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Title VII and the Unenvisaged Case: Is Anti-LGBTQ Discrimination Unlawful Sex Discrimination?

RONALD TURNER*

*This Article examines recent circuit-split-creating federal appeals courts' decisions interpreting and applying Title VII of the Civil Rights Act of 1964's prohibition of sex discrimination in unenvisaged cases presenting an issue not contemplated by the United States Congress when it enacted the statute: is anti-LGBTQ discrimination unlawful sex discrimination? Whether sexual-orientation discrimination constitutes sex discrimination has been answered in the affirmative by the United States Court of Appeals for the Seventh Circuit in *Hively v. Ivy Tech Community College of Indiana* and the Second Circuit in *Zarda v. Altitude Express, Inc.*, and in the negative by the Eleventh Circuit in *Bostock v. Clayton County Board of Education*. In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit held that a plaintiff could pursue her transgender-discrimination-is-sex-discrimination claim; thereafter, the Fifth Circuit's *Wittmer v. Phillips 66 Company* decision held that binding circuit precedent foreclosed such an action.*

*This Article discusses the interpretive approaches chosen and applied by courts and individual judges in recognizing or rejecting Title VII anti-LGBTQ discrimination claims, with special reference to (1) the meaning of Title VII's "because of sex" prohibition, (2) the Supreme Court's and circuit courts' construction of the sex discrimination provision in the context of sex stereotyping and gender nonconformity discrimination as applied to the anti-LGBTQ discrimination question, and (3) associational discrimination theory. This Article concludes that judicial recognition of anti-LGBTQ claims best comports with Title VII's sex discrimination ban as interpreted over the years by the Supreme Court and more recently in *Hively*, *Zarda*, and *R.G. & G.R. Funeral Homes*. Is anti-LGBTQ discrimination unlawful sex discrimination? Yes.*

INTRODUCTION

The year is 1964. The United States Congress has enacted the Civil Rights Act, a landmark statute that includes in Title VII a ban on employment discrimination because of race, color, religion, national origin, and a last-minute addition to the statutory text: sex.¹ In the years and decades following the passage of Title VII, the United States Supreme Court has interpreted and applied the sex discrimination ban in a number of contexts involving allegations that certain employer practices and conduct unlawfully discriminated against individuals on the basis of sex, such as employer policies denying employment to women with pre-school-age children, requiring women to make higher pension plan contributions than men, and providing pregnancy-related hospitalization benefits to female employees but not female

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1. 42 U.S.C. § 2000e (2012); *see infra* Part I.

spouses of male employees.² The Court has also held that workplace sexual harassment, including male-on-male harassment, violates Title VII and that discrimination against an employee because she did not conform to the employer's gender stereotypes is sex-based discrimination prohibited by the statute.³

The year is 2017. In *Hively v. Ivy Tech Community College of Indiana*, the United States Court of Appeals for the Seventh Circuit, sitting en banc, addressed and answered in the affirmative the question whether Title VII's sex discrimination proscription encompasses sexual-orientation discrimination.⁴ The next year, the Second Circuit, in its en banc decision in *Zarda v. Altitude Express, Inc.*,⁵ held that sexual-orientation discrimination is a function of, and therefore discriminates on the basis of, sex. Shortly thereafter, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,⁶ the Sixth Circuit ruled that a plaintiff could pursue her Title VII transgender discrimination against her employer. Two months later, in *Bostock v. Clayton County Board of Commissioners*,⁷ the Eleventh Circuit held that Title VII does not prohibit sexual-orientation discrimination. And most recently, the Fifth Circuit's *Wittmer v. Phillips 66 Company* decision held that 1979 circuit precedent foreclosed Title VII sexual-orientation discrimination claims.⁸

This Article examines the aforementioned circuit-split-creating decisions' interpretations and applications of Title VII's "because of sex" provision in unenvisaged cases presenting an issue not anticipated by the 88th Congress when it enacted Title VII in 1964: does Title VII prohibit anti-LGTBQ discrimination? An unenvisaged case arises when a statute enacted to address and regulate a particular subject is said to apply to another subject not considered or foreseen by the enacting legislature. In the words of H.L.A. Hart, a legislature's "inability to anticipate brings with it a relative indeterminacy of aim."⁹ Unlike the "paradigm, clear cases" in which the legislative aim "is so far determinate because we have made a certain choice," the aim in the unenvisaged case is indeterminate as "[w]e have not settled, because we have not anticipated, the question which will be raised by the unenvisaged case when it occurs . . ."¹⁰ When that case arises, "we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us," thereby settling the question "as to the meaning, for the purposes of this rule, of a general word."¹¹

In performing this settlement function in the "age of statutes,"¹² the federal judiciary has selected from a menu of interpretive options and methodologies,

2. See *infra* Section I.A.

3. See *infra* Sections I.B, I.C.

4. 853 F.3d 339 (7th Cir. 2017) (en banc).

5. 883 F.3d 100 (2d Cir. 2018) (en banc).

6. 884 F.3d 560 (6th Cir. 2018).

7. 723 Fed. App'x 964 (11th Cir. 2018) (per curiam), *reh'g en banc denied*, 894 F.3d 1335 (11th Cir. 2018).

8. 915 F.3d 328 (5th Cir. 2019).

9. H.L.A. HART, *THE CONCEPT OF LAW* 128 (3d ed. 2012).

10. *Id.* at 129.

11. *Id.*

12. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (stating that the American legal system has fundamentally changed to a system primarily

including intentionalism, purposivism, textualism, and deference to administrative agencies. A judge's selection is of obvious importance to the analyses of and the outcomes reached in cases. Hence the perennial question: how should judges decide cases in which parties contest the meaning of a statute? Should judges "look within the statute they interpret and outside it" and "turn to legal understandings that precede the statute, postdate it, and coincide with its enactment" and "draw on overarching, abstract principles"?¹³ Or should the judicial search for a, or the, meaning of the at-issue text be restricted to then extant sources at the time of the statute's enactment?

As discussed herein, courts and individual judges recognizing or not finding actionable Title VII anti-LGBTQ¹⁴ claims have offered different rationales in support of their conflicting positions, including three justifications discussed in this project: (1) the meaning of Title VII's "because of sex" prohibition, (2) the Supreme Court's and circuit courts' construction of the "because of sex" provision in the context of sex stereotyping and gender nonconformity discrimination as applied to the anti-LGBTQ question, and (3) associational discrimination theory. Claim-recognizing jurists have looked to Title VII's text, Supreme Court and circuit court precedent, and the views of the Equal Employment Opportunity Commission (EEOC) in supporting their position. Those rejecting the argument that Title VII covers anti-LGBTQ discrimination have focused on a posited original public meaning of the statute's text circa 1964 and relied on circuit court precedents holding that sexual orientation and transgender discrimination claims are not cognizable under the statute. Both sides of the debate are catalogued and critiqued herein.

The discussion proceeds as follows. As a prefatory matter, Part I discusses the last-minute addition of the word "sex" to the list of characteristics protected from discrimination in H.R. 7152, the proposed Civil Rights Act, and the path leading to the sex amendment's inclusion in the legislation signed into law by President Lyndon B. Johnson on July 2, 1964. Part II examines the Supreme Court's interpretations of the statute's "because of sex" prohibition, focusing on the Court's initial sex discrimination decisions and its subsequent recognition of unenvisaged causes of

governed by legislatively enacted statutes, creating an "age of statutes").

13. Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 596 (2017).

14. "LGBTQ" refers to lesbian, gay, bisexual, transgender, and queer. "LGB" refers to sexual orientation, the "emotional, romantic and/or sexual attractions of men to women or women to men (heterosexual), of women to women or men to men (homosexual), or by men or women to both sexes (bisexual)." *Lesbian, Gay, Bisexual, Transgender*, AM. PSYCHOL. ASS'N, <https://www.apa.org/topics/lgbt/index> [<https://perma.cc/8XWT-M894>]. This change has been implemented throughout the remainder of this Article. "T" refers to transgender or gender nonconforming, "an umbrella term for people whose gender identity or gender expression does not conform to that typically associated with the sex to which they were assigned at birth." *Id.* "Q" refers to queer, an "adjective used by some people . . . whose sexual orientation is not exclusively heterosexual (e.g., queer person, queer woman)." *GLAAD Media Reference Guide – Lesbian / Gay / Bisexual Glossary of Terms*, GLAAD, <https://www.glaad.org/reference/lgbtq> [<https://perma.cc/TK38-5AH4>]. For persons identifying as queer "the terms *lesbian*, *gay*, and *bisexual* are perceived to be too limiting and/or fraught with cultural connotations they feel don't apply to them." *Id.*; see also LGBTQIA Res. Ctr., *LGBTQIA Resource Center Glossary*, UCDAVIS, <https://lgbtqia.ucdavis.edu/educated/glossary> [<https://perma.cc/P9JE-52WE>] (stating that "LGBTQIA" refers to lesbian, gay, bisexual, transgender, queer, intersex, and asexual).

action for workplace sexual harassment, same-sex sexual harassment, and gender nonconformity discrimination. Part III addresses the question of whether sexual-orientation discrimination violates Title VII's sex discrimination ban and examines the justifications supporting and opposing statutory coverage in *Hively*, *Zarda*, and *Bostock*.

Part IV turns to the separate and distinct issue of transgender discrimination and the Sixth and Fifth Circuits' contrary holdings in *G.R. and R.G. Funeral Homes* (recognizing the claim) and *Wittmer* (foreclosing the claim). Part V concludes that the sexual-orientation-and-transgender-discrimination-is-sex-discrimination position is the better, if not best, interpretation and application of Title VII's "because of sex" proscription. That view best comports with the language of the sex discrimination provision as construed by the Supreme Court, lower courts, and the EEOC and reflects a jurisprudential approach that does not render invisible significant legal and contextual changes occurring in the half century following the enactment of Title VII.

I. THE SEX DISCRIMINATION AMENDMENT

In 1964, the United States House of Representatives debated H.R. 7152, part of the proposed Civil Rights Act prohibiting employment discrimination on the basis of race, color, religion, or national origin. On February 8, the eighth and last day of that debate,¹⁵ Representative and House Rules Committee Chair Howard W. Smith, Democrat from Virginia, introduced a floor amendment proposing the addition of the word "sex" to the then-listed four categories of prohibited discrimination. The clerk announced the amendment ("After the word 'religion,' insert 'sex.'").¹⁶ The House "erupted in shock as the full import of the amendment sank in"¹⁷ and "[t]wo hours of pandemonium ensued."¹⁸

The standard account of the introduction of the sex amendment holds that Smith (an octogenarian racist and "die-hard opponent of integration and federal legislation to enforce civil rights for African Americans")¹⁹ did so in an attempt "to scuttle the adoption of the Civil Rights Act"²⁰ and make H.R. 7152 "so controversial that

15. See TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964, at 146 (2014); GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK 1 (2016).

16. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115 (1985).

17. *Id.*

18. PURDUM, *supra* note 15, at 195.

19. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 139 (2d Cir. 2018) (en banc) (Lynch, J., dissenting); see also Arienne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55, 67 (2016); 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 (2014).

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

eventually it would be voted down either in the House or the Senate.”²¹ Smith’s “purpose was to sink civil rights for blacks by adding a similar guarantee for women; although some congressmen would grant equal rights for men of both races, Smith was certain that they would never extend those rights to women.”²² Agreeing with that explanation for the amendment, Professor Catherine MacKinnon remarked that “sex discrimination in private employment was forbidden only in a last minute joking ‘us boys’ attempt to defeat Title VII’s prohibition on racial discrimination” and that “this attempted *reductio ad absurdum* failed” as the bill was ultimately enacted into law.²³ Speaking about the amendment after the enactment of Title VII, Franklin D. Roosevelt, Jr., the first chair of the EEOC, stated that Smith introduced the amendment to “create ridicule and confusion.”²⁴ And Herman Edelsberg, the EEOC’s 1965–1967 executive director, described the amendment as “a fluke . . . conceived out of wedlock.”²⁵

A different account describes the legislative path to the ultimate adoption of the sex discrimination amendment. In December 1963, the National Woman’s Party (NWP) unanimously adopted a resolution to add the word “sex” to H.R. 7152 and urged longtime NWP ally Smith to support the amendment.²⁶ Supporters of the Equal Rights Amendment (ERA)²⁷ also campaigned to have “sex” added to the bill, and

21. WHALEN & WHALEN, *supra* note 16, at 116.

22. BRUCE J. DIENEFELD, *KEEPER OF THE RULES: CONGRESSMAN HOWARD W. SMITH OF VIRGINIA* 194 (1987).

23. Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1283–84 (1991); *see also* Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 *WM. & MARY J. WOMEN & L.* 137, 152 (1997) (stating that Smith’s amendment was “a last ditch effort to sink the Civil Rights Bill”); Cary Franklin, *Inventing the Traditional Concept of Sex Discrimination*, 125 *HARV. L. REV.* 1307, 1318 (2012) (“[L]egal commentators have generally characterized [Smith’s] intervention as a last-ditch, if ultimately unsuccessful, attempt to derail a piece of legislation to which he was fiercely opposed.”).

24. Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 *DENV. U. L. REV.* 995, 1015 (2015) (quoting Edith Evans Asbury, *Protest Proposed on Women’s Jobs*, *N.Y. TIMES*, Oct. 13, 1965, at 32).

25. Rachel Osterman, Comment, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident*, 20 *YALE J.L. & FEMINISM* 409, 416 (2009).

26. The resolution, “notable for its implicit racism, anti-Semitism, and xenophobia,” stated that the bill would not “give protection against discrimination because of ‘race, color, religion, or national origins’ to a *White Woman*, a *Woman of the Christian Religion*, or a *Woman of United States Origin*.” ROSALIND ROSENBERG, *JANE CROW: THE LIFE OF PAULI MURRAY* 275 (2017) (quoting the National Woman’s Party December 16, 1963 resolution); *see also* SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 20 (2011) (“Some National Woman’s Party members marched to the segregationists beat. For them, equal rights for women would only be undermined by an association with black civil rights.”).

