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## How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong

Jessica A. Clarke<sup>†</sup>

### Abstract

*The Supreme Court will soon decide whether, under Title VII of the Civil Rights Act of 1964, it is discrimination “because of sex” to fire an employee because of their sexual orientation or transgender identity. There’s a simple textual argument that it is: An employer cannot take action on the basis of an employee’s sexual orientation or transgender identity without considering the employee’s sex. But while this argument is simple, it was not one that federal courts adopted until recently. This has caused some judges to object that the simple argument must be inconsistent with the original meaning of Title VII. In the words of one Fifth Circuit judge, “If the first forty years of uniform circuit precedent nationwide somehow got the original understanding of Title VII wrong, no one has explained how.”*

*This Essay explains how the first forty years of circuit precedent got Title VII wrong. It demonstrates that, rather than relying on the statutory text, early appellate decisions relied on their era’s misunderstanding of LGBTQ identities as pathological, unnatural, and deviant. The errors of the*

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*early cases persisted as a result of stare decisis, until the old doctrine was rendered indefensible by changing social attitudes, the rise of textualism, and the Supreme Court's recognition that Title VII forbids an employer from insisting that men or women conform to sex stereotypes. This account has important implications for the pending cases, as well as for social movements that seek to disable prejudice.*

## I. Introduction

This term, the Supreme Court has granted certiorari in three cases<sup>1</sup> asking it to interpret the meaning of employment discrimination because of sex for purposes of Title VII of the Civil Rights Act of 1964.<sup>2</sup> The question is whether firing someone because of their sexual orientation or transgender identity qualifies as a “discharge . . . because of” that “individual’s . . . sex.”<sup>3</sup>

There’s a simple argument that the answer is yes. Accepting the conservative definition of sex as a biological male or female classification,<sup>4</sup> it is impossible to categorize someone as lesbian, gay, bisexual, or transgender without first classifying them as male or female. There would be

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1. *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 Fed. App’x 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019).

2. 42 U.S.C. § 2000e-2 (2012) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” (emphasis added)). In 1991, the statute was amended to provide for employer liability if the plaintiff can show sex was a “motivating factor for any employment practice, even though other factors also motivated the practice,” *id.* § 2000e-2(m), but a plaintiff’s remedies under this amendment are limited if the defendant can show that sex was not a determinative or “but for” cause, *id.* § 2000e-5(g)(2)(B).

3. *Id.* § 2000e-2. This question has enormous stakes. Twenty-six states do not expressly prohibit discrimination based on sexual orientation or gender identity. Natasha Bach, *Should Title VII Civil Rights Protections Include the LGBTQ Community?*, FORTUNE (Apr. 23, 2019), <https://fortune.com/2019/04/23/title-vii-supreme-court-lgbt-case/> [https://perma.cc/QB29-5VLD].

4. I accept this definition just for the sake of argument. *But see* William N. Eskridge Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 338 (2017) (discussing contemporary dictionary definitions that defined “sex” to include what we might today call gender and sexuality). I take no position on the objectively “correct” definition of sex or gender. *See* Jessica Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 933–36 (2019) (arguing against the use of universal definitions for “sex” and “gender”).

no sexual orientation<sup>5</sup> or transgender identity<sup>6</sup> in a world without sex classifications like male or female.<sup>7</sup> This simple argument should appeal to conservative jurists,<sup>8</sup> who are drawn to strict constructions of the text<sup>9</sup> and who generally agree with “blindness” and “merit” as tropes in discrimination law.<sup>10</sup>

And yet, many jurists seem to think this argument is too clever by half.<sup>11</sup> In a recent concurrence, Judge Ho of the Fifth Circuit Court of Appeals argued that the problem is that “[n]o one seriously contends that, at the time

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5. See, e.g., *Zarda*, 883 F.3d at 113 (“To . . . identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted.”); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 358 (7th Cir. 2017) (en banc) (Flaum, J., concurring) (“Fundamental to the definition of homosexuality is the sexual attraction to individuals of the ‘same’ sex. . . . One cannot consider a person’s homosexuality without also accounting for their sex: doing so would render ‘same’ . . . meaningless.”); KATIE R. EYER, AM. CONST. SOC’Y FOR L. & POL’Y, SEX DISCRIMINATION AND LGBT EQUALITY 3–4 (2017), [https://www.acslaw.org/wp-content/uploads/2018/04/Sex\\_Discrimination\\_Law\\_and\\_LGBT\\_Equality.pdf](https://www.acslaw.org/wp-content/uploads/2018/04/Sex_Discrimination_Law_and_LGBT_Equality.pdf) [<https://perma.cc/6RMU-GWRZ>] (discussing the argument that discrimination on the basis of sexual orientation and transgender status are forms of sex discrimination because they necessarily take sex into account).

6. See, e.g., *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 575 (“[I]t is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.”).

7. In addition to the argument that Title VII requires sex-blind decision-making, there’s a related point, often called the comparator argument, that goes as follows: if Steve were Eve, no one would object to his marriage to Adam, and if Caitlyn had been assigned female at birth rather than male, no one would object to the fact that she identifies as a woman. See Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809, 820 (2017); Eyer, *supra* note 5, at 4, 10. It is no answer to this comparator argument that gay and transgender *men* are fired just like gay and transgender *women*. An employer who fires a woman for being too manly cannot cure its discrimination by firing a man for being too womanly. The statute speaks of the “individual” who may not be discharged because of their sex. See *supra* note 2.

8. The sex-blind and comparator arguments are not the only arguments, nor are they my favorite arguments. See Clarke, *supra* note 7, at 833–37 (advancing arguments based on anti-stereotyping, anti-subordination, and intersectionality principles). Other arguments rely on analogies between discrimination based on same-sex relationships and anti-miscegenation rules, or between transgender identity and religious conversion, *id.* at 821; Eyer, *supra* note 5, at 6, principles of immutability, Clarke, *supra* note 7, at 824–32, and Title VII’s “normative ideal of a *merit-based workplace*,” see, e.g., Eskridge, *supra* note 4, at 334.

9. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 48 (1995) (“Attention to the language of the statute may therefore lead to something of a paradox—the stricter a constructionist one is, the more seriously one takes statutory language, the more inescapably one is led to a quite radical view of the effect of Title VII.”).

10. See, e.g., Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 143–44 (2017) (discussing the libertarian underpinnings of the anti-classification principle, which requires “blindness” as to prohibited grounds for discrimination such as race or sex, so that all individuals may be judged on their own merits).

11. See, e.g., *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring) (rejecting the argument that Title VII requires employment decisions that are “blind to sex”).

of enactment, the public meaning and understanding of Title VII included sexual orientation or transgender discrimination.”<sup>12</sup> It is important to note his argument is not that courts are bound by how Congress originally expected that the statute would be *applied*. Modern textualists claim they must adhere to the public meaning of the words Congress used—here “because of . . . sex”—not how Congress expected those words to be applied at the time.<sup>13</sup> Indeed, in a 1998 case resolving whether “male-on-male sexual harassment” is discrimination “because of . . . sex,” Justice Scalia recognized that although male-on-male harassment “was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>14</sup> The same argument must go for how the public originally thought the statute would be applied.<sup>15</sup> Surely the public in 1964, no more than Congress, imagined the statute’s application to male-on-male harassment.

Nonetheless, perhaps there is something wrong with literal interpretations that did not occur to anyone until recently. Some judges believe the literal arguments must be out of touch with the original meaning of the statute because they are of recent vintage.<sup>16</sup> Judge Ho argues: “If the first forty years of uniform circuit precedent nationwide somehow got the original understanding of Title VII wrong, no one has explained how.”<sup>17</sup>

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12. *Id.*

13. *See, e.g.,* *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (“[A]s a matter of interpretive method, I agree with my colleagues that the scope of Title VII is not limited by the subjective intentions of the enacting legislators.”).

14. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

15. *See* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 67–68 (2019) (refuting the argument that the public’s original expected application of statutory language should govern). For example, in *Yeskey v. Pa. Dep’t of Correction*, 524 U.S. 206, 211–12 (1998), the Supreme Court held that the Americans with Disabilities Act’s “broad text must be extended to prisoners—even if Congress might not have anticipated or desired its application to that context.” Eyer, *supra* at 98.

16. *See, e.g.,* *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 167 (2d Cir. 2018) (en banc) (Livingston, J., dissenting) (“The majority does not discover a ‘plain’ yet hidden meaning in Title VII, sufficiently obscure as to wholly elude every appellate court, including this one, until the Seventh Circuit’s decision in *Hively*”), *cert. granted*, 139 S. Ct. 1599 (2019); *Hively*, 853 F.3d at 361 (Sykes, J., dissenting) (“Suddenly sexual-orientation discrimination is sex discrimination and thus is actionable under Title VII. What justification is offered for this radical change in a well-established, uniform interpretation of an important—indeed, transformational—statute? . . . From the statute’s inception to the present day, the appellate courts have unanimously and repeatedly read the statute the same way, as my colleagues must and do acknowledge.”).

17. *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 336 (5th Cir. 2019) (Ho, J., concurring). *But see* Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 39 (2000) (“Legal scholars have put forward a variety of theoretical explanations for why courts have failed to deal

This Essay explains how the first forty years of circuit precedent got the original meaning of Title VII's sex discrimination provision wrong.<sup>18</sup> It wasn't that the literal argument never occurred to anyone. In the 1970s and 1980s, litigants, district court judges, and dissenting appellate judges made textual arguments. But appellate judges outright refused to apply the statute's terms. These early precedents self-consciously deviated from the text of the statute, inventing limiting principles to leave gay, lesbian, and transgender plaintiffs unprotected. This is unsurprising, considering that, as Professor William Eskridge has argued, sexual acts between same-sex couples could be criminalized until 2003, and the Supreme Court did not recognize that "homosexuality" is a normal human variation until 2015.<sup>19</sup> It was widely assumed, at the time of the early cases, that "homosexual" and "transsexual" people were blameworthy, deviant, or dangerous.<sup>20</sup>

This Essay traces that assumption through the early cases, demonstrating that these precedents were informed by prejudices and misunderstandings that obscured textual arguments.<sup>21</sup> It shows judges laid bare their biases in the texts of their opinions, describing transgender identity as a psychological disorder, perhaps even a "psychopathology,"<sup>22</sup> and referring to the linkages between gender nonconformity and "sexual aberration."<sup>23</sup> This examination of early doctrine reveals that the story is not just about the acceptability of prejudice against gay people. Most of the early appellate cases were about transgender women,<sup>24</sup> whom judges described

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with transgender people in a coherent or principled way."). For a recent take, see Anthony Michael Kreis, *Dead Hand Vogue*, 54 U. RICH. L. REV. (forthcoming 2020) (draft date Aug. 7, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3430357](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3430357) [<https://perma.cc/S5Q4-JH5N>] (arguing that the old precedents erred in focusing on groups rather than individuals).

18. The first federal appellate case to get Title VII right on transgender discrimination was the Sixth Circuit in 2004 in *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004), and on sexual orientation, it was the Seventh Circuit in 2017 in *Hively*, 853 F.3d at 351–52.

19. See Eskridge, *supra* note 4, at 333.

20. *Id.*

21. Although Professor Eskridge's article mentions some of the early cases discussed in this Essay, *id.* at 353 n.112, 376–77, it does not examine their reasoning. The early cases have long been criticized on various grounds, *see, e.g.*, Currah & Minter, *supra* note 17, at 37–42 (collecting sources), but their reasoning has not been examined against today's understandings of LGBTQ identity. Recent articles have criticized the cases on other grounds such as their invention of history. *See, e.g.*, Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1375–78 (2012) (offering the cases discussed in this Essay as examples of how courts invented a so-called "traditional" concept of sex discrimination to preserve traditional gender norms).

22. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 n.3 (9th Cir. 1977).

23. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 328 n.4 (5th Cir. 1978) (quoting the district judge's explanation of why the plaintiff was not hired).

24. A "transgender woman" is a person who was assigned "male" at birth but identifies as a woman. At the risk of applying anachronistic labels, I use the term "transgender" to describe any plaintiff whose gender identity did not match the one associated with the sex they were assigned at

with bewilderment, skepticism, and voyeuristic curiosity.<sup>25</sup> The foundational case in the series cited to a study of transgender women finding their “most prevailing feature” to be “hysterical personality” and noting that some doctors regarded “the transsexual”<sup>26</sup> as “undeveloped psychologically; as immature; as crippled; as disabled, if not sick.”<sup>27</sup> These courts conflated gay men, transgender women, and gender-nonconforming men together as a group outside the statute’s protection.<sup>28</sup> They understood gender nonconformity as the trait that made “transsexual” and “homosexual” people a separate social class—different from the normal men and women protected by the statute. While some opinions made empty professions of abhorrence for all forms of discrimination, close examination of their reasoning,

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birth. See, e.g., GLAAD, GLAAD MEDIA REFERENCE GUIDE 10 (10th ed. 2016), <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> [<https://perma.cc/6QZT-N3P8>] (defining “transgender”). While infants in the United States are assigned a binary “male” or “female” sex designation at birth, see Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 792–93 (2015) (discussing sex assignment practices for infants under federal law), a person may have a gender identity as a boy, a girl, a man, a woman, or any number of nonbinary variations, see Clarke, *supra* note 4, at 905–10 (discussing the diversity of nonbinary identities). Transgender men did not appear as plaintiffs in reported Title VII cases until recently. For insights on why this might be, see, for example, JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 4 (2007) (arguing that trans women “challenge[] those in our society who wish to glorify maleness and masculinity”) and SUSAN STRYKER, TRANSSEXUAL HISTORY: THE ROOTS OF TODAY’S REVOLUTION 100 (2d ed. 2017) (arguing that transgender women were historically more visible and therefore easier targets for discrimination).

25. See *infra* notes 170–204 and accompanying text (discussing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984), which called transgender identity “untraditional and unusual”); see Currah & Minter, *supra* note 17, 39–40 (“For the most part, transgender people have not been excluded from civil rights protections because of conceptual or philosophical failures in legal reasoning, but rather because they have not been viewed as worthy of protection or, in some cases, even as human.”).

26. Joseph C. Finney et al., *A Psychological Study of Transsexualism*, in PROCEEDINGS OF THE SECOND INTERDISCIPLINARY SYMPOSIUM ON GENDER DYSPHORIA SYNDROME 82, 85 (D.R. Laub & P. Gandy, eds. 1974) (cited in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 n.3 (9th Cir. 1977)). The term “transsexual,” which is increasingly regarded as archaic, was popularized by doctors in the 1940s as a term for a medical condition that would require “hormone treatment, surgery, and total transformation.” Kris Franklin & Sarah E. Chinn, *Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases*, 32 BERKELEY J. GENDER L. & JUST. 1, 8 (2017). The term “transgender,” as currently understood by many trans people, works to resist the historical pressures of medicalization that were built into ‘transsexual,’ along with the mandates of hormones, surgery, and teleology.” *Id.* at 10.

27. Finney et al., *supra* note 26, at 82, 85 (cited in *Holloway*, 566 F.2d at 662 n.3 on the “origin and development of transsexualism”).

28. Professor Francisco Valdes was an early critic of these cases in a lengthy article that deconstructed their formal reasoning, showing how they “ignorantly or strategically” tangled and disentangled the concepts of sex, gender, and sexual orientation to preserve traditional values. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 136–53, 151 (1995).

language, and sources demonstrates that appellate judges were blinded by the biases and misunderstandings of their era.

