

## Acknowledging the Gender in Anti-Transgender Discrimination

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Title VII of the Civil Rights Act of 1964, the primary federal employment nondiscrimination statute, prohibits discrimination “because of,”<sup>1</sup> “based on,”<sup>2</sup> or “on account of”<sup>3</sup> race, color, religion, national origin, or sex. The Equal Employment Opportunity Commission (EEOC or “Commission”) has interpreted Title VII’s ban on sex discrimination to forbid discrimination against an employee or job applicant because the person is transgender.<sup>4</sup> Federal agency employers are bound by this conclusion in complaints taken up to the EEOC.<sup>5</sup> Courts should give this interpretation some measure of deference, and, regardless, it is correct. Older judicial arguments against such coverage either do not carry weight in light of current approaches to federal statutory interpretation or are facilely sophistic.<sup>6</sup> More recently voiced scholarly concerns or reservations about this interpretation of the Act, sometimes presented as parts of more theoretical inquiries, would provide inadequate reason to reject the doctrinal conclusion

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1. 42 U.S.C. § 2000e-2(a) (2012).

2. *Id.* at §§ 2000e-3(b), 2000e-16(a).

3. *Id.* at § 2000e-5(g)(2)(A) (referring to 42 U.S.C. § 2000e-3(a)).

4. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*10–11 (E.E.O.C. Apr. 20, 2012).

5. *See, e.g.*, Steven M. Ranieri, “*If at First You Don’t Succeed . . . : An Argument Giving Federal Agencies the Ability to Challenge Adverse Equal Employment Opportunity Commission Decisions in Federal Court*,” ARMY LAW., Sept. 2008, at 23, 23 (“Neither the originally enacted nor the amended versions of Title VII provide a mechanism for federal agencies to challenge the EEOC’s award of remedies in federal court. The Title VII and the EEOC implementing regulations act in concert to make EEOC decisions regarding both liability and remedies binding upon federal agencies.”). *But see id.* at 24 (arguing by extension of Supreme Court precedent “that adverse EEOC decisions are not binding against federal agencies when complainants seek compensatory damages”).

6. *See infra* notes 90–105 and accompanying text.

that anti-transgender discrimination categorically is sex discrimination under Title VII.<sup>7</sup>

By *transgender* or *trans*, I mean to include a broad range of people whose gender expression or whose gender identity, their inner sense of themselves as female or male (or, less often, as both or neither), differs from the sex to which they were assigned at birth.<sup>8</sup> In some cases, transgender persons may have had medical or surgical procedures to bring their bodies into alignment with their gender identity.<sup>9</sup> However, not all transgender people will need or want to medically or surgically transition.<sup>10</sup>

The EEOC is the federal agency chiefly responsible for enforcement of the nation's employment nondiscrimination laws, and it has concluded that anti-transgender discrimination is sex discrimination, which it held in a case brought by Mia Macy.<sup>11</sup> It was from the EEOC that Ms. Macy ultimately sought relief for the employment discrimination she believed she faced.<sup>12</sup> Ms. Macy had applied for a job with the Bureau of Alcohol, Tobacco, Firearms and Explosives, but the Bureau changed its mind about hiring her after learning that she was transitioning from male to female.<sup>13</sup> Macy formally complained to the Bureau, but it concluded that Macy's claim of anti-transgender discrimination did not state a claim for sex discrimination covered by Title VII.<sup>14</sup> Macy appealed to the EEOC, and in April 2012, the Commission unanimously ruled in her favor in *Macy v. Holder*.<sup>15</sup> Transgender

7. See *infra* notes 106–172 and accompanying text.

8. See TRANSGENDER RIGHTS xiv (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) (“Since about 1995, the meaning of *transgender* has begun to settle, and the term is now generally used to refer to individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.”).

9. See E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT’L J. TRANSGENDERISM 165, 170–71 (2011).

10. See *id.*

11. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, \*11 (E.E.O.C. Apr. 20, 2012); see also *id.* at \*11 n.16 (noting that “[t]he Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011 . . .”).

12. *Id.* at \*2.

13. *Id.* at \*1–2.

14. *Id.* at \*2. This account comes from the EEOC opinion. *Id.* at \*1–3. That opinion explains that its rendering of the facts is “taken from the EEO Counselor’s Report and the formal complaint of discrimination.” *Id.* at \*1 n.1. This Article makes no representations as to what the actual facts of the Bureau’s conduct were.

