CHAPTER 3

Competing Definitions of Equality
Formal and Substantive Equality

In the United States, the term “equality” generally means the concept of parallel treatment, expecting that two people who are similar in their essential characteristics should be treated as similarly as possible to each other. This model of equality is known as “formal equality.” When speaking of gender, advocates of equality traditionally have meant that men and women should receive parallel legal treatment. As the country moved away from judicially enforced inequality—such as coverture—statutory laws and constitutional amendments were passed to ensure the legal or “formal” equality between men and women. The nation eventually endorsed the notion that physical sexual characteristics should not determine who has the right to vote or inherit property.¹

The women of the nation found that even after these laws were passed, biological differences between men and women, for instance child bearing, and sociological differences, such as higher poverty rates and lower wages for females, affected women’s ability to have lives and opportunities similar to men.² This realization led to the development of the notion of “substantive equality,” which is the idea that women can be treated differently than men for the expectation that outcomes are commensurate between genders. Both models, like most legal theory and jurisprudence, treat gender as a binary variable, not as a continuum. As society and the legal structure continue to rethink the idea of gender and recognize a more complex construction, new models of legal equality will be designed. The very nature of pregnancy may mean this area of law will be the last to adapt. Possibly, the best way to demonstrate the present, competing conceptions of equality is through a discussion of the “potty parity” wars.
Formal and Substantive Equality: The “Potty Parity” Wars

Not long ago, when women would attend a public event, such as a concert, festival, or sports activity, it was commonly acknowledged that during an intermission, lines would form outside the restroom and the women’s queue would snake around the venue. Simultaneously, men would be able to quickly march in and out of the facilities and return to their seats. While women would make new acquaintances during the shared twenty-minute interval and grouse about the inequity of the wait, men would only be aware of this disparity when they observed the absence of their female companions or when a couple of women commandeered the empty men’s restroom in an attempt to disperse the female crowd before the next act, inning, or interlude.

Formal equality is the reason for the difference in the lines. Many states had building codes and construction laws that required a 1:1 ratio for toilet fixtures for men and women. If the women’s restroom had five stalls, the men’s restroom had to have five toilet fixtures (for men, a combination of stalls and urinals). Equality, or “potty parity,” was measured and ensured by laws, in essence requiring the identical treatment of men and women.

The problem is that men and women are both biologically and sociologically different. Women must navigate toilet stalls and stools whenever they use the restroom, use toilet paper with every bathroom visit, and occasionally negotiate their menstruation. Sociologically, women are more likely to wear items of clothing that must be removed with every visit. As frequent primary childcare and/or eldercare providers, women may have to assist children or others in the restroom. The consequence of these differences is that women spend on average 79 seconds per visit to a public restroom to men’s 47 seconds on a typical trip. Because of the differences in their circumstances, architectural designs that treat men and women identically have resulted in disparate consequences to the detriment of women. Many traditional male spaces (e.g., workplaces, public sporting venues) only made provisions for a male clientele, and as middle- and upper-income women moved from the private into the public sphere and the rights of female employees in these venues became recognized, laws were passed to treat women the same as their male colleagues, hence the 1:1 ratio. It is ironic that these 1:1 ratio laws often came into effect in an effort to protect women and ensure they had privacy and security. Because most architects and legislators were male, the differences between men and women were not carefully considered, and typically women have not been asked about their public-restroom experiences.

So the question has been raised, how would equality look if we worried less about treating men and women identically and more about making their experiences or outcomes comparable? In other words, how would we measure