Contrary to the views of dissenting judges today,<sup>29</sup> the early opinions were not based on the plain meaning of the text. Courts openly explained that they were inventing limiting principles to preserve employer discretion to enforce traditional gender norms.<sup>30</sup> Otherwise, the statute's plain language would require that employers accommodate "counter-culture" phenomena, such as long-haired male hippies in the 1970s<sup>31</sup> and "transsexual" workers who seemed to create unsolvable restroom dilemmas.<sup>32</sup>

This Essay also illuminates the doctrinal moves courts made to avoid following Title VII's text. One move was inventing immutability principles—borrowed from Equal Protection doctrine—that would limit Title VII's text.<sup>33</sup> On these immutability principles, discrimination against "homosexuals" and "transsexuals" was not considered sex discrimination because those conditions were not understood to be accidents of birth, traits a person could not change, or traits a person was blameless for.<sup>34</sup> "Homosexuality" and "transsexualism" were considered deviant behaviors that should be stopped, sexual preferences that should not be accommodated, and mental illnesses that should not be indulged.

Under the influence of then-prevalent methodologies of statutory interpretation that asked about the spirit rather than the letter of the law,<sup>35</sup> early courts also invented limiting principles based on conjectures about congressional intent. Specifically, they interpreted Title VII's sex discrimination provision to reach only those forms of sex-based mistreatment that had disparate effects on men or women as groups.<sup>36</sup> Not only was this interpretation atextual, but it was also contrary to precedent and based on myths about the legislative history behind Title VII's sex amendment.<sup>37</sup> Even after their rationales had been invalidated, the old cases continued to exert precedential force for decades.

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29. See *supra* note 16.

30. See Franklin, *supra* note 21, at 1352–53; KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 61 (2016).

31. *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1087 (5th Cir. 1975) (en banc).

32. See *infra* notes 47–48, 163–169, 301–308, and accompanying text.

33. Cf. Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 62–85 (2015) (describing variations on the immutability principle and explaining how courts use those principles to limit the reach of Title VII in other contexts).

34. *Id.* at 13–28.

35. *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008) (explaining that early cases had followed the contra-textual approach to statutory interpretation from *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

36. See *infra* notes 134–143 and accompanying text.

37. See *infra* notes 63–64 and accompanying text.



Today, neither homosexuality<sup>38</sup> nor transgender identity<sup>39</sup> is considered a sign of psychopathy, degeneracy, or threat. Text has replaced purpose as the starting point of statutory interpretation,<sup>40</sup> and the Supreme Court has made clear that Title VII protects individuals against sex-role stereotyping that constrains the lives of both men and women, not just sex discrimination that affects men or women as a group disproportionately.<sup>41</sup> This Essay describes how these developments—not changes in the meaning of the term “because of . . . sex”—are what resulted in the change in federal appellate court opinions over the past twenty years.

It is time for the Supreme Court to recognize that Title VII’s prohibition on discrimination because of sex forbids discrimination on the bases of sexual orientation and transgender identity. This Essay shows the Court should not rely on the fact that appellate courts reached the wrong conclusions for forty years. Those appellate decisions were not based on the statutory text. They engaged in wholesale invention of immutability and group-rights principles to prevent Title VII’s guarantee of workplace equality from reaching plaintiffs wrongly regarded as mentally ill and morally suspect.

Regardless of how the Supreme Court resolves the pending cases, this Essay’s examination of the doctrine’s evolution has lessons for social movements that seek to disable prejudice. One lesson is that theories often associated with progressive causes—such as purposive methodologies of statutory interpretation, immutability theories, and group rights—can also be

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38. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

39. “Transsexuality” and “gender identity disorder” are no longer diagnoses. Compare AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261–63 (3rd ed. 1980) (hereinafter, “DSM-3”) (defining “an incongruence between anatomic sex and gender identity” as “gender identity disorder” generally and “transsexualism” specifically when it occurs in adults), with AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452–53 (5th ed. 2013) (hereinafter, “DSM-5”) (stating that “a marked incongruence” between an individual’s assigned sex and gender identity could be “gender dysphoria” if it is accompanied by “distress”).

40. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71, 73 (2006) (“For a not inconsiderable part of our history, the Supreme Court held that the ‘letter’ (text) of a statute must yield to its ‘spirit’ (purpose) when the two conflicted. . . . Near the close of the twentieth century, however, the ‘new textualism’ challenged the prevailing judicial orthodoxy by arguing that the Constitution, properly understood, requires judges to treat the clear import of an enacted text as conclusive, even when the text fits poorly with its apparent background purposes.”).

41. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 117 (2d Cir. 2018) (Katzmann, C.J.) (applying *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978) to ask whether an individual faced discrimination in a way she would not have “but for” her sex), *cert. granted*, 139 S. Ct. 1599 (2019); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (holding that the logic of the early cases had been “eviscerated” by the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

deployed against progressive causes. Another is that medical authorities play a role in civil rights disputes, both in pathologizing the traits that come to define stigmatized groups and in undoing that very process.<sup>42</sup> And another is that broad statutory guarantees of equality, which by their very nature challenge conventional prejudices, will be contested by judicial interpreters who are not immune from conventional prejudices. The project of such statutes will always be incomplete, refined over time as social movements contest the prejudices of their eras. A final lesson is that the prejudices of the past, lying entombed in doctrine, can continue to haunt the promise of equality, even after those prejudices have largely died out in the broader culture.<sup>43</sup>

Part I of this Essay explains how circuit courts of the 1970s and 1980s failed to apply the text of Title VII, which prohibits the discharge of any individual because of their sex. Part II explains the legal and social developments that allowed circuit courts to see their errors, beginning in the 2000s.

## II. How Circuit Courts Got It Wrong

Until the 2000s, the consensus among circuit courts was that discrimination on the basis of “transsexualism” or “sexual preference” was not a form of sex discrimination. By the 1990s, this consensus was so firmly established that judicial decisions referred to it perfunctorily and without critical consideration. An examination of the early cases, however, reveals reasons to be critical of this consensus. The first precedents failed to apply the term “because of . . . sex” because judges thought it would be anomalous for the statute to protect people they labeled “transsexuals,” “homosexuals,” or “effeminate men.” Based on prevailing social mores, these types of gender nonconformity were thought to evince moral failings and dangerous mental illnesses. Accordingly, courts invented limiting principles to constrain the statute’s plain text. One principle was that the statute only prohibited sex discrimination with significant disparate impacts on women or men as a group. Another was that the statute only reached sex discrimination that implicated what courts considered to be immutable traits or fundamental rights. These limiting principles appear nowhere in the text of the statute. Rather than reflecting a broad consensus, a number of these opinions were divided or reversed the contrary opinions of district court judges.

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42. Cf. Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 805–10 (2017) (discussing the role of mainstream medical authorities in bans on “conversion” therapy).

43. Cf. Arthur S. Leonard, *Exorcizing the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 CHL.-KENT L. REV. 519, 522 (2009) (discussing the “ghostly afterlife” of overruled precedents in equal-protection doctrine).

### A. *Ramona Holloway*

The foundational case in the series is a 1977 Ninth Circuit decision, *Holloway v. Arthur Andersen & Co.*<sup>44</sup> The plaintiff in that case, Ramona Holloway, had presented as a man when she began working at Arthur Andersen in 1969.<sup>45</sup> As a man, Holloway had received promotions and pay raises.<sup>46</sup> But when Holloway began to present as a woman, her supervisor complained about the fact that she “wore red nail polish, glossy red lipstick, hair in a French twist and carried a purse.”<sup>47</sup> While Holloway’s use of the men’s room caused “embarrassment,” her “desire to use the ladies’ room would have caused even greater problems.”<sup>48</sup> Arthur Andersen suggested to Holloway that she “find another job where the sex change would not be known.”<sup>49</sup> Shortly after requesting that her first name be changed to “Ramona” in the company’s records, Holloway was fired.<sup>50</sup>

Holloway argued she was fired because of sex: put simply, her employer had rejected “Ramona Holloway (as a woman) in the job previously performed by Robert Holloway.”<sup>51</sup> She argued that the term “sex” included not just men and women, but also individuals who did not fit neatly into either category.<sup>52</sup> This argument was based on the medical definition of a “male-to-female transsexual” at the time: an individual who is “mentally and emotionally” a woman but has “male” anatomy.<sup>53</sup> Holloway argued that this interpretation was consistent with Title VII’s purpose: to ensure that every individual would be evaluated based on their “job capabilities” rather than their “gender.”<sup>54</sup> Her brief used the term “gender” to avoid conflation with the meaning of “sex” as sexual activity.<sup>55</sup> Arthur Andersen countered that the statute only prohibited discrimination “because an individual is a male or a

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44. 566 F.2d 659 (9th Cir. 1977). In 2000, the Ninth Circuit held this case had been overruled by the Supreme Court’s decision in *Price Waterhouse*, 490 U.S. at 240. *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

45. *Holloway*, 566 F.2d at 661.

46. Appellant’s Opening Brief at 2, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (No. 76-2248), <http://files.eqcf.org/cases/76-2248-appellant-opening-brief/> [<https://perma.cc/HR5A-Z82P>].

47. Appellee’s Brief at 3, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (No. 76-2248), <http://files.eqcf.org/cases/76-2248-appellee-brief/> [<https://perma.cc/JE33-NWKP>]. I am grateful to Katrina Rose for tracking down and sharing the briefs in this case.

48. *Id.*

49. *Id.* at 2.

50. *Holloway*, 566 F.2d at 661.

51. Appellant’s Opening Brief, *supra* note 46, at 7.

52. *Id.* at 4–5.

53. *See id.* at 2 (quoting the plaintiff’s physician on why she had been “diagnosed as a genuine male-to-female transsexual”).

54. *Id.* at 5.

55. *Id.* at 4.

female.”<sup>56</sup> It argued Holloway was not protected because, “at the time of the discharge, [she] was a transsexual in the process of transformation from male to female.”<sup>57</sup>

To resolve the dispute, the Ninth Circuit turned immediately to Title VII’s “legislative history,”<sup>58</sup> and concluded, “Congress had only the traditional notions of ‘sex’ in mind.”<sup>59</sup> It based this conclusion on the fact that a 1972 amendment to the 1964 Act was intended “to remedy the economic deprivation of women as a class.”<sup>60</sup> Support for this class-based interpretation is not to be found in Title VII’s text, which forbids discrimination against individuals on particular *grounds*, such as sex, not against particular *groups*, such as women or men.<sup>61</sup> The court thought it had license to offer a group-based interpretation of the statute due to the “dearth” of legislative history behind the addition of “sex” to the original statute in 1964.<sup>62</sup> Yet the idea that there is scant legislative history on the sex amendment is a myth that only became “true by virtue of repetition.”<sup>63</sup> The historical record reveals support for Holloway’s view that the 1964 Congress intended to make an individual’s sex irrelevant to employment decisions<sup>64</sup>

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56. Appellee’s Brief, *supra* note 47, at 6.

57. *Id.*

58. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

59. *Id.*

60. *Id.* The court was aware that men could bring claims under Title VII. As Holloway’s brief pointed out, courts at the time allowed sex discrimination claims by men as well as women. Appellant’s Opening Brief, *supra* note 46, at 6 (citing *Diaz v. Pan Am*, 442 F.2d 385 (5th Cir. 1971) and *Wilson v. Sibler Mem’l Hosp.*, 288 F.2d 1338 (D.C. Cir. 1973)). In 1983, the Supreme Court would make clear that “congressional discussion focused on the needs of female members of the work force . . . does not create a ‘negative inference’ limiting the scope of the Act to the specific problem that motivated its enactment.” *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp’t Opportunity Comm’n*, 462 U.S. 669, 679 (1983).

61. See 42 U.S.C. § 2000e-2 (2012); Clarke, *supra* note 10, at 110–19 (explaining how Title VII, unlike some other discrimination statutes, forbids discrimination on particular grounds, such as “race” and “sex,” not against groups such as black and white people or men and women).

62. *Holloway*, 566 F.2d at 662.

63. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 15 (1995). In the early days of the Equal Employment Opportunity Commission, agency officials resistant to enforcement of sex discrimination law publicized an apocryphal story that the sex amendment had only been proposed in jest in an attempt to derail the Act. *Id.* at 25; Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1015 (2015) (discussing research demonstrating that the sex amendment resulted from feminist advocacy both in and outside of Congress).

64. See, e.g., Franke, *supra* note 63, at 25 (discussing how the sex amendment passed over the opposition that “biological differences between women and men could justify sex-specific employment practices”); Franklin, *supra* note 21, at 1332 (explaining that Congress members voted for the amendment even though they believed it would reach forms of discrimination that do not affect all women as a class, such as the practices of certain airlines to fire “stewardesses” when they got married (discussing 110 CONG. REC. 2578 (statement of Rep. Bass))); *id.* at 1329 (explaining that the sex amendment passed over the opposition that its implications in terms of unsettling

unless it was a bona fide occupational qualification (BFOQ), a defense not raised by Arthur Andersen.<sup>65</sup>

In any event, the court did not offer a precise definition of the “traditional” meaning of “sex,” other than to reject any interpretation that would extend coverage to “transsexuals as a class.”<sup>66</sup> Instead, it referred to Arthur Andersen’s argument that sex was “based on anatomical characteristics.”<sup>67</sup> But even accepting Arthur Andersen’s definition, Holloway’s presumed<sup>68</sup> male anatomy was certainly what resulted in her firing. Arthur Andersen admitted as much.<sup>69</sup> Holloway, however, did not argue she was fired on account of being presumed to be an “anatomical male.”<sup>70</sup> Nor did the court consider the point.

This can be explained by the grip of immutability on thinking about discrimination at the time.<sup>71</sup> The theory of immutability is that societal

traditional gender roles would be “unlimited” (quoting 110 CONG. REC. 2578 (statement of Rep. Celler)); cf. Mary Anne Case, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1339–40 (2014) (explaining that support for the sex amendment came from “what we today call intersectionality,” in other words, the concern that one group status would be used to justify discrimination based on another; for example, Representative Martha Griffiths was concerned that if sex discrimination were not prohibited along with race discrimination, black women would continue to be denied equal employment opportunities).

65. 42 U.S.C. § 2000e-2(e)(1). The BFOQ defense applies to sex but not race. *Id.*

66. *Holloway*, 566 F.2d at 662, 664.

67. *Id.* at 662. In a footnote, the court quoted a dictionary offering multiple definitions of “sex,” including one that went beyond “structural” anatomy to include reproductive differences that were “functional” and “behavioral.” *Id.* at 662 n.4 (quoting WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 347, 795 (1970)). It did not explain which of these differences were included in the traditional definition.

68. Presumption is sufficient; “actual knowledge” is not required by the statutory language. *Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (Scalia, J.) (“It is significant that § 2000e-2(a)(1) does not impose a knowledge requirement.”).

69. Appellee’s Brief, *supra* note 47, at 6 & n.\* (“[I]t cannot be a violation of Title VII for an employer to discharge an anatomical male for appearing at work dressed and made up as a female” and “[i]n the instant case, there had been no surgery.”).

70. It is possible that Holloway preferred not to make any argument inconsistent with her status as a woman. Cf. Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to “Win” A Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. 205, 205 (2010) (quoting successful litigant Diane Schroer, a transgender woman, as saying “I haven’t gone through all this only to have a court vindicate my rights as a gender non-conforming man.”); Richard F. Storrow, *Naming the Grotesque Body in the “Nascent Jurisprudence of Transsexualism”*, 4 MICH. J. GENDER & L. 275, 315 (1997) (“[T]ranssexuals are unlikely to sue for discrimination based on a sex they do not believe they are.”). In the mid-2000s, Schroer’s lawyers avoided this dilemma by pleading that their client “had a female gender identity, and thus was a woman, but that she had likely been perceived to be a man by the hiring official.” McGowan, *supra* at 215.