15. *Id.* at \*11; Dana Beyer et al., *New Title VII and EEOC Rulings Protect Transgender Employees*, TRANSGENDER LAW CENTER,

plaintiffs had won victories under Title VII before, but usually because they were able to demonstrate discrimination based on sex stereotyping in their particular factual circumstances.<sup>16</sup> Such an approach remains open after *Macy* and thus will continue to offer an additional avenue of protection for transgender workers. So too could a law like the proposed federal Employment Non-Discrimination Act expressly banning discrimination on the basis of gender identity or expression.<sup>17</sup> Independent of those other legal approaches, the *Macy* ruling makes clear the great reach of the sex discrimination prohibition in Title VII,<sup>18</sup> even if it is, as of this writing, one of only two extant published adjudications holding that anti-transgender discrimination is always sex discrimination under Title VII.<sup>19</sup>

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<http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf> (last visited Mar. 12, 2014).

16. See, e.g., *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653, 667 (S.D. Tex. 2008) (holding Title VII reached discrimination against transgender plaintiff whose gender expression was regarded by employer as not conforming to what employer perceived plaintiff's sex to be).

17. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (as passed by Senate, Nov. 7, 2013) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity . . .").

18. Title VII is law, and the aim of this Article is to embrace the interpretation of that law as forbidding anti-transgender discrimination and to demonstrate that the reasons some persons might prefer trans-specific laws against discrimination are not sufficient reasons to shrink from using the full sweep of Title VII. Space constraints preclude me from exploring the more academic question of which avenue of protection might, in some sense, be superior.

19. The district court ruled in *Ulane v. Eastern Airlines, Inc.* that discrimination against a trans person for transitioning was by definition sex discrimination, 581 F. Supp. 821, 825 (1983), but the Court of Appeals for the Seventh Circuit reversed, 742 F.2d 1081, 1084–85, 1087 (7th Cir. 1984).

*Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2008), suggested it might be time to revisit that issue ("[I]t may be time to revisit Judge Grady's conclusion in *Ulane I* that discrimination against transsexuals *because they are transsexuals* is 'literally' discrimination 'because of . . . sex.'"), and did conclude that discrimination based on Diane Schroer's plans "to change her anatomical sex" was "literally 'discrimination because of sex.'" *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (citations omitted). The bulk of the court's analysis, however, went to its alternative holding basing liability for discrimination on particular evidence in the case that the Library of Congress discriminated against Schroer on the basis of sex stereotypes. See *id.* at 305 (addressing reactions to "photographs of Schroer in traditionally feminine attire" and beliefs concerning her especially masculine prior work).

The original opinion from the Sixth Circuit in *Smith v. City of Salem*, 369 F.3d 912 (6th Cir. June 1, 2004), superseded by 378 F.3d 566 (6th Cir. Aug. 5, 2004), appeared to say that anti-trans discrimination is per se sex discrimination:

Even if Smith had alleged discrimination based only on his self-identification as a transsexual—as opposed to his specific appearance and

Although the matter is unclear,<sup>20</sup> the EEOC interpretation of Title VII in *Macy* should be entitled to some measure of deference from courts<sup>21</sup> adjudicating claims of anti-transgender discrimination. The Supreme Court in 1971 said that “the administrative interpretation by the” EEOC, the agency with “enforcement responsibility” for Title VII, “is entitled to great deference.”<sup>22</sup> In addition, the *Macy* decision was the product of a formal adjudication, which the Court has suggested entitles an administrative statutory interpretation to more deference.<sup>23</sup> It is also an eminently reasonable interpretation of the statute, the best in my view, as explicated below. On the other hand, *Macy*’s view of Title VII is an interpretation of law, and its reasoning was grounded particularly in Supreme Court case law, which is a

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behavior—this claim too is actionable pursuant to Title VII. By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify. *Ergo*, identification as a transsexual is the statement or admission that one wishes to be the opposite sex or does not relate to one’s birth sex. Such an admission—for instance the admission by a man that he self-identifies as a woman and/or that he wishes to be a woman—itself violates the prevalent sex stereotype that a man should perceive himself as a man. Discrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide. This is the very essence of sex stereotyping.

*Id.* at 921–22. This categorical language was removed when the panel issued a modified opinion. See *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. Aug. 5, 2004) (omitting this paragraph), *superseding* 369 F.3d 912.

The Court of Appeals for the Eleventh Circuit almost held that anti-trans discrimination is by definition sex discrimination under the Equal Protection Clause, but stopped just short. *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011). I discuss *Glenn* *infra* at text accompanying notes 66–90.

20. See, e.g., Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1938 (2006) (“[T]he Court has consistently refused to define what level of deference the [EEOC]’s regulations are owed, preferring to retain a broad and undefined discretion to accept or reject agency analysis.”).