27. First introduced in Congress in 1923, *see* S.J. Res. 21, 68th Cong., 65 *CONG. REC.* 150 (1923), the ERA provided: “Men and women shall have equal rights throughout the United States and every place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.” That language was changed in 1946 to include states: “Equality of rights under the law shall not be denied or abridged by the United States or by

Representatives Martha Griffiths, Democrat from Michigan, and Katherine St. George, Republican from New York, sought support from southern legislators. Believing that Smith (a sponsor of the ERA)²⁸ could secure southern votes, Griffiths asked him to propose the amendment.²⁹ “For Smith, it was a win/win strategy: either the sex amendment would defeat the Civil Rights Act—a regulation of private business which he opposed—or it would amount to the passage of the ERA—a measure that he had always supported.”³⁰

Smith advised bill manager Emmanuel Celler, Democrat from New York and chair of the House Judiciary Committee, that he would offer the “sex” amendment as the NWP was “serious about it.”³¹ Smith appeared on *Meet the Press* two weeks before proposing the amendment and was asked by reporter Elisabeth May Craig (who was also a NWP member)³² whether he intended to add “sex” to H.R. 7152. “I might do that,” he replied.³³ Thus, Smith’s February 8 introduction of the amendment

any State on account of sex. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation.” S.J. Res. 61, 79th Cong., 92 CONG. REC. 9223 (1946). Eleanor Roosevelt and other liberal Democrats opposed the ERA “largely because it threatened their proud legacy of progressive legislation to protect women in the workplace.” HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972*, at 137 (1990). For more on the ERA, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 15–23 (1995). In 1972, Congress proposed the ERA with a resolution that it be approved within seven years. It was ratified by thirty-five of the thirty-eight states required for adoption. In 1978 a new Congressional resolution extended the ratification deadline to June 30, 1982. No additional states voted for ratification. Most recently, Nevada approved the amendment in 2017 as did Illinois in 2018. In January 2019, the Virginia Senate voted for ratification and the measure was sent to the Virginia House of Delegates where it died after it failed to clear a House subcommittee. See Jenna Portnoy, *ERA Bill Dies for Good in GOP-Controlled Virginia House of Delegates*, WASH. POST (Feb. 21, 2019), https://www.washingtonpost.com/local/virginia-politics/virginia-house-kills-era-ratification-bill/2019/02/21/82920204-3560-11e9-854a-7a14d7fec96a_story.html [https://perma.cc/U42E-2PN3].

28. In 1945, the NWP persuaded Smith to sponsor the ERA. As Virginia and other southern states provided the textile industry with cheap female labor, the NWP emphasized to Smith and other southern legislators that the ERA would strike down protective labor laws limiting the number of hours women could work. ROSENBERG, *supra* note 26, at 275. Thus, Smith may have had a secondary purpose in supporting the sex amendment. Southern industry, particularly textile mills such as those in Virginia, relied heavily on cheap female labor toiling in sweatshop conditions to remain profitable. Recently passed protective laws for women had endangered this exploitation. A sex amendment would strike down such sex-based legislation that hurt southern companies. As a result, Smith and other southern Democrats may have adopted a chivalrous pose to assist local businesses. By adding the sex amendment, the Judge apparently hoped either to defeat the bill or, if it passed, to assist southern businessmen. DIERENFIELD, *supra* note 22, at 194.

29. See ROSENBERG, *supra* note 26, at 276.

30. Franke, *supra* note 27, at 23.

31. *Id.*

32. See Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII*, 49 J. SOUTHERN HIST. 37, 44 (1983).

33. ROSENBERG, *supra* note 26, at 276.

“could not have come as a surprise”³⁴ as he “had been dropping hints for weeks” that he would do just that.³⁵

The amendment was debated on the floor of the House of Representatives for two hours; all but one of the female members of the House spoke in favor of the addition.³⁶ Representative Griffiths warned “a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister.”³⁷ Stating that “[i]t would be incredible to me that white men would be willing to place white women at such a disadvantage,” Griffiths also emphasized the need to protect African-American women from workplace sex discrimination, such as a black female dishwasher wishing to move from “a greasy spoon” to a “very good restaurant which employed only . . . white men” and “a colored woman political scientist” seeking a job at a college or university where a female political scientist had never been employed.³⁸

Representative St. George made clear her support for the amendment:

We do not want special privilege. We do not need special privilege. We outlast you—we outlive you—we nag you to death. So why would we want special privileges? I believe that we can hold our own. We are entitled to this little crumb of equality. The addition of that little, terrifying word “s-e-x” will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive. It will make it logical. It will make it right.³⁹

St. George noted the days “when women were chattels” and “belonged, first of all, to their fathers; then to their husbands or to their nearest male relative,” with “no command over their own property.”⁴⁰ Another legislator, Edna Kelly, Democrat from New York, declared her “support and sponsorship of this amendment and of this bill” in “an endeavor to have all persons, men and women, possess the same rights and same opportunities.”⁴¹ Representative L. Mendel Rivers, Democrat from South Carolina, argued that prohibiting discrimination on the basis of race, color, religion, and national origin but not sex would deny opportunity to “the white woman of mostly Anglo-Saxon or Christian heritage.”⁴²

Opposing the amendment, Representative Robert Griffin, Republican from Michigan, proposed an amendment that would have required a sworn statement by a female employee that her spouse was unemployed before she could file a sex discrimination claim.⁴³ Griffin believed that his amendment “would not prevent or prohibit any married woman from working because her husband also has a job.”⁴⁴

34. PURDUM, *supra* note 15, at 196.

35. THOMAS, *supra* note 15, at 2.

36. *See* Franke, *supra* note 27, at 23–24.

37. 110 CONG. REC. 2580 (1964) (statement of Rep. Griffiths).

38. *Id.* at 2579, 2583.

39. *Id.* at 2580–81 (statement of Rep. St. George).

40. *Id.* at 2581.

41. *Id.* at 2583 (statement of Rep. Kelly).

42. *Id.* at 2579 (statement of Rep. Rivers).

43. *See id.* at 2731 (statement of Rep. Griffin).

44. *Id.*

However, as noted by Professor Cary Franklin, “as a practical matter, it would permit employers to prefer male workers over married women, and thereby ensure that a woman who enjoyed the financial support of a husband could not lay out a claim to a job that might otherwise go to ‘an unemployed man with a family to support.’”⁴⁵

Bill manager, Representative Emanuel Celler, an opponent of both the “sex” amendment and the ERA, posed the following questions:

Would male citizens be justified in insisting that women share with them the burdens of compulsory military service? What would become of traditional family relationships? What about alimony? Who would have the obligation of supporting whom? Would fathers rank equally with mothers in the right of custody to children? What would become of the crimes of rape and statutory rape? Would the Mann Act be invalidated? Would the many State and local provisions regulating working conditions and hours of employment for women be struck down?⁴⁶

Celler also spoke of the “delightful accord” in his home: “I usually have the last two words and those words are ‘Yes, dear.’”⁴⁷

Also opposing the amendment, Representative Edith Green, Democrat from Oregon and the author of the Equal Pay Act of 1963,⁴⁸ argued that it would “clutter up the bill and it may later . . . be used to help destroy this section of the bill by some of the very people who today support it.”⁴⁹ Fearing that she would be called an Uncle Tom or Aunt Jane, Green stated that race discrimination was a more serious problem than sex discrimination and that sex-specific workplace practices could be justified by biological differences between men and women.⁵⁰ “For every discrimination that has been made against a woman in this country there has been 10 times as much discrimination against the Negro of this country.”⁵¹

At the end of the two-hour debate, and with no hearings held, the House voted 168–133 in favor of Smith’s sex amendment. H.R. 7152, as amended, passed the House by a 290–130 vote.⁵² When the bill came before the United States Senate,

45. Franklin, *supra* note 23, at 1323 (quoting 110 CONG. REC. 2577 (1964) (statement of Rep. Celler)).

46. 110 CONG. REC. 2577 (1964) (statement of Rep. Celler).

47. *Id.* at 2684.

48. See KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 30 (2016). The Equal Pay Act provides that an employer shall not discriminate “between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” 29 U.S.C. § 206(d) (2012). Representative Green noted that male Representatives supporting the Title VII sex amendment had opposed the EPA when that legislation was debated a few months earlier. See 110 CONG. REC. 2581 (1964) (statement of Rep. Green).

49. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3221 (1968).

50. See 110 CONG. REC. 2584 (1964) (statement of Rep. Green).

51. *Id.* at 2581.

52. See Barzilay, *supra* note 19, at 94. “Of all the congressmen who spoke for the adoption of the sex amendment, all except one ultimately voted against the Act.” *Id.* at 95.

Everett Dirksen, Republican from Illinois and Senate minority leader, considered removing the word “sex” from the bill.⁵³ Advised of that development, lawyer and activist Pauli Murray⁵⁴ drafted a memorandum showing the parallels between race and sex discrimination and arguing that “the basic principle that the right to a job without discrimination is a fundamental and individual right.”⁵⁵ If the “sex” amendment was removed from the legislation “both Negro and white women will share a common fate of discrimination, since it is exceedingly difficult for a Negro woman to determine whether or not she is being discriminated against because of race or sex.”⁵⁶ Murray’s memorandum was distributed to Attorney General Robert F. Kennedy, Vice President Hubert H. Humphrey, Senator Dirksen, Senator Margaret Chase Smith, Lady Bird Johnson, and others.⁵⁷ Dirksen did urge the Republican Senate conference to strike the amendment; Senator Smith opposed that move, and the sex discrimination amendment remained in the bill.⁵⁸

After the longest continuous filibuster in Senate history, that body voted for the legislation. The House voted for the Senate version on July 2 and that same day President Lyndon B. Johnson (whose administration had opposed the sex amendment)⁵⁹ signed the Civil Rights Act into law.⁶⁰ With the passage of Title VII, “the modern law of sex discrimination got its statutory footing,” and “the parallelism the act established between various types of forbidden discrimination assured that concepts developed in one area would be used in others.”⁶¹

53. See PURDUM, *supra* note 15, at 254; ROSENBERG, *supra* note 26, at 277.

54. For discussion of Murray’s life and work, see KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 207–33 (2012); see also ROSENBERG, *supra* note 26; Duke Human Rights Ctr., *Pauli Murray Project*, <https://paulimurrayproject.org/> [<https://perma.cc/7PG4-48T3>].

55. ROSENBERG, *supra* note 26, at 277 (quoting Memorandum from Pauli Murray in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex (Apr. 14, 1964)) [hereinafter Murray memorandum] (on file with the *Indiana Law Journal*).

56. *Id.* at 278 (quoting Murray memorandum); see also Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 243 (1965) (“If ‘sex’ had not been added to the equal employment opportunity provisions of the Civil Rights Act of 1964, Negro women would have shared with white women the common fate of discrimination since it is exceedingly difficult to determine whether a Negro woman is being discriminated against because of race or sex. Without the addition of ‘sex,’ Title VII would have protected only half the potential Negro work force.”).

57. See ROSENBERG, *supra* note 26, at 279.

58. See *id.*

59. See Brauer, *supra* note 32, at 46 (noting Deputy Attorney General Nicholas Katzenbach’s view that the amendment “might overburden the legislation”); see also HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960–1972, at 75 (1992) (noting Katzenbach’s opposition to the amendment).

60. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

61. Paul Gewirtz, *The Triumph and Transformation of Antidiscrimination Law*, in RACE, LAW AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* 110, 112 (Austin Sarat ed., 1997).

II. DISCRIMINATION “BECAUSE OF SEX”

In pertinent part, Title VII prohibits employment discrimination “because of [an] individual’s . . . sex.”⁶² The Supreme Court has defined “[t]he words ‘because of’ [to] mean ‘by reason of: on account of.’”⁶³ This causation standard requires “the plaintiff to show ‘that the harm would not have occurred’ in the absence of—that is, but for—the defendant’s conduct.”⁶⁴ Beginning in 1991,⁶⁵ Title VII plaintiffs alleging status-based (race, color, religion, sex, or national origin) discrimination can satisfy a relaxed and lessened causation standard by “show[ing] that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives which were causative in the employer’s decision.”⁶⁶

Whether and how certain employer conduct violates the “because of sex” prohibition has been addressed by the Supreme Court in various contexts including those discussed in the following sections of this Part.

A. Initial Supreme Court Rulings

In its first Title VII sex discrimination ruling, *Phillips v. Martin Marietta Corporation*,⁶⁷ the Court held that an employer policy denying employment to women but not men with pre-school-age children violated the statute’s requirement “that persons of like qualifications be given employment opportunities irrespective of their sex.”⁶⁸ Interestingly, the Court also stated that conflicting family obligations demonstrated to be more relevant to a woman’s job performance could provide an employer with a bona fide occupational qualification (BFOQ) defense to a sex discrimination claim.⁶⁹ A concurring Justice Thurgood Marshall did not agree that a BFOQ “could be established by a showing that some women, even the vast majority, with pre-school children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities.”⁷⁰ He feared that

62. 42 U.S.C. § 2000e-2(a)(1).

63. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009) (quoting 1 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)).

64. *Univ. of Texas Sw. Med. Center v. Nassar*, 570 U.S. 338, 346–47 (2013) (quoting RESTATEMENT (FIRST) OF TORTS § 431 (AM. LAW INST. 1934)); *see also* EEOC v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (“[B]ecause of’ . . . typically imports, at a minimum, the traditional standard of but-for causation.”).

65. *See infra* notes 131–32 and accompanying text.

66. *Nassar*, 570 U.S. at 343; *see also* *Abercrombie & Fitch*, 135 S. Ct. at 2032; 42 U.S.C. § 2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”).

67. 400 U.S. 542 (1971) (per curiam).

68. *Id.* at 544.