71. In equal protection law, the question of whether a trait is immutable may be one consideration in deciding if government classifications based on that trait should be held to

condemnation should not fall on those who bear no individual responsibility for a trait.<sup>72</sup> Holloway could not make the argument that the basis for discrimination was her “male” anatomy, because that would have left her with no way to distinguish her case from the male “transvestite,”<sup>73</sup> thought at the time to be a man who wore women’s attire as a fetish, not as the result of any immutable identity.<sup>74</sup> Cross-dressing was still regarded as a sex offense in some U.S. jurisdictions in 1977.<sup>75</sup> Moreover, Holloway’s “male” anatomy had proved to be mutable; indeed, she had had surgery by the time of her appeal. Instead, Holloway argued that “transsexuality” was immutable, defining it as “a condition where ‘gender reversal . . . is present as soon as any behavior that can be called masculinity or femininity begins, even as early as one year of age’ or as including those ‘persons not readily classifiable as male or female.’”<sup>76</sup> Arthur Andersen called out Holloway for “advancing the theory that transsexualism [is] organically and biologically determined.”<sup>77</sup>

A dissenting judge agreed with Holloway. In his view, Holloway was “a person completing surgically that part of nature’s handiwork which apparently was left incomplete somewhere along the line.”<sup>78</sup> But he noted that immutability was not relevant: Title VII drew no distinctions between a plaintiff who “was born female” and one who “was born ambiguous and chose to become female.”<sup>79</sup> He reasoned that Holloway had a claim based on “the language of the statute, itself,” despite the fact that “Congress probably never contemplated that Title VII would apply to transsexuals.”<sup>80</sup> He would

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heightened scrutiny. *See, e.g.,* Clarke, *supra* note 33, at 13–20. Title VII, by contrast does not require that courts determine suspect classifications or protected classes; rather, it enumerates prohibited grounds for discrimination like race and sex. *Id.* at 28.

72. *Id.* at 14–15 (discussing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972)).

73. Appellant’s Opening Brief, *supra* note 46, at 7 (distinguishing transsexuals and transvestites).

74. JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES* 173–76 (1980).

75. I. Bennett Capers, *Cross Dressing and the Criminal*, 20 *YALE J.L. & HUMAN.* 1, 10 (2008) (collecting cases striking down criminal laws against cross-dressing in the 1970s and 1980s); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 27–28 (1999) (discussing the rationales for laws against cross-dressing). Even after cross-dressing laws were struck down in California the 1960s, enforcement continued due to the persistence of attitudes among police that the practice was deviant. STRYKER, *supra* note 24, at 76.

76. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 n.3 (9th Cir. 1977).

77. Appellee’s Brief, *supra* note 47, at 3.

78. *Holloway*, 566 F.2d at 664 (Goodwin, J., dissenting) (distinguishing Holloway’s case from one about “sexual preference”).

79. *Id.*

80. *Id.*

have allowed Holloway to proceed on the theory that she was discharged “for being or (becoming) female.”<sup>81</sup>

The majority rejected this point, arguing Holloway had been discharged for *choosing to change* her sex, not for *being* a woman.<sup>82</sup> Holloway had a response to this: “an employer is not entitled to discriminate against an employee for studying to convert to Catholicism or Judaism any more than it is entitled to discriminate against him or her for being a Catholic or a Jew.”<sup>83</sup> But the majority’s opinion did not address the analogy. This was likely because, at the time, religion was thought to be a matter of faith that not only could be changed, but should be changed if an individual’s conscience so dictated, without interference from an employer.<sup>84</sup> Sex, however, was thought to be a matter of nature that could not and should not be changed.<sup>85</sup>

The *Holloway* opinion was demonstrably influenced by the views of medical professionals at the time who believed that transsexuality was a delusion, a danger, and a moral defect. The Ninth Circuit rejected Holloway’s exculpatory definition of “transsexuality” on the ground that “there is no generally accepted definition of the term transsexual.”<sup>86</sup> It noted that some psychiatrists regarded “a request for a sex change” to be “a sign of severe

81. *Id.* at 664. The dissenting judge thought the majority had denied Holloway’s claim because she was not “born into the victim class.” *Id.*

82. *Id.* at 664 (majority opinion) (“Holloway has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who *chose* to change her sex.” (emphasis added)).

83. Appellant’s Rebuttal Brief at 3–4, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (No. 76-2248), <http://files.eqcf.org/cases/76-2248-appellant-rebuttal-brief/> [<https://perma.cc/YQX9-R8MJ>]; see also Appellant’s Opening Brief, *supra* note 46, at 12.

84. Currah & Minter, *supra* note 17, at 41 (“Yet, the only difference between these situations and that of a transsexual person is that while changing one’s religion or nationality is generally considered to be a legitimate personal choice, ‘the very idea that one sex can change into another’ is likely to engender ‘ridicule and horror.’” (quoting Storrow, *supra* note 70, at 334)). *Cf.* Clarke, *supra* note 33, at 27 (describing a variation on the theory of immutability that would explain protection for religion, under which “a certain trait should not be the basis for discrimination because it is a normatively acceptable, protected exercise of individual liberty or expression of personality”).

85. The only potential difference, in terms of statutory text, is that Title VII was amended in 1972 to clarify that “‘religion’ includes all aspects of religious observation and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s . . . observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j) (2012). While this provision speaks to religious practices, which could be characterized as choices, it does not speak to the distinction between conversion and status. In any event, neither Arthur Andersen nor the court made reference to this provision.

86. *Holloway*, 566 F.2d at 665. The court observed that “[s]ome [experts] feel that transsexual identification arises from psychosocial learning and others feel that the condition comes from inherited or genetic causes.” *Id.* The court also rejected Holloway’s equal protection argument, on grounds including that it had not “been established that transsexuality is an ‘immutable characteristic determined solely by the accident of birth’ like race or national origin.” *Id.* at 663 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

psychopathology.”<sup>87</sup> To put this in historical context, a number of university-based medical programs had legitimated surgical treatments for transgender patients by the late 1960s.<sup>88</sup> But at the time of *Holloway*, these programs were under attack.<sup>89</sup> Some doctors from the then-still influential psychoanalytic tradition<sup>90</sup> viewed transsexuals as “borderline psychotics” with “a deep-seated depression and a psychotic denial of self.”<sup>91</sup> The article the *Holloway* court cited discussed the theory that transsexuality was the result of dysfunctional parenting rather than nature.<sup>92</sup> It stated that some doctors regarded “the transsexual” as “undeveloped psychologically; as immature; as crippled; as disabled, if not sick” and “in a broader group—with the impotent, the frigid, and the homosexual.”<sup>93</sup> One psychoanalyst said a transgender woman suffered from “the delusional hope that he [sic] can really be transformed into something he [sic] is not.”<sup>94</sup> These doctors characterized surgery as “amputation of male organs” that was “self-mutilating, self-destructive, masochistic, and suicidal.”<sup>95</sup> Rather than surgery, they recommended psychoanalysis to cure patients of their “delusions.”<sup>96</sup> Apprehensions about surgery were on the judges’ minds in *Holloway*: they mischaracterized Holloway’s discharge as resulting from her “decision to undergo sex change surgery,” rather than her official request to be addressed as “Ramona.”<sup>97</sup> In light of the court’s stated concern about whether

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87. *Id.* at 662 n.3.

88. MEYEROWITZ, *supra* note 74, at 97; JAMI K. TAYLOR ET AL., THE REMARKABLE RISE OF TRANSGENDER RIGHTS 17 (2018). The clinics offered treatment only to the “‘good’ transsexual who manifested gender dysphoria at a young age, played with gender appropriate toys, failed as a member of [their] birth sex, and had to pass as a member of the desired sex.” TAYLOR ET AL., *supra* at 17.

89. MEYEROWITZ, *supra* note 74, at 266.

90. See, e.g., Joel Paris, *Is Psychoanalysis Still Relevant to Psychiatry?*, 62 CAN. J. PSYCHIATRY 308 (2017) (explaining that psychoanalytic theories and treatments have been marginalized over the past fifty years because they lack the evidentiary support expected by modern psychiatry).

91. MEYEROWITZ, *supra* note 74, at 266 (quoting Joost A.M. Meerloo).

92. Finney et al., *supra* note 26, at 82 (discussing the view that transsexuality was a result of “certain atypical experiences, unusual kinds of interactions with one’s parents” that “result in a stunting of one’s ability to enjoy using one’s organs in a mature, genital act with someone of the opposite anatomical sex”).

93. *Id.* at 82. The article reported the results of a study of eleven “transsexual” patients that found “hysterical personality trends of repression denial and dissociation.” *Id.* at 88–89.

94. *Id.* (quoting D.A. Russell, *The Sex-Conversion Controversy*, 279 N. ENG. J. MED. 535 (1968)); see also MEYEROWITZ, *supra* note 74, at 265 (quoting Joost A.M. Meerloo, who asked, “Do we have to collaborate with the sexual delusions of our patients?”).

95. Finney et al., *supra* note 26, at 82.

96. *Id.* at 83.

97. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977).



transsexuality was “a sign of severe psychopathology,” it is unsurprising that it found a way to interpret Title VII to exclude Holloway’s claim.<sup>98</sup>

The *Holloway* court also supported its exclusionary interpretation of Title VII by pointing to the fact that “[s]everal bills [had] been introduced to amend the Civil Rights Act to prohibit discrimination against ‘sexual preference’” but none had been enacted.<sup>99</sup> At the time of the case, transgender people were not included in proposed legislation to protect lesbian and gay rights, and were generally marginalized in lesbian and gay rights organizing.<sup>100</sup> The *Holloway* court did not explain why it regarded transsexuality as analogous to homosexuality, but it likely understood both as deviations from normal sex roles. Marshalling medical evidence, Holloway had argued that transsexualism was different from homosexuality and transvestism because it “does not serve to change other views society has about sexuality” and “there is nothing outwardly sexually unconventional about a transsexual following surgery.”<sup>101</sup> This argument is representative of efforts at the time by the medical profession to “sanitize transsexuals” in public opinion.<sup>102</sup> Those efforts often ran up against accounts in the popular press of transgender women engaged in sex work, stripping, or drag performances.<sup>103</sup> Against this background, it may have seemed obvious to the *Holloway* court that the prohibition on sex discrimination did not extend to “transsexuals.”

Thus, the *Holloway* court did not reason from the text of Title VII. It departed from the text based on a flawed understanding of Title VII’s purpose as protecting only men and women as classes. Concerns about immutability and the stigmatization of cross-dressing and homosexuality constrained the litigation from the outset by taking the argument that Holloway lost her job as a result of her presumed “male” sex off the table. And medical controversies in the late 1970s over whether “transsexuality” was the surgical completion of “nature’s handiwork” or a psychotic delusion made the analogy to discrimination against the religious convert a nonstarter.

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98. *Id.* at 662 n.3.

99. *Id.* at 662. One such bill defined sexual preference as “having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such attachment.” H.R. 5452, 94th Cong. (1975).

100. *See, e.g.*, TAYLOR ET AL., *supra* note 88, at 28.

101. Appellant’s Opening Brief, *supra* note 46, at 6–7. A dissenting judge argued that transsexuality was distinct from sexual preference because of its biological nature. *Holloway*, 566 F.2d at 664 (Goodwin, J., dissenting).

102. *Cf.* MEYEROWITZ, *supra* note 74, at 194–96.

103. *Id.*

### *B. Bennie Smith*

One year after the *Holloway* case, the meaning of sex discrimination came up in a second federal appellate case: the Fifth Circuit's 1978 decision in *Smith v. Liberty Mutual Insurance*.<sup>104</sup> The plaintiff in that case, Bennie Smith, was a black man who applied for a job as a mail room clerk with Liberty Mutual in 1969.<sup>105</sup> Liberty Mutual did not dispute that Smith was qualified for the job; indeed, the man who interviewed Smith thought he was "over qualified,"<sup>106</sup> perhaps due to his having an advanced degree in philosophy.<sup>107</sup> But the interviewer "did not recommend that the company hire Smith because, in [the interviewer's] opinion, Smith was effeminate."<sup>108</sup> In particular, Smith had social "interests . . . not normally associated with males"<sup>109</sup> such as "[p]laying musical instruments, singing, dancing and sewing."<sup>110</sup> As the district judge concluded, the interviewer thought Smith's effeminacy "gave evidence of the characteristics of sexual aberration."<sup>111</sup> Smith "most stringently denie[d] that he [was] a homosexual" and asserted that he was a "happily married man."<sup>112</sup> He brought both race and sex discrimination claims under Title VII. With respect to the sex discrimination claim, Smith argued he was fired as a result of "sexual stereotypes."<sup>113</sup> The Court of Appeals regarded Liberty Mutual's reason for not hiring Smith to be that Smith was "too womanly" rather than "because he was a male."<sup>114</sup> While modern cases would view this as sex discrimination against a man for behaving in ways women are allowed to, the Fifth Circuit in 1978 did not.<sup>115</sup>

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104. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978).

105. *Id.* at 326.

106. *Id.* at 327 n.2. Smith believed that his interviewer, who was also a black man, did not hire him "because he feared that I had better qualifications than he had, and would be a threat to him as a Negro coworker." *Smith v. Liberty Mut. Ins. Co.*, No. 17499, 1974 WL 10490, at \*2 (N.D. Ga. Mar. 6, 1974), *aff'd*, 569 F.2d 325 (5th Cir. 1978) (quoting Smith's EEOC charge).

107. *Smith*, 569 F.2d at 328 n.4.

108. *Id.* at 326.

109. Valdes, *supra* note 28, at 139 (quoting Brief for the Appellee at 9 n.7).

110. *Id.* (quoting Plaintiff's Brief in Support of Motion for Summary Judgment at 1).

111. *Smith*, 569 F.2d at 328 n.4 (quoting the district judge).

112. Valdes, *supra* note 28, at 146 (quoting Brief for the Appellant, Bennie E. Smith at 17, 20 n.7). At the time, "married man" meant a man married to a woman.

113. *Id.* at 140 (quoting Plaintiff's Brief in Support of Motion for Summary Judgment at 2 as arguing: "The sole issue presented . . . is whether the refusal to hire an applicant based on sexual stereotypes amounts to unlawful discrimination on the basis of sex.").

114. *Smith*, 569 F.2d at 327.

115. *See infra* Part II(A) (discussing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). Smith also made a comparator argument: he pointed to a black female applicant who was hired despite "presumably displaying effeminate characteristics." *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1102 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978). The district court rejected this argument, reasoning that because "the plaintiff, a male, displayed characteristics inappropriate to

In explaining its reasoning, the Court of Appeals did not offer a definition of “sex” or attempt to apply the statute’s terms. Instead, it asked “whether a line can legitimately be drawn beyond which employer conduct is no longer within the reach of the statute.”<sup>116</sup> To find a place to draw the line, it turned to *Willingham v. Macon Telegraph Publishing Co.*,<sup>117</sup> a 1975 case that held that employers could refuse to hire men with long hair.<sup>118</sup> Macon Telegraph believed that its clientele would disapprove of men with long hair, because “longhaired youths” had developed a bad reputation at a recent “counter-culture” music festival, where “scantily dressed young women flooded the countryside;” “use of drugs and marijuana was open;” and “[c]omplete nudity by both sexes, although not common was frequently observed.”<sup>119</sup> Plaintiff Alan Willingham argued it was sex discrimination to hire women, but not men, with long hair.<sup>120</sup> The original panel agreed with this argument and held that the employer would have to prove that its sex discrimination was justified under the statute’s BFOQ defense.<sup>121</sup> The Equal Employment Opportunity Commission (EEOC)<sup>122</sup> and a number of district courts had previously taken this approach.<sup>123</sup> On this interpretation, an employer did not have carte blanche to enforce different grooming rules as to men and women—it had to demonstrate it had a reasonable need for such discriminatory practices.<sup>124</sup>

In an en banc decision, the Fifth Circuit disagreed. It regarded the discrimination against Willingham as a type of discrimination it termed “sex plus”—discrimination against men with a particular “plus factor,” here, long hair. It invented a special rule for sex plus discrimination: it is only prohibited when the plus factor is an “immutable or protected characteristic.”<sup>125</sup> That the

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his sex” the right “counterpart” would “be[] a female applicant displaying inappropriate masculine attributes.” *Id.*

116. *Smith*, 569 F.2d at 326.

