heightened scrutiny.

If this assessment is correct,[92] the Court will need to address the contours of an incidental-intent exception, including the definition of incidental intent or the doctrinal path to implementing such an exception. The next Part will explore the ways that the Court might define and implement an incidental-intent exception, noting that some of the paths available to do so are quite dangerous to settled views of antidiscrimination doctrine.

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attracted to the same sex or those whose gender identity differs from their birth sex is qualitatively different than more traditional forms of sex discrimination. *See supra* text accompanying notes 85-86. On the other hand, we might think that the idea of exonerating incidental intent is a bad one. That is, perhaps we should be just as concerned about incidental intent as we are about sex-based intent more generally. If so, it may make sense either to ban incidental discrimination (on the ground that sorting by sex for any reason is problematic), or, at the very least, to demand that a decision maker who engages in incidental discrimination must justify that discrimination. Of course, the latter is precisely what pre-*Skrmetti* traditional equal protection law does: it applies intermediate scrutiny to sex-based sorting, and requires that the decision maker demonstrate an important justification and substantial fit. Finally, some readers may simply like the result in *Bostock,* which seems to depend on incidental intent being fully actionable. And none of this addresses the question of whether an incidental-intent exception should include incidental race, as well as incidental sex discrimination.

92. There is an alternative explanation of *Skrmetti*'s discrimination blindness, which I do not address: that the Court has created a "medical exception" to equal protection law. *See Skrmetti*, 145 S. Ct. at 1829 ("This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny.... Such an approach, moreover, would be especially inappropriate in the medical context." (citing Tuan Anh Nguyen v. INS, 533 U.S. 53, 64 (2001))). I do not address this possibility in this Article for three reasons. First, the idea that antidiscrimination doctrine might not apply in a particular field, such as medicine, is not really an antidiscrimination concept. So it is not clear that doctrinal structuralism has much to add. Second, even if such an exception exists, it will not help the Court address the problem of incidental intent in cases outside of the medical field, including its upcoming cases on transgender athletics. *See supra* note 20 and accompanying text. Third, several scholars do an excellent job arguing why such an exception would be a bad idea. *See, e.g.*, Persad, *supra* note 73, at 29-37 (laying out a normative case against medical exceptions to equal protection). Indeed, it is hard to see why we should be less concerned about a medical law prohibiting women from taking aspirin or receiving cancer treatment than a nonmedical law prohibiting men under twenty-one from drinking beer. *See* Craig v. Boren, 429 U.S. 190, 191-92, 210 (1976).

III. THE PATHS TOWARD AN INCIDENTAL-INTENT EXCEPTION

If the majority in *Skrmetti* was trying to create an escape valve for incidental intent, the Court does not clearly tell us (if at all) how it implemented or planned to implement such an exception as a doctrinal matter. My doctrinal structuralism framework can help us anticipate five paths that future courts might use to define and implement an incidental-intent exception. This Part will identify and evaluate those paths. As we will see, several of these doctrinal paths are highly problematic. Others are less problematic.

Before proceeding, it is worth briefly noting two paths that I will not explore. The option that is most obvious, and worth keeping in mind, is the traditional, pre-*Skrmetti* approach: acknowledge the statute's sex discrimination, apply intermediate scrutiny, and evaluate the government's legal intent as a justification for its discrimination. Put differently, the Court could stop trying to solve the problem of incidental intent, and simply address legal intent in the traditional manner under heightened scrutiny. However, as noted above, the Court resists this option.[93] Second, the Court could continue down the path of discrimination blindness, baselessly denying that there is discrimination any time the Court does not want to apply heightened scrutiny. This approach would make the court look foolish, and seriously undercut its credibility, reputation, and authority. Accordingly, this Part will explore five more likely paths to implementing an incidental-intent exception.

A. An Animus Requirement

The most obvious way to implement an incidental intent exception would seem to be as a definitional matter. Recall that, if a doctrine such as equal protection requires intent, we must select a definition of intent (decision point 2 in my graphic, above).[94] Thus, perhaps the Court can define incidental intent and then decline to apply heightened scrutiny any time the government's intent satisfies that definition.

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93. *See supra* text accompanying note 19.

94. *See supra* Part I.B.

The problem with this approach is that, as a doctrinal structural matter, there are only two definitions of intent: classification and animus.[95] As discussed above, a classification-based definition is agnostic as to the reason for classification, and thus, cannot distinguish between incidental and nonincidental intent. So the only definition available to implement an incidental-intent exception would be to use an animus requirement. That is, the Court might require animus, rather than mere classification, to trigger heightened scrutiny. Because animus focuses on the purpose for sorting (to harm or subordinate), such a definition, by its nature, would preclude any possibility of incidental intent.

The statute in *Skrmetti* unequivocally sorted based on sex.[96] Thus, the case clearly involved classification. But there was no indication that the statute sorted by sex in order to harm anyone because of their sex.[97] That is, there was arguably no evidence of sex-based animus.[98] So maybe, when *Skrmetti* said the statute did not intentionally discriminate based on sex, the Court was defining intent as requiring animus, not merely classification.

This path toward an incidental-intent exception would be deeply problematic for several reasons. First, as a doctrinal matter, since at least 1989, in *City of Richmond v. J.A. Croson Co.*, the Court has been unequivocal in holding that mere classification triggers heightened scrutiny under the Equal Protection Clause.[99] The Court recently applied this anticlassification norm outside of equal

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95. *See supra* Part I.B.

96. *See Skrmetti*, 145 S. Ct. at 1872-73 (Sotomayor, J., dissenting).

97. *See generally* TENN. CODE ANN. §§ 68-33-101, -103 (2025).