69. *See id.*; 42 U.S.C. § 2000e-2(e) (stating that an employer does not discriminate when it hires and employs an employee “on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”).

70. *Phillips*, 400 U.S. at 544 (Marshall, J., concurring).

the Court had “fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.”⁷¹

*City of Los Angeles Department of Water & Power v. Manhart*⁷² held unlawful an employer policy requiring women to make pension plan contributions 14.84% higher than the contributions made by male employees, a practice resulting in lower take-home pay for female workers with the same salaries as their male counterparts.⁷³ The employer justified the contribution differential on the ground that, because women live longer than men, the cost of a pension for the average female retiree is greater than for the average male retiree since the average female retiree will receive more monthly pension payments. The Court held that this aspect of the policy violated Title VII. While it is unquestionably true that “[w]omen, as a class, do live longer than men,”⁷⁴ the Court declared that Title VII focuses on the individual, and that in enacting the statute “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁷⁵ Thus, “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman’s ability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.”⁷⁶ Requiring a woman to contribute more to a pension plan “simply because . . . [she] is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act”⁷⁷ and “does not pass the simple test of whether the evidence shows ‘treatment of a person . . . which but for that person’s sex would be different.’”⁷⁸

Discrimination on the basis of pregnancy was held not to be unlawful sex discrimination under Title VII in the Court’s 1977 *General Electric Co. v. Gilbert* decision.⁷⁹ Relying on *Geduldig v. Aiello*,⁸⁰ the Court ruled that the plaintiffs made no showing that the employer invidiously or pretextually discriminated against members of one sex when it excluded pregnancy disability benefits from its disability benefits plan. “Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability.”⁸¹

71. *Id.* at 545.

72. 435 U.S. 702 (1978).

73. *Id.* at 712.

74. *Id.* at 707.

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

76. *Id.* at 707 (footnote omitted).

77. *Id.* at 711.

78. *Id.* (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1174 (1971)).

79. 429 U.S. 125 (1977).

80. 417 U.S. 484 (1974). In *Geduldig*, the Court held that the exclusion of pregnancy benefits from a disability benefits plan’s coverage did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Geduldig*, 417 U.S. at 497; see also U.S. CONST. amend., XIV, § 1. “The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.” *Geduldig*, 417 U.S. at 497 n.20.

81. *Gilbert*, 429 U.S. at 136.

Congress quickly responded to and legislatively overruled *Gilbert* in the Pregnancy Discrimination Act of 1978 (PDA).⁸² Thereafter, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,⁸³ the Court held that the employer's health insurance plan (amended on the effective date of the PDA) violated Title VII by providing pregnancy-related hospitalization benefits to female employees but not to the female spouses of male employees. "Such a practice would not pass the simple test of Title VII discrimination that we enunciated in *Los Angeles Dept. of Water & Power v. Manhart* for . . . male employee[s] with dependents [whom were treated] 'in a manner which but for that person's sex would be different.'"⁸⁴ Furthermore, and significantly, the Court opined that the fact that pre-enactment discussion of the PDA focused on female and not male employees did "not create a 'negative inference' limiting the scope of the Act to the specific problem that motivated its enactment."⁸⁵ Unenvisaged discrimination against male employees did not foreclose their cause of action.

As can be seen in the aforementioned cases, the question whether alleged discrimination is unlawful discrimination "because of sex" was answered in the affirmative after the application of the "simple test" of whether the evidence demonstrated treatment of the plaintiff which but for her sex would have been different. Martin Marietta's denial of employment to the female plaintiff pursuant to its policy of hiring men but not woman with pre-school-age children was because of her sex and would not have occurred if she was a man. Higher pension plan contributions women were required to pay, because their life expectancy, as a class, was longer than the life expectancy of men, also did not pass the simple "but for" test. Nor did an employer's "because of sex" discrimination against men in the provision of pregnancy-related hospitalization benefits. In each instance, the at-issue disparate treatment of women and men would have been different but for their sex.

B. Sexual Harassment

In enacting Title VII in 1964, the 88th Congress did not contemplate that the statute's sex discrimination prohibition banned workplace sexual harassment.⁸⁶ As

82. See Pub. L. No. 95-955, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)). The PDA provides, among other things, that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." *Id.*

83. 462 U.S. 669 (1983).

84. *Id.* at 682–83 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

85. *Id.* at 680. For additional Court decisions interpreting the PDA, see *Young v. UPS*, 135 S. Ct. 1338 (2015); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

86. See, e.g., Trina Jones, *Title VII at 50: Contemporary Challenges for U.S. Employment Discrimination Law*, 6 ALA. CIV. R. & CIV. LIB. L. REV. 45, 60 (2014) (Congress arguably did not contemplate a sexual harassment cause of action in 1964); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 346 (1990) ("In all likelihood, the members of Congress would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination—especially since the term 'sexual harassment' did not come into currency until the late 1970s.").

discussed in this section, post-enactment developments charted a path that ultimately led to the Supreme Court's recognition of that Title VII claim.

In 1971 the EEOC issued agency decisions concluding that workplace racial and national origin harassment violated Title VII.⁸⁷ That same year the Fifth Circuit, in *Rogers v. EEOC*, recognized a Title VII claim for racial and ethnic harassment, and concluded "employees' psychological as well as economic fringes [were] statutorily entitled to protection from employer abuse."⁸⁸ Other court decisions in the 1970s held that Title VII prohibited racial,⁸⁹ religious,⁹⁰ and national origin harassment.⁹¹ Sexual harassment, a term reportedly coined by Cornell University professors in early 1975,⁹² was judicially recognized as sex discrimination in *Williams v. Saxbe*⁹³ and *Barnes v. Costle*.⁹⁴ Not all courts agreed with that view; however, one opined that a supervisor's harassment was "nothing more than a personal proclivity, peculiarity, or mannerism . . . satisfying a personal urge."⁹⁵

Activists and scholars challenged the view that sexual harassment did not violate Title VII. In May 1975, Working Women United held the first "Speak-Out on Sexual Harassment,"⁹⁶ and Carroll Brodsky's 1976 book *The Harassed Worker*⁹⁷ discussed and defined sexual harassment. Catherine MacKinnon's influential 1979 work *Sexual Harassment of Working Women: A Case of Sex Discrimination* argued that sexual harassment—"the unwanted imposition of sexual requirements in the context of a relationship of unequal power" and "the use of power derived from one social sphere to lever benefits or impose deprivations in another"—is sex discrimination proscribed by Title VII.⁹⁸

87. EEOC Dec. No. 72-0679, 4 Fair Empl. Prac. Cas. (BNA) 441 (1971); EEOC Dec. No. 71-2598, 4 Fair Empl. Prac. Cas. (BNA) 21 (1971).

88. 454 F.2d 234, 238 (5th Cir. 1971). Circuit Judge Paul Hirsch Roney dissented, finding nothing in the statute or its legislative history indicating a congressional concern about whether an employer's business was "environmentally attractive" to all employees or whether an individual employee "might be uncomfortable or have feelings of unhappiness in his employment. . . . Congress has simply not given this scope to its legislation." *Id.* at 246 (Roney, J., dissenting).

89. *E.g.*, *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506 (8th Cir. 1977); *Gray v. Greyhound Lines E.*, 545 F.2d 169 (D.C. Cir. 1976).

90. *E.g.*, *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976).

91. *E.g.*, *Cariddi v. Kan. City Chiefs Football Club*, 568 F.2d 87 (8th Cir. 1977) (per curiam).

92. *See* FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 218–25 (2009) (sexual harassment was coined by Cornell professors Lin Farley, Susan Meyer, and Karen Sauvigné in early 1975); THOMAS, *supra* note 15, at 84.

93. 413 F. Supp. 654, 658 (D.D.C. 1976).

94. 561 F.2d 983, 994 (D.C. Cir. 1977).

95. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975); *see also* *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (Title VII was "not intended to provide a federal tort remedy" for sexually-motivated attacks in the workplace), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

96. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1685 n.2, 1698–99 (1998).

97. CARROLL M. BRODSKY, *THE HARASSED WORKER* (1976).

98. CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF*

Another significant development in sexual harassment law and policy occurred in 1980 when the EEOC issued its Guidelines on Sex Discrimination and defined sexual harassment:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁹⁹

In 1986, twenty-two years after the passage of Title VII, the Supreme Court recognized a Title VII hostile environment claim for supervisory sexual harassment in *Meritor Savings Bank, FSB v. Vinson*.¹⁰⁰ Justice William H. Rehnquist's opinion for a unanimous Court stated, "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex."¹⁰¹ He rejected, for two reasons, the employer's argument that Congress was only concerned with tangible economic barriers caused by discrimination and not with the psychological aspects of a work environment. "First, the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."¹⁰² Second, the EEOC's Guidelines, while not controlling, drew "upon a substantial body of judicial decisions and EEOC precedent" and "fully support the view that harassment leading to noneconomic injury can violate Title VII."¹⁰³ Justice Rehnquist also cited the Fifth Circuit's *Rogers v. EEOC*¹⁰⁴ decision and other lower court rulings prohibiting racial, religious, and national origin harassment.¹⁰⁵ "Nothing in Title VII suggests a hostile environment based on discriminatory *sexual* harassment should not likewise be prohibited."¹⁰⁶

Meritor thus relied on statutory text, lower court decisions, and the EEOC's Guidelines in recognizing as actionable hostile-environment sexual harassment claims. The Court was not persuaded by the employer's argument that Title VII's history and the circumstances of its enactment compelled the conclusion that sexual

SEX DISCRIMINATION 1 (1979).

99. 29 C.F.R. § 1604.11(a).

100. 477 U.S. 57 (1986). A hostile work environment is one in which the challenged conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

101. *Id.* at 64 (alteration in original).

102. *Id.* (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

103. *Id.* at 65.

104. 454 F.2d 234 (5th Cir. 1971).

105. *See, e.g., Meritor*, 477 U.S. at 66.

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

harassment was not “within the ambit of Congressional concern,”¹⁰⁷ or by the *amicus* Chamber of Commerce of the United States’s position that a sexual harassment action was not justiciable because “Title VII does not contain an express provision concerning sexual harassment.”¹⁰⁸

Did a male employee’s allegation that other male employees sexually harassed him state an actionable Title VII claim? That was the question before the Court in *Oncale v. Sundowner Offshore Services, Inc.*¹⁰⁹ Seeking a negative answer from the Court, the employer argued that Congress would have drafted Title VII differently if it meant to cover same-sex sexual harassment; that the harassment issue “does not involve a difference between the sexes” or otherwise implicate the statute’s goal of equal employment opportunity for men and women; and that same-sex harassment “is an entirely separate area of concern that cannot and should not be grafted onto Title VII.”¹¹⁰

Yet another unanimous Court, in an opinion by Justice Antonin Scalia, held that the same-sex sexual harassment claim was actionable. Noting that Title VII’s “because of sex” prohibition protects both men and women,¹¹¹ he rejected a conclusive presumption that an employer will not discriminate against a member of the employer’s own sex or race.¹¹² “If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”¹¹³ The “critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹¹⁴

In an important passage of his opinion Justice Scalia addressed head-on the argument that the scope of Title VII was limited to the concerns of members of Congress in 1964:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male

107. Brief of Petitioner, *Meritor*, 477 U.S. 57 (No. 84-1979), 1985 WL 669769, at *14.

108. Motion for Leave to File Amicus Curiae Brief and Brief for the Chamber of Commerce of the United States as Amicus Curiae, *Meritor*, 477 U.S. 57 (No. 84-1979), 1985 WL 669770, at *5.

109. 523 U.S. 75 (1998).

110. Brief for Respondents, *Oncale*, 523 U.S. 75 (No. 96-568), 1997 WL 634147, at *17.

111. See *Oncale*, 523 U.S. at 78; see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 104 (2012) (“[T]here is no textual basis [in Title VII] for limiting its protections to women.”).

112. *Oncale*, 523 U.S. at 78.

113. *Id.* at 79.

114. *Id.* at 80 (citation omitted). Professor David Schwartz has argued that the Court’s “emphasis on ‘because of sex’ as the touchstone of sex discrimination works against the exclusion of lesbians and gays. . . . Discrimination on the basis of sexual orientation is thus, in the plainest of language, discrimination on the basis of sex within the terms of Title VII.” David S. Schwartz, *When is Sex Because of Sex?: The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1789 (2002).

sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But *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.* Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.¹¹⁵

Statutory text and the Court’s precedents controlled the outcome of the case.

C. Sex Stereotyping and Gender Nonconformity Discrimination

Any discussion of the Title VII term “sex” must consider the interpretive consequences of the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*.¹¹⁶ Ann Hopkins unsuccessfully sought promotion to partner in Price Waterhouse’s Washington, D.C. office. Partners considering her bid praised her character and accomplishments and work with clients. However, partners also criticized Hopkins’s abrasiveness with staff members, criticized her use of profanity, described her as “macho,” suggested that she take “a course at a charm school,” and commented that she had “matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate.”¹¹⁷ Another partner “delivered the *coup de grace*” when he advised Hopkins to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹¹⁸

Justice William J. Brennan, Jr., in a plurality opinion, concluded that Hopkins had been subjected to unlawful sex stereotyping and that gender¹¹⁹ had played a motivating part in the adverse employment decision she challenged.

115. *Oncle*, 523 U.S. at 79–80 (alteration in original) (emphasis added).

116. 490 U.S. 228 (1989) (plurality opinion), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, § 107(a), 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 2000e-2(m)). For more on this seminal decision, see generally THOMAS, *supra* note 15, at 127–47 (narrative of Plaintiff’s experience before, during, and after the case); Ann Hopkins, *Price Waterhouse v. Hopkins: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 357 (2005) (article written by the Plaintiff and her perspective on the case).

117. *Price Waterhouse*, 490 U.S. at 235.