117. 507 F.2d 1084 (5th Cir. 1975) (en banc).

118. *Id.* at 1090.

119. *Id.* at 1087 (quoting the original panel’s dissenting opinion).

120. *Id.* at 1088 (“[W]ere he a girl with identical length hair and comparable job qualifications, he (she) would have been employed.”).

121. *Id.* The BFOQ defense allows discrimination where sex is a “bona fide occupational qualification” that is “reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e) (2012).

122. *Id.* at 1090; *see also* EEOC Decision No. 71-1529, 1971 WL 3867, at \*2 (Apr. 2, 1971).

123. *See, e.g., Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 664–65 (C.D. Cal. 1972); *Donohue v. Shoe Corp. of America*, 337 F. Supp. 1357, 1359 (C.D. Cal. 1972); *Roberts v. General Mills, Inc.*, 337 F. Supp. 1055, 1056–57 (N.D. Ohio 1971). *But see Baker v. California Land Title Co.*, 349 F. Supp. 235, 237 (C.D. Cal. 1972).

124. *See, e.g., Roberts*, 337 F. Supp. at 1056.

125. *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc). This rule may have been an attempt by the Fifth Circuit to reconcile its holding with the Supreme Court’s

text of the statute covers this situation was irrelevant to the court because it thought that “[t]he beginning (and often the ending) point of statutory interpretation is an exploration of the *legislative history* of the Act in question.”<sup>126</sup> And yet, the court found the legislative history of Title VII’s sex provision to be “meager.”<sup>127</sup> Based on the false assumption that the legislative history revealed nothing, the Fifth Circuit guessed that “Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications.”<sup>128</sup> Thus, it rationalized, Title VII could not have been intended “to limit an employer’s right to exercise his informed judgment as to how best to run his shop.”<sup>129</sup> The court imagined that Title VII’s purpose was only to equalize the employment opportunities of men and women as groups,<sup>130</sup> not to “maximiz[e] individual freedom by

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decision in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971). That case was a short per curiam opinion in which the Court reversed the Fifth Circuit for its mistaken reading of Title VII as allowing an employer policy that excluded women with school-age children, but not men with school-age children. *Id.* at 544 (holding that any such policy had to be justified under the statute’s BFOQ defense). A concurrence by Justice Marshall explained that, by adding sex to the Civil Rights Act, Congress “intended to prevent employers from refusing ‘to hire an individual based on stereotyped characterizations of the sexes’” and made clear that “[e]ven characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.” *Id.* at 545 (Marshall, J., concurring). It is possible that the *Willingham* court regarded having small children as a “protected characteristic[]” unlike hair length.

126. *Willingham*, 507 F.2d at 1090 (emphasis added).

127. *Id.* To support this conclusion, the court cited two student notes and one earlier Fifth Circuit case, *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971). *Willingham*, 507 F.2d at 1090. But rather than concluding the sex amendment’s purpose was inscrutable, *Diaz* reasoned that the statutory text made clear that its purpose was “to provide equal access to the job market for both men and women” and to “achieve the optimum use of our labor resources” in a way that “would enable individuals to develop as individuals.” *Diaz*, 442 F.2d at 386–87 (holding that an airline could not refuse to hire men as flight attendants).

128. *Willingham*, 507 F.2d at 1090. *But see supra* notes 63–64 and accompanying text (citing sources discussing how the sex amendment passed over the opposition that it would have significant and sweeping implications). The *Holloway* court also relied on *Willingham* for its flawed understanding of the sex amendment’s history. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (citing *Willingham*, 507 F.2d at 1090).

129. *Willingham*, 507 F.2d at 1092.

130. For this idea, the Fifth Circuit cited Supreme Court precedent on how a *facially neutral* practice may be discriminatory if it has a disparate impact on a minority group. *Id.* at 1091 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)). But it was contrary to Supreme Court precedent to apply the disparate impact test to a *facially discriminatory* practice. *See Griggs*, 401 U.S. at 429, 431 (noting the statute already “proscribe[d] . . . overt discrimination” and practices that were not “fair in form”). In *Martin Marietta*, the Court struck down the employer’s facially discriminatory rule excluding women, but not men, with small children, despite the fact that the rule had no disparate impact on women as a group. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971). In that case, women were overrepresented in the position. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 2 (5th Cir. 1969) (noting the employer’s argument that “while 70 to 75 percent of those who applied for this position were women, 75 to 80 percent of those holding the positions were women”), *vacated*, 400 U.S. 542 (1971).

eliminating sexual stereotypes.”<sup>131</sup> It did not think that hair length regulations had any significant effects on the overall employment opportunities of men or women as groups.<sup>132</sup> In its short opinion rejecting Bennie Smith’s claim, the Fifth Circuit saw itself as simply “adher[ing] to the conclusion in *Willingham*.”<sup>133</sup>

At the time of *Willingham* and *Smith*, it was clear from the text and history of Title VII that the statute’s sole purpose was not equalizing group conditions. In April 1978, three months after *Smith*, the Supreme Court made it all the more clear in *Los Angeles Department of Water & Power v. Manhart*.<sup>134</sup> *Manhart* was a class action brought by female employees challenging a policy that required women to make larger contributions to the employer’s pension fund than men.<sup>135</sup> The reason the employer asked women to pay more in contributions was actuarial data that showed women live longer than men.<sup>136</sup> The pension fund made monthly payments from the time of retirement until the time of death. Thus, women, who lived longer, would end up taking out more money in benefits.<sup>137</sup> The Supreme Court held that even though the policy equalized conditions for women and men as groups, it was impermissible discrimination.<sup>138</sup> The Court explained this result was required by the text of the statute:

The question . . . is whether the existence or nonexistence of “discrimination” is to be determined by comparison of class characteristics or individual characteristics. A “stereotyped” answer to that question may not be the same as the answer that the language and purpose of the statute command. The statute makes it unlawful “to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual’s* race, color, religion, sex, or national origin.” 42 U.S.C.

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131. *Willingham*, 507 F.2d at 1092.

132. *Id.* (“Neither sex is elevated by these regulations to an appreciably higher occupational level than the other. We conclude that Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities.” (quoting *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973))). This interpretation was based solely on the term “because of . . . sex”; the court noted the term “discriminate” could not do any work to preclude *Willingham’s* claim, on account of “persuasive legislative evidence that the word ‘discriminate’ is to be construed broadly under the Act.” *Id.* at 1088, 1093 n.3 (citing 110 CONG. REC. 7213 (1964)).

133. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

134. *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

135. *Id.* at 704.

136. *Id.* at 705.

137. *Id.*

138. *Id.* at 708.

§ 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous.<sup>139</sup>

While it was true that some women would live longer than men, some would not. Those who would not were “receiv[ing] smaller paychecks because of their sex” with “no compensating advantage.”<sup>140</sup> The Court held this was unlawful, just as it would have been unlawful for an employer to charge different rates based on actuarial data showing that life expectancies differ based on race or national origin.<sup>141</sup> The purpose of the statute was to make these traits “irrelevant.”<sup>142</sup> The Court explained: “In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”<sup>143</sup>

But even if *Manhart* had been decided before Smith's appeal, it is likely that the Fifth Circuit would still have denied his claim due to then-prevailing prejudices about homosexuality. It framed the question in the case as whether Title VII allows discrimination based on “affectional or sexual preference,” a question it blurred together with whether discrimination was allowed based on Smith's “effeminacy.”<sup>144</sup> This blurring reflects a misunderstanding of same-sex desire as necessarily correlating with the “inversion” of any number of gendered personality traits.<sup>145</sup> Although it relied entirely on *Willingham*, the court offered no explanation for why Bennie Smith's presumed homosexuality was not an immutable or protected characteristic. Readers today might bristle at the comparison between a long-haired white hippie like Willingham, who the court characterized as seeking to “maximiz[e]

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139. *Id.*

140. *Id.*

141. *Id.* at 709.

142. *Id.*

143. *Id.* at 707 n.13 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 n.13 (7th Cir. 1971)).

144. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326–27 (5th Cir. 1978) (failing to explain this conflation). The court claimed it was Smith who argued sexual preference was covered under Title VII, repeating an assertion that had been made by the district court. *Id.* But according to Professor Valdes, Smith's briefs had “repeatedly tried to stress that his claim was not about sexual orientation and that, in any event, he was a happily-married, albeit socially gender-atypical, member of the sexual majority.” Valdes, *supra* note 28, at 146.

145. This was an outdated understanding even in 1978. *See, e.g.*, George Chauncey, Jr. *From Sexual Inversion to Homosexuality*, 58/59 SALMAGUNDI 114, 116 (1983) (discussing the nineteenth century concept of “sexual inversion,” which “referred to a broad range of deviant gender behavior, of which homosexual desire was only a logical but indistinct aspect”); Valdes, *supra* note 28, at 44–45 (discussing the “sexual inversion” theory of Victorian-era sexologists).

individual freedom by eliminating sexual stereotypes,<sup>146</sup> and Bennie Smith, a black man with an advanced degree who could not get a job as a mail room clerk because of his presumed sexual orientation.<sup>147</sup>

But at the time of the *Smith* decision, “homosexuality,” rather than long hair, may have seemed the more likely reason to deny Title VII protection. The *Smith* court cited a 1975 EEOC ruling concluding that the term “sex,” while not defined in Title VII, means “gender, an immutable . . . characteristic with which a person is born.”<sup>148</sup> The EEOC held that discharge of a man due to “homosexual tendencies” was on account of his “sexual practices” rather than his “male gender.”<sup>149</sup> The EEOC did not ask whether the man would have been hired had he been a woman who engaged in those same sexual practices. The concept of immutability did the conceptual work to obscure this question. While a person is blameless for being born a man or a woman, they are at fault for their “practices.”

To put these events in historical context, “[b]etween 1967 and 1996, authoritative Supreme Court decisions advised Congress and state legislatures that homosexual or bisexual persons could be treated as per se ‘afflicted with psychopathic personality’ and that private nonprocreative sexual acts between consenting same-sex couples could be criminalized as felonies.”<sup>150</sup> At the time of *Smith*, the U.S. military regarded “homosexual tendencies” as a disqualifying moral defect.<sup>151</sup> Media coverage of “homosexuality” in the 1970s was, by in large, “negative—highlighting medical theories that emphasized pathology, reporting police campaigns against ‘deviants,’ or casting pitying glances at the lives of sexual outlaws.”<sup>152</sup>

The *Smith* decision thus resulted from the unstated understanding that male “effeminacy” equates with “homosexuality,” and that neither are immutable or normatively acceptable traits that employers should be required to ignore. The *Smith* decision rested on an understanding of Title VII’s sex discrimination provision as limited to the purpose of equalizing the

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146. *Willingham v. Macon Tel. Pub. Co.*, 482 F.2d 535, 536 (5th Cir. 1973), *opinion vacated on reh’g*, 507 F.2d 1084 (5th Cir. 1975) (describing Willingham as “a twenty-two year old white male and an artist by trade” with “shoulder length” hair).

147. *See Smith*, 569 F.2d at 326–27.

148. Equal Employment Opportunity Comm’n, EEOC Dec. No. 76-67 (1975), 1975 WL 4475, at \*2.

149. *Id.* (emphasis in original).

150. Eskridge, *supra* note 4, at 332–33 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986) and *Boutilier v. INS*, 387 U.S. 118 (1967)).

151. *See, e.g.*, RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY 105 (1993) (discussing how the military constructed homosexuality as a national security threat based on the unfounded view that “perverts” would be disloyal).

152. JOHN D’EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 319 (3d ed. 2012).

employment opportunities of men and women as groups, not protecting individuals against sex-role stereotypes. It was not based on Title VII's text; it openly disregarded the statutory text.

*C. The Legacy of Holloway and Smith*

Despite the errors of *Holloway* and *Smith*, later appellate decisions viewed the two cases as standing for the well-established proposition that Congress did not intend to prohibit discrimination based on “transsexualism” and “homosexuality.” Based on this premise, courts rejected any new theories that would explain how discrimination based on sexual orientation or transgender identity was a type of sex discrimination as illegitimate “bootstrapping” of unprotected groups into Title VII. While courts began to profess that they did not condone these forms of discrimination, their opinions continued to evince misunderstandings and prejudices. In cases brought by transgender women, courts fixated on the irrelevant questions of whether the plaintiffs were really women, or whether transgender identity was natural or disordered, rather than asking whether the plaintiffs were fired because of sex.

In 1979, the Ninth Circuit decided *DeSantis v. Pacific Telephone and Telegraph Co.*,<sup>153</sup> a case brought by gay and lesbian workers.<sup>154</sup> The plaintiffs alleged they had been mistreated on the basis of sex because “if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners” and vice versa.<sup>155</sup> The Ninth Circuit rejected this argument. Unlike the *Smith* and *Holloway* courts, it did not offer an interpretation of the statute that required a plaintiff to show a sex-based practice had a disparate impact on men or women as a group. To the contrary, it rejected the plaintiff's disparate impact argument that anti-gay discrimination harmed men as a class more than women as class, on the ground that the theory was an illegitimate attempt to “‘bootstrap’ Title VII protection for homosexuals” in contravention of congressional intent to exclude them.<sup>156</sup> The court's conclusions about congressional intent were

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153. 608 F.2d 327 (9th Cir. 1979), *abrogated by* *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

154. *Id.* at 330–31.

155. *Id.* at 331. The court rejected the individualized logic of this argument and reframed the comparison in terms of group equality: “whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex.” *Id.*

156. *Id.* at 331. The plaintiffs' disparate impact argument was “that discrimination against homosexuals disproportionately affects men both because of the greater incidence of homosexuality in the male population and because of the greater likelihood of an employer's discovering male homosexuals compared to female homosexuals.” *Id.* at 330. Over a dissent, the court refused to



based entirely on *Holloway*, which it quoted at length.<sup>157</sup> The *DeSantis* court also rejected the claim of one plaintiff who had been fired because his employer “felt that it was inappropriate for a male teacher to wear an earring to school.”<sup>158</sup> The court cited *Smith* for the proposition that “discrimination because of effeminacy, like discrimination because of homosexuality . . . or transsexualism (*Holloway*), does not fall within the purview of Title VII.”<sup>159</sup>

Unlike *Holloway* and *Smith*, *DeSantis* included the caveat that “we do not express approval of an employment policy that differentiates according to sexual preference.”<sup>160</sup> But by the time of *DeSantis*, negative views about homosexual and transgender identity were baked into the doctrine, along with the mistaken beliefs about congressional intent that the *Holloway* and *Smith* courts employed to override the statutory text. Taking for granted *Holloway* and *Smith*’s holdings, later courts rejected textual arguments on the ground that any interpretation that led to “protection for homosexuals” had to be foreclosed as illegitimate bootstrapping.<sup>161</sup> The use of the term “homosexuals” hints that it was this particular minority group, not sexual orientation generally, that courts thought Congress could not have intended to protect.

*Holloway* also had a strong pull on the 1982 Eighth Circuit case, *Sommers v. Budget Marketing*,<sup>162</sup> where the court transfigured the question of sex discrimination into one about which restroom a transgender plaintiff should use. In *Sommers*, the plaintiff Audra Sommers described herself as “a psychological female with anatomical features of a male.”<sup>163</sup> She was hired to do clerical work by Budget Marketing, where she presented as a woman and worked for three days without complaint, until a former acquaintance who had known her as a man raised questions about her “sexual status.”<sup>164</sup> Budget fired Sommers on the ground that “she misrepresented herself as an

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allow the plaintiffs to pursue this theory due to concerns that it would “‘bootstrap’ Title VII protection for homosexuals under the guise of protecting men generally.” *Id.*

157. *Id.* at 329 (addressing congressional intent by quoting three paragraphs from *Holloway*).