98. I say "arguably" because we might understand sex-based stereotyping, or, more specifically, punishing people for failing to conform to sex-based stereotypes, as a form of animus. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 125 (2010) ("[W]omen's subordination [has been linked] with laws that enforced traditional sex roles—particularly in the domain of marriage, childrearing, and sexuality."). However, for purposes of fleshing out this potential understanding of *Skrmetti*, which I ultimately reject, I will assume that there was no sex-based animus. Similarly, I do not address the question of animus towards transgender people. The question for purposes of this understanding of *Skrmetti* is only whether there was sex-based animus.

99. *See* 488 U.S. 469, 490-91 (1989); *see also* Johnson v. California, 543 U.S. 499, 505 (2005) ("We have held that '*all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.'" (alteration in original) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))).

protection, for example in Title VII cases.[100] And in equal protection, the Court reaffirmed its anticlassification norm—a colorblindness norm—as recently as its 2023 case, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*.[101] So it is hard to imagine that *Skrmetti* silently changed the definition of intent to require animus, as well as classification.[102]

Second, an animus requirement would effectively give the government a free pass to classify. Historically, the Court has imposed heightened scrutiny in classification cases, not only to "smoke out" potential animus,[103] but also because the Court is concerned about the corrosive and potentially unfair effects of classification.[104] Classification treats people differently based on nothing more than group membership. While the government might have adequate justification for doing this where suspect classes are involved, heightened scrutiny requires a strong justification and a close fit.[105]

It is possible that those who dislike the Court's recent affirmative-action jurisprudence might cheer at the adoption of an animus test. Because affirmative-action cases tend to involve classification without animus,[106] such a test might result in the application of a

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100. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020) (Title VII); *see also* Franklin, *supra* note 44, at 31-35 (discussing animus in civil rights law).

101. *See* 143 S. Ct. 2141, 2225-26 (2023) (Sotomayor, J., dissenting) ("In [its] holding, the Court cements a superficial rule of colorblindness as a constitutional principle."); *see also id.* at 2188 (Thomas, J., concurring) ("Properly understood, our precedents have largely adhered to the Fourteenth Amendment's demand for colorblind laws.").

102. As noted above, animus is generally considered worse than classification. *See supra* note 45 and accompanying text. For this reason, the Court has repeatedly held that government actions based on animus fail even the most lenient justification requirement, the rational basis test. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 898-99 (2012).

103. *See Johnson*, 543 U.S. at 506.

104. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 642-44 (1993); *see also* Clarke, *supra* note 50, at 5 ("[A]ll sex classifications, like all race-based ones, ought to trigger heightened scrutiny, regardless of the purposes or effects of those classifications."). Professor Clarke also does an excellent job explaining the normative underpinnings for this doctrine. *See id.* at 63-74.

105. *See* R. Randall Kelso, *Classifying the Four Kinds of "Exacting Scrutiny" Used in Current Supreme Court Doctrine*, 127 PENN ST. L. REV. 375, 378 (2023) (explaining the standards for intermediate and strict scrutiny).

106. *See, e.g.*, Students for Fair Admissions, Inc. v. President of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126, 139 (D. Mass. 2019) ("[T]he Court finds no persuasive documentary evidence of any racial animus or conscious prejudice."), *aff'd sub nom.*, Students for Fair Admissions, Inc. v. President of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891,

lower level of scrutiny, under which proponents of affirmative action might prevail more often. Yet even for fans of affirmative action, such a test would come at a terrible cost. It would allow conduct that most people would condemn. Thus, it would make little sense, either doctrinally or normatively, to understand *Skrmetti* as adopting an animus requirement.[107]

Note that the argument above assumes that there are only two types of intent: animus and classification. It is possible that there is a third definition of intent, distinct from classification and animus. Recall that, in defining intent (decision point 2), we distinguished classification, a noninstrumental definition, from instrumental definitions, which depend on the decision maker's reason for classifying.[108] And recall that we focused on a particular instrumental definition: animus, which occurs when a decision maker classifies for bad reasons.[109] This leaves open the possibility of another instrumental definition of intent that, unlike animus, is based on a decision maker's good ultimate intent. For example, suppose that a decision maker classifies by race or sex to create a better learning environment, rather than to harm a particular race or sex. Such intent would be instrumental, but would not be animus. Perhaps *Skrmetti* sought to define incidental intent instrumentally to require an ultimate purpose for sorting other than harming or subordinating the sorted group.

The problem with such a third definition of intent is that the Court has never used such a concept—and for good reason. Current doctrine contains two perfectly good ways to address a decision maker's potentially good reasons for sorting by race or sex: (1) evaluating the decision maker's good reason as a justification under the appropriate level of scrutiny, or (2) addressing the question as one of causation, that is, whether the good reason (legal intent) or the

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1915-16 (2020) (plurality opinion) (holding that recission of the Deferred Action for Childhood Arrivals (DACA) program did not violate the Equal Protection Clause, in part because plaintiffs failed to show that "the recission was motivated by animus").

107. This may be a reason why the *Skrmetti* Court hesitated to flesh out the concept of incidental intent: because the most obvious way of doing so would conflict with its affirmative action jurisprudence (and adopt a problematic definition of intent).

108. *See supra* Part I.B.

109. *See supra* Part I.B.

illegal intent (sorting by race or sex) caused the decision in question (decision point 3 in my graphic).

As noted above, the Court seems uninterested in the first path (applying heightened scrutiny).[110] Accordingly, the next Part will examine causation-based approaches to implementing an incidental-intent requirement.