118. *Id.*

119. Gender identity is “[o]ne’s innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.” *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [https://perma.cc/6PAB-7W6R]. “[G]ender expressions might be defined and limited to those commonly associated with masculinity or femininity” and “be defined by those expressions that are socially group identified.” YURACKO, *supra* note 48, at 144.

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.¹²⁰

Justice Brennan did not quarrel with the district court's conclusion that a number of the partners' comments about Hopkins demonstrated that she was subjected to sex stereotyping.¹²¹

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, for "[i]n 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."¹²²

While workplace remarks and actions based on such stereotypes do not inevitably establish that gender played a role in a particular employment decision, they "can certainly be *evidence* that gender played a part."¹²³ Remanding the case for further proceedings, Justice Brennan instructed that the relevant question to be answered was whether the partners who evaluated Hopkins "in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man."¹²⁴

Justice Sandra Day O'Connor's concurring opinion agreed with the district court's findings that a number of partners referred to Hopkins's "failure to conform to certain gender stereotypes as a factor militating against her election to the partnership," and that the partner responsible for informing Hopkins of the reasons her candidacy was placed on hold told her that her "'professional' problems would be solved if she would 'walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.'"¹²⁵ Hopkins thus "proved that Price Waterhouse 'permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner.'"¹²⁶ "At this point," the Justice concluded, "Ann Hopkins had taken her proof as far as it could go" and had "proved that participants in the process considered her failure to

120. *Price Waterhouse*, 490 U.S. at 250 (plurality opinion) (footnote omitted).

121. *Id.* at 251.

122. *Id.* (alteration in original) (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

123. *Id.*

124. *Id.* at 258. On remand, the district court held that Price Waterhouse failed to show that it would have placed Hopkins' partnership candidacy on hold even in the absence of the negative, sex-stereotyped evaluations she received. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202 (D.D.C. 1990), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

125. *Price Waterhouse*, 490 U.S. at 272 (O'Connor, J., concurring) (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985)).

126. *Id.* (alteration in original) (citation omitted).

conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision.”¹²⁷

As later described by Justice Anthony M. Kennedy (who dissented in *Price Waterhouse*),¹²⁸ six Justices in that case agreed that a plaintiff could prevail by showing that one of the traits prohibited by Title VII was a motivating or substantial factor in the employer’s decision.¹²⁹ And a majority of the *Price Waterhouse* Court determined that a plaintiff who made that showing in a mixed-motives case (one involving both lawful and unlawful employer motives) shifted the burden of persuasion to the employer which could avoid liability by showing that it would have made the same decision in the absence of the discriminatory factor. “In other words, the employer had to show that a discriminatory motive was not the but-for cause of the adverse employment action.”¹³⁰ Congress responded to this aspect of *Price Waterhouse* in the Civil Rights Act of 1991,¹³¹ adding a lessened “motivating factor” causation standard as well as a limited affirmative defense applicable in mixed-motives cases.¹³²

Price Waterhouse went beyond merely prohibiting discrimination on the basis of an individual’s biological sex (male or female). Ann Hopkins was discriminated against not because she was a “woman *per se*,” but because she was, in the employer’s view, not “womanly enough.”¹³³ “The Court’s seemingly simple declaration” that penalizing employees based on stereotypes about how they should behave “has been the most important development in sex discrimination jurisprudence since the passage of Title VII” and “has been responsible for dramatic expansions in how courts have interpreted the act’s coverage.”¹³⁴ Whether that expansion includes Title VII coverage sexual orientation and transgender discrimination is discussed in the ensuing Parts.

127. *Id.*

128. *Id.* at 294 (Kennedy, J., dissenting) (arguing that Title VII “creates no independent cause of action” for sex stereotyping and that evidence of sex stereotyping, while relevant to the issue of discriminatory intent, does not answer the question whether the plaintiff was harmed by discrimination).

129. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 348 (2013) (citing *Price Waterhouse*, 490 U.S. at 258 (plurality opinion)).

130. *Id.* at 348.

131. Pub. L. No. 102-166, tit. I, § 107(a), 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 2000e-2(m)).

132. *See* 42 U.S.C. § 2000e-2(m) (2012) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”); 42 U.S.C. § 2000e-5(g)(2)(A)–(B) (2012) (stating that an employer making the same-decision showing in a mixed-motives case may be subject to declaratory and injunctive relief and may be required to pay certain attorney’s fees and costs; the plaintiff shall not receive a court order of reinstatement, hiring, promotion, or back pay).

133. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 572 (6th Cir. 2018).

134. YURACKO, *supra* note 48, at 5.

III. SEXUAL-ORIENTATION DISCRIMINATION: BECAUSE OF SEX?

Is sexual-orientation discrimination unlawful sex discrimination under and within the meaning of Title VII? In the decades following the enactment of the statute federal courts of appeals repeatedly answered no.¹³⁵ For instance, in 1979 the Ninth Circuit held that Title VII “should not be judicially extended to include sexual preference such as homosexuality.”¹³⁶ Ten years later, the Eighth Circuit concluded that “Title VII does not prohibit discrimination against homosexuals”¹³⁷ and, in 1996, the Fourth Circuit stated, “Title VII does not afford a cause of action for discrimination based upon sexual orientation.”¹³⁸

More recently, the question whether sexual-orientation discrimination is unlawful sex discrimination has been answered by the Seventh Circuit (yes),¹³⁹ Second Circuit (yes),¹⁴⁰ and Eleventh Circuit (no).¹⁴¹ This Part examines the various arguments made in these cases for and against the sexual-orientation-discrimination-is-sex-discrimination position.

A. “Because of Sex”

1. *Hively v. Ivy Tech Community College of Indiana*

In *Hively v. Ivy Tech Community College of Indiana*,¹⁴² Kimberly Hively, who is openly lesbian, sued the college and alleged that her employment was terminated because of her sexual orientation. Dismissing her suit, the district court held that sexual orientation is not a protected category under Title VII.¹⁴³ A Seventh Circuit panel, deeming itself bound by *Ulane v. Eastern Airlines, Inc.*¹⁴⁴ and other circuit

135. See *Evans v. Georgia Reg. Hosp.*, 850 F.3d 1248, 1255–57 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017); *Kalich v. AT & T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003), *overruled by Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977).

136. *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979).

137. *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

138. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996).

139. *Hively*, 853 F.3d at 339.

140. *Zarda*, 883 F.3d at 100.

141. *Bostock v. Clayton Cty. Bd. of Comm’rs.*, 723 F. App’x 964 (11th Cir. 2018).

142. 853 F.3d 339 (7th Cir. 2017) (en banc).

143. *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-cv-1791, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015), *rev’d*, *Hively*, 853 F.3d at 341.

144. 742 F.2d 1081 (7th Cir. 1984).

decisions, held that Hively's sexual orientation claim was not actionable. Vacating that decision and rehearing the case en banc, the court reversed, holding that "discrimination on the basis of sexual orientation is a form of sex discrimination."¹⁴⁵

Chief Judge Pamela Wood's majority opinion remarked that the interpretive question before the court was not whether Title VII could be judicially amended to add sexual orientation to the statute's prohibition of race, color, religion, sex, or national origin discrimination.¹⁴⁶ "Obviously[,] that lies beyond our power."¹⁴⁷ Rather, the issue was a pure question of statutory interpretation well within the judiciary's competence: what does it mean to discriminate on the basis of sex, and is an action taken because of an individual's sexual orientation a subset of a prohibited action taken because of sex?¹⁴⁸ Noting Ivy Tech's argument that Congress has frequently considered but has not added the words "sexual orientation" to Title VII,¹⁴⁹ the Chief Judge responded that where a "statute is plain on its face[]" there is no need to resort to secondary sources, such as legislative history or unsuccessful efforts to change the law.¹⁵⁰ And when a statute is not pellucid, "the best source for

145. *Hively*, 853 F.3d at 341.

146. *Id.* at 343 (citing 42 U.S.C. § 2000e-2(a)).

147. *Id.*

148. *Id.* For an affirmative answer to the latter question, see Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 77–78 (2019).

149. See, e.g., Equality Act, S. 1006, 115th Cong. (2017); Equality Act, H.R. 2282, 115th Cong. (2017); Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 3185, 114th Cong. (2015); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Civil Rights Amendments Act of 2005, H.R. 88, 109th Cong. (2005); Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 1430, 103d Cong. (1994); Civil Rights Amendments Act of 1989, S. 47, 101st Cong. (1989); Civil Rights Protection Act of 1988, S. 2109, 100th Cong. (1988); A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 430, 98th Cong. (1983); Civil Rights Amendments Act of 1981, H.R. 1454, 97th Cong. (1981); Civil Rights Amendments Act of 1977, H.R. 4794, 95th Cong. (1977); Civil Rights Amendments Act, H.R. 13019, 94th Cong. (1976); Civil Rights Amendments Act, H.R. 166, 94th Cong. (1975). In March 2019, the Equality Act (H.R. 5 and S. 788, 116th Cong.) was introduced in Congress. The legislation would, among other things, amend Title VII section 703(a) by striking "sex" and inserting "sex (including sexual orientation and gender identity)." If enacted, the bill would be the first federal statute prohibiting discrimination against LGBTQ persons. At least twenty-one states and the District of Columbia have enacted laws prohibiting discrimination on the basis of sexual orientation and gender identity. See *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws [<https://perma.cc/HM3L-ZR56>].

150. *Hively*, 853 F.3d at 343–44. Failed attempts to change a statute "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 [the] merits." *Id.* Thus, "it is simply too difficult to draw

disambiguation is the broader context of the statute that the legislature—in this case, Congress—passed.”¹⁵¹

Noting but assuming no duty to defer to the EEOC’s 2015 determination that Title VII’s sex discrimination prohibition encompasses sexual orientation discrimination,¹⁵² Chief Judge Wood was guided by *Oncale v. Sundowner Offshore Services, Inc.* and Justice Scalia’s pronouncement that “statutory prohibitions often go beyond the principal evil[s] 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.”¹⁵³ “The Court could not have been clearer” Chief Judge Wood wrote: “the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.”¹⁵⁴

It is thus “neither here nor there” that, in including “sex” as a prohibited basis for employment discrimination in 1964, Congress “may not have realized or understood the full scope of the words it chose. Indeed, in the years since 1964, Title VII has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B.”¹⁵⁵ The Court has held that the “because of sex” provision prohibits workplace sexual harassment, including same-sex sexual harassment;¹⁵⁶ discrimination on the basis of actuarial assumptions about an individual’s longevity;¹⁵⁷ and discrimination because of a person’s failure to conform to an employer’s gender stereotypes.¹⁵⁸ While it is possible that these decisions would have surprised those serving in the 88th Congress, “experience with the law has led the Supreme Court to recognize that each of these examples is a covered form of sex discrimination.”¹⁵⁹

a reliable inference from these truncated legislative initiatives to rest our opinion on them. The goalposts have been moving over the years, as the Supreme Court had shed more light on the scope of the language that already is in the statute: no *sex* discrimination.” *Id.* at 344 (emphasis in original).

151. *Id.*

152. *Baldwin v. Foxx*, EEOC No. 0120133080, 2015 WL 4397641, at *4–5 (July 14, 2015) (citing *Price Waterhouse* and concluding that sexual-orientation discrimination premised on stereotypes, assumptions, norms, and expectations constitutes unlawful sex discrimination because the employee has been treated less favorably because of her sex); *see also* *Macy v. Holder*, EEOC No. 012012821, 2012 WL 1435995, at *9, *11 (Apr. 20, 2012) (intentional transgender discrimination “is, by definition, discrimination ‘based on . . . sex,’” and therefore violates Title VII; this is so even though members of the 1964 enacting Congress “were likely not considering the problems of discrimination that were faced by transgender individuals . . .”). Agency decisions prior to *Baldwin* and *Macy* did not assert jurisdiction over employees’ complaints alleging that they had been discriminated against because they were gay. *See* *Johnson v. Frank*, EEOC No. 05910850, 1991 WL 118760 (Dec. 19, 1991); *Dillon v. Frank*, EEOC No. 01900157, 1990 WL 1111074 (Feb. 14, 1990).

153. 523 U.S. 75, 79 (1998).

154. *Hively*, 853 F.3d at 345.

155. *Id.*

156. *See supra* notes 109–15 and accompanying text.

157. *See supra* notes 72–78 and accompanying text.

158. *See supra* notes 116–32 and accompanying text.

159. *Hively*, 853 F.3d at 345.

In dissent, Judge Diane S. Sykes asked, “[i]s it even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination ‘because of sex’ also banned discrimination because of sexual orientation? The answer is no, of course not.”¹⁶⁰ Observing that Title VII does not define discrimination “because of sex[,]”¹⁶¹ she looked for the “original public meaning” of “sex” in dictionary definitions.¹⁶² In “1964—and now, for that matter—the word ‘sex’ mean[t] biologically *male* or *female*; it d[id] not also refer to sexual orientation.”¹⁶³ Accordingly, for a “fluent speaker of the English language—then and now—the ordinary meaning of the word ‘sex’ does not fairly include the concept of ‘sexual orientation’” as the two terms are not interchangeable and do not overlap in meaning.¹⁶⁴

Judge Sykes’s original public meaning and dictionary-centered approach is problematic in several respects. First, who is, and how does one identify, the posited reasonable person competent in the English language? This reasonable person

160. *Id.* at 362 (Sykes, J., dissenting). Judge Sykes invoked the “fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Id.* (quoting *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014)). “Contemporary” means not now but at the time of the statute’s enactment. *Id.*

161. *See id.*

162. *See id.* at 362–63. On judicial reliance on dictionaries in statutory interpretation, see WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 44 (2016) (“Increasingly, judges are turning to dictionaries as external evidence of what words might mean.”); *id.* at 59 (arguing that “the rule of law underpinning of the ordinary meaning rule suggests that the dictionary meaning of any term should normally be judged by current as well as historic dictionaries”); ROBERT A. KATZMANN, *JUDGING STATUTES* 43 (2014) (stating that dictionaries can be helpful in interpreting statutes “especially when dealing with . . . a word’s usage at the time of the law’s enactment”); SCALIA & GARNER, *supra* note 111, at 415–24 (discussing the use of dictionaries in statutory interpretation). *But see* *Jordan v. De George*, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting) (dictionaries are “the last resort of the baffled judge”); RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 200 (2013) (“Dictionaries are mazes in which judges are soon lost. A dictionary-centered textualism is hopeless.”); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 *HARV. J.L. & PUB. POL’Y* 61, 67 (1994) (a dictionary is a “museum of words . . . rather than a means to decode the work of legislatures”).