21. See, e.g., *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (“[T]he EEOC’s interpretation of ambiguous language need only be reasonable to be entitled to deference.”) (citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979)). Accord Hart, *supra* note 20, at 1938 (concluding that “the Court is making a mistake by refusing to respect the EEOC’s interpretation of the statutes it has been charged with enforcing . . .”). But see *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (“Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.”).

22. *Griggs v. Duke Power*, 401 U.S. 424, 433–34 (1971).

23. See, e.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (contrasting “an interpretation contained in an opinion letter,” entitled not to deference but only to such respect as warranted by the interpretation’s persuasiveness, with an interpretation “arrived at after, for example, a formal adjudication or notice-and-comment rulemaking[.]” which is entitled to deference).

factor that reduces the amount of deference the Supreme Court holds warranted, even when adopted in formal adjudications.<sup>24</sup> The EEOC position in *Macy* is also a newer one for the agency,<sup>25</sup> not one consistently held since Title VII was adopted.<sup>26</sup> This could reduce the requisite deference,<sup>27</sup> though the EEOC has a justification for its new position—new Supreme Court and lower court case law<sup>28</sup>—and thus is not merely offering “nothing more than an agency’s convenient litigating position,” as the Court has characterized some past agency interpretations to which it has refused deference.<sup>29</sup> Indeed, the EEOC appears to be consistently adhering to and enforcing this understanding of Title VII in its for-cause determinations and ensuing settlements.<sup>30</sup>

Courts should, however, not need to resolve definitively the level of deference due to the EEOC’s interpretation of Title VII in *Macy*. In the past, the Supreme Court has ducked that issue when it concluded that the EEOC was correct. As it said in one case:

We find the EEOC rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch. Because we so

24. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.11 (2007) (citing *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 336, n.5 (2000)) (“[W]e . . . decline to defer to the EEOC’s adjudicatory positions. The EEOC’s views in question are based on its misreading of [one Supreme Court precedent]. . . . Agencies have no special claim to deference in their interpretation of our decisions. Nor do we see reasonable ambiguity in the statute itself . . .”).

25. *But cf. Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*11 n.16 (E.E.O.C. Apr. 20, 2012) (“The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that ‘[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination ‘because of . . . sex’ under Title VII.’”) (quoting EEOC Amicus Brief for Plaintiff, at 1, *Pacheco v. Freedom Buick GMC Truck*, 2011 WL 5410751 (W.D. Tex. Oct. 17, 2011) (No. 07-116)).

26. See *id.* (“With this decision, we expressly overturn . . . contrary earlier decisions from the Commission.”).

27. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (“The EEOC’s interpretation does not fare well under these standards. As an initial matter, the position taken by the Commission ‘contradicts the position which [it] had enunciated at an earlier date, closer to the enactment of the governing statute.’”) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976)).

28. See, e.g., *Macy*, 2012 WL 1435995, at \*11 n.16 (overturning earlier contrary interpretations “in light of the recent developments in the case law described above”).

29. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

30. See, e.g., Erik Roldan, *Victory! Lambda Legal Helps South Dakota Transgender Employee Win Landmark Settlement After Wrongful Termination*, LAMBDA LEGAL (Sept. 16, 2013), [http://www.lambdalegal.org/news/sd\\_20130916\\_victory-south-dakota-transgender-employee](http://www.lambdalegal.org/news/sd_20130916_victory-south-dakota-transgender-employee) (recounting two settlements of charges of sex discrimination brought by transgender employees and describing EEOC backing in one of them).

clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much.<sup>31</sup>

The EEOC's interpretation of Title VII's ban on sex discrimination as forbidding anti-transgender discrimination is correct, and thus questions of judicial deference are somewhat academic here.

The starting place for statutory interpretation, Title VII's text, supports understanding anti-transgender discrimination as unlawful sex discrimination. The main ban in Title VII declares that

[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.<sup>32</sup>

Other provisions of Title VII ban discrimination "on account of" or "based on" sex,<sup>33</sup> but there is little to no indication that the various

31. *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002).