158. *Id.* at 331. According to Professor Valdes, the plaintiff’s attorney in that case “was not sure whether the employer actually knew or even suspected his client’s homosexuality.” Valdes, *supra* note 28, at 155 (citing the author’s November 19, 1993 telephone interview with plaintiff Donald Strailey’s attorney, Richard Gayer). The attorney thought that the defendant—a nursery school—was concerned that parents would assume his client was gay based on “‘his effeminate image.’” *Id.* The earring was “‘the last straw.’” *Id.*

159. *DeSantis*, 608 F.2d at 332.

160. *Id.* at 331.

161. *Id.*

162. 667 F.2d 748 (8th Cir. 1982).

163. *Id.* at 750 n.2 (describing a “medical affidavit” submitted by Sommers).

164. This fact is drawn from Sommers’s parallel state-court case. *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470, 471, 474 (Iowa 1983) (holding that the prohibition on sex discrimination in Iowa’s Civil Rights Act did not “include transsexuals”).

anatomical female when she applied for the job” and caused disruption after female employees threatened to quit if Sommers were permitted to use the women’s restroom.<sup>165</sup> The court held that transsexuals—who are psychologically one sex and anatomically the other—were outside the “plain meaning” of the term “sex,” defined as male or female.<sup>166</sup> But this reasoning did not drive the result in the case. Rather than seeing Sommers’s sexual identity as outside Title VII’s scope, the district court recognized that “for the purposes of Title VII,” Sommers was “male because she is an anatomical male.”<sup>167</sup> This factual finding should have led the court to conclude Sommers was indeed fired because of her sex. Sommers’s status as an “anatomical male” was the explicit reason she was fired. Had she been an “anatomical female,” she would have kept her job.

But the court was not asking the question the statute asks: whether Sommers was discharged because of her sex. Rather, it was addressing a different question: whether she was properly classified by her employer for purposes of restroom usage. Echoing the district court, the Eighth Circuit explained:

We are not unmindful of the problem Sommers faces. On the other hand, Budget faces a problem in protecting the privacy interests of its female employees. According to affidavits submitted to the district court, even medical experts disagree as to whether Sommers is properly classified as male or female. The appropriate remedy is not immediately apparent to this court. Should Budget allow Sommers to use the female restroom, the male restroom, or one for Sommers’s own use?<sup>168</sup>

The court expressed its wish that some “reasonable accommodation” could be worked out by the parties but held it was constrained to decide only “whether Congress intended Title VII of the Civil Rights Act to protect transsexuals from discrimination.”<sup>169</sup> With respect to the restroom dilemma, Title VII offers the BFOQ defense for employers who wish to justify sex classifications on business grounds. Instead of asking whether this defense applied, a restroom dilemma resulted in a rule giving employers carte blanche to fire transgender workers.

A less sympathetic view of transgender identity drove the result in the Seventh Circuit’s 1983 decision in *Ulane v. Eastern Airlines*.<sup>170</sup> The plaintiff

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165. *Sommers*, 667 F.2d at 748–49.

166. *Id.* at 750.

167. *Id.* at 749.

168. *Id.* at 750; *see also id.* at 749 (quoting the district court’s concerns about which restroom the plaintiff should use).

169. *Id.* at 750.

170. 742 F.2d 1081 (7th Cir. 1984).

in that case, Karen Ulane, worked as a First Officer and flight instructor with Eastern Airlines, after a decorated career as an Army pilot.<sup>171</sup> The airline fired Ulane as a result of her transition, arguing that she was not fit to fly on account of transsexuality, a psychological problem, and because no one knew what effects her medical treatments might have.<sup>172</sup> After a bench trial, the district judge concluded: “There is no evidence of any rational belief on the part of Eastern that there is a safety problem,” and that Eastern’s real issue was the perception that “the respectability of aviation is compromised by the presence of a transsexual” as a pilot.<sup>173</sup>

The district judge thought that discharge on the basis of transsexuality was because of sex for two reasons, one literal and one scientific.<sup>174</sup> The literal argument was based on his “layman’s reaction to the simple word,” “sex,” which “literally applies to transsexuals.”<sup>175</sup> Rather than speculating about legislative intent, the judge reasoned that he was bound to “work[] with the word that the Congress gave us.”<sup>176</sup> He concluded both that Ulane was fired for transsexuality, and also that she was in fact “female” and had lost her job “because of her sex.”<sup>177</sup>

The scientific argument was based on medical testimony at trial that “sex” encompasses a psychological component called “sexual identity.”<sup>178</sup> While cast in scientific terms, the dispute was about the immutability of transgender identity, a concept with moral heft. If Ulane had been a transvestite—a man who wore women’s attire for purposes of sexual gratification—there was no argument that she would have been covered by Title VII.<sup>179</sup> Medical professionals of the era distinguished “bona fide

171. *Id.* at 1082–83.

172. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 827–29 (N.D. Ill. 1983), *rev’d*, 742 F.2d 1081 (7th Cir. 1984).

173. *Id.* at 832 (characterizing the testimony of Eastern’s witnesses).

174. *See Ulane*, 742 F.2d at 1084 (characterizing the district court’s opinion).

175. *Ulane*, 581 F. Supp. at 822, 825.

176. *Id.* at 825; *see* Chai Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623, 641 (2000) (explaining that Judge Grady was “more concerned with what the statute actually meant, than with what Congress intended it to mean”).

177. *Ulane*, 581 F. Supp. at 839. This finding was based on her “post operative legal status.” *Id.* The state of Illinois and the Federal Aviation Administration had recognized Ulane as female. *Ulane*, 742 F.2d at 1083.

178. *Ulane*, 581 F. Supp. at 825.

179. *Id.* at 823 (“[T]he statute was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex.”). At the time of *Ulane*, the Illinois Supreme Court had held that laws that forbade cross-dressing were unconstitutional, but only as applied to transsexual individuals. *City of Chicago v. Wilson*, 389 N.E.2d 522, 523, 525 (1978). Ulane’s expert witness testified that transvestites, unlike transsexuals, engaged in cross-dressing for purposes of “sexual arousal.” *See* Richard Green, *Spelling ‘Relief’ for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 YALE L. & POL’Y REV. 125, 128 (1985). In

transsexuals” from sexual “deviants.”<sup>180</sup> It is apparent from the district judge’s opinion that he came to sympathize with Ulane over the course of the bench trial.<sup>181</sup> The judge remarked that Ulane’s transition was not undertaken lightly and came at great personal cost.<sup>182</sup> Rather than having a “freakish” appearance, she was indistinguishable from a “biological woman.”<sup>183</sup> As a “true transsexual,” she was protected by Title VII.<sup>184</sup>

The Seventh Circuit reversed in an opinion that suggests it could not help but see Karen Ulane as “freakish.” The court began its opinion by remarking that Ulane’s transition “may give some cause to pause”—an acknowledgment that readers might be unfamiliar or uncomfortable with transgender people.<sup>185</sup> It then proceeded to tell Ulane’s “story” as if to those disbelieving readers.<sup>186</sup> Rather than remarking on the social aspects and challenges of Ulane’s transition as the district judge had done, the Seventh Circuit described her medical treatments in intimate and irrelevant detail.<sup>187</sup> The circuit court referred to “transsexuality” as a “diagnosis.”<sup>188</sup> It defined “transsexualism” as a person who “experiences discomfort or discontent about *nature’s choice* of his or her particular sex.”<sup>189</sup> “Nature’s choice” was the court’s paraphrase of the Third Edition of the American Psychiatric Association’s Diagnostic and Statistical Manual, which did not use this freighted language.<sup>190</sup> The court expressed outright skepticism about surgical

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a law review article, Ulane’s expert witness argued that “behavioral science data demonstrate that there is nothing ‘voluntary’ about sexual or gender identity. Only sexual *anatomy* is mutable.” *Id.* at 138–39. The district judge agreed. *Ulane*, 581 F. Supp. at 823.

180. MEYEROWITZ, *supra* note 74, at 168, 196; *see also* TAYLOR ET AL., *supra* note 88, at 17.

181. *See Ulane*, 581 F. Supp. at 823 (“Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female.”).

182. *Id.* at 826.

183. *Id.* at 827 (noting she appeared to her psychiatrists to be indistinguishable from a “biological woman,” with “nothing flamboyant” or “freakish” about her). The judge also noted that she had adjusted to the transition, and was even elected “vice president of her church . . . by parishioners who know of her situation.” *Id.* This observation reflects the problematic view that the “intelligibility of one’s new gender in the eyes of non-trans people” is the “the favored indication of ‘success’” for treatment. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 26, 28 (2003) (“While some [trans people] do rely on passing as non-trans women or men in various aspects of their lives, and some embrace non-trans male or female identity, I think that all are disserved by the requirement that trans people exhibit hyper-masculine or hyper-feminine characteristics to get through medical gatekeeping.”).

184. *See Ulane*, 581 F. Supp. at 827.

185. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082 (7th Cir. 1984).

186. *Id.*

187. *Id.* at 1083.

188. *Id.*

189. *Id.* at 1083 n.3 (emphasis added).

190. DSM-3, *supra* note 39, at 261–64 (cited in *Ulane*, 742 F.2d at 1083 n.3). The one medical text cited by the *Ulane* court on the definition of transsexuality—while less hostile than that cited

procedures that would override “nature’s choice,” remarking that “even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.”<sup>191</sup>

This skepticism reflected a line of popular opinion at the time that there was something disturbingly unnatural about such surgeries. In 1978, feminist theologian Mary Daly had likened transsexual women to Frankenstein’s monster.<sup>192</sup> Deploying similar imagery, Janice Raymond’s 1979 book, *The Transsexual Empire: The Making of the She-Male*, argued that “the problem of transsexuality would best be served by morally mandating it out of existence.”<sup>193</sup> Today such arguments and terms like “she-male” are recognized as dehumanizing and offensive,<sup>194</sup> but in 1979, Raymond’s book received positive coverage in the *New York Times*.<sup>195</sup> By the mid-1980s, there

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by the *Holloway* court—is still offensive by today’s standards. See Milton T. Edgerton, Jr., et al., *Psychological Considerations of Gender Reassignment Surgery*, 9 SYMP. ON SOC. & PSYCHOL. CONSIDERATIONS PLASTIC SURGERY 355, 355 (1982) (discussing how prejudices in the medical profession “have tended to obscure the fact that all transsexuals are desperate and lonesome people”) (cited in *Ulane*, 742 F.2d at 1083 n.3). The article divided “male transsexual patients” into two categories—reliable and manipulative—describing the manipulative group as “exemplified by the flamboyant, ‘hysterical’ males dressed in seductive female clothing” and “prone to antisocial behavior.” *Id.* at 364.

191. *Ulane*, 742 F.2d at 1087 (“*Ulane* is entitled to any *personal belief* about her sexual identity she desires.” (emphasis added)). I am not the first legal scholar to criticize this passage. See Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 347 (1999) (“The passage is brimming with the language of skepticism.”); Ronald Garet, *Self-Transformability*, 65 S. CALIF. L. REV. 121, 197 (1991) (“In these words, more than a trace is to be found, if not of disgust, then at least of distaste.”). But these criticisms bear repeating.

192. See Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 GLQ: J. LESBIAN AND GAY STUD. 237, 238 (1994) (discussing MARY DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* 69–72 (1978)).

193. JANICE RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* 178 (1979); see also STRYKER, *supra* note 24, at 132 (discussing the impact of Raymond’s arguments that transgender women were appropriating women’s bodies and invading their spaces in the mid-1980s). Raymond accused transsexual women of engaging in “sexual deception” which she equated with rape. See Talia Mae Bettcher, *Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion*, 22 HYPATIA 43, 56–57 (2007) (explaining how the argument that sexual deception is a form of metaphorical rape has been used to justify the actual rape of transgender people).

194. See Michelle Goldberg, *What Is A Woman?*, NEW YORKER (July 28, 2014), <https://www.newyorker.com/magazine/2014/08/04/woman-2> [https://perma.cc/MMN4-8W9B] (“It’s a measure of how much perceptions have changed in the past thirty-five years that ‘The Transsexual Empire’ received a respectful, even admiring hearing in the mainstream media.”).

195. See, e.g., *id.*; Thomas Szasz, *Male and Female Created He Them*, N.Y. TIMES (June 10, 1979), <https://www.nytimes.com/1979/06/10/archives/male-and-female-created-he-them-transexual.html> [https://perma.cc/G92U-DNDQ] (describing Raymond’s support for her thesis as “flawless” and observing “[i]n the old days, when I was a medical student, if a man wanted to have his penis amputated, my psychology professors said that he suffered from schizophrenia, locked him up in an asylum and threw away the key”).

had been a “barrage of negative publicity” around surgical interventions for transgender patients, and one prominent treatment program at Johns Hopkins had closed, prompting insurance carriers to deny coverage for treatments.<sup>196</sup> In the words of one physician, carriers were using the closure of the Johns Hopkins program “to justify considering transsexuals freaks and frauds again.”<sup>197</sup>

In *Ulane*, the Seventh Circuit emptily professed that it did “not condone discrimination in any form,” but nonetheless concluded it was “constrained to hold that Title VII does not protect transsexuals.”<sup>198</sup> *Ulane* interpreted Title VII as barring discrimination “against women because they are women and against men because they are men.”<sup>199</sup> By this, the court meant that to prevail, *Ulane* would have to show that Eastern Airlines thought she was female and fired her because it generally “treated females less favorably than males.”<sup>200</sup> But Eastern Airlines fired *Ulane* because it considered her to be “a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.”<sup>201</sup> The district judge thought it was literal sex discrimination to fire *Ulane* because of her female “sexual identity.”<sup>202</sup> But the circuit court believed *Ulane* was fired not for her sexual identity, but for having a “sexual identity disorder” defined as a condition in which “a person born with a male body . . . believes himself to be female.”<sup>203</sup> The court’s skepticism of this “untraditional and unusual” disorder left it unwilling to allow *Ulane*’s claim without a new law from Congress specifically instructing it to do so.<sup>204</sup>

These early cases—*Holloway*, *Smith*, *DeSantis*, *Sommers*, and *Ulane*—were premised not on the statutory text but rather on misunderstandings, judgments, and fears; the conflation of transgender identities, homosexuality, and gender nonconformity; mistakes about congressional intent; and judicially invented limitations on the statute to only group rights or immutable characteristics. These precedents set in place formidable barriers to change. Later circuit court decisions simply relied on them for their

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196. MEYEROWITZ, *supra* note 74, at 269–70.

197. *Id.* (quoting Mark Bowden, *A Squabble Over Sex Change Operations*, PHILADELPHIA INQUIRER, March 24, 1980, at 2A).

198. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

199. *Id.* at 1085; *see* Clarke, *supra* note 10, at 103 (arguing that this interpretation is not supported by the text of Title VII, is contrary to Supreme Court precedent, and is inconsistent with any plausible normative theory of the harm of employment discrimination).

200. *Ulane*, 742 F.2d at 1087.

201. *Id.* *Ulane* did not argue she was fired because she was perceived to be a “biological male,” likely for similar reasons as Ramona Holloway. *See supra* notes 71–76 and accompanying text.

202. *Ulane*, 581 F. Supp. at 825.

203. *Ulane*, 742 F.2d at 1085 (emphasis added).

204. *Id.* at 1086.

holdings, updating references to “homosexuality” to the more neutral-sounding “sexual orientation.”<sup>205</sup> Few new arguments were made, other than additional negative inferences from the continued failure of legislative proposals to ban discrimination on the basis of sexual orientation.<sup>206</sup> The anti-bootstrapping point from *DeSantis*—that Congress *meant* to exclude any theory that amounts to a claim that discrimination on the basis of homosexuality is sex discrimination—foreclosed the development of legal theories that might have undermined the old cases.<sup>207</sup>

### III. How Circuit Courts Got It Right

The early circuit cases got Title VII wrong because they understood “homosexual” and “transsexual” people to be deviant social classes, different from the men and women the statute was intended to protect. Even as attitudes about LGBTQ<sup>208</sup> people softened, the errors of the early cases were buried under the accumulated sediment of precedent. As a result of a number of developments, those errors have been unearthed, and recent circuit court decisions now apply Title VII’s text to forbid anti-LGBTQ discrimination. This Part will discuss four of these developments: (1) the Supreme Court’s 1989 *Price Waterhouse* decision holding that Title VII forbids discrimination against individuals for failing to conform with sex-role stereotypes, (2) the rise of textualism as an approach to statutory interpretation, (3) the normalization of LGBTQ identities, and (4) the loosening of the assumption that employers must enforce distinctions between the sexes in the workplace.