163. *Hively*, 853 F.3d at 362 (Sykes, J., dissenting). Chief Judge Wood did not disagree with Judge Sykes’s statement that “sexual orientation” was not defined by dictionaries at or around the time of Title VII’s enactment. But “neither was . . . ‘sexual harassment’—a concept that, although it can be distinguished from ‘sex,’ has at least since 1986 been included by the Supreme Court under the umbrella of sex discrimination.” *Id.* at 350 n.5 (majority opinion).

164. *Id.* at 363 (Sykes, J., dissenting). Judge Richard A. Posner, calling for a “judicial interpretive updating” approach, rejected what he called Judge Sykes’s “diehard originalist” argument. *Id.* at 353 (Posner, J., concurring). In his view, the enactors of Title VII “understandably didn’t understand . . . how attitudes toward homosexuals would change in the following half century.” *Id.* at 357. He preferred that the court openly acknowledge that it was imposing a meaning of “sex discrimination” that would not have been accepted by Congress in 1964 rather than give “the impression that we are merely the obedient servants of the 88th Congress (1963-1965)[] carrying out their wishes.” *Id.*

cannot be nonarbitrarily constructed[.] Is the person a he or a she? Does he or she live in the city or the country? How much education and of which kind has he or she had? How much information does he or she possess about the law in question and the reasons behind its promulgation, etc.?¹⁶⁵

The inquiry into what this constructed person supposedly knows is an exercise in interpretive creativity.

As for Judge Sykes's reliance on dictionaries, great caution should be exercised in determining the legal meaning of a statutory term by reference to dictionary definitions or other lexicographical sources. A posited dictionary-based meaning of the statutory term "sex," based on a hypothetical reasonable person's understanding and usage of the term, may not shed useful interpretive and applicative light on legal meaning and can render jurisprudentially irrelevant legislative, judicial, and administrative agency uses and understandings of that term. That posited meaning should not invisibilize and trump decades of judicial constructions of "sex" and the Title VII phrase "because of sex."

Second, and assuming for the sake of argument the interpretive relevance of dictionaries,¹⁶⁶ Judge Sykes's dictionary analysis is "incomplete, at best."¹⁶⁷ As Professor William Eskridge notes, the 1961 edition of Webster's dictionary defined "sex" in three ways: (1) "*sex as biology*" (male or female); (2) "*sex as gender*" (masculine and feminine); and (3) "*sex as sexuality*" ("the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct").¹⁶⁸ And other dictionaries in existence prior to the enactment of Title VII did not limit "sex" to biological males and females and included sex-as-gender and sex-as-sexuality definitions.¹⁶⁹ All of which shows that "the meaning of 'sex' in 1964 was not as one-dimensional as Judge Sykes asserted."¹⁷⁰

165. Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539, 541 (2013); see also Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *CONST. COMMENT.* 47, 73 (2006) ("[T]he reasonable person of the law . . . is highly intelligent and educated and capable of making and recognizing subtle connections and inferences . . . [and] is familiar with the peculiar language and conceptual structure of the law.").

166. Judge Joel M. Flaum's concurring opinion referred to dictionaries defining "homosexuality" as sexual attraction to persons of the same sex. See *Hively*, 853 F.3d at 358 (Flaum, J., concurring). Noting that a person's homosexuality cannot be considered without accounting for that person's sex, he concluded that an employer discriminating against an employee because of that employee's sexual attraction to a same-sex individual "is motivated, in part, by an enumerated trait, the employee's sex. That is all an employee must show to successfully allege a Title VII claim." *Id.* at 359.

167. 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).

168. *Id.* (citing and quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2296 (2d unabridged ed. 1961)).

169. See *id.* at 338 n.63 (citing THE AMERICAN COLLEGE DICTIONARY (Clarence L. Barnhart ed. 1955)).

170. *Id.* at 339.

Third, it is noteworthy that congressional drafters “do not use dictionaries. Period.”¹⁷¹ This reality calls into question the view that “ordinary meaning is the right lodestar from which to chart an interpretive path for statutory language.”¹⁷² A court’s dictionary-based determination of a reasonable person’s understanding of a statutory term can import into the interpretive analysis sources not considered by those who drafted the legislation and its at-issue provisions.

Fourth, Judge Sykes’s static and dictionary-based textualist approach does not take into account changes in linguistic usage and context. Consider “property,” a word that, in context, does not mean today what it meant in the past. At one time, “property”

included a man’s right to his wife’s exclusive domestic and sexual services, to the management of her property and the dictation of her domicile, and to the labor of his children, apprentices, and . . . slaves, all protected by law against strangers who would appropriate or interfere with them . . . no lawyer or lay interpreter of the word ‘property’ would take it to include any of those rights today.¹⁷³

Like “property,” the meaning of the Title VII term “sex” is not and should not be restricted to a postulated frozen-in-time meaning with no consideration of post-enactment linguistic usage, context, and judicial constructions.¹⁷⁴

2. *Zarda v. Altitude Express, Inc.*

In *Zarda v. Altitude Express, Inc.*,¹⁷⁵ Donald Zarda, a gay man, was employed as a skydiving instructor, a position in which he engaged in tandem skydives strapped shoulder-to-shoulder and hip-to-hip with clients. Seeking to assuage any concerns a female client may have had about being strapped to a male instructor, he told one female client that he was gay and “had an ex-husband to prove it.”¹⁷⁶ Zarda was terminated after one dive when a female client alleged that he had inappropriately touched her and disclosed his sexual orientation to her to excuse his behavior. Zarda

171. Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They are Already Trying to Do*, 84 U. CHI. L. REV. 177, 206 (2017); see also Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1318 (2018) (Congressional “drafters do not consult dictionaries when drafting”).

172. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 574 (2013).

173. ROBERT W. GORDON, *TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW* 367 (2017). With regard to the view that a wife was her husband’s property, recall Representative Katherine St. George’s statement during the 1964 House debates over the sex amendment to Title VII: “women were chattels” who “belonged, first of all, to their fathers; then to their husbands . . .” 110 CONG. REC. 2581 (statement of Rep. St. George); see *supra* note 39 and accompanying text.

174. Francis J. Mootz III, *Judging Well*, 11 WASH. U. JUR. REV. 1, 26 (2018).

175. 883 F.3d 100 (2d Cir. 2018) (en banc).

176. *Id.* at 108 (bracket and citation omitted).

brought a Title VII lawsuit alleging that he was fired because he failed to conform to male sex stereotypes when he referred to his sexual orientation. Granting summary judgment to the employer, the district court concluded that Zarda¹⁷⁷ failed to establish a prima facie case of gender stereotyping. On appeal, a Second Circuit panel held that under the court's precedents¹⁷⁸ Zarda's sexual-orientation discrimination claim was not cognizable.¹⁷⁹ After rehearing en banc, the court affirmed in part, vacated in part, and remanded the case to the district court.

Chief Judge Robert A. Katzmann's majority opinion focused on judicial precedent and the text of Title VII, in particular the phrase "because of sex" and Section 703(m)'s "motivating factor" causation standard.¹⁸⁰ He observed that the Supreme Court has held that Title VII prohibits discrimination on the basis of sex itself, as well as "traits that are a function of sex, such as life expectancy . . . and nonconformity with gender norms . . ." ¹⁸¹ Citing *Oncale*, the Chief Judge reasoned that application of the statute to such traits is consistent with the Court's view that Title VII covers both the principal evils with which Congress was concerned in 1964, as well as "reasonably comparable evils" meeting the statute's requirements.¹⁸²

Chief Judge Katzmann then determined that the "most natural reading" of Title VII's sex discrimination ban "is that it extends to sexual orientation . . . because sex is necessarily a factor in sexual orientation."¹⁸³ Operationalizing the *Black's Law Dictionary's* definition of "sexual orientation" (a "person's predisposition or inclination toward sexual activity or behavior with other males or females")¹⁸⁴ and citing Judge Flaum's *Hively* concurrence,¹⁸⁵ Chief Judge Katzmann opined that identifying a person's sexual orientation requires knowledge of that person's sex and the sex of the person he or she is attracted to; that double delineation led him to conclude that "sexual orientation is a function of sex and sex is a protected characteristic under Title VII . . ." ¹⁸⁶

Chief Judge Katzmann turned to the argument made by Judge Sykes in her *Hively* dissent: that it is not remotely plausible that in 1964 a reasonable person competent in the English language would have understood that Title VII's sex discrimination

177. After filing suit, Zarda died in a jumping accident and the executors of his estate substituted as plaintiffs. *Id.* at 107 n.1.

178. See *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), *overruled by Zarda*, 883 F.3d 100; *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), *overruled by Zarda*, 883 F.3d 100; see also *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring) (expressing his view that the court should revisit *Simonton* and *Dawson* "especially in light of the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued").

179. See *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017), *rehearing en banc granted* May 25, 2017, *aff'd in part, vacated in part, and remanded*, 883 F.3d 100 (2d Cir. 2018) (en banc).

180. See *Zarda*, 883 F.3d at 112; *supra* note 132.

181. *Zarda*, 883 F.3d at 112 (citations omitted).

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

183. *Id.*

184. *Id.* at 113 (quoting BLACK'S LAW DICTIONARY (10th ed. 2014)).

185. *Id.* (citing *Hively*, 853 F.3d at 358 (Flaum, J., concurring)); see *supra* note 166 and accompanying text.

186. *Zarda*, 883 F.3d at 113.

ban also prohibited sexual-orientation discrimination.¹⁸⁷ As did Chief Judge Wood in *Hively*, Chief Judge Katzmann responded that the same could be said of other forms of discrimination initially believed to fall outside of the statute's protective umbrella and "not necessarily obvious from the face of the statute[,]"¹⁸⁸ such as sexual harassment and unlawful hostile work environments. As Congress cannot anticipate "the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language Congress used."¹⁸⁹

Dissenting Judge Gerard E. Lynch's analysis was premised on his understanding of the legislative commitment to the principles of the enacted words chosen by Congress, "illuminated by an understanding of the central public meaning of the language used in the statute at the time of its enactment."¹⁹⁰ Looking beyond the legislative history of the Title VII sex amendment¹⁹¹ to the broader political and social history of that provision, he argued that the sex discrimination ban "was intended to eliminate workplace inequalities that held women back from advancing in the economy," just as the statute sought to protect African Americans and other racial, national, and religious minorities from workplace discrimination.¹⁹² The statutory language "would have been so understood" by members of Congress and "by any politically engaged citizen deciding whether to urge his or her representatives to vote for" the sex discrimination amendment.¹⁹³ On the eve of the passage of historic legislation addressing racial discrimination against African Americans "women in effect stood up and said 'us, too,' and Congress agreed."¹⁹⁴

Judge Lynch's understanding of the "central public meaning" of Title VII at the time of its enactment introduces extratextual elements into the interpretive calculus: congressional intent, the political and social history of the sex discrimination amendment, the understanding of Members of Congress as well as politically engaged citizens (who they are is not specified), and congressional agreement with women who said (in effect and not in actuality) "us, too." Judge Lynch's focus and reliance on congressional intent is reminiscent of subjective intentionalism discredited by Justice Scalia and others,¹⁹⁵ and the other elements he mentions are

187. *Id.* at 114; *see supra* note 160 and accompanying text.

188. *Zarda*, 883 F.3d at 114.

189. *Id.* at 115 (citation omitted).

190. *Id.* at 144 (footnote omitted) (Lynch, J., dissenting); *see also id.* at 143 (referring to the "fundamental *public* meaning of the language of the Civil Rights Act") (emphasis in original). Judge Lynch also noted that the political context of proposed legislation and the way that language is or is not used in public debate can be helpful in understanding statutory meaning. *See id.* at 144 n.8.

191. *See supra* Part I.

192. *Zarda*, 883 F.3d at 145 (Lynch, J., dissenting).

193. *Id.*

194. *Id.*

195. *See* SCALIA & GARNER, *supra* note 111, at 30 ("describing the interpretive exercise as a search for 'intent' inevitably causes readers to think of *subjective* intent, as opposed to the objective words that the drafters agreed to in their expression of rights and duties") (emphasis in original); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1259 (1999) (intentionalism has been discredited); Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107,

rife with opportunities for interpreter discretion and judicial creativity not tethered to the language of the statute itself at the time of its enactment.

Responding to Chief Judge Katzmann's observation that Title VII prohibits certain conduct and practices not contemplated by Congress when the statute was enacted in 1964, Judge Lynch argued that unanticipated consequences do "not support extending Title VII by judicial construction to protect an entirely different category of people."¹⁹⁶ Outlawing sexual harassment and hostile work environments says nothing about whether the statute covers discrimination on other bases, he contended. The "political reality" is that Title VII does not mandate equal protection in the workplace; rather, the statute prohibits discrimination based on specified categories and classifications. Groups that successfully persuaded a majority of Congress that they should be protected from discriminatory treatment were included in the protected categories listed in the statute; those who did not achieve that political goal were not.¹⁹⁷ Thus, he hypothesized, if Representative Smith's "sex" amendment had been defeated Title VII would have only provided workplace protection on the basis of race, color, religion, or national origin. "But it would not have protected women," a fact that would not have changed "without legislative action."¹⁹⁸ "Congress is permitted to choose what types of social problems to attack and by which means"; in 1964, it did not choose to prohibit sexual-orientation discrimination.¹⁹⁹

This counterfactual is not helpful. We know that Representative Smith's amendment was not defeated and that Congress chose to prohibit discrimination "because of . . . sex." The legal meaning of that phrase has not been frozen in amber such that cases unenvisaged and unanticipated in 1964 (for example, sexual harassment and hostile work environment claims) are beyond the statute's scope and reach.