B. A Sole-Cause Test

A second possible way to implement an incidental-intent exception would be at decision point 3 in the doctrinal structural framework,[111] which deals with causation. Recall that, where a decision maker has multiple intents, one illegal and the other legal, we must determine what test to use to answer the question of whether the illegal intent caused the decision in question.[112]

Causation seems like a promising approach to incidental intent. As noted above, what arguably makes intent to sort (classification) incidental is that the sorting is unrelated or only tangentially related to the group being sorted.[113] For example, if the decision maker's goal in sorting people by their sex is to identify people who are attracted to the same sex, or who are transgender, we might say that goal is only tangentially related to sex. This framing, of course, begs the question of just how tangential the relationship has to be in order for the sex-based sorting to be considered incidental. As *Bostock* makes clear, there is indeed a relationship between sex and same-sex attraction or gender identity.[114] So the question would become: How much or what type of relationship between the legal and illegal intent is required in order to be nonincidental? Doctrinal structuralism shows that these questions, dealing with the relationship between legal and illegal intent, are the province of causation (decision point 3).

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110. *See supra* text accompanying note 19.
111. *See supra* Part I.C.
112. *See supra* Part I.C.
113. *See supra* text accompanying notes 15-18.
114. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020).

This Part and the next two Parts will evaluate potential causal tests that could be used to implement an incidental-intent requirement. This Part will evaluate the sole-cause test.

In *Skrmetti*, the Court tried to suggest that Tennessee could not have sorted by sex because it sorted by other (legal) characteristics: age and medical use.[115] As a question of intent, this explanation is logically flawed unless we think that decision makers can have only a single intent.[116] But this analysis might make more sense as a matter of causation.

There is a causal test, called sole cause, that would have permitted the Court to say, as a doctrinal matter, that where a decision maker has multiple intents, we will only credit one. A sole-cause requirement would allow the Court to implement an incidental intent requirement, though at great cost.

To understand this, suppose that a decision maker had an illegal intent (e.g., to sort by sex) and a legal intent (e.g., to sort by age or medical use). A sole-cause test would require the illegal intent (sex) to be the sole cause of the decision in order to be actionable. The mere existence of a second, legal intent (age or medical use) would preclude the illegal intent from being the sole cause.[117]

The problem is that the Court has repeatedly, and unequivocally, rejected such a test in equal protection and in most other antidiscrimination doctrines.[118] Moreover, rejecting a sole-cause test

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115. United States v. Skrmetti, 145 S. Ct. 1816, 1829 (2025).

116. *See supra* Part II.

117. *See* Katz, *supra* note 28, at 900-02.

118. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("[The Court] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes" in equal protection cases.); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1074 (11th Cir. 1996) (rejecting sole causation in an ADA context stating that "[a] liability standard that tolerates decisions that would not have been made in the absence of discrimination, but were nonetheless influenced by at least one other factor, does little to 'eliminate' discrimination; instead, it indulges it"); Keller v. Hyundai Motor Mfg., 513 F. Supp. 3d 1324, 1330-31 (M.D. Ala. 2021) (rejecting sole causation in the ADEA context and explaining that the argument that but-for causation requires that the factor at issue be the sole cause "crashes, Wile E. Coyote-esque, into veritable mountains of contrary precedent"); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (holding under Title VII that, "since we know that the words 'because of' do not mean '*solely* because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations"), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2), *as recognized in*, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 337 (2020).

makes logical and normative sense. The fact that a statute sorted by age and medical use does not mean that the statute did not also sort by sex.[119] And the fact that a decision maker had legal, as well as illegal, reasons for an action does not negate the normative implications of the illegal reason.[120] Thus, if the Court's goal in *Skrmetti* was to discount incidental discrimination, it needs another doctrinal path.

C. A But-For Test

A second causal test the Court might use to implement an incidental-intent requirement is a but-for test. The Court has been quite enamored of the but-for test in several areas of antidiscrimination law, including equal protection.[121] So perhaps the *Skrmetti* Court believed that sex discrimination was not a but-for cause of Tennessee's decision to adopt its statute. That is, even though the legislature may have sorted by sex (an illegal factor), it would have passed the statute for a second, legal reason, regardless of its consideration of sex.[122] This possibility is intriguing. It would allow us to understand *Skrmetti*—and suggest a path for the Court to address incidental intent—in a minimally destructive way, both doctrinally and normatively. It does not undermine settled understandings of intent (by adding an animus requirement). And once we get past the deeply problematic sole-cause requirement, causation seems well suited to address the problem of incidental intent. The whole point of causation doctrine is to exonerate illegal intent only when it bears the correct relationship to legal intent. And as causation tests go, a but-for test—the Court's favorite—seems well suited to this task at first blush.[123]

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119. *See* Katz, *supra* note 11, at 1415.

120. *See* Katz, *supra* note 64, at 542.

121. *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (Equal Protection Clause); Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020) (Title VII).

122. Presumably, this would have been a factual question if the Court had addressed the issue of but-for causation.

123. This is not to say that the but-for test is normatively unproblematic. That test has significant normative problems. *See* Katz, *supra* note 64, at 515-20. I do not dwell on those problems here because, as discussed in the text below, a but-for test cannot logically serve as a method of implementing an incidental-intent requirement in a case like *Skrmetti*. *See infra*

The problem is that but-for causation requires that the legal intent must be *independently sufficient* from the illegal intent.[124] That is, the legal intent must be (1) independent from the illegal intent, and (2) sufficient to cause the decision in question. Those requirements did not exist in *Skrmetti*.