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205. See, e.g., *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (refusing to depart from a brief statement in *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) that “[d]ischarge for homosexuality is not prohibited by Title VII”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“It is clear, however, that Title VII does not prohibit discrimination based on sexual orientation.”); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (extending *Ulane* to sexual orientation), *overruled by Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (“[W]e regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.” (quoting *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996))); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (“Title VII does not prohibit discrimination against homosexuals.”).

206. See, e.g., *Bibby*, 260 F.3d at 261.

207. See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (“Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’”), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (same).

208. I use this common acronym to describe any person who (a) is not exclusively heterosexual or (b) does not exclusively identify with the gender associated with the sex they were assigned at birth. I do not intend to exclude those who use other terms to self-identify, nor am I attempting to delimit the broader social movement with this choice of acronym.

None of these developments changed what it means to “discharge” an “individual . . . because of” their “sex.”<sup>209</sup> Rather, they removed the blinders, allowing courts to understand the application of that text to LGBTQ workers.

#### A. *Sex Stereotyping Doctrine*

A first development was the Supreme Court’s 1989 *Price Waterhouse v. Hopkins*<sup>210</sup> decision holding that Title VII forbids discrimination against individuals for failing to conform with sex-role stereotypes. This anti-stereotyping rule undercut the group-rights logic of the early cases: first with respect to men deemed effeminate, then to transgender plaintiffs, and then to plaintiffs fired due to their sexual orientations.

The plaintiff in *Price Waterhouse*, Ann Hopkins, was a cisgender<sup>211</sup> woman denied a promotion at an accounting firm.<sup>212</sup> Hopkins was told that she “overcompensated for being a woman,” that her swearing was objectionable “because it’s a lady using foul language,” and that if she wanted to make partner, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>213</sup> The Supreme Court held that under Title VII, an employer could not deny opportunities to a woman based on “stereotypical notions about women’s proper deportment.”<sup>214</sup> The Court clarified: “As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by *assuming or insisting* that they matched the stereotype associated with their group.”<sup>215</sup> *Manhart* had already held that an employer could not discriminate against an individual woman by *assuming* she matched the stereotype for her group.<sup>216</sup> *Price Waterhouse* made it undeniable that employers could not discriminate by *insisting* women match the stereotype associated with their group.<sup>217</sup> Two years after the decision, Congress amended Title VII to clarify that discrimination is unlawful even if

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209. 42 U.S.C. § 2000e-2(a)(1) (2012).

210. 490 U.S. 228 (1989) (plurality opinion).

211. I use this term to mean she was not transgender.

212. *See Price Waterhouse*, 490 U.S. at 233.

213. *Id.* at 235.

214. *Id.* at 256.

215. *Id.* at 251 (emphasis added). Justice O’Connor’s concurring opinion agreed with the four Justices in the plurality on this point. *Id.* at 266 (O’Connor, J., concurring) (agreeing that there had “been a strong showing that the employer has done exactly what Title VII forbids”).

216. *See* Zachary R. Herz, Note, *Price’s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 *YALE L.J.* 396, 406 (2014).

217. *Id.* This version of the sex stereotyping idea was not a new one; as Justice Marshall explained in his 1971 concurrence in *Martin Marietta*, it is to be found in the Civil Rights Act’s legislative history. *See supra* note 125.



“sex” is just one “motivating factor,” making it easier for victims of discrimination to bring claims where the employer had mixed motives.<sup>218</sup>

Because Title VII protects men as well as women, there was no way to reconcile *Price Waterhouse* with the holdings of *Smith* and *DeSantis* that Title VII allows discrimination against “effeminate” men.<sup>219</sup> In a 1997 case, *Doe v. City of Belleville*,<sup>220</sup> a sixteen-year-old boy was harassed by his straight male coworkers, including one who called him a “fag,” “queer,” and “his ‘bitch’”; told him to “go back to San Francisco”; threatened to rape him; and at one point, grabbed him by the testicles, saying he needed to find out whether Doe was “a boy or a girl.”<sup>221</sup> Doe was heterosexual; it appears his coworkers targeted him because he wore an earring.<sup>222</sup> The Seventh Circuit reasoned that this harassment would obviously be unlawful if Doe were a woman and if it “were triggered by that woman’s decision to wear overalls and a flannel shirt to work.”<sup>223</sup> The differences between *Doe* and *Price Waterhouse* were “immaterial.”<sup>224</sup> An earring was the reason one of the male plaintiffs in *DeSantis* had been fired two decades earlier.<sup>225</sup> In 2001, the Ninth Circuit recognized that *Price Waterhouse* had overruled *DeSantis* to the extent that the case had held that a male nursery school teacher could be fired because he was perceived as effeminate.<sup>226</sup>

In the words of the Sixth Circuit Court of Appeals, *Price Waterhouse* “eviscerated” the logic of *Holloway*, *Sommers*, and *Ulane*,<sup>227</sup> making success possible on sex discrimination claims for transgender plaintiffs.<sup>228</sup> In *Smith*

218. See *supra* note 2 (discussing 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)). The 1991 amendment was motivated by the *Price Waterhouse* decision but did not disturb its holding on sex stereotypes; rather, supporters of the amendment endorsed the sex-stereotyping rule. See, e.g., Eskridge, *supra* note 4, at 374–76.

219. See, e.g., I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1180 (1991); Case, *supra* note 9, at 43–44; Valdes, *supra* note 28, at 178.

220. 119 F.3d 563 (7th Cir. 1997). The decision was vacated and remanded for further consideration in light of the Supreme Court’s decision in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, (1998), but the parties settled the matter before an opinion could be issued on remand. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3d Cir. 2001) (noting that “[i]t would seem, however, that the gender stereotypes holding of *City of Belleville* was not disturbed” by *Oncale*).

221. *Doe*, 119 F.3d at 567.

222. *Id.*

223. *Id.* at 568.

224. *Id.* at 581.

225. See *supra* note 158 and accompanying text.

226. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001).

227. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).

228. The first of these appellate decisions was *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), a case under the Gender Motivated Violence Act—a law that provides a cause of action for certain violent crimes motivated by “gender.” *Id.* at 1198. The court reasoned that the term “gender”

*v. City of Salem*, the plaintiff was a firefighter, “biologically and by birth a male,” who began to present at work as a woman after being diagnosed with “Gender Identity Disorder.”<sup>229</sup> This caused Smith’s coworkers to complain that “his appearance and mannerisms were not ‘masculine enough,’” leading eventually to his suspension.<sup>230</sup> Smith claimed to be “male” for Title VII purposes, and argued that “he” would not have suffered discrimination “on account of his non-masculine behavior and [Gender Identity Disorder], had he been a woman instead of a man.”<sup>231</sup> The Sixth Circuit agreed, reasoning that *Price Waterhouse* bars discrimination against a plaintiff for failing to “act and/or identify with his or her gender.”<sup>232</sup> It explained that after *Price Waterhouse*, “employers who discriminate against men because they . . . wear dresses and makeup, or otherwise act femininely, are . . . engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”<sup>233</sup> Early courts had overlooked these arguments because they were distracted by the fact that plaintiffs were “transsexual.”<sup>234</sup> Those courts had “superimpose[d] classifications such as ‘transsexual’ on a plaintiff, and then legitimize[d] discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.”<sup>235</sup>

Over the next decade, the EEOC<sup>236</sup> and most appellate courts that considered the issue came to agree that discrimination on the basis of transgender status was a type of sex stereotyping.<sup>237</sup> The plaintiff in *Smith*

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was “interchangeable” with the term “sex,” drawing on *Price Waterhouse* to conclude that discrimination against a transgender woman met the terms of the statute. *Id.* at 1202.

229. *Smith*, 378 F.3d at 568.

230. *Id.*

231. *Id.* at 570.

232. *Id.* at 575. Later decisions debated whether *Smith* held that discrimination on the basis of transgender status was necessarily unlawful. *See* Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 577 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019). In 2018, the Sixth Circuit explicitly held that it was. *Id.* (“[W]e now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.”).

233. *Smith*, 378 F.3d at 574.

234. *See supra* note 86–98 and accompanying text.

235. *Smith*, 378 F.3d at 574.

236. *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*8 (Apr. 20, 2012).

237. *See* *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (“By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (reasoning that discrimination against a transgender woman was “motivated, at least in part, by [her] gender—in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor”). *But see* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding

proceeded on the theory that “he” was an insufficiently masculine “male,” akin to the cisgender male plaintiff harassed in *Doe*. The argument that transgender women are “female” for Title VII purposes also had some success.<sup>238</sup> In other cases by transgender women raising the sex stereotyping theory, courts have concluded it is immaterial whether the plaintiff is proceeding as male or female for Title VII purposes.<sup>239</sup> What matters is that the discriminator targeted the plaintiff because she was *perceived* to be an “insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming [transgender individual].”<sup>240</sup>

*Price Waterhouse* also paved the way for sex discrimination cases brought by gay and lesbian plaintiffs. After *Price Waterhouse*, it proved exceedingly difficult for courts to sort out when discrimination against lesbian and gay plaintiffs was based on sexual orientation and when it was based on sex. To avoid “bootstrapping” protection for sexual orientation into Title VII, courts attempted to draw a line between sex stereotypes about “appearance or behaviors,” which could give rise to a sex discrimination claim, and sex stereotypes about “sexual practices,” which could not.<sup>241</sup> This resulted in a bizarre set of lower court opinions in which gay and lesbian plaintiffs who did not conform to sex stereotypes in “observable ways,” for example, with their haircuts or attire, won, while those who were fired just

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that a plaintiff “may not claim protection under Title VII based upon her transsexuality *per se*” without resolving whether the plaintiff had a sex-stereotyping claim).

238. See *United States v. Se. Okla. State Univ.*, No. CIV-15-324-C, 2015 WL 4606079, at \*2 (W.D. Okla. July 10, 2015) (“Here, it is clear that Defendants’ actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender.”); *cf.* *Kastl v. Maricopa Cnty. Comm. College Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at \*2, \*3 (D. Ariz. June 3, 2004), *aff’d*, 325 F. App’x 492 (9th Cir. 2009) (holding that “neither a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait” but concluding that it is permissible for an employer to segregate its restrooms “by genitalia”).

239. See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 737, 739 (6th Cir. 2005) (concluding that a transgender plaintiff “established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes” and that the plaintiff had standing because he was “a member of a protected class—whether as a man or a woman”).

240. *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008). The employer’s motives are what matter. See *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 573 (6th Cir. 2018) (holding it was sex discrimination for an employer to fire a transgender woman “simply because she refused to conform to the [employer’s] notion of her sex”), *cert. granted*, 139 S. Ct. 1599 (2019); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (“What matters . . . is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one.”).

241. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (discussing *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)).

for identifying as gay lost.<sup>242</sup> In 2016, a Seventh Circuit panel observed that no one in Congress “would be satisfied with a body of case law that protects ‘flamboyant’ gay men and ‘butch’ lesbians but not the lesbian or gay employee who acts and appears straight.”<sup>243</sup> That panel “described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin.”<sup>244</sup>

When the Seventh Circuit reheard the case en banc, it concluded the line “does not exist at all,” becoming the first federal appellate court to hold that discrimination based on sexual orientation is sex discrimination.<sup>245</sup> *Price Waterhouse*’s anti-stereotyping rule extended logically to forbid employers from enforcing stereotypes about who men and women should partner with. The Seventh Circuit explained: “a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex. . . . Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex.”<sup>246</sup> The EEOC had already taken the position that sexual orientation discrimination is a type of sex discrimination in 2015,<sup>247</sup> and the Second Circuit followed suit in 2018.<sup>248</sup>

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242. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 718 (2014) (surveying court decisions).

243. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 715 (7th Cir. 2016), *rev’d en banc* 853 F.3d 339, 346 (7th Cir. 2017). Professor Soucek’s article had raised this concern. Soucek, *supra* note 242, at 786–87.

244. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc).

245. *Id.*

246. *Id.* at 346–47; *see also* *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1263 (11th Cir. 2017) (Rosenbaum, J., concurring in part and dissenting in part) (holding that *Price Waterhouse*’s rejection of discrimination by employers “‘insisting that [employees] matched the stereotype associated with their group’—opened a whole new avenue for Title VII claims”).

247. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*4 (July 15, 2015) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241–42 (1989)).

248. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131–32 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019). In *Zarda*, Judge Katzman recognized that “stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. . . . The gender stereotype at work here is that ‘real’ men should date women, and not other men.” *Id.* at 121 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)). This portion of Judge Katzman’s majority opinion was joined by five other judges, for a total of six out of the thirteen-member panel.

### B. Textualism

Another development that undermined the 1970s and 1980s cases was the rise of textualism.<sup>249</sup> “Modern textualism . . . maintains that, contrary to the tenets of strong intentionalism, respect for the legislative process requires judges to adhere to the precise terms of statutory texts.”<sup>250</sup> This theory gave courts reasons to be skeptical about the legislative intent arguments at the foundations of *Holloway*, *Smith*, *DeSantis*, *Sommers*, and *Ulane*.<sup>251</sup> After these decisions, the Supreme Court increasingly began “emphasizing that legislation routinely has unintended consequences and that judges must give effect to the actual commands embedded in clearly worded statutes rather than to the apparent background intent of the legislators who voted for them.”<sup>252</sup> Most notably, Justice Scalia’s 1998 opinion in *Oncale* made clear that sex discrimination could include male-on-male sexual harassment, despite the fact that this application of the sex amendment would not have occurred to the statute’s drafters.<sup>253</sup> The rise of textualism called into question the old cases, which had strained to invent limiting interpretations of the statute to avoid its application to contexts that judges thought the 1964 Congress would not have approved of.

In 2008, a district court judge observed that the old cases had followed the outdated approach to statutory interpretation from *Church of the Holy Trinity*: “that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>254</sup> The early cases turned on an interpretation of the statute as only prohibiting a discharge based on sex if the employer’s motive was to disparately harm men or women as groups. This limitation—not any textual argument or dictionary definition—was what drove the results of those

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249. See Eyer, *supra* note 15, at 83–85 (identifying “the rise of textualist modalities of statutory interpretation” as a reason for “the increasing success of LGBT sex discrimination claims”); cf. Feldblum, *supra* note 176, at 659 (predicting that “a strict textualist approach” had promise in convincing judges that Title VII’s sex discrimination provision “achieve[d] protection for people who change their sex, protection for people who love someone of the same sex, and protection for people who do not meet societal expectations of sex”).

250. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

251. *Id.* (“In particular, textualists argue that the (often unseen) complexities of the legislative process make it meaningless to speak of ‘legislative intent’ as distinct from the meaning conveyed by a clearly expressed statutory command.”).

252. *Id.*; see Pa. Dep’t of Corrs. v. Yeskey, 524 U.S. 206, 212–13 (1998) (“[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” (internal quotation marks omitted)).