3. *Bostock v. Clayton County Board of Commissioners*

The Eleventh Circuit's decision in *Bostock v. Clayton County Board of Commissioners*²⁰⁰ reviewed a district court's dismissal of Gerald Lynn Bostock's sexual-orientation discrimination claim. In a four-paragraph per curiam opinion, the appeals court agreed with the district court that the case was governed by the Fifth Circuit's pre-*Price Waterhouse* 1979 decision in *Blum v. Gulf Oil Corporation* holding that "[d]ischarge for homosexuality is not prohibited by Title VII"²⁰¹

110 (1995) (intentionalism "has long been discredited by scholars").

196. *Zarda*, 883 F.3d at 145 (Lynch, J., dissenting).

197. *See id.* at 147.

198. *Id.*

199. *Id.* at 148.

200. 723 F. App'x 964 (11th Cir. 2018) (per curiam), *reh'g en banc denied*, 894 F.3d 1335 (11th Cir. 2018).

201. 597 F.2d 936, 938 (5th Cir. 1979) (per curiam). *Blum* was decided by the Eleventh Circuit's predecessor, the United States Court of Appeals for the Fifth Circuit. The Eleventh Circuit adopted as binding precedent all decisions of the Fifth Circuit issued before the close of business on September 30, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Blum's binding status was also recently confirmed by the Eleventh Circuit's decision in *Evans v. Georgia Regional Hospital*.²⁰²

B. Gender Nonconformity Discrimination

1. Hively

Viewing the sexual-orientation discrimination issue through the lens of gender nonconformity law, Chief Judge Wood wrote that Kimberly Hively “represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual.”²⁰³ That employers may not lawfully police the boundaries of behaviors acceptable for women was the critical point made by the Supreme Court in *Price Waterhouse v. Hopkins*²⁰⁴ and by the Seventh Circuit in a 1971 decision wherein the court stated that Title VII applies to the “entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”²⁰⁵ Chief Judge Wood explained that in both of those cases the challenged employer actions did not affect every female employee. Likewise, a policy discriminating 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

202. 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017). The *Evans* court deemed itself bound by *Blum* unless and until that decision was overruled by the Eleventh Circuit or the Supreme Court. *Id.* at 1255. Judge William H. Pryor, Jr., concurring, opined that although plaintiffs alleging gender nonconformity discrimination will often experience sexual-orientation discrimination, under Title VII the only question asked is whether the individual experienced discrimination for deviating from a gender stereotype. Citing two magazine articles referring in the titles to the authors' choice to be gay, Judge Pryor wrote, “Some gay individuals adopt what various commentators have referred to as the gay ‘social identity’ but experience a variety of sexual desires.” *Id.* at 1259 (Pryor, J., concurring) (citing E.J. Graff, *What's Wrong with Choosing to Be Gay?*, NATION (Feb. 3, 2014), <https://www.thenation.com/article/whats-wrong-choosing-be-gay/> [<https://perma.cc/M787-ML3A>]). Drawing a line between the behavior and status of a person claiming gender nonconformity discrimination, Judge Pryor argued that *Price Waterhouse* concerned behavior and not status. “Status-based protections must stem from a separate doctrine or directly from the text of Title VII.” *Id.* at 1260. The statute's enumeration of protected characteristics does not include sexual orientation and the argument that that status should be a protected class should be pressed in Congress and not in courts. *See id.* at 1260–61. Judge Pryor's colleague, Judge Robin S. Rosenbaum, pointed out that his arbitrary line between behavior and status would protect an “outwardly lesbian plaintiff” but not a “lesbian who is private about her sexuality.” *Id.* at 1267 (Rosenbaum, J., concurring in part and dissenting in part). The employer “smart enough to say only that it thought that the employee was a lesbian” could fire a female employee perceived to be a lesbian without identifying the basis for that conclusion. *Id.* This behavior-status analysis does not “comport with the lived experiences of gay, lesbian, and bisexual persons” and creates “‘fictional gays’ to justify excluding LGB people from Title VII's protections.” Anthony Michael Kreis, *Against Gay Potemkin Villages: Title VII and Sexual Orientation Discrimination*, 96 TEX. L. REV. ONLINE 1, 8 (2017).

203. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017).

204. 490 U.S. 228, 258 (1989); *see supra* Section I.C.

205. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

someone of a given sex.”²⁰⁶ When an employer acts on those assumptions it takes into account and has reacted to “the victim’s biological sex (either as observed at birth or as modified, in the case of transsexuals)”²⁰⁷

Judge Sykes, dissenting, argued that *Price Waterhouse* only held that “sex stereotyping” can be evidence of sex discrimination and did not establish such stereotyping as a “doctrine” or “theory”²⁰⁸ or an independent cause of action.²⁰⁹ Seeing nothing in *Price Waterhouse* casting doubt on the distinction between sex discrimination and sexual-orientation discrimination, she thought it plain that “heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all.”²¹⁰

It is true that Justice Brennan’s plurality opinion in *Price Waterhouse* did not expressly label his sex-stereotyping analysis as doctrinal or theoretical or as establishing an independent cause of action. That does not change the fact that he clearly and unequivocally declared that employers cannot discriminatorily assume or insist that employees match their employers’ stereotypes.²¹¹ Nor does it invisibilize concurring Justice O’Connor’s conclusion in *Price Waterhouse* that Ann Hopkins proved that her employer’s sex stereotyping played a significant role in the decision not to invite her into the partnership.²¹² For these reasons, Judge Sykes’s observations do not fairly call into question the Court’s three-decades-old precedent as applied to the sexual-orientation discrimination issue.²¹³

2. Zarda

Also viewing the sexual-orientation discrimination issue through the gender-stereotyping/nonconformity lens, Chief Judge Katzmann argued that sexual-orientation discrimination is “almost invariably rooted in stereotypes about men and women.”²¹⁴ Applying *Price Waterhouse*, he concluded that when “‘an employer acts on the basis of a belief that men cannot be attracted to men, or that they must not be,’ but takes no action against women who are attracted to men, the employer ‘has acted on the basis of gender.’ . . . The gender stereotype at work here is that ‘real’ men should date women, and not other men.”²¹⁵

206. *Hively*, 853 F.3d at 346.

207. *Id.* at 346–47.

208. *Id.* at 369 (Sykes, J., dissenting). *But see* *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (referring to the *Price Waterhouse* “sex-stereotyping theory”); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (noting the *Price Waterhouse* “theory of sex stereotyping”).

209. *Hively*, 853 F.3d at 369 (Sykes, J., dissenting).

210. *Id.* at 370.

211. *See supra* note 122 and accompanying text.

212. *See supra* note 126 and accompanying text.

213. For more on these points, *see infra* notes 312–15 and accompanying text.

214. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 119 (2d Cir. 2018).

215. *Id.* at 120–21 (alterations omitted) (citations omitted) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)).

Amicus U.S. Department of Justice²¹⁶ argued that *Price Waterhouse* does not prohibit sex-stereotyping/sexual-orientation discrimination because women are treated no worse than men. Reading *Price Waterhouse* in conjunction with *Oncale*, Chief Judge Katzmann responded that *Price Waterhouse* “could not have defended itself by claiming that it fired a gender-nonconforming man as well as a gender-nonconforming woman any more than it could persuasively argue that two wrongs make a right.”²¹⁷ The two wrongs would doubly violate Title VII in that both men and women would be discriminated against on the basis of gender stereotypes.²¹⁸

Dissenting Judge Lynch fully accepted the view that discrimination based on “a normative belief about how *all* women *should be*” imposes different working conditions on men and women and is therefore prohibited by Title VII: the systematic disadvantaging of one sex is the “key element” in the finding that sexual stereotyping is sex discrimination.²¹⁹ But he did not agree that a homophobic employer’s stereotypes regarding men or women disadvantaged either sex. The homophobic employer who disapproves of the behavior of a class of persons including both men and women does not act on “a belief about what men or women ought to be or do; it is a belief about what *all* people ought to be or do—to be heterosexual and to have sexual attraction to or relations with only members of the opposite sex.”²²⁰ In his view, that kind of discrimination is not better or worse than other kinds of discrimination, but it is “something different from sex discrimination” and is therefore not prohibited by Title VII.²²¹

C. Associational Discrimination

Another rationale offered by the Seventh and Second Circuits in support of recognition of a Title VII sexual-orientation discrimination claim likened such discrimination to the prohibition and criminalization of interracial marriages in *Loving v. Virginia*.²²² In that canonical decision, issued three years after the enactment of Title VII, the Court invalidated Virginia’s white supremacist anti-miscegenation laws.²²³ In doing so, the Court rejected Virginia’s argument that those

216. The DOJ, supporting the employer, and the EEOC, supporting Zarda, submitted separate *amicus* briefs to the Second Circuit. *Id.* at 116 n.12.

217. *Id.* at 123.

218. *See id.* Chief Judge Katzmann also rejected the DOJ’s argument that an employer’s negative views about same-sex sexual attraction based not on gender but on its moral beliefs would not violate Title VII. That argument “merely begs the question by assuming that moral beliefs about sexual orientation can be disassociated from beliefs about sex. Because sexual orientation is a function of sex, this is simply impossible.” *Id.* at 122.

219. *Id.* at 158 (Lynch, J., dissenting). Disagreeing with Judge Lynch on this point, Chief Judge Katzmann noted that Title VII “does not ask whether a particular sex is discriminated against; it asks whether a particular ‘*individual*’ is discriminated against ‘because of such *individual’s* . . . sex.’” *Id.* at 123 n.23 (majority opinion).

220. *Id.* at 158 (Lynch, J., dissenting).

221. *Id.*

222. 388 U.S. 1 (1967).

223. “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” *Id.* at 11.

laws did not violate the Fourteenth Amendment to the United States Constitution²²⁴ since the interracial marriage proscription applied to both the African-American and white participants in the marriage. The “fact of equal application does not immunize the statute from the very heavy burden of justification” required by the Equal Protection Clause when government draws racial lines.²²⁵

1. *Hively*

Chief Judge Wood, invoking *Loving*, observed, “society understands now” that anti-miscegenation laws “are (and always were) inherently racist.”²²⁶ She compared interracial marriage bans and discrimination on the basis of sexual orientation: an African American discriminated against because of his or her marriage to a white person would not have been discriminated against if he or she had married an African American; a woman who had or preferred intimate relations with a woman would not be discriminated against if she had or preferred such a relationship with a man.²²⁷ In the racial discrimination and Title VII context, courts have applied the associational discrimination theory in holding that employers engaging in such conduct unlawfully discriminated on the basis of race.²²⁸ In the sexual-orientation discrimination and Title VII context, courts should likewise apply the theory and hold that an adverse action based on the employer’s disapproval of same-sex associations discriminates against a plaintiff-employee because of her sex.

Disagreeing with Chief Judge Wood’s invocation of *Loving*,²²⁹ Judge Sykes argued that the inherently racist anti-miscegenation laws at issue in *Loving* are different from sexual-orientation discrimination that is “not inherently *sexist*. No one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex.”²³⁰ This view, in the words of Professor Brian Soucek, is

224. *Id.* at 12; see U.S. CONST. amend. XIV, § 1.

225. *Loving*, 388 U.S. at 9; see also *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (“Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . .”).

226. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 348 (7th Cir. 2017).

227. See *id.* at 349; see also Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 5 (1992).

228. See *Hively*, 853 F.3d at 348 (quoting *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008)) (“[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s own race”); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (a plaintiff’s discrimination claim “based upon an interracial marriage or association” alleges, “by definition, that he has been discriminated against because of his race”); see also *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) (assuming for the sake of argument that an associational race discrimination claim is actionable where white employees brought a Title VII action alleging that they were subjected to a hostile work environment because they associated with African-American coworkers).

229. As did Judge Posner: in his view, *Loving* “had nothing to do with the recently enacted Title VII.” *Hively*, 853 F.3d at 356 (Posner, J., concurring).

230. *Id.* at 368 (Sykes, J., dissenting). But see *Zarda v. Altitude Express, Inc.*, 883 F.3d

“astonishingly, flamboyantly wrong.”²³¹ As he notes, “it would be nearly impossible even to glance at the queer and gender theory or antidiscrimination scholarship of the last two decades without encountering the notion that sexual orientation discrimination has something to do with the subordination of women.”²³² Sexism is “the ideology of male supremacy and superiority over women,”²³³ and men and boys use homophobic slurs to establish and enforce hierarchies in which women are at the bottom.²³⁴ In both the white-supremacist anti-miscegenation and male-supremacist sexual-orientation contexts, discrimination is triggered and fueled by disapproval of certain associations and relationships.

2. Zarda

Zarda agreed with the Seventh Circuit that employment discrimination based on an employee’s associations is discrimination on the basis of sex. The court had previously recognized associational discrimination as a violation of Title VII’s race discrimination prohibition in *Holcomb v. Iona College*²³⁵ as have other federal courts of appeals.²³⁶ In addition, the Sixth and Seventh Circuits have extended the theory beyond race to claims of color, religion, sex, and national origin.²³⁷ Agreeing with those decisions, Chief Judge Katzmann declared, “we now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.”²³⁸ He explained that if a male employee who is married to a man is fired because his employer disapproves of same-sex marriage, the employee “has suffered associational discrimination based on his own sex” because the employer was motivated by the fact that the employee is a man instead of a woman.²³⁹ The employer cannot avoid that conclusion by requiring men and women to refrain from same-sex relationships and attractions. If an African-American employee and his white wife, who was also an employee, were both fired for their association, it “is unthinkable” that the discrimination “would be excused because two employees of different races were both victims of an anti-miscegenation

100, 160 (2d Cir. 2018) (Lynch, J., dissenting) (“It is certainly plausible to me that the ‘deep roots’ of hostility to homosexuals are in some way related to the same sorts of beliefs about the proper role of men and women in family life that underlie at least some employment discrimination against women.”); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 830 F.3d 698, 711 (7th Cir. 2016) (“There is, of course, a considerable overlap in the origins of sex discrimination and homophobia, and so it is not surprising that sexist and homophobic epithets often go hand in hand.”).

231. Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J. F. 115, 121 (2017).

232. *Id.*; see also *id.* at 123 n.36.

233. Gila Stopler, “A Rank Usurpation of Power”—*The Role of Patriarchal Religion and Culture in the Subordination of Women*, 15 DUKE J. GENDER L. & POL’Y 365, 380 (2008).

234. See Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 965 (2014).

235. 521 F.3d 130 (2d Cir. 2008).

236. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 124 (2d Cir. 2018).

237. See *id.* at 124–25 and cases cited therein.

238. *Id.* at 125.

239. *Id.*

workplace policy. The same is true of discrimination based on sexual orientation.”²⁴⁰ Reinforcing this conclusion with the reasoning of *Loving*,²⁴¹ the Chief Judge extended the *Loving* court’s rejection of the equal application defense²⁴² to associations based on sex.²⁴³

Amici supporting the employer argued that *Loving* and *Holcomb* should not be applied to same-sex relationships because anti-miscegenation policies are motivated by racism while sexual orientation discrimination is not rooted in sexism. And amici supporting Zarda contended that “sexual orientation discrimination has deep misogynistic roots.”²⁴⁴ Chief Judge Katzmann did not resolve this disagreement because the employer’s amici did not identify any cases limiting the scope of Title VII’s sex discrimination ban to “discrimination motivated by what would colloquially be described as sexism.”²⁴⁵ In his view, that approach is foreclosed by the *Oncale* court’s recognition of a cause of action for male-on-male harassment which is “well outside the bounds of what is traditionally conceptualized as sexism,” and by the *Manhart* court’s invalidation of a policy requiring female employees to make higher pension contributions than their male counterparts because women generally live longer than men, even though “some people might not describe this policy as sexist.”²⁴⁶ In any event, the position that sexual-orientation discrimination “does not evince conventional notions of sexism . . . is not a legitimate basis for concluding that it does not constitute discrimination ‘because of . . . sex.’”²⁴⁷

Additionally, Chief Judge Katzmann observed that the Supreme Court has rejected the fallback argument made by opponents of the associational discrimination approach—that such discrimination can be based only on acts and not on the status of sexual orientation.²⁴⁸ That argument fails to comprehend that a Title VII claim originates in a challenge to employer discrimination based on an individual’s status (a protected characteristic) and not an act.²⁴⁹

Presenting a different analysis of the associational discrimination theory, Judge Lynch’s dissent opined that the associational discrimination at issue in *Loving* and *Holcomb* “was a product of bigotry against a single race by another” that “is expressly prohibited in employment by Title VII.”²⁵⁰ Sexual-orientation discrimination is not the same, he argued, as Donald Zarda did not and could not plausibly allege that his employer discriminated against him because the employer “had something against *men*, and therefore discriminated not only against men, but also against anyone, male or female, who associated with them.”²⁵¹ He maintained

240. *Id.* at 125–26.

241. “Constitutional cases like *Loving* ‘can provide helpful guidance in the statutory context’ of Title VII.” *Id.* at 126 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009)).

242. *See supra* notes 221–24 and accompanying text.

243. *See Zarda*, 883 F.3d at 126.

244. *Id.*

245. *Id.*

246. *Id.* at 127.

247. *Id.*

248. *See id.*

249. *See id.* at 128.

250. *Id.* at 159 (Lynch, J., dissenting).

251. *Id.* at 160.

that an employer discriminating against gay men is hostile to gay men and not men generally, and the animus runs, not against a protected group as in race cases, but “against an (alas) *unprotected* group to which they belong: other gay men.”²⁵²

The flaw in this analysis is Judge Lynch’s focus on the person with whom the plaintiff associates instead of the plaintiff who suffered discrimination because the employer did not approve of the association. The employer’s animus in the racial discrimination context did not run “against all black people (or all white people) but against people marrying persons of a different race. “That maps squarely onto [Zarda’s] case where the prejudice is not against all men, but people being attracted to persons of the same sex.”²⁵³

Judge Lynch argued, further, that his analysis of associational discrimination is not foreclosed by *Oncale*, for he was not maintaining that Title VII prohibits only those practices with which the framers of the statute might have been principally concerned. He was not surprised that courts have interpreted Title VII to prohibit sexual harassment as that conduct obstructs women’s entry into and advancement in the workplace.²⁵⁴ “[I]t does not matter whether the victim is male or female”; what matters is that the victim “is selected by his or her sex” and is disadvantaged because of his or her membership in the protected class.²⁵⁵ This “is not a question of what is traditionally conceptualized as sexism It is a question of the public meaning of the words adopted by Congress in light of the social problem it was addressing when it chose those words.”²⁵⁶

Judge Lynch’s contention that sexual harassment is not a question of sexism is troubling. Sexual harassment is more about sexism than sex,²⁵⁷ includes a number of forms of sexism and abuse,²⁵⁸ and “is a technology of sexism. It is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms”²⁵⁹ Admittedly, sexism may not be an aspect of the factual backdrop of every harassment claim. But if harassment meets Title VII’s “because of sex” requirement, “why the harassment was perpetuated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point.”²⁶⁰

252. *Id.*

253. *Id.* at 126 n.28 (majority opinion).

254. *See id.* at 161 (Lynch, J., dissenting).

255. *Id.* at 161–62.

256. *Id.* at 162.

257. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 22 (2018).

258. *See* Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 20 (2018).

259. Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997); *see also* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1220 (1998) (“[S]exual harassment as a practice [is] rooted in a struggle between men and women in the workplace that perpetuates both male control and the primacy of conventionally masculine norms, that genders both men and women through a variety of dynamics commensurate with their individual and subgroup based variations, and that interferes with the capacity both to define oneself as a subject to and to seek less stereotypic or confining roles.”).

260. *Doe v. City of Belleville*, 119 F.3d 563, 578 (7th Cir. 1997), *cert. granted and*

The *Hively* and *Zarda* majorities and dissents reached contrary conclusions about the meaning of “because of sex” as applied to plaintiffs’ claims that they were discriminated against because of their sexual orientation. These differences are the product of markedly different interpretive approaches yielding, unsurprisingly, conflicting statutory interpretations. Recognizing an anti-LGB claim, the *Hively* and *Zarda* side of the interpretive divide looked to statutory text and juridical and doctrinal developments occurring over the past fifty-five years. Declining to recognize the claim, the dissenting judges on the other side of the divide insisted that the original or central public meaning of “sex” in 1964 is the unchanged meaning of “sex” today. As that meaning does not refer to or include “sexual orientation,” the Title VII phrase “because of sex” does not encompass anti-LGB discrimination. And the Eleventh Circuit’s not-actionable position in *Bostock*, adhering to binding circuit precedent, did not engage with the various rationales offered and disputed in *Hively* and *Zarda*. This split in authority will remain absent Supreme Court resolution of these conflicting constructions of Title VII.

IV. TRANSGENDER DISCRIMINATION: BECAUSE OF SEX?

A. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.

Aimee Stephens, assigned male at birth, lived and presented as a man while working at R.G. & G.R. Harris Funeral Homes. Her employment was terminated after she informed the funeral home’s director that she intended to transition from male to female and would present and dress as a woman while at work. Stephens was fired, according to the director, because she “was no longer going to represent himself as a man. He wanted to dress as a woman.”²⁶¹ The EEOC filed a complaint alleging that the employer violated Title VII by terminating Stephens’s employment because of her transgender and/or transitioning status and refusal to conform to sex-based stereotypes. The district court granted the employer’s motion to dismiss the transgender discrimination claim on the ground that transgender status is not a protected trait under Title VII but denied the motion to dismiss the sex stereotyping/gender nonconformity claim.²⁶² In deciding the parties’ cross-motions for summary judgment, the district court concluded that although there was direct evidence supporting Stephens’s sex-stereotyping claim, the Religious Freedom Restoration Act²⁶³ precluded the EEOC’s enforcement of Title VII.²⁶⁴

The Sixth Circuit, in an opinion by Judge Karen Nelson Moore, agreed with the district court that Stephens was fired because she failed to conform to the employer’s sex stereotypes. The appeals court disagreed, however, with the district court’s

judgment vacated, 523 U.S. 1001 (1998).

261. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 569 (6th Cir. 2018).

262. See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 595 (E.D. Mich. 2015).

263. See 42 U.S.C. §§ 2000bb(1)–(6) (2012).

264. See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837 (E.D. Mich. 2016), *aff’d in part, rev’d in part, and remanded*, 884 F.3d 590.

conclusion that Stephens could not alternatively pursue a discrimination claim based on her transgender and/or transitioning status.

With respect to the sex-stereotyping claim, Judge Moore was guided by the Sixth Circuit's decision in *Smith v. City of Salem*.²⁶⁵ The *Smith* court, basing its analysis on the Supreme Court's *Price Waterhouse* ruling, held that a transgender person who was subjected to adverse working conditions after "he began to express a more feminine appearance and manner on a regular basis" could sue the employer under Title VII because the challenged "discrimination would not have occurred but for the employee's sex."²⁶⁶ Firing Stephens because she "'wanted to dress as a woman' . . . falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid."²⁶⁷

The funeral homes argued that sex stereotyping violates Title VII only when it results in the disparate treatment of men and women. Not persuaded, Judge Moore pointed out that *Smith* did not ask whether transgender persons transitioning from male to female were treated differently than transgender persons transitioning from female to male; rather, the court asked whether a transgender person had been discriminated against because of the failure to conform to the employer's stereotype regarding how a man should look and behave.²⁶⁸ On that view, an employer's expectation of conformity by both male and female employees violates Title VII.²⁶⁹

With respect to the transgender/transitioning status claim, the EEOC and Stephens²⁷⁰ argued that transgender discrimination is always based on the gender stereotype that individuals will conform their behavior and appearance to their birth-assigned sex (for example, their dress and the name they use).²⁷¹ The employer countered that the Title VII word "sex" "refers to a binary characteristic for which there are only two classifications, male and female," which arise "in a person based on their chromosomally driven physiology and reproductive function," and that transgender status refers to a person's "self-assigned" gender identity and not their sex.²⁷²

For two reasons, Judge Moore concluded that Stephens and the EEOC had the better argument. First, it 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."²⁷³ Second, "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping."²⁷⁴ As a

265. 378 F.3d 566 (6th Cir. 2004).

266. *Id.* at 572, 574; *see also* Glenn v. Brumby, 663 F.3d 1312, 1320 (6th Cir. 2011) (holding that discrimination against an individual based on his or her gender nonconformity is sex-based discrimination under the Equal Protection Clause).

267. *Harris Funeral Homes*, 884 F.3d at 572.

268. *Id.* at 574; *Smith*, 378 F.3d at 572.

269. *See Harris Funeral Homes*, 884 F.3d at 574.

270. Stephens successfully moved to intervene in the appeal of the district court's decision because she was concerned that changed policy priorities in the federal government may have prevented the EEOC from fully representing her interests. *See id.* at 570.

271. *See id.* at 575.

272. *Id.* (quoting employer's brief).

273. *Id.*

274. *Id.* at 576.

transgender person is inherently gender nonconforming, discrimination on that basis imposes “stereotypical notions of how sexual organs and gender identity ought to align”; such discrimination cannot be disaggregated from discrimination on the basis of gender nonconformity.²⁷⁵

Judge Moore also rejected the employer’s physiology, reproductive, and self-assigned gender identity argument. “[T]he drafters’ failure to anticipate that Title VII would cover transgender status is of little interpretive value.”²⁷⁶ Governed as we are by the provisions of Title VII and not the principal concerns of legislators,²⁷⁷ congressional failure to foresee the case of transgender discrimination does not place that form of discrimination beyond the reach of the statute.²⁷⁸ As Judge Moore concluded, this argument is precluded by *Smith* and has been “eviscerated by *Price Waterhouse*.”²⁷⁹

Judge Moore considered an additional employer argument: transgender status is not unique to one biological sex as both biologically male and biologically female persons can be transgender.²⁸⁰ That is true, Judge Moore said, as biological sex and transgender status are not coterminous; however, “a trait need not be exclusive to one sex to nevertheless be a function of sex.”²⁸¹ As Chief Judge Katzmann explained in *Zarda*, Title VII asks not “whether a particular sex is discriminated against,” but “whether a particular ‘individual’ is discriminated against ‘because of such ‘individual’s’ . . . sex.’”²⁸² To reiterate, discrimination against an employee because of her transgender status takes into account her biological sex; therefore, that discrimination “necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be.”²⁸³

Accordingly, the court held that that the EEOC could pursue its claim that the employer discriminated against Stephens on the basis of her transgender status and transitioning identity.

B. Wittmer v. Phillips 66 Company

A recent Fifth Circuit decision, notable for its concurring opinion, warrants mention. *Wittmer v. Phillips 66 Company*²⁸⁴ considered Nicole Wittmer’s appeal of the district court’s dismissal of her suit alleging that her employer violated Title VII when it rescinded an offer of employment because of her identity as a transgender woman and her failure to conform to female sex stereotypes.²⁸⁵ Noting *Hively*, *Zarda*,

275. *Id.* at 576–77.

276. *Id.* at 577.

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

278. *See id.* (citing *Oncale*, 523 U.S. at 79).

279. *Harris Funeral Homes*, 884 F.3d at 578.

280. *See id.*

281. *Id.*

282. *Id.* (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 123 n.23 (2d Cir. 2018) (en banc) (plurality opinion)).

283. *Id.*

284. 915 F.3d 328 (5th Cir. 2019).