In *Skrmetti*, there were two potentially legal intents: intent to sort by age and intent to sort by medical use.[125] However, it seems clear that neither of those were independently sufficient from the illegal intent to sort by sex. The State did not—and presumably *would* not—ban all medical treatment, or even all *hormone-therapy* procedures for anyone under eighteen.[126] It banned only gender-affirming-care procedures for those under eighteen.[127] So age does not seem to have been a sufficient cause for Tennessee's statute. And even if we believed that medical use might have been a sufficient cause for Tennessee's statute, medical use was not independent from sex under the statute. To the contrary, the statute defined medical use by reference to sex.[128] For example, as the majority noted, the statute distinguishes the medical use of testosterone to treat early-onset puberty from the medical use of testosterone to treat gender dysphoria.[129] But the difference cannot be determined without first knowing the sex of the patient.[130] In other words, medical use is not independent from sex, and thus cannot logically preclude sex from being a but-for cause of the state's decision.

The problem of independence can be understood by reference to a prototypical but-for case, *Price Waterhouse v. Hopkins*.[131] In that case, the defendant effectively admitted to sorting by sex in rejecting the female plaintiff for partnership, but claimed that it

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text accompanying notes 125-31.

124. *See* Katz, *supra* note 64, at 521.

125. *See* 145 S. Ct. 1816, 1829 (2025).

126. *Id.* at 1826 (citing TENN. CODE ANN. § 68-33-103(b)(1) (2025)).

127. TENN. CODE ANN. § 68-33-103(a)(1).

128. *Skrmetti*, 145 S. Ct. at 1872-73 (Sotomayor, J., dissenting) ("[D]octors can facilitate consistency between an adolescent's physical appearance and the 'normal development' of her sex identified at birth, but they may not use the same medications to facilitate 'inconsisten[cy] with sex." (second alteration in original) (first quoting § 68-33-102(1); and then quoting § 68-33-103(a)(1))).

129. *See id.* at 1830-31 (majority opinion).

130. *See id.* at 1830.

131. 490 U.S. 228 (1989).

would have reached the same decision based on the fact that the plaintiff was abrasive and aggressive.[132] That is, the defendant claimed that there was no but-for causation because it had an independently sufficient legal intent (abrasiveness and aggressiveness). The problem was that the lower court found that the defendant only rejected *women* who were abrasive or aggressive, while *men* who had these qualities were valued.[133] Thus, the lower court found, the supposedly independent variables (abrasiveness and aggressiveness) were not in fact independent from sex. Thus, the defendant could not show a lack of but-for causation. The legislature in *Skrmetti* would seem to have a similar problem. And so would legislatures passing laws that expressly discriminate on the basis of gender identity because as explained in *Bostock*, gender identity is not independent from sex.[134]

Thus, as appealing as but-for causation might be as a path for implementing an incidental-intent exception, the test cannot do this work in cases like *Skrmetti*. However, as will be discussed in the next Part, another causal test might be more suitable: a primary- or predominant-cause test.

D. A Primary- or Predominant-Cause Test

Under a primary-cause test,[135] the question is not whether there is an independently sufficient legal cause for a decision (as in the but-for test). Rather, the question is, as between causes, which is the more important cause: the illegal cause or the legal cause? That is, which cause carries the greatest causal weight?[136]

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132. *Id.* at 234-35.

133. *See* Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985) ("Besides the plaintiff, the Admissions Committee rejected at least two other women candidates because partners believed that they were curt, brusque and abrasive, acted like ' "Ma Barker" ' or tried to be ' "one of the boys".' Comments suggesting that sex stereotypes may have influenced the partners' evaluations of interpersonal skills were not frequent, but they appear as part of the regular fodder of the partnership evaluations."), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228.

134. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1741-43 (2020); *see also* Katz, *supra* note 11, at 1400.

135. As noted above, this test is often referred to as a predominant-cause test, or sometimes grammatically incorrectly as a predominate-cause test, but the terms are synonymous. *See supra* notes 66-67. For simplicity, I will refer to the test as a primary-cause test.

136. *See* Katz, *supra* note 28, at 899 fig. 8.

This test seems better suited for addressing incidental intent in a case like *Skrmetti*. There, the legislature clearly had both illegal intent (to discriminate on the basis of sex) and legal intent (to discriminate on the basis of age and medical use). But, as discussed above, the legal intents were not independently sufficient to cause Tennessee to pass the statute.[137] Yet, unlike the but-for test, a primary-cause test does not require that the legal intent be independent from the illegal intent or sufficient to cause the decision. That is not to say that independence is irrelevant. If the legal intent is dependent on the illegal intent, that might affect the way we understand its weight in the State's decision. But lack of independence does not preclude a conclusion that, in the decision in question, the legal intent was more important than the illegal intent. The illegal intent could have been, in this sense, incidental to the decision.

Notably, the legal definition of "incidental" exactly fits this test. In *Black's Law Dictionary*, the first definition for the term is "[s]ubordinate to something of greater importance."[138] This is precisely the definition of something that is not a primary cause.

It is worth noting that, unlike the but-for test, little has been written about the normative implications of a primary-cause test. The most common criticism of doctrines based on a primary-cause test, such as the secondary-effects doctrine in free speech, is that such a test is factually dependent and thus susceptible to dishonesty or manipulation.[139] My point here is not to engage in a comprehensive evaluation of this causal standard, or to suggest that this standard is free from flaws. But given the problems of the last three approaches to implementing an incidental intent exception, the primary-cause test seems to be the most promising path. Unlike

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137. *See supra* note 123 and text accompanying notes 124-30.

138. *Incidental*, BLACK'S LAW DICTIONARY (12th ed. 2024). The second definition is "having a minor role," *id*., which would likely refer to a substantial-cause, or substantial-factor, test.