253. See text accompanying *supra* note 14 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Scalia, J.)).

254. *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

cases.<sup>255</sup> *Smith*—the first appellate decision to hold “homosexuality” was out of bounds—was explicit about not following the text of Title VII.<sup>256</sup> *Smith* relied on *Willingham*, a case that unabashedly invented its interpretation of the sex amendment out of what it construed as the vacuum of legislative history.<sup>257</sup> *Holloway*—the first appellate decision to hold “transsexuality” was out of bounds—based its interpretation on the legislative history of the 1972 amendments.<sup>258</sup> *Ulane* at least purported to reason from the text.<sup>259</sup> But *Ulane* asked the wrong question: whether “sex” includes “sexual identity disorder[s].”<sup>260</sup> The question the statute asks is whether *Ulane* was “discharge[d] . . . because of” her “sex.”<sup>261</sup>

The early cases relied on the inference that Congress had not intended to cover “transsexualism” or “homosexuality” based on failed legislative proposals to prohibit discrimination on the basis of sexual orientation.<sup>262</sup> While mid-twentieth century Supreme Court decisions had “sometimes found meaning in congressional refusal to adopt legislation,”<sup>263</sup> the advent of textualism rendered suspicious any such reliance. In 1990, the Supreme Court called failed proposals a “particularly dangerous ground on which to rest an interpretation of a prior statute.”<sup>264</sup> As Professor Eskridge has explained, the “usual explanation” for failed proposals is “inertia.”<sup>265</sup> “For the current Court, rejected proposals have only been considered relevant when Congress enacts

255. See *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 519–20 (D. Conn. 2016) (explaining that while *Holloway* and *Sommers* purport to reason from the “‘plain’ or ‘traditional’ meaning of the word ‘sex,’ . . . rather than examining what the word ‘sex’ means, they intuit what Congress must have intended the statute to do with respect to sex (while acknowledging that there is virtually no legislative history to guide them)”).

256. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978) (asking “whether a line can legitimately be drawn beyond which employer conduct is no longer within the reach of the statute”) (quoting *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975)).

257. See *supra* notes 126–132 and accompanying text.

258. See *supra* notes 59–60 and accompanying text.

259. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

260. *Id.*

261. 42 U.S.C. § 2000e-2(a)(1) (2012). Title VII forbids an employer from discriminating against a transgender woman because of her female sex, because of her presumed male sex, or because of some other presumption about her nonconformity with her sex. See *supra* notes 231, 237–240, and accompanying text.

262. See *Ulane*, 742 F.2d at 1085; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977)), *abrogated by Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

263. Eskridge, *supra* note 4, at 389.

264. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 2678, 110 L.Ed.2d 579 (1990).

265. Eskridge, *supra* note 4, at 389.

a law, considers alternatives, and explicitly rejects those alternatives.”<sup>266</sup> That was not the case with Title VII.<sup>267</sup>

With the focus on the text, concerns about “bootstrapping” in derogation of the legislature’s purpose evaporated.<sup>268</sup> Plaintiffs were able to pursue arguments that would have otherwise been foreclosed, like the sex-stereotyping theory.<sup>269</sup> Sex-blind interpretations, like the district judge’s “layman’s reaction” in *Ulane* that the “simple word” “sex” obviously covered discrimination against someone for being “transsexual,”<sup>270</sup> gained plausibility.<sup>271</sup> Rather than fixating on the question of what the transgender plaintiff’s “true” sex was, courts began to recognize that it did not matter—the statutory text forbids sex discrimination in any event.<sup>272</sup>

Lesbian and gay plaintiffs also began to persuade courts with comparator arguments—that if, for example, a lesbian were a man rather than a woman, no one would object to her marriage to a woman.<sup>273</sup> Early courts had rejected comparator arguments, reasoning that an employer who refuses to hire effeminate men has not discriminated if it also refuses to hire masculine women,<sup>274</sup> or an employer who refuses to hire lesbians has not discriminated if it also refuses to hire gay men.<sup>275</sup> But after *Oncale*, it could not be a defense to Ann Hopkins’ claim that Price Waterhouse also fired men who failed to conform to sex stereotypes.<sup>276</sup> Neither could it be a defense to

266. *Id.*

267. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 130 (2d Cir. 2018) (“[I]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a particular] statutory interpretation.” (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989))), *cert. granted*, 139 S. Ct. 1599 (2019); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 343–44 (7th Cir. 2017) (en banc) (“Those failures can mean almost anything, ranging from the lack of necessity for a proposed change because the law already accomplishes the desired goal, to the undesirability of the change because a majority of the legislature is happy with the way the courts are currently interpreting the law, to the irrelevance of the non-enactment, when it is attributable to nothing more than legislative logrolling or gridlock that had nothing to do with its merits.”).

268. *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004) (rejecting the “bootstrapping” argument on the ground that Title VII’s protection against sex stereotyping was not conditioned on whether or not a person was “transsexual”).

269. *Id.*

270. *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 822, 825 (N.D. Ill. 1983), *rev’d*, 742 F.2d 1081 (7th Cir. 1984).

271. See sources cited *supra* notes 5–6 (giving examples of the sex-blind argument in recent appellate decisions).

272. See sources cited *supra* note 240.

273. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 345–47 (7th Cir. 2017); *Zarda*, 883 F.3d at 116–19.

274. See *supra* notes 104–114 and accompanying text.

275. See *supra* notes 154–159 and accompanying text.

276. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 123 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019).

a lesbian's claim that an employer also fired gay men for failing to conform with expectations for their sex.<sup>277</sup> With concerns about "bootstrapping" eliminated, lesbian, gay, and bisexual plaintiffs were able to pursue other theories as well, such as the "associational theory" based on *Loving v. Virginia* that, just as it is discrimination to fire an individual for engaging in an interracial relationship, it is discrimination to fire an individual for engaging in a same-sex relationship.<sup>278</sup>

### C. Normalization of LGBTQ Identities

In addition to these changes in Supreme Court doctrine and prevailing methodologies of statutory interpretation, the case law changed because the misunderstandings and prejudices about LGBTQ identities and gender nonconformity that it was based on began to fade away.<sup>279</sup> Arguments about immutability had been proxies for debates over the morality of homosexuality and transsexuality. When moralistic concerns about LGBTQ identities lost their force, immutability arguments became irrelevant. This shift has been more definitive in the sexual orientation context than with respect to transgender identity.

At the time of Bennie Smith's case, effeminacy in a man was considered by an employer to be a sign of "sexual aberration."<sup>280</sup> Same-sex intimacy was regarded as immoral, if not criminal, and homosexuality was considered an illness.<sup>281</sup> In 2015, the Supreme Court recognized that homosexuality is now understood to be "both a normal expression of human sexuality and immutable."<sup>282</sup> As a result of this shift in social values, judges stopped trying to find limiting principles, like the *Willingham* rule,<sup>283</sup> that would prevent the statute from reaching lesbian, gay, and bisexual employees.<sup>284</sup> And after

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277. *Id.*

278. *See id.* at 124–28; *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 347–49 (7th Cir. 2017) (en banc). The First Circuit accepted a theory that it was sex discrimination to forbid men from wearing feminine clothing if women are permitted to wear masculine clothing. *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000).

279. Eskridge, *supra* note 4, at 335–36; Eyer, *supra* note 15, at 83–84; Franklin, *supra* note 21, at 1377–78.

280. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 328 n.4 (5th Cir. 1978).

281. *Obergefell v. Hodges*, 135 U.S. 2584, 2596 (2015).

282. *Id.* (striking down laws that restrict marriage to different-sex couples); *see also* *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (striking down a law that criminalized same-sex intimacy); *Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (striking down an amendment to a state constitution that would have barred any state or local laws forbidding discrimination on the basis of sexual orientation).

283. *See supra* Part I.B (discussing *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978)).

284. Judge Posner made the point bluntly. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 354–55 (7th Cir. 2017) (en banc) (Posner, J., concurring) ("The position of a woman



*Obergefell* legalized same-sex marriage, circuit courts saw a disturbing dissonance in an interpretation of Title VII that meant “a person can be married on Saturday and then fired on Monday for just that act.”<sup>285</sup>

In the 1970s and 1980s, transgender women could not argue that the basis for their discrimination was their perceived biological “male” sex, because they would have been unable to distinguish themselves from transvestites and homosexuals, groups that were associated with stigmatized sexual behaviors.<sup>286</sup> As those stigmas faded, these arguments appeared.<sup>287</sup> This shift in understanding of sexual orientation has been so complete that now in dissent, some judges reason that sexual orientation is uncovered because it is a “different immutable characteristic” than sex.<sup>288</sup> In doing so, they turn the logic of immutability upside down, making it a ground for *denying* protection.

In the 1970s and 1980s, transgender women were thought to be suffering from mental illnesses simply by virtue of the fact that they did not identify as men. In 2013, the Fifth Edition of the American Psychiatric Association’s Diagnostic and Statistical Manual (“DSM-5”) omitted the diagnostic category “gender identity disorder” to clarify that “having a gender identity different from one’s assigned sex is no longer a ‘disorder’; it is perfectly healthy.”<sup>289</sup> Simply being transgender<sup>290</sup> is not a medical condition, and not

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discriminated against on account of being a lesbian is thus analogous to a woman’s being discriminated against on account of being a woman. That woman didn’t choose to be a woman; the lesbian didn’t choose to be a lesbian.”).

285. *Id.* at 372 (Posner, J., concurring) (quoting *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 714 (7th Cir. 2016)); *see also id.* at 355 (majority opinion) (“We now understand that homosexual men and women (and also bisexuals, defined as having both homosexual and heterosexual orientations) are normal.”).

286. *See supra* notes 73–75, 179–183 and accompanying text.

287. *See supra* notes 231–237 and accompanying text.

288. *Hively*, 853 F.3d at 363 (Sykes, J., dissenting); *cf. Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1259 (11th Cir. 2017) (Pryor, J., concurring) (arguing that Title VII forbids discrimination based on gender nonconforming “behavior” but not based on a “status” like LGBTQ identity).

289. Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 519 (2016) (discussing DSM-5). This change reflected transgender rights advocacy, which sought to carve out social and political space for “transgender” as an identity category, rather than a clinical diagnosis. *See* Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, in *TRANSGENDER RIGHTS* 141, 152–53 (Paisley Currah et al. eds., 2006).

290. The definition of a “transgender” person is anyone whose gender identity does not match the one associated with the sex they were assigned at birth. *See, e.g., GLAAD, supra* note 2426, at 10.

all transgender people seek medical treatment related to their transgender identities.<sup>291</sup>

The DSM-5 now includes a listing for “gender dysphoria,” a condition that may require treatment when transgender people experience distress.<sup>292</sup> At the time of *Holloway* in 1977 and *Ulane* in 1983, some health care professionals considered transgender identity a delusion to be treated by psychoanalysis. Today, not only have experts concluded that these “conversion” therapies are not supported by evidence; they also recognize that such therapies are “potentially harmful.”<sup>293</sup> There is now a body of medical research to support treatment approaches for gender dysphoria.<sup>294</sup> This research suggests “an individualized approach to gender transition, consisting of a medically-appropriate combination of hormone therapy, living part- or full-time in one’s desired gender role, gender reassignment surgery, and/or psychotherapy.”<sup>295</sup>

*Holloway* and *Ulane* reflect the views of some of their era’s medical professionals that transgender identity was not just a mental illness, but a dangerous, delusional, immature condition. Today, the medical profession has made clear that transgender identity “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.”<sup>296</sup> Courts have recognized this as well.<sup>297</sup> The perception of transgender identity as something “unusual” or “freakish” no longer has the hold it did at the time of

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291. See generally SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 99–103 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [<https://perma.cc/83BB-6VCP>].

292. Barry, *supra* note 289, at 519.

293. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES’ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, ENDING CONVERSION THERAPY: SUPPORTING AND AFFIRMING LGBTQ YOUTH 51 (2015), <http://https://store.samhsa.gov/system/files/sma15-4928.pdf> [<https://perma.cc/HW3N-A9S6>].

294. Barry, *supra* note 289 at 521.

295. *Id.*

296. AMERICAN PSYCHIATRIC ASSOCIATION, POSITION STATEMENT ON DISCRIMINATION AGAINST TRANSGENDER AND GENDER DIVERSE INDIVIDUALS (2018), <https://www.aglp.org/APAPositionStatements/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf> [<https://perma.cc/8P25-9LC9>]. Discrimination and harassment are the reasons transgender people face challenges in the workplace. *Id.*

297. See, e.g., *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 209 (D.D.C. 2017) (“[T]he Court is aware of no argument or evidence suggesting that being transgender in any way limits one’s ability to contribute to society.”), *vacated sub nom. on other grounds*, *Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019); *Bd. of Educ. of Highland v. U.S. Dept. of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (“[T]here is obviously no relationship between transgender status and the ability to contribute to society.”).

*Ulane*.<sup>298</sup> While widespread biases against transgender people remain, the view that transgender identities are immoral no longer predominates.<sup>299</sup>

However, immutability arguments continue to bear a mark on the doctrine in cases involving transgender plaintiffs. Although the recent trend among federal circuit courts has been in favor of transgender plaintiffs,<sup>300</sup> in 2007 the Tenth Circuit held that discrimination on the basis of transgender status was not a form of sex discrimination *per se*.<sup>301</sup> In that case, the plaintiff, Krystal Etsitty, who “describe[d] herself as a ‘pre-operative transgendered individual’” was a bus driver for the Utah Transit Authority (“UTA”).<sup>302</sup> Etsitty wore “makeup, jewelry, and acrylic nails to work,” but she did not have the money for surgery.<sup>303</sup> She was fired because the UTA was concerned that it would face liability “if a UTA employee with male genitalia was observed using the female restroom” at one of the stops along her route.<sup>304</sup> Etsitty argued the discrimination against her was on the basis of sex because it was “directly connected to the sex organs she possesses,” in other words, because of her “male” sex.<sup>305</sup>

Instead of evaluating this argument, the court asked whether it could adopt an “expansive” interpretation of Title VII that “would include transsexuals as a protected class.”<sup>306</sup> It reflected: “Scientific research may someday cause a shift in the plain meaning of the term ‘sex’ so that it extends beyond the two starkly defined categories of male and female” by showing that “sexual identity may be biological.”<sup>307</sup> The court’s reference to a “shift in the plain meaning of the term ‘sex’” demonstrates it viewed its task as something other than applying the term’s original meaning. It saw the

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298. See *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 354 (7th Cir. 2017) (Posner, J., concurring) (“[N]ow of course transgender persons are common.”); TAYLOR ET AL., *supra* note 88, at 4 (“One important change has been the increasing visibility of transgender people and trans themes in our media culture. For instance, *Time* magazine’s June 9, 2014 issue gave transgender rights center billing for its cover story ‘Transgender Tipping Point.’”).

299. There have been few public opinion polls to address transgender issues specifically, but a 2015 study found that only 29%–32% of respondents agreed with the statement that “sex changes are morally wrong.” TAYLOR ET AL., *supra* note 88, at 67–68. 37%–39% did not agree with the statement, and the remainder were neutral. *Id.* Over 60% agreed that “transgender people deserve the same rights and protections as other Americans.” *Id.* at 73. 29.7% were neutral as to this statement, and 9.11% disagreed. *Id.*

300. See *supra* notes 232 & 237 and accompanying text.

301. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007). The court did not resolve whether Etsitty had a sex stereotyping claim. *Id.* at 1224.

302. *Id.* at 1218–19.

303. *Id.* at 1219.

304. *Id.*

305. *Id.* at 1221.

306. *Id.*

307. *Id.* at 1222. For the point that “sexual identity may be biological,” the court cited an equal protection case, *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995). *Etsitty*, 502 F.3d at 1222.

question before it as whether Etsitty’s “sexual identity” was analogous to the categories of male and female, not whether she lost her job on account of her employer’s categorization of her as male. Because the court understood the issue to be which classes the statute protects, the immutability of “sexual identity” became relevant.<sup>308</sup> By contrast, in recent appellate cases involving restroom usage in schools, courts have affirmed the rights of transgender students to use restrooms consistent with their gender identities.<sup>309</sup> In these cases, judicial concerns about immutability may have been defused by the recognition that transgender girls have “lasting, persistent” gender identities as girls, and transgender boys have “lasting, persistent” gender identities as boys.<sup>310</sup>

#### *D. Decline of Workplace Sex Distinctions*

A final development has been the declining perception that workplace sex distinctions, such as those with respect to restrooms and dress codes, naturally require enforcement based on biological sex. Judges have resisted sex-blind interpretations of Title VII and comparator arguments out of concern that they would lead down a slippery slope toward the invalidation of all rules that separate the sexes.<sup>311</sup> Some judges regard these “comfortable

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308. *Id.* at 1223.

309. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 528–29 (3d Cir. 2018); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049–50 (7th Cir. 2017); *Gloucester Cty. Sch. Bd. v. G.G.*, 822 F.3d 709, 723 (4th Cir. 2016) (deferring to the Obama-era Department of Education’s interpretation of regulations under Title IX, which forbids certain forms of sex discrimination in schools), *vacated and remanded*, 137 S. Ct. 1239 (2017).

310. *Doe*, 897 F.3d at 522; *see also Whitaker*, 858 F.3d at 1050 (explaining that the plaintiff, a transgender boy, “has a medically diagnosed and documented condition”; that “[s]ince his diagnosis, he has consistently lived in accordance with his gender identity”; and that “the decision to do so was not without cost or pain”). By contrast, Etsitty did not frame her claim around her identity as a woman. *See Etsitty*, 502 F.3d at 1221, 1223 n.3 (noting the plaintiff did “not claim protection under Title VII as a woman who fails to conform to social stereotypes about how a woman should act and appear”). For discussion of the benefits of framing claims in ways that “fully embrac[e] the reality of transgender identity, which includes the reality that transgender people thrive when they are permitted to live authentically as the men and women that they are,” see Alexander Chen, *The Supreme Court Doesn’t Understand Transgender People*, SLATE (Oct. 18, 2019), <https://slate.com/news-and-politics/2019/10/supreme-court-transgender-discrimination-sex.html> [<https://perma.cc/V3S7-Z2T8>].

311. *See, e.g., Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 134 (2d Cir. 2018) (en banc) (Jacobs, J., concurring) (“But when the comparator test is used for textual interpretation, it carries in train ramifications that are sweeping and unpredictable: think fitness tests for different characteristics of men and women, not to mention restrooms.”), *cert. granted*, 139 S. Ct. 1599 (2019); *id.* at 150–51 (Lynch, J., dissenting) (mentioning dress codes, restrooms, and gender-normed physical fitness standards); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring) (“Separate bathrooms for men and women are of course ubiquitous in our society . . . because they protect the privacy of both sexes. . . . But they are unlawful under the blindness approach to Title VII, because separate bathrooms are obviously not blind to sex.”). Gender-normed physical fitness standards—such as the requirement that a man do more push-ups

gender conventions” as so self-evidently nondiscriminatory that any interpretation of the term “because of . . . sex” that might reach them must be out of bounds.<sup>312</sup> Yet it is unlikely that the existence of men’s and women’s uniform or restroom *options* is under legal threat.<sup>313</sup> Problems arise when a worker is fired or harassed for choosing the “wrong” option.<sup>314</sup> As the strict enforcement of sex-segregated workplace policies has come to seem less inevitable, natural, or necessary,<sup>315</sup> real and hypothetical dress code and restroom dilemmas have begun losing their grip on the statute.

It is no longer implausible to require sex-specific dress codes to meet a BFOQ defense.<sup>316</sup> As late as 2006, the Ninth Circuit held that it was permissible for Harrah’s Casino to fire a female bartender because she refused to comply with a dress code that required women, but not men, to wear makeup, among other rules.<sup>317</sup> The court reasoned that this dress code imposed equal burdens on men, who had to keep their hair short (above the

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than a woman to become an FBI agent, *see, e.g., Zarda*, 883 F.3d at 150 (Lynch, J., dissenting), (discussing *Bauer v. Lynch*, 812 F.3d 340, 342, 351 (4th Cir. 2016))—are facially discriminatory practices that can be analyzed based on whether they meet the BFOQ defense or are necessary to avoid a disparate impact on women. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (“[T]he employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”); Clarke, *supra* note 4, at 979 n.531.

312. *See* Clarke, *supra* note 4, at 816 (quoting YURACKO, *supra* note 30, at 45).

313. The EEOC has not concluded that its decisions recognizing anti-LGBTQ discrimination as sex discrimination invalidate all workplace policies offering men’s and women’s restrooms or dress options. Nor have any courts gone that route. To the contrary, *see Whitaker*, 858 F.3d at 1055 (observing that “allowing transgender students to use facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls”). Courts are likely to bar what they regard as facial challenges to such policies on the ground that an individual did not suffer any discrimination in the “terms or conditions” of employment. *Cf. Zarda*, 883 F.3d at 119 (Katzmann, J.) (“Whether sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question . . .”). I do not mean to say I think this is a good thing. I agree with those who argue the ideal resolution to restroom problems is “making all facilities ‘all gender,’ with larger, open, public spaces and fully enclosed private stalls that would better ensure safety, accommodate families, and operate fairly and efficiently,” *see* Clarke, *supra* note 4, at 894, and that dress codes based in notions of professionalism that rely on a binary understanding of gender should be revised, *cf. id.* at 965, 978–79.

314. *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 573 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (distinguishing the case from dress code challenges because the plaintiff, a transgender woman, “fully intended to comply with the company’s sex-specific dress code” in wearing the women’s option, and was fired “simply because she refused to conform to the Funeral Home’s notion of her sex”).

315. *See* Clarke, *supra* note 4, at 951–63, 974–90 (cataloguing the diminishing number of contexts in which sex distinctions remain relevant to employment law and arguing binary legal sex categories are not generally necessary to serve the purposes of these legal regimes).

316. Perhaps it never was. *See supra* notes 122–123 (noting the EEOC and a number of district courts took this approach in the early years of the statute).

317. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1105–06 (9th Cir. 2006) (en banc).

shirt collar) and were not allowed to wear makeup.<sup>318</sup> To say the decision has been much-criticized is an understatement.<sup>319</sup> There was no business imperative behind the policy.<sup>320</sup> Harrah's failed to argue its dress code qualified for the BFOQ defense, because the policy obviously did not; indeed, the dress code was so unnecessary, if not counterproductive, that Harrah's eliminated it after the plaintiff filed suit.<sup>321</sup>

In recent cases, dress code hypotheticals come up as reasons for cramped interpretations of Title VII's bar on discrimination "because of . . . sex." In the Second Circuit's *Zarda* decision, a dissenting judge asked, "what of a pool facility that requires different styles of bathing suit for male and female lifeguards?"<sup>322</sup> That the question of whether it was sex discrimination to fire Donald Zarda for being gay might be resolved by a hypothetical bathing-suit dilemma is troubling<sup>323</sup> considering all the variations such scenarios could take, each meriting consideration on its particular facts.<sup>324</sup> The majority set hypothetical questions aside. In *Harris Funeral Homes*, where the employer actually had a sex-specific dress code,

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318. *Id.* at 1109 (rejecting "Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case [of sex discrimination]").

319. *See, e.g.*, Case, *supra* note 64, at 1336. *See generally* Symposium, *Makeup, Identity Performance, & Discrimination*, 14 DUKE J. GENDER L. & POL'Y 1 (2007) (responding to the *Jespersen* decision with a symposium on the topic).

320. The plaintiff, Darlene Jespersen, had succeeded at her job as a bartender without wearing makeup. *Jespersen*, 444 F.3d at 1106–08.

321. *Id.* at 1114 n.2 (Pregerson, J., dissenting).

322. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 150 (2d Cir. 2018) (Lynch, J., dissenting), *cert. granted*, 139 S. Ct. 1599 (2019).

323. *Cf.* Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 73 (2013) (describing how the Affordable Care Act litigation turned on a hypothetical argument about broccoli regulation, and arguing that "[t]he Court's premature engagement with limiting principles bypassed the benefits of its ordinary incremental, case-by-case analysis and circumvented institutional synergies that can generate superior and more democratically legitimate outcomes").

324. For example, an employer who "required both male and female lifeguards to wear a uniform consisting only of trunks would violate Title VII," *Zarda*, 883 F.3d at 150 (Lynch, J., dissenting), because that policy could be a pretense for excluding women, a form of sexual harassment, or a policy with a disparate impact on women. Whether a Las Vegas swimming pool/strip club hybrid could get away with this is an interesting question for an employment discrimination exam. As to an employer who "prescribed trunks for men and a bathing suit covering the breasts for women," *id.*, in the unlikely event that such a policy were challenged, requiring a business rationale would result in productive legal discussions of social norms with respect to gender and modesty. *Cf.* *Tagami v. City of Chicago*, 875 F.3d 375, 379 (7th Cir. 2017) (recognizing that a criminal law that allows men, but not women, to bare their breasts is a sex-based classification, but holding it survived review because its purpose of "promoting traditional moral norms and public order" was "self-evident and important"). *But see id.* at 382 (Rovner, J., dissenting) (arguing that the city's justification "boils down to a desire to perpetuate a stereotype that female breasts are primarily the objects of desire, and male breasts are not").

the Sixth Circuit concluded that if an employer cannot fire a transgender woman because it disapproves of the fact that she wears women's clothing in general, it should not be able to fire her just because it has put in place a formal policy that bars her from wearing women's clothing.<sup>325</sup>

In addition to dress codes, hypothetical restroom concerns continue to constrain interpretations of Title VII's text.<sup>326</sup> In *Etsitty*, the court did not resolve Crystal Etsitty's argument that she had been fired for failing to conform to sex stereotypes, because it concluded that her employer, UTA, had a "legitimate nondiscriminatory reason" for firing her: specifically, its concern about lawsuits from women complaining about a person with "male genitalia" using the women's restroom.<sup>327</sup> Since Etsitty would not have exposed her genitals to other women in any public restroom,<sup>328</sup> UTA's real reason was more likely that the public would view a transgender woman's use of the women's restroom as "radical" or "inappropriate."<sup>329</sup> Even though UTA's fear of lawsuits was speculative—there had been no complaints against Etsitty and it was unlikely any potential plaintiff would have legal ground for a suit—the court refused to question UTA's "business judgment" on the point.<sup>330</sup> Had the court instead reasoned that Etsitty lost her job because of her sex and UTA therefore had to demonstrate a BFOQ, it is likely UTA would have lost.<sup>331</sup>

Courts have not analyzed whether privacy or safety concerns in other contexts might suffice as BFOQ arguments. The BFOQ defense would put

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325. *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) ("[T]he Funeral Home may not rely on its [sex-specific dress code] policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex.").

326. *See cases cited supra* note 311.

327. *Etsitty v. Utah Trans. Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) ("However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms."); *see also Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (holding that an employer did not engage in sex-stereotyping where it required a transgender woman to use the men's restroom because it "did not require Plaintiff to conform her appearance to a particular gender stereotype, instead, the company only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms"), *aff'd*, 98 F. App'x 461 (6th Cir. 2004).

328. Etsitty argued that "no one would know she was not biologically female." *Etsitty*, 502 F.3d at 1226.

329. *See id.* at 1225 (quoting UTA's witnesses).

330. *Id.* at 1226.

331. *See, e.g., Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991) (rejecting the argument that speculative concerns about tort lawsuits are a valid BFOQ); *cf. Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (rejecting, in an equal protection case, an employer's argument that it had a persuasive justification for firing a transgender plaintiff due to "speculative concern about lawsuits arising if [the plaintiff] used the women's restroom").

such concerns to critical scrutiny in asking whether they perpetuate sex stereotypes.<sup>332</sup> The BFOQ defense has long been an area of Title VII doctrine where courts have resolved conflicts between the ideal of sex equality and the interests in favor of gendered social practices, finding solutions that are attentive to particular contexts.<sup>333</sup> In a number of Title IX cases, schools have accommodated transgender students by allowing them to use spaces consistent with their gender identities, while ensuring that all students have safe and private restrooms and changing facilities.<sup>334</sup> As institutions work out accommodations for transgender individuals and those solutions are contested through legal processes, restroom dilemmas no longer seem as unsolvable as they did at the time of *Sommers* in 1982, or even at the time of *Etsitty* in 2007.

### Conclusion

This Essay has attempted to address Judge Ho's concern that "if the first forty years of uniform circuit precedent nationwide somehow got the original understanding of Title VII wrong, no one has explained how."<sup>335</sup> The answer is that early courts conflated "transsexualism," "homosexuality," and "effeminacy" in men as mental illnesses, aberrations, and blameworthy deviations from sex roles. Rather than applying the text of Title VII, these courts devised limiting principles that would prevent the law from reaching these plaintiffs, based on conjectures about congressional intent, group-based understandings of civil rights, moralistic immutability principles, and antiquated medical opinions. Changes in Supreme Court doctrine on sex stereotyping, the rise of textualism, and the gradual fade of myths about LGBTQ individuals have now allowed circuit courts to get it right. It remains

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332. Courts have long held that discriminatory "customer preferences" do not suffice as BFOQ arguments, because they would undermine the very purpose of Title VII. *See, e.g., Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) ("[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.").

333. *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2565–68 (1994) (discussing opinions on the BFOQ defense for sex-differentiated dress codes); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 17–30 (2000) (explaining how courts have resolved conflicts between the "norm of sex blindness," "historically given gender conventions," and the "functional rationality" of business imperatives in evaluating BFOQ arguments).

334. *See, e.g.,* *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 287 (W.D. Pa. 2017) (noting that "cases involving transgender status implicate a fast-changing and rapidly-evolving set of issues that must be considered in their own factual contexts"); *see also* *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052–53 (7th Cir. 2017).

335. *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring).



to be seen whether the Supreme Court will follow their lead. While this Essay was undergoing final revisions, the Supreme Court held oral arguments in the Gerald Bostock, Donald Zarda, and Aimee Stephens cases.<sup>336</sup> Restroom dilemmas dominated.<sup>337</sup>

But whatever the outcome of the cases pending in the Supreme Court, the evolution of circuit court doctrine on this question has lessons for progressive approaches to civil rights law. It shows that a number of theoretical approaches often favored by progressives can be turned to regressive ends. Purposive approaches to statutory interpretation are often associated with progressive causes due to their relative flexibility. Yet they may also be employed to narrowly construe civil rights law so as not to challenge the perceived biases of earlier eras. Group-based understandings of civil rights are often associated with progressive approaches like disparate impact law and affirmative action. Yet courts may also employ group-based understandings to exclude plaintiffs they regard as falling outside traditional groups or as belonging to new social groups. Immutability considerations have progressive potential in questioning social structures that allocate opportunities based on accidents of birth. Yet they may also be employed to rationalize discrimination against individuals who are regarded as responsible, on some level, for their own misfortunes. Medical expertise—often faulted by progressives for pathologizing identities—can play a role in undoing that same dynamic. This is not to say that any one theory, method, or source is preferable to another; rather, it suggests reasons for progressive lawyers to be wary of theoretical rigidity.

An important part of the evolution of the doctrine in favor of protecting LGBTQ plaintiffs was contestation of conventional sex roles and gender norms, both in and out of court. Whatever results in the Supreme Court this term, it is worth revisiting the stories of Ramona Holloway, Bennie Smith, Audra Sommers, and Karen Ulane, among others, and re-examining the biases, prejudices, and misunderstandings about LGBTQ people that caused the first forty years of circuit court precedent to get Title VII's sex discrimination provision wrong.

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336. See cases cited *supra* note 1.

337. See, e.g., Masha Gessen, *The Supreme Court Considers L.G.B.T. Rights, but Can't Stop Talking About Bathrooms*, NEW YORKER (Oct. 9, 2019), <https://www.newyorker.com/news/our-columnists/the-supreme-court-considers-lgbt-rights-but-cant-stop-talking-about-bathrooms> [<https://perma.cc/4DTG-9MSR>].