285. *See Wittmer v. Phillips 66 Co.*, 304 F. Supp. 3d 627, 632, 637 (S.D. Tex. 2018), *aff’d on other grounds*, 915 F.3d 328 (5th Cir. 2019).

and *Harris Funeral Homes*, the district court assumed that Title VII protected Wittmer.²⁸⁶ However, summary judgment was granted to the employer on the ground that Wittmer failed to establish a prima facie case of sex discrimination.²⁸⁷

When the case was appealed to the Fifth Circuit, the employer did not take a position on the question whether Title VII prohibits transgender discrimination.²⁸⁸ Judge James C. Ho's opinion for the court affirmed the district court's ruling that Wittmer had not demonstrated a prima facie case of sex discrimination.²⁸⁹ He also concluded that binding Fifth Circuit precedent in *Blum v. Gulf Oil Corp.*²⁹⁰ foreclosed Wittmer's claim.²⁹¹ Although *Blum* held that "[d]ischarge for homosexuality is not prohibited by Title VII,"²⁹² Judge Ho applied that sexual-orientation discrimination ruling to Wittmer's separate and distinct transgender discrimination claim.²⁹³

Judge Ho also issued a separate concurring opinion explaining why, in his view, the court's precedent is "correct as matter of faithful interpretation."²⁹⁴ "As a matter of ordinary usage, the term 'sex,' of course, does not mean 'sexual orientation' or 'transgender status.'"²⁹⁵ Citing Judge Sykes's *Hively* dissent, he stated that in 1964 and today the word "sex" means biologically male or female.²⁹⁶

Asking what it means to discriminate because of sex, Judge Ho set forth out two competing schools of thought: (1) the longstanding view that Title VII prohibits employment discrimination favoring men over women, or vice versa, and (2) what he characterized as the recently adopted view that the statute requires employer blindness to an individual's sex.²⁹⁷ He applied his schools of thought to a subject having nothing to do with the case before the court: separate bathrooms for men and women.²⁹⁸ Under his anti-favoritism approach, separate bathrooms are lawful

286. *See Wittmer*, 304 F. Supp. 3d at 634.

287. *Id.*

288. *See Wittmer*, 915 F.3d at 331. Taking no position on whether the district court's order should be affirmed or reversed, *amici* EEOC and other organizations asked the Fifth Circuit to hold that transgender discrimination violates Title VII. *See id.*

289. *See id.* at 330.

290. 597 F.2d 936 (5th Cir. 1979) (per curiam).

291. *Wittmer*, 915 F.3d at 330.

292. 597 F.3d at 938.

293. On the difference between sexual orientation and transgender, see *supra* note 14 and accompanying text; *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018) (stating that sexual-orientation discrimination is not the same as transgender discrimination); Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 925 (2019) ("Gender identity is conceptually distinct from sexual orientation. Nonbinary people have a diverse array of sexual orientations.").

294. *Wittmer*, 915 F.3d at 333 (Ho, J. concurring).

295. *Id.*

296. *Id.* at 334.

297. *See id.*

298. Of all the topics available to illustrate the difference between the schools of thought he presents, Judge Ho chose restrooms, the subject of a debate that "has engendered political controversy over claims for recognition of the gender identities of transgender people who are asking only to use the male or female facilities." Clarke, *supra* note 293, at 981; *see also id.* ("Because their gender identities may not accord with norms, the presence of a nonbinary

because the privacy of both sexes is protected; under his blindness theory, separate bathrooms are unlawful because they are not blind to sex.²⁹⁹

Judge Ho's schools of thought diverged on the issue of transgender and sexual-orientation discrimination. Under the anti-favoritism theory, employer discrimination against both transgender men and transgender women does not discriminate on the basis of sex since men would not be favored over women, or vice versa; rather, nontransgender persons would be favored over transgender persons.³⁰⁰ And discrimination against either gay men or lesbian women favors not men over women, but straight men and women over gay men and lesbian women. By contrast, he reasoned that under his blindness theory, Title VII would prohibit both transgender and sexual-orientation discrimination as "it would not matter that the company isn't favoring men over women, or women over men. All that matters is that company policy treats people differently based on their sex: Because only women, not men, may identify as women—and only women, not men, may marry men—just as only women, not men, may use women's bathrooms."³⁰¹

Asking how should "a dutiful textualist" should proceed, Judge Ho declared that "the traditional interpretation should prevail."³⁰² In 1964, there was no serious contention that "the public meaning and understanding of Title VII included sexual orientation or transgender discrimination,"³⁰³ and he argued that today's judicial consensus confirms that view. Distinguishing the original public meaning of Title VII from the subjective intent of the legislators, he expressed his understanding that those opposing the traditional view argue that members of the 1964 Congress would not have expected that the statute would prohibit sexual harassment or same-sex sexual harassment.³⁰⁴

But for originalists, the point is not whether members of Congress subjectively intended that result—rather, the point is whether they *should* have expected it, in light of the words of the statute as they were generally understood at the time. In short, our lodestar is original public meaning, not original intent.³⁰⁵

He argued, further, that no one should be surprised that Title VII, "drafted to eradicate sex discrimination in the workplace," would be interpreted by the Supreme Court to prohibit sexual harassment.³⁰⁶ "That of course says nothing about whether Title VII also forbids sexual orientation and transgender discrimination."³⁰⁷

person in either the men's or women's restroom may result in harassment or even violence.").

299. *Wittmer*, 915 F.3d at 334 (Ho, J., concurring).

300. *See id.*

301. *Id.*

302. *Id.*

303. *Id.* at 334–35.

304. *See id.* at 335 n.1.

305. *Id.*

306. *Id.* But see Paul, *supra* note 86, at 346 (stating that "the members of . . . Congress would have been quite surprised to learn" that sex discrimination included sexual harassment).

307. *Wittmer*, 915 F.3d at 335 (Ho, J., concurring).

Judge Ho labels his approach as original public meaning originalism, the current predominant approach among originalist academics and judges.³⁰⁸ But his focus on what members of Congress should have expected in 1964 is actually a different variant of originalism—original expected applications originalism. The original public meaning of a text “is one thing; expectations about how the text will or should be applied to particular cases or issues is another.”³⁰⁹ Regarding his argument that no one should be surprised by the Supreme Court’s holding that sexual harassment is sex discrimination, Judge Ho may be surprised that his own approach can yield an interpretation resulting in the recognition of anti-LGBTQ discrimination claims. The (his) traditional view of “sex” as male or female is also the view of “sex” in the court’s sexual harassment decisions³¹⁰ and in the recent appeals courts’ decisions holding that anti-LGBTQ claims are actionable. This raises the obvious question of why the sex-as-biology construction of that statute should not also govern in the anti-LGBTQ discrimination context.³¹¹

Turning to *Price Waterhouse* and echoing Judge Sykes’s *Hively* dissent, Judge Ho identified what he perceived to be a problem with the court’s sex stereotyping analysis: *Price Waterhouse* did not make sex stereotyping a *per se* violation of Title VII as Justice Brennan’s plurality opinion spoke only of prohibiting the “disparate treatment of men and women resulting from sex stereotypes.”³¹² It is true that Justice Brennan’s plurality opinion in *Price Waterhouse* did not expressly state that sex stereotyping is a *per se* violation of Title VII. He made clear, however, that while stereotypical workplace remarks do not inevitably establish that gender played a part in an employment decision, such remarks could be evidence that gender did in fact play a part.³¹³ And Judge Ho’s observation that Justice Brennan was only speaking of disparate treatment resulting from sex stereotypes simply restates what Justice Brennan said in *Price Waterhouse*. Recall that Justice Brennan instructed that the question to be answered on remand was the but-for, disparate-treatment inquiry: would Ann Hopkins have been criticized as sharply or at all if she had been a man?³¹⁴ Given the Justice’s clearly stated view that sex stereotyping can be evidence of

308. See Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 473 (2016).

309. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1637 (2017).

310. See *supra* Section I.B.

311. See Joanna L. Grossman & Grant Hayden, *Holy Dictum: Federal Judge Rejects Protection Against Transgender Discrimination in “Elegant Aside,”* JUSTIA VERDICT (Feb. 26, 2019), <https://verdict.justia.com/2019/02/26/holy-dictum-federal-judge-rejects-protection-against-transgender-discrimination-in-elegant-aside> [https://perma.cc/9ZJP-BFN5].

312. *Wittmer*, 915 F.3d at 339 (Ho, J., concurring) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251).

313. See *supra* note 123 and accompanying text.

314. See *supra* note 124 and accompanying text; see also *Lampley v. Mo. Comm’n on Human Rights*, 570 S.W.3d 16, 24 (Mo. 2019) (“Since *Price Waterhouse*, it is clear an employer who discriminates against ‘women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.’”) (quoting *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1040 (8th Cir. 2010)).

disparate treatment discrimination, Judge Ho has curiously branded as problematic something that is not.³¹⁵

Having issued a concurring (bordering on advisory) opinion to his own majority opinion, Judge Ho wrote that the case before him

does not simply concern sexual orientation and transgender discrimination. It affects every American who uses the restroom at any restaurant, buys clothes at any department store, or exercises at any gym. What's more, because federal statutes governing educational institutions employ language indistinguishable from Title VII, this debate also affects virtually every school, college, dormitory, athletic activity, and locker room in America.³¹⁶

This op-ed-like statement and the overreaching dicta and “elegant asides”³¹⁷ in Judge Ho’s maximalist concurring opinion lays down a marker in the current and ongoing debate over the legal protections afforded or not provided to LGBTQ persons in and beyond the workplace.

The contrast between *R.G. & G.R. Funeral Homes* and Judge Ho’s concurring *Wittmer* opinion could not be starker. Judge Moore, guided by the Supreme Court’s *Price Waterhouse* decision and Sixth Circuit precedent, persuasively established that transgender discrimination constitutes gender nonconformity discrimination and sex stereotyping that would not have occurred but for the employee’s sex. That the

315. Judge Ho also quoted the following sentence from Justice O’Connor’s statement in her *Price Waterhouse* concurrence: “What is required . . . is direct evidence that decisionmakers placed *substantial negative reliance* on an illegitimate criterion in reaching their decision.” *Whittmer*, 915 F.3d at 339 (Ho, J., concurring). His opinion fails to note that in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 91 (2003), the Court held that direct evidence is not required in order to prove employment discrimination in a mixed-motives case. Nor does he indicate that Justice O’Connor’s position—that a plaintiff must demonstrate that an illegitimate factor played a substantial role in the employment decision—was legislatively overruled by the Civil Rights Act of 1991’s requirement that a plaintiff prove that an unlawful reason was a motivating (not a substantial) factor in the challenged employment decision. *See supra* note 132 and accompanying text.

316. *Id.* at 337–38; *see also id.* at 341 (arguing that the people will lose confidence when courts surprise them “with rulings that bear no resemblance to our common language” set forth in legislation and expressing his concern that “the people are losing faith in their institutions—and that our courts are giving the people reason to do so”).

317. Judge Patrick E. Higginbotham concurred in the dismissal of *Wittmer*’s claim. He pointed out that *Blum* was decided decades before *Lawrence v. Texas*, 539 U.S. 558 (2003), wherein the Court struck down laws criminalizing same-sex sexual conduct, and that after *Lawrence* the Fifth Circuit has not relied on *Blum*. *See Wittmer*, 915 F.3d at 333 (Higginbotham, J., concurring). As neither party questioned that *Blum* was binding precedent, Judge Higginbotham thought that the court wisely did not “reach here to resolve *Blum*’s endurance or the question of whether Title VII today proscribes discrimination against someone because of sexual orientation or transgender status. We do not because we cannot, even with elegant asides.” *Id.*

drafters of Title VII did not foresee that the statute’s “because of sex” provision would cover transgender discrimination was neither here nor there given post-1964 developments including *Price Waterhouse* and *Oncale*.³¹⁸

Judge Ho’s *Wittmer* concurrence gave primacy of place to his understanding of the original public meaning of the statutory text. As previously noted, he actually applied a different form of originalism—original expected applications—in suggesting that in 1964 members of Congress should have expected that Title VII’s words would be later interpreted to prohibit sexual harassment. In addition, his effort to problematize *Price Waterhouse*’s sex stereotyping analysis is, for reasons earlier noted, unpersuasive and unavailing.³¹⁹

CONCLUSION

In 1964, gays and lesbians “were, literally, considered psychopaths, criminals, and enemies of the people” and “presumptive felons”;³²⁰ it is thus not surprising that the 88th Congress did not mean to protect them from discrimination in employment. Fortunately, those mid-1960s views “no longer enjoy respectable support,”³²¹ a consequence of “profound changes within society—the constitutionalization of privacy rights, the Civil Rights Movement, the women’s rights movement, the LGBTQ rights movement, and the racial and gender integration of most workplaces and institutions,”³²² and the Supreme Court’s recognition of the constitutional right to marry a person of the same sex in *Obergefell v. Hodges*.³²³

Obergefell “creates a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.”³²⁴ That paradox would be eliminated by an affirmative answer to the question posed in this Article: Is anti-LGBTQ discrimination prohibited by Title VII’s discrimination “because of sex” proscription? Yes. That answer best comports with the text of Title VII’s sex discrimination provision as construed over the years by the Supreme Court and more recently by *Hively*, *Zarda*, and *R.G. & G.R. Funeral Homes*, and is the product of a jurisprudential approach that does not render invisible or irrelevant more than a half-century of significant legal developments in Title VII law and policy. Anti-LGBTQ discrimination is sex discrimination.

318. See *supra* notes 109–132 and accompanying text.

319. See *supra* notes 312–15 and accompanying text.

320. Eskridge, *supra* note 167, at 333, 336.

321. *Id.* at 336.

322. Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 853–54 (2019).

323. 135 S. Ct. 2584, 2608 (2015).

324. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 342 (7th Cir. 2017) (en banc) (quoting *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 714 (7th Cir. 2016)).