139. *See* JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 37-39 (4th ed. 2008). "Government officials often can come up with rationales for restricting speech that are considered a secondary effect." David L. Hudson, Jr., *Secondary Effects Doctrine*, THE FIRE: RSCH. & LEARN, https://www.thefire.org/research-learn/secondary-effects-doctrine-overview [https://perma.cc/UT3U-A93B]. Similarly, the primary effects part of the *Lemon* test for Establishment Clause violations was criticized as being subjective and unpredictable. *See* Richard L. Pacelle Jr., Lemon *Test*, FREE SPEECH CTR. (Nov. 19, 2025), https://firstamendment.mtsu.edu/article/lemon-test/ [https://perma.cc/DA3N-G7W7].

some of the other paths we have explored, it would not exclude the most important categories of discrimination from heightened scrutiny. Thus, it might provide a way to understand *Skrmetti*—and incidental intent—in a minimally destructive way.

E. A Disparate-Impact Requirement (in Addition to a Disparate-Treatment Requirement)

Though a primary-cause test seems to be the best approach for implementing an incidental-intent requirement, it is worth considering one additional option: requiring disparate impact, in addition to disparate treatment, to trigger strict scrutiny. This Part will demonstrate that such an option has some significant doctrinal and normative downsides. I consider this option not because I think it is a good one, but because it seems to be a close fit with what the Court seeks in an incidental-intent requirement.

A disparate-impact requirement implicates decision point 1 in the graphic above: the question of whether intent is required.[140] Recall that there were four possible doctrinal options to answer this question. An antidiscrimination doctrine like equal protection can require (1) disparate treatment, (2) disparate impact, (3) either, or (4) both.[141] We saw that the Court has unequivocally rejected the idea that disparate impact alone can trigger heightened scrutiny.[142] So the remaining choices are (1) disparate treatment alone can trigger heightened scrutiny, or (4) both disparate treatment and disparate impact are required to trigger heightened scrutiny. This last option—requiring disparate impact, along with disparate treatment, might be a way to implement an incidental-intent requirement.

We can see how such a requirement would operate in the *Skrmetti* case. Recall that in *Skrmetti,* Tennessee's statute contained disparate treatment: It expressly sorted by sex.[143] But there was no

140. *See supra* Part I.A.
141. *See supra* Part I.A.
142. *See supra* Part I.A.
143. *See* TENN. CODE ANN. § 68-33-103(a)-(b) (2025); United States v. Skrmetti, 145 S. Ct.

evidence that the statute affected men and women differently. That is, there was no evidence of disparate impact by sex. So perhaps *Skrmetti* could be read as meaning that disparate treatment (intent) alone, without disparate impact (effect), will not trigger heightened scrutiny. Perhaps incidental intent—the type of intent that is insufficient to trigger heightened scrutiny—might mean disparate treatment without disparate impact.

It is difficult to find cases that involve disparate treatment without disparate impact. Usually, when the government sets out to sort people by a protected characteristic and allocate advantages or disadvantages to one group but not the other, it succeeds in doing so.[144] Accordingly, the only cases where we have tended to see disparate treatment without disparate impact were spite cases: those in which the government so despised a minority group that it was willing to harm the majority group in order to spite the minority group. Because the political costs of such laws are high, we would expect them to be rare. But in these rare cases, we would see disparate treatment (intent to sort by group) without disparate impact (because both groups are subject to the same disadvantage).

The archetypal spite case is *Palmer v. Thompson*, in which a town that had been ordered to desegregate its public swimming pools chose instead to shut down all its public pools.[145] As a result, people of all races were left without public pools. So there appeared to be no disparate impact.[146]

Skrmetti suggests a second type of case in which there might be disparate treatment without disparate impact: cases involving discrimination on the basis of sexual orientation or gender identity. As

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1816, 1873 (Sotomayor, J., dissenting).

144. *See, e.g.*, Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2155-56, 2171-72 (2023) (public university succeeded in giving admissions preference to nonwhite applicants) (held unconstitutional); United States v. Virginia, 518 U.S. 515, 520 (1996) (public university succeeded in excluding women from enrolling) (held unconstitutional); Craig v. Boren, 429 U.S. 190, 191-92 (1976) (state successfully excluded men from drinking alcohol until they were twenty-one, while allowing women to drink alcohol at eighteen) (held unconstitutional); Korematsu v. United States, 323 U.S. 214, 215-16, 223-24, (1944) (government succeeded in imposing extreme limits on the freedom of Japanese Americans).

145. *See* 403 U.S. 217, 224-25 (1971).

146. I say "appeared" because it is possible that, as a result of socioeconomic differences between the races, and the availability of private pools, that the races might have experienced different disadvantages from the closing of the public pools.

the Court recognized in *Bostock*, discrimination based on sexual orientation or gender identity always involves disparate treatment (classification) by sex, because it is impossible to sort by sexual orientation or gender identity without also sorting by sex.[147] But in cases involving sexual orientation or gender identity discrimination, disparate impact may often be absent. If roughly equal numbers of men and women are gay or lesbian, or have gender identities that differ from their birth sex, such laws would not disproportionately effect men or women (disparate impact).[148] In these cases, requiring disparate impact, as well as disparate treatment, would preclude the application of heightened scrutiny, even though there is sex-based disparate treatment.[149]

This seems to be exactly what the Court was trying to achieve in *Skrmetti*. So it is worth considering the arguments for and against a disparate-impact requirement as a path to the Court's goal.

Doctrinally, the idea of requiring disparate impact, along with disparate treatment, has dubious roots. The concept flows from the *Palmer* pool-closure case.[150] In that case, as noted above, there was

147. 140 S. Ct. 1731, 1741-42 (2020).