32. 42 U.S.C. § 2000e-2(a) (2012). Subsection 2000e-2(a) also makes it an unlawful employment practice for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.*

33. 42 U.S.C. § 2000e-3(b) (2012) specifies that

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, *based on* race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

(Emphasis added). Section 2000e-16(a) specifies that

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and

phrasings were meant to bear different meanings.<sup>34</sup> And Title VII provides that, except where otherwise specified, “an 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.”<sup>35</sup>

If “sex” in Title VII includes not just biological but also social aspects and psychological aspects,<sup>36</sup> such as a person’s gender identity, then discrimination on the basis of sex would include discrimination on the basis of gender identity. Hence, anti-transgender discrimination, understood as based on gender identity, would be actionable sex discrimination. Jillian Weiss has advanced such an argument in detail, building upon contemporary medical understandings of “sex” and the principle that the specific intent of Congress in enacting Title VII in 1964 should not be controlling, or at least likely would not be so treated by the Supreme Court, as opposed to the plain meaning of the text.<sup>37</sup>

Whether Professor Weiss’s argument is likely to be wholly judicially embraced is not wholly clear. In insisting that “the meaning of the term sex has changed since 1964, and now includes the concepts of gender and gender identity,”<sup>38</sup> the argument seems that it might require interpreting a statute by reference to the plain meaning of its language *at the time a court resolves a*

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the Library of Congress shall be made free from any discrimination *based on* race, color, religion, sex, or national origin.

(Emphasis added). And § 2000e-16b(a) provides that

All personnel actions affecting the Presidential appointees described in section 1219 of Title 2 or the State employees described in section 2000e-16c of this title shall be made free from any discrimination *based on* . . . race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title . . . .

(Emphasis added).

34. See, e.g., ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 48–49 n.20 (1983) (“No court has yet indicated that any significance is to be attached to these variations in the way Title VIII [a different antidiscrimination statute] expresses its ‘because of’ requirement.”). But cf. Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 25 HARV. J.L. & GENDER 209, 220 (2012) (asserting that “Congress provided broader protection for federal employees” under Title VII than for other covered employees); *id.* at 221 (asserting more guardedly that “Congress *may have* meant for federal workers to have broader protections . . . .”) (emphasis added).

35. 42 U.S.C. § 2000e-2(m).

36. See, e.g., Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 623–24 (2009) (quoting and citing *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 823 (N.D. Ill. 1983) *rev’d*, 742 F.2d 1081 (7th Cir. 1984)).

37. See *id.*

38. *Id.* at 638.

controversy. Whether or not statutory interpreters adopt a “strict plain meaning” reading of the text or a broader “traditional plain meaning” approach that attends to “the overall statutory structure, statutory goals and purposes, and legislative history” of the text,<sup>39</sup> they commonly are referring to the plain meaning of the words *at the time the legislature enacted the law*.<sup>40</sup> More “dynamic” approaches to statutory interpretation, however, could support Weiss’s claims.<sup>41</sup> Noted authority on statutory interpretation professor Bill Eskridge has, for example, praised “[t]he Supreme Court’s dynamic interpretation of Title VII” when he judged that the Court’s decision construing the statute to allow affirmative action “continued the government’s commitment to the public values in Title VII in light of changed circumstances that threatened to undermine those values decisively.”<sup>42</sup>

Courts should not even have to resolve this question of the breadth of the term “sex” in Title VII and whether it includes “gender identity” as an aspect of sex, though. As noted above, Title VII makes it unlawful to “discriminate” “on the basis of” (or “because of” or “on account of”) sex, and that is enough to reach anti-transgender discrimination. This is true even if “sex” were taken to refer only to physical (and social) divisions of the human species into males and females,<sup>43</sup> and not to include the psychological component of sex that increasing numbers of doctors

39. Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 961 (2005) (articulating these two variants of “plain meaning” interpretation).

40. See, e.g., *Moskal v. United States*, 498 U.S. 103, 125-26 (1990) (Scalia, J., joined by O’Connor and Kennedy, JJ., dissenting) (interpreting statute restrictively because “falsely made” had a well-established common-law meaning *at the time the relevant language of [the statute] was enacted*) (emphasis added), quoted in Craig, *supra* note 39, at 1016.

41. Cf. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 339 (1978) (opinion of Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (concluding that “Congress’ resolve not to incorporate a static definition of discrimination into Title VI [of the Civil Rights Act of 1964] is not surprising”); *id.* at 340 (“Congress intended the meaning of the statute’s prohibition to evolve with the interpretation of the commands of the Constitution.”).

42. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1516 (1987) (discussing *United Steelworkers v. Weber*, 443 U.S. 193 (1979)).

43. *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (“Even if the decisions that define the word ‘sex’ in Title VII as referring only to anatomical or chromosomal sex are still good law . . . the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”).



are recognizing includes “gender identity.”<sup>44</sup> A transgender person is defined in terms of a difference between one’s natally assigned sex and one’s gender identity or gender expression.<sup>45</sup> An employer can only know or believe that a person is transgender if the employer knows or has a belief about the employee’s natally assigned sex (say, male) and a mismatch between that sex and the employee’s gender identity or expression (say, female). Thus, if an employer discriminates against a person because the employee is transgender, then the employer has literally discriminated against her on the basis of her sex. Were the employee’s assigned sex female rather than male, for example, there would be no discrepancy between her sex and her gender identity or expression, she would not be transgender, and the employer would not be discriminating against her on that basis.