148. Empirically, it is far from clear that there would be no disparate impact in such cases. Some research suggests that more men than women identify as same-sex attracted (though this does not account for those who report being bisexual, who are more likely to be women), and that more men than women have gender identities that differ from their birth sex. *See, e.g.*, *What Percentage of Americans Are LGBTQ+?*, GALLUP: THE SHORT ANSWER (Aug. 6, 2025), https://news.gallup.com/poll/332522/percentage-americans-lgbt.aspx [https://perma.cc/53SN-JA66]; Press Release, Williams Inst. at UCLA Sch. of L., New Estimate: 2.8 Million People Aged 13 and Older Identify as Transgender in the US (Aug. 20, 2025), https://williamsinstitute.law.ucla.edu/press/trans-pop-estimates-press-release/ [https://perma.cc/SN9Z-VSPN]. The factual accuracy of this idea in general, or in any specific context, is beyond the scope of this Article.

149. In *Bostock*, the Court held that the lack of disparate impact did not preclude a Title VII claim. 140 S. Ct. at 1741 (2020) (lack of disparate impact does not excuse disparate treatment). But it is possible that the Court might view equal protection doctrine as imposing a requirement that is absent from Title VII. In my earlier piece on *Bostock*, I argued that its primary conclusion—that intent to sort by sexual orientation or gender identity requires intent to sort by sex—rests on logic, rather than on textual interpretation, and should thus apply in equal protection cases. *See* Katz, *supra* note 11, at 1441. However, the question of whether a particular doctrine requires disparate impact, in addition to disparate treatment, is an interpretive question, rather than a logical one. Thus, it might make sense to distinguish equal protection doctrine from Title VII in this respect, at least if there is reason to believe that the authors of the different texts had different expectations about the role of disparate impact.

150. 403 U.S. 217 (1971); *see, e.g.*, Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm., 89 F.4th 46, 59-60 (1st Cir. 2023) (applying *Palmer* to support the holding that "to

no evidence of disparate impact, as both races were denied public pools.[151] And the Court in *Palmer* held that the pool closure did not trigger heightened scrutiny under the Equal Protection Clause.[152] The question is whether the Court's refusal to apply heightened scrutiny was because there was no proof of disparate impact.

It is possible to read *Palmer* this way. But this reading seems to assume that there was disparate treatment in *Palmer*. After all, if disparate treatment had been lacking in *Palmer,* that would be the more obvious reason for the Court's refusal to apply heightened scrutiny.[153] But if there had been disparate treatment, then we could understand the Court's refusal to apply strict scrutiny as stemming from the lack of disparate impact.

Looking at *Palmer* through a 2026 lens, we might assume that there was disparate treatment in that case. After all, the City was motivated by white supremacy, perhaps the clearest form of disparate treatment. So, viewed through a 2026 lens, we would assume that *Palmer* was a case where there was disparate treatment, but no disparate impact. Understood this way, we might see the Court's refusal to apply heightened scrutiny as suggesting that both disparate treatment and disparate impact are required; disparate treatment alone was not enough. Such a reading of *Palmer* might explain *Skrmetti*.

However, this seems to be a poor reading of *Palmer*, and a product of revisionist history. The *Palmer* Court actually found there was no evidence of disparate treatment.[154] Today, such a finding would

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successfully challenge the use of a facially neutral, and otherwise bona fide, selection criterion, the Coalition must prove both improper intent and disparate impact"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 669 (7th Ed. 2024) ("Although the Supreme Court has never expressly addressed the question, it appears that both [disparate impact and disparate treatment] are required. Palmer v. Thompson is the case that indicates that disparate impact also must be shown."); Caroline Mala Corbin, Essay, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 315 n.106 (2015) ("*Palmer* ... may preclude finding that a discriminatory message alone violates the Equal Protection Clause.... [T]he Court upheld the pool closing in part because there was no disparate impact." (citing *Palmer*, 403 U.S. at 220-22)).

151. *See Palmer,* 403 U.S. at 225.

152. *See id.* at 226.

153. *See* Washington v. Davis, 426 U.S. 229, 239, 245 (1976) (requiring disparate treatment to trigger heightened scrutiny).

154. *Palmer*, 403 U.S. at 224-26.

be anomalous.[155] But the actual result at the time was that *Palmer* was a case where the Court found neither disparate treatment nor disparate impact. This raises the question of which was dispositive in the Court's refusal to apply heightened scrutiny: lack of disparate treatment, lack of disparate impact, or both. In light of the Court's subsequent holding in *Washington v. Davis* that disparate treatment is required,[156] the most obvious holding in *Palmer* would be the same: The challenger lost because disparate treatment was required and not present (according to the Court)—not because both disparate treatment and disparate impact were required. So reading *Palmer* as requiring disparate impact, in addition to disparate treatment, makes little doctrinal or historical sense.

This is not to say that the Court could not create such a doctrine.[157] It is only to say that, if that is what the Court wants to

155. This finding was based on a legal historic anomaly: The Court's hesitation, at the time, to examine legislative intent beyond the face of a statute when the statute (or other government action, such as the pool closings) was facially neutral between the races. *See Palmer*, 403 U.S. at 224 ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."). Because of this doctrine, the Court did not find disparate treatment. Since *Palmer*, the Court has clearly abandoned its hesitance to examine legislative intent beyond the face of statutes. *See* Friedman, *supra* note 59, at 1610 ("Chief Justice Warren, in his opinion in *O'Brien*, wrote that the worst thing one could do is look at the individual motivation of legislators.... And you can never do that, except in *Arlington Heights*, where the Supreme Court said there is no absolute rule against it and indeed you may be able to do it." (footnote omitted) (first citing O'Brien v. United States, 391 U.S. 367, 389 (1968); and then citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977))); *see also* Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99-102 (arguing the *Palmer* Court erred in declining to consider legislative intent); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1208-12 (1970) ("The Court should stop pretending it does not remember opinions on which the ink is barely dry and try to formulate principles for deciding on what occasions and in what ways the motivation of legislators or other government officials is relevant to constitutional issues."). In fact, in 1976, the Court expressly disavowed this hesitance. *See Davis*, 426 U.S. at 244 n.11 ("To the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases—as indicated in the text—are to the contrary."). But this historical anomaly led to the result in *Palmer* that the Court refused to consider strong evidence of disparate treatment, and therefore concluded there was none in the decision to close the pools.