While the consequences of this interpretation of “discriminat[ion] . . . on the basis of . . . sex” may strike some as broad, nothing in the text of Title VII precludes this “plain” interpretation<sup>46</sup> of the statutory language. The text of the statute does immediately make an exception to its proscription: Title VII allows an employer “to hire and employ employees . . . on the basis of . . . sex, . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification [or BFOQ] reasonably necessary to the normal operation of that particular business or enterprise.”<sup>47</sup> If anything, however, the narrowness of this BFOQ exception—it is an exception for “occupational” qualifications limited “to ‘certain instances’ where sex discrimination is ‘reasonably necessary’ to the ‘normal operation’ of the ‘particular’ business”<sup>48</sup>—suggests the breadth of the main ban.

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44. JULIE GREENBERG, *INTERSEXUALITY AND THE LAW: WHY SEX MATTERS* 89 (2012).

45. Nikki Burrill & Valita Fredland, *The Forgotten Patient: A Health Provider’s Guide to Providing Comprehensive Care for Transgender Patients*, 9 *IND. HEALTH L. REV.* 69, 71 (2012).

46. *But cf. Bakke*, 438 U.S. at 339 (referring to Congress’s “refusal precisely to define that racial discrimination which it intended to prohibit” with Title VI and thus, presumably, “[t]he cryptic nature of the language employed in Title VI”).

47. 42 U.S.C. § 2000e-2(e)(1) (2012).

48. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). *See also id.* (“The BFOQ defense is written narrowly, and this Court has read it narrowly[,] . . . grounded on both the language and the legislative history of § 703.”). That the Supreme Court has ruled that this is a very narrow exception counts more as a precedential reason supporting my and the EEOC’s interpretation than as a textual reason.

Title VII's purposes are served by this interpretation of the statute.<sup>49</sup> As the Supreme Court has understood Title VII, its primary purpose is "the elimination of discrimination in the workplace."<sup>50</sup> The statutory interpretation adopted by the EEOC in *Macy* can help ameliorate the subordinate status of a group of people defined in terms of sex. Like most of Title VII, it helps combat a pernicious tendency in at least U.S. society to give unjust significance to circumstances of birth unrelated to ability, that is, a tendency to try to make biology into destiny.<sup>51</sup> Trans people should not be deprived of equal employment opportunity because of their gender identity or expression or people's reactions to it. Since the Civil Rights Act of 1964, including Title VII, is a remedial statute<sup>52</sup> designed to protect people from a range of forms of workplace discrimination, it should be construed broadly.<sup>53</sup>

Treating anti-transgender discrimination as a form of sex discrimination is consistent not simply with Title VII's text and purpose, but with simple justice as well.<sup>54</sup> In contemporary U.S.

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49. Selecting a level of generality is a non-mechanical and frequently contested process. See, e.g., Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1062–63 (1990). Choosing a level that is not the most specific possible, see, e.g., Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J., arguing for substantive due process doctrine that claimed rights should be identified at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"), is, I believe, warranted in this case based upon reflection on the purposes of Congress to eliminate invidious discrimination in employment and to preserve only a limited realm of employer discretion when it comes to the enumerated forbidden grounds of discrimination.

50. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

51. See, e.g., David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1024–25 (2002) (describing "history of the use of 'natural' differences to subordinate" different groups in U.S. society).

52. "Title VII is a broad remedial measure, designed 'to assure equality of employment opportunities.'" *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

53. See, e.g., *Washington Cnty. v. Gunther*, 452 U.S. 161, 178 (1981) ("As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination . . . . We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.") (quoting S. Rep. No. 867, 88th Cong., 2d Sess., 12 (1964)); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 381 (1978) (Marshall, J., joined by Brennan, J., concurring in part and dissenting in part) (concluding of Title VII that "under longstanding principles of statutory construction, the Act should 'be given a liberal interpretation . . .'" (quoting *Piedmont & N.R. Co. v. ICC*, 286 U.S. 299, 311–312 (1932))).

54. Anna Kirkland, *What's at Stake in Transgender Discrimination as Sex Discrimination*, 32 SIGNS 83, 108 (2006) (characterizing Title VII protection against anti-transgender discrimination as a "new group benefit . . . required by justice on

society, gainful employment is effectively a necessity for most adults. It is true that trans people have achieved distinction in careers in the military, higher education, entertainment, and countless other fields.<sup>55</sup> Nevertheless, the largest, most systematic national survey on the subject, the National Transgender Discrimination Survey,<sup>56</sup> has found that transgender and other gender non-conforming people as a group “face injustice at every turn: in childhood homes, in school systems that promise to shelter and educate, in harsh and exclusionary workplaces, at the grocery store, the hotel front desk, in doctors’ offices and emergency rooms, before judges and at the hands of landlords, police officers, health care workers and other service providers.”<sup>57</sup> The respondents to this survey “lived in extreme poverty,” “nearly four times more likely to have a household income of less than \$10,000 [per] year compared to the” population average.<sup>58</sup> They “experienced unemployment at twice the rate of the general population at the time of the survey, with rates for [trans and gender-nonconforming] people of color up to four times the national unemployment rate.”<sup>59</sup> “Ninety percent . . . of those surveyed reported experiencing harassment, mistreatment or discrimination on the job or took actions like hiding who they are to avoid it.”<sup>60</sup> “Forty-seven percent . . . said they had experienced an adverse job outcome, such as being fired, not hired[,] or denied a promotion because of being transgender or gender non-conforming.”<sup>61</sup>

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independent grounds: relieving the oppression, subordination, exclusion, and torment of trans people”).

55. See, e.g., Joanne Herman, *Transgender Success Stories*, ADVOCATE.COM (Oct. 2, 2006, 12:00 AM), <http://www.advocate.com/politics/commentary/2006/10/02/transgender-success-stories>.

56. JAIME M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (Nat’l Ctr. for Transgender Equal. and Nat’l Gay and Lesbian Task Force 2011), available at [www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf); see Marissa L. Walters, compiler, *Keynote Address from Mara Keisling*, 4 CHARLOTTE L. REV. 203, 207 (2013) (“[O]ur organization, along with the National Gay and Lesbian Task Force . . . did a study, called the National Transgender Discrimination Survey, where we interviewed sixty five hundred trans people. It’s the largest survey ever done to this point.”).

57. GRANT ET AL., *supra* note 56, at 2.

58. *Id.*

59. *Id.* at 3, footnote omitted.

60. *Id.*

61. *Id.*

I recount all this to underscore the problems trans people face in maintaining gainful, lawful employment<sup>62</sup> and thus the importance of the availability of legal protection against anti-transgender discrimination. As of this writing, only seventeen states and the District of Columbia<sup>63</sup> have laws expressly prohibiting employment discrimination on the basis of gender identity, and there is no federal statute that does so expressly.<sup>64</sup> So, accepting the text-based interpretation of Title VII's ban on sex discrimination as reaching anti-transgender discrimination is vitally important from a justice perspective.<sup>65</sup>

As the EEOC's *Macy* decision properly recognized, building on the Court of Appeals for the Eleventh Circuit's decision in *Glenn v. Brumby*,<sup>66</sup> Supreme Court precedent also supports the conclusion that anti-transgender discrimination is sex discrimination under Title VII. *Glenn* properly recounted that the Supreme Court subjects sex-classifying government action to a form of heightened scrutiny under the Equal Protection Clause, intermediate scrutiny,<sup>67</sup> and rejects action "on the basis of gender stereotypes."<sup>68</sup> To understand what constitutes impermissible sex discrimination through sex or gender stereotyping, the Court of Appeals drew freely upon Title VII precedent, particularly the Supreme Court's decision in *Price Waterhouse v. Hopkins*.<sup>69</sup> *Glenn* took *Price Waterhouse* to stand for the conclusions that

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62. "Overall, [sixteen percent] said they had been compelled to work in the underground economy for income (such as doing sex work or selling drugs)." *Id.*

63. *Non-Discrimination Laws: State by State Information—Map*, AMER. CIV. LIB. UNION, (last visited Mar. 20, 2014), <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>.

64. Remember, Title VII extends to discrimination on the basis of race, color, religion, national origin, and sex; the Americans with Disabilities Act expressly excludes much anti-trans discrimination from its coverage. 42 U.S.C. § 12211(b)(1) (2012) (defining "the term 'disability'" to exclude "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders"). The proposed federal Employment Non-Discrimination Act (or ENDA) would forbid covered employers from discriminating on the basis of sexual orientation or gender identity, but it would need to be passed by both Houses of Congress, which might be challenging in the current political climate.

65. This is true even if direct enforcement of bans on anti-transgender discrimination are not robustly enforced. Cf. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2011).

66. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

67. *Id.* at 1315–16 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985)).

68. *Id.* at 1319.