156. *See Davis*, 426 U.S. at 239, 245 (referring to *Palmer* and noting, "[b]ut our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact").

157. Based on a close and careful reading of equal protection cases, Justice Alito recently rejected the idea of a disparate impact requirement. In *Boston Parent Coalition for Academic*

do, we should expect a lot more explanation.

The normative argument in favor of a disparate-impact requirement also seems weak. The argument would be that disparate impact is somehow necessary to ensure that there is group-based harm.[158] Antidiscrimination law, by its nature, focuses on groups. The law does not prevent any adverse action taken against an

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Excellence Corp. v. School Committee for City of Boston, the lower court required evidence of disparate impact, as well as disparate treatment. 145 S. Ct. 15, 17 (2024) (Alito, J., dissenting from denial of certiorari). Justice Alito responded:

> To my knowledge, we have never said as much. To be sure, we have said disparate impact is "[p]ossible evidence" of such a [disparate treatment] claim, and "may provide an important starting point." We have also emphasized that disparate impact "is *not* the sole touchstone." Further, a rigid rule requiring disparate-impact evidence would make little sense. We would, of course, recognize an equal-protection violation if the government had a malicious "intent or purpose" to discriminate against an *individual* based on his or her race or ethnicity. Proof that the government's action also injured *the racial or ethnic group* to which the plaintiff belongs, however, is not essential.... I would reject root and branch this dangerously distorted view of disparate impact.

Id. at 17-18 (first alteration in original) (footnote omitted) (citations omitted) (first quoting Dep't of Homeland Sec. v. Regents of Univ. of Cal., 591 U.S. 1 (2020) (plurality opinion); then quoting *Arlington Heights*, 429 U.S. at 266; then quoting Washington v. Davis, 426 U.S. 229, 242 (1976); and then quoting *Arlington Heights*, 429 U.S. at 265). *But see* Harness v. Watson, 47 F.4th 296, 313 (5th Cir. 2022) (per curiam) (Ho, J., concurring) ("I have found no governing precedent holding a law unconstitutional based on discriminatory intent alone, in the absence of discriminatory effect. And Plaintiffs do not cite any.").

There seems to be one area where the Court has said that the Equal Protection Clause requires both disparate impact and disparate treatment: selective prosecution claims. The core doctrine in these cases is that a criminal defendant must show that similarly situated people from another group were not prosecuted. *See* United States v. Armstrong, 517 U.S. 456, 465 (1996) ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."). In explaining the similarly situated test, the Court has referred to "ordinary equal protection standards," which the Court has said require the claimant to show that the challenged policy "had a discriminatory effect and that it was motivated by discriminatory purpose." *Id.* (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)); *Wayte*, 470 U.S. at 608 (first citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); then citing *Arlington Heights,* 429 U.S. 252; and then citing *Davis,* 426 U.S. 229). It is far from clear that *Feeney*, *Arlington Heights*, or *Davis* stand for this proposition. In fact, these are many of the same cases cited by Justice Alito for the contrary proposition: that disparate impact is not required. *See Bos. Parent Coal. for Acad. Excellence*, 145 S. Ct. 15, 15-18 (Alito, J., dissenting from denial of certiorari). And what the *Wayte* and *Armstrong* cases really seem to be saying is that challengers need to present comparative evidence of disparate treatment, which is different than requiring proof of disparate impact. But taken at face value, the Court seems to say that both disparate impact and disparate treatment are required in selective prosecution cases.

158. I am indebted to my student, Connor Hathaway, for getting me thinking about the nature of harm in disparate-impact cases.

individual; it only prevents an adverse action taken against an individual because of the individual's membership in a protected group.[159] So it might make sense to require group-based harm to ensure that an individual can only claim harm as a member of a group.

The problem with this argument is that a disparate impact requirement is not necessary to accomplish this result. Recall that disparate treatment doctrine requires a mental connection between an adverse action and group membership. In other words, disparate treatment doctrine, by itself, ensures that the harm occurs because of group membership. So it is hard to see why a showing of disparate-impact should be required.

The normative arguments against a disparate-impact requirement seem much stronger. It is widely understood that antidiscrimination laws such as the Equal Protection Clause are designed to—and should—protect individuals, as opposed to groups.[160] This is a key aspect of the Court's affirmative action jurisprudence.[161] And the individualized nature of our justice system was one of the primary reasons the Court gave for rejecting equal protection claims based solely on disparate impact.[162]

Yet, a disparate-impact requirement would preclude a remedy for individual harm. Individual harm occurs from disparate treatment in both animus and classification cases. In animus cases, the government effectively tells individuals that they are second-class citizens.[163] But, as noted above, courts and commentators also seem

159. The Court has entertained "class of one" cases, but those do not involve heightened scrutiny. *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).

160. *See* Patrick S. Shin, *Treatment as an Individual and the Priority of Persons Over Groups in Antidiscrimination Law*, 12 DUKE J. CONST. L. & PUB. POL'Y 107, 109 (2016); *see also* Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020) ("[Title VII]'s focus on individuals rather than groups [is] anything but academic.").