69. See, e.g., *id.* at 1316 (addressing *Price Waterhouse*); *id.* at 1317–19 & nn. 5–7 (addressing lower court Title VII decisions)

“discrimination on the basis of gender stereotype is sex-based discrimination[]” and that “Title VII barred not just discrimination because of biological sex, but also gender stereotyping—failing to *act and appear* according to *expectations defined by gender*.”<sup>70</sup> Such reliance on Title VII sex discrimination cases in the equal protection context is largely unproblematic.<sup>71</sup>

Drawing on legal scholarship, the Eleventh Circuit addressed the relevance of these statutory and constitutional restrictions on sex stereotyping in a way that seems correct, if broad. According to *Glenn*, “[a] person is defined as transgender precisely because of the perception that his or her *behavior* transgresses gender stereotypes.”<sup>72</sup> The court next quoted Ilona Turner for the proposition that “[t]he very *acts* that *define transgender people as transgender* are those that contradict *stereotypes* of gender-appropriate *appearance and behavior*.”<sup>73</sup> The *Glenn* court also cited Taylor Flynn as “defining transgender persons as those whose ‘*appearance, behavior, or other personal characteristics* differ from traditional gender *norms*.’”<sup>74</sup> “There is thus a congruence,” the *Glenn* court concluded, “between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based *behavioral norms*.”<sup>75</sup>

There are a couple of significant things to note about this passage. First, it refers to both gender stereotypes and gender norms. *Price Waterhouse* had spoken of sex stereotyping.<sup>76</sup> As others have helpfully noted before, stereotypes can be descriptive or normative.<sup>77</sup> Sex stereotypes can be descriptive beliefs about the way that men are and that women are, at least typically—for example, aggressive versus nurturing.<sup>78</sup> But stereotypes can also be normative beliefs about the way that men *should be* and women

70. *Id.* at 1316 (emphases added).

71. Some courts and commentators have taken it too far, though, and bluntly claimed that Title VII and equal protection sex discrimination standards are the same. *E.g.*, *Bryant v. Jones*, 575 F.3d 1281, 1296 (11th Cir. 2009); Jason Lee, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423 (2012). But that is largely a side point.

72. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (emphasis added).

73. *Id.* (emphases added) (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007)).

74. *Id.* (emphases added) (quoting Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001)).

75. *Id.* (emphasis added).

76. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989).

77. *See, e.g.*, GREENBERG, *supra* note 44, at 119–24 (2012).

78. *Id.*

should be, breadearners versus homemakers, for example.<sup>79</sup> The plurality in *Price Waterhouse*, in some of its most widely quoted language, invoked both descriptive and normative stereotypes: “[i]n 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.”<sup>80</sup> In language encompassing both descriptive and normative stereotypes, the *Price Waterhouse* plurality insisted: “[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .”<sup>81</sup> So, *Glenn v. Brumby* appears to read equal protection law (drawing on Title VII law) to protect transgender employees, as all others, from discrimination based on either descriptive sex stereotyping or normative sex stereotyping.

Another thing to note is that the Eleventh Circuit did not simply limit its discussion in *Glenn* to behavior or even appearance. It also quoted Professor Flynn’s suggestion that “other personal characteristics” that “differ from traditional gender norms” define transgender persons.<sup>82</sup> Thus, when the court concludes that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender[,]”<sup>83</sup> its notion of gender nonconformity should be read broadly. After all, it approvingly quotes the *Schroer* court’s suggestion that “[i]t may be time to revisit [the] conclusion . . . that discrimination against transsexuals *because they are transsexuals* is literally discrimination because of sex.”<sup>84</sup> *Glenn* also quoted a federal district court’s suggestion in *Kastl v. Maricopa County Community College District* that “[n]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.”<sup>85</sup> “An individual cannot be punished because

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79. *Id.*

80. *Price Waterhouse*, 490 U.S. at 250.

81. *Id.* at 251.

82. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (quoting Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001)).

83. *Id.* at 1317.

84. *Id.* (quoting *Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006)).