161. *See* Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2172 (2023) ("[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (quoting Miller v. Johnson 515 U.S. 900, 911 (1995)). Whether this norm is appropriate in affirmative action cases is beyond the scope of this Article.

162. *See* McCleskey v. Kemp, 481 U.S. 279, 312 (1987) ("[I]ndividualized justice is 'firmly entrenched in American law.'" (quoting 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.2(a), at 160 (1984))).

163. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate [school

to agree that mere classification harms individuals; that being sorted based on one's race or sex harms the individual.[164] So, anytime there is disparate treatment, there is individual harm. And requiring disparate impact, in addition to disparate treatment, would render this individual harm unactionable unless there is also harm to a group. Such a prioritization of group harm over individual harm seems at odds with the Court's historical focus on individuals in antidiscrimination law.

A disparate-impact requirement's prioritization of group-based harm would be most acute in animus cases. In a case like *Palmer*, such a requirement would shield those whose racial hatred is so strong that they are willing to act out of spite, and leave victims of animus without a remedy.[165] The fact that animus is worse than classification might suggest a more limited disparate-impact requirement: If such a requirement were limited to classification cases, at least it would not shield the harm that results from animus, and would not allow spite cases—the worst forms of discrimination—to evade heightened scrutiny.[166] So perhaps one path for an incidental-intent requirement would be to preclude heightened scrutiny only in the presumably small subset of cases in which (1) there is no animus, and (2) there is classification, but no disparate impact.[167]

However, even such a classification-only disparate-impact requirement would remain problematic. As noted above, even mere classification of those in protected groups, without animus,

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children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."), *supplemented by*, 349 U.S. 294 (1955).

164. *See supra* Part I.B.

165. *See* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971).

166. That being said, heightened scrutiny is likely unnecessary in animus cases. The Court has repeatedly held that, in animus cases, the government will fail even the rational basis test. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634-35 (1996); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 537-38 (1973).

167. It is also worth noting that such an approach would effectively privilege animus cases, applying a more plaintiff-friendly standard to them (disparate treatment only) than the standard that would apply to mere classification cases (which would require disparate impact, as well as disparate treatment). As I note above, animus is normatively more problematic than classification. *See supra* Part III.A. So making it easier for plaintiffs to win animus cases than it would be to win mere classification cases might make normative sense.

represents a significant form of harm.[168] And a classification-only disparate-impact requirement would shield such harm from heightened scrutiny.

It might be argued that a classification-only disparate-impact requirement would likely apply only in a small subset of cases (those involving sexual orientation and gender identity claims). But this limit presents its own problem: Adopting such a test might have the appearance of gerrymandering doctrine to exclude LGBTQ individuals from the protection of heightened scrutiny. Such an approach would give less protection to these groups. Of course, that might be exactly what the Court is trying to do.[169] So the Court might see the gerrymandering as a benefit, rather than a flaw of a disparate-impact requirement.

Finally, there is an additional normative problem with a disparate-impact requirement in sexual-orientation and gender-identity cases: Such a requirement might bar only one sex—women—from receiving heightened scrutiny. As noted above, it is possible that, as an empirical matter, more men than women may be gay or lesbian, and that more men than women have gender identities that differ from their birth sex.[170] If this is true, a disparate impact requirement would lead to the strange result that plaintiffs of one sex could challenge such laws under intermediate scrutiny, but plaintiffs of the other sex could not. Not only would such a sex-limited doctrine be extremely ironic—a disparate-impact requirement that itself creates a disparate impact against one sex. Such a doctrine would seem to be fundamentally at odds with equal protection norms.

In summary, implementing an incidental-intent exception by requiring disparate impact, in addition to disparate treatment,

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168. *See supra* Part I.B.

169. The Court already appears to favor non-LGBTQ antidiscrimination claims over LGBTQ antidiscrimination claims in other areas of constitutional law. *Compare, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (holding that a request for a religious exemption from a law precluding racial discrimination in accommodations was "frivolous"), *with* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (holding that the City violated the Free Exercise Clause by denying a Catholic foster organization an exemption from LGBTQ antidiscrimination law), *and* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723-24 (2018) (holding that the State violated the Free Exercise Clause in denying religious baker an exemption from LGBTQ antidiscrimination law).

170. *See supra* note 148.

would create significant doctrinal and normative issues. Though limiting such a requirement to classification cases would reduce some normative problems, significant issues would remain.

That being said, I raise the possibility of such a rule because it seems to fit what the Court is trying to accomplish in *Skrmetti*: to address the arguably tangential nature of sex-based sorting in sexual orientation and gender identity cases, and avoid applying heightened scrutiny in such cases. A disparate-impact requirement would accomplish that goal, and if limited to classification cases, would do so with minimal damage to antidiscrimination doctrine (at least beyond sexual orientation and gender identity cases). A primary-cause test would be better. But a limited, classification-only disparate-impact requirement might also accomplish what the Court seems to be seeking without danger to other areas of the law.

CONCLUSION

On its face, *Skrmetti* seems to have ignored sex discrimination that was clear to the rest of the world. It seems likely that the Court did this to address the problem of incidental discrimination. However, the Court's failure to explain its discrimination blindness poses not only problems of credibility, but the very real danger that future courts, driven by similar inclinations, will twist antidiscrimination law in ways that radically undermine that doctrine. This Article has tried to highlight the danger of some of those twists, and to suggest a path out of that danger. If the Court is determined to implement an incidental-intent exception, the least dangerous way to do so would be through a primary- or predominant-cause test.