85. *Id.* at 1317 (quoting *Kastl v. Maricopa Cnty. Comm. Coll. Dist.*, No. Civ. 02-1531PHX-SRB, 2004 WL 2008954, at \*2 (D. Ariz. June 3, 2004)). *But cf.* *Kastl v. Maricopa Cnty. Comm. Coll. Dist.*, No.06-16907, 2006 WL 2460636, at \*6 (D. Ariz.

of his or her *perceived* gender-nonconformity,” the court of appeals wrote in *Glenn*,<sup>86</sup> and thus by focusing, as much federal antidiscrimination law does, on the mind of the perpetrator, the court leaves ample room to conclude that in early twenty-first century U.S. society, *being* transgender *is* gender-nonconforming. The Eleventh Circuit in *Glenn v. Brumby* does not quite go there, holding less specifically that “a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”<sup>87</sup> But it also properly held that Sewell Brumby’s admission that his decision to fire Vandy Beth “was based on ‘the sheer fact of the transition[]’”<sup>88</sup> constituted “direct evidence to support the district court’s conclusion that Brumby acted on the basis of Glenn’s gender non-conformity.”<sup>89</sup>

Older judicial arguments against such Title VII coverage either do not carry weight in light of current approaches to federal statutory interpretation or are facilely sophistic. Prior to *Price Waterhouse*,<sup>90</sup> courts sometimes said that Title VII’s ban on sex discrimination “does not embrace transsexual discrimination [sic]”<sup>91</sup> because Congress did not intend to forbid anti-trans discrimination.<sup>92</sup> To the extent that such cases were attempting to analyze “the term ‘sex’”<sup>93</sup> in isolation without considering the

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Aug. 22, 2006) *aff’d* 325 Fed. App’x. 492 (9th Cir. 2009) (holding that “Plaintiff has failed to meet her burden of establishing a *prima facie* case of discrimination because she has provided no evidence that she was a biological female and member of a protected class while she was employed by Defendant”).

86. *Glenn*, 663 F.3d at 1319 (emphasis added).

87. *Id.* at 1320.

88. *Id.* at 1321.

89. *Id.*

90. And sometimes afterward. See *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009) (holding firing of transgender employee based on failure to conform to dress code and grooming policy was not actionable sex discrimination); *Etsitty v. Utah Transit Auth.*, No. 2:04CV616DS, 2005 WL 1505610, at \*4–5 (D. Utah June 24, 2005) *aff’d on other grounds*, 502 F.3d 1215 (10th Cir. 2007) (holding *Price Waterhouse* inapplicable to anti-transsexual discrimination); *Oiler v. Winn–Dixie Louisiana, Inc.*, No. Civ.A. 00–3114, 2002 WL 31098541 (E.D. La. 2002); *Cox v. Denny’s Inc.*, No. 98–1085–CIV–J–16B, 1999 WL 1317785 (M.D. Fla. Dec. 22, 1999); *Underwood v. Archer Mgmt. Serv., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994); *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993).

91. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977). The overruling of the *Holloway* rationale was recognized in *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

92. *Id.* at 663. See also, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084–85 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

93. *Holloway*, 566 F.2d at 663.

notion of “discrimina[tion] . . . because of . . . sex,”<sup>94</sup> their argument was fatally incomplete.<sup>95</sup> But even to the extent that the older cases’ reasoning might be taken as addressing the meaning of sex *discrimination*, they still fail.

As numerous commentators and adjudicators have noted,<sup>96</sup> the Supreme Court has declared that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>97</sup> Discrimination against persons because they are transgender is an evil comparable to discrimination against women because they are women, against men because they are men,<sup>98</sup> or (what anti-trans discrimination at least in part is,) against either because of sex stereotypes.<sup>99</sup> Moreover, *Price Waterhouse* made clear that Title VII’s prohibition of sex discrimination is not limited to banning discrimination against men because they are men or against women because they are women. As noted above, the Court there concluded that an employer’s excluding women, say, was not necessary for a violation; Title VII is violated where employers discriminatorily require people to conform to sex stereotypes.<sup>100</sup> The text of Title VII is thus honored, its purposes served, and the Supreme Court’s precedents respected by interpreting the Act to ban anti-transgender discrimination regardless of Congress’s specific intent.

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94. 42 U.S.C. § 2000e-2(a)(1) (2012).

95. See, e.g., *Etsitty*, 502 F.3d at 1221–22 (10th Cir. 2007) (addressing only “the plain meaning of the term ‘sex’”).

96. See, e.g., *Doe v. United Consumer Fin. Serv.*, No. 1:01 CV 1112, 2001 WL 34350174, at \*3 n.7 (N.D. Ohio Nov. 9, 2001); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008); *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*9–10 (E.E.O.C. Apr. 20, 2012); Julie A. Greenberg, *What do Scalia and Thomas Really Think About Sex? Title VII and Gender Nonconformity Discrimination: Protection for Transsexuals, Intersexuals, Gays and Lesbians*, 24 T. JEFFERSON L. REV. 149, 158 (2002); William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 528 (2011); Weiss, *supra* note 36, at 626.

97. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998). *Oncale* was a case brought under Title VII challenging same-sex harassment as actionable sex discrimination.

98. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (“The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.”).

99. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989).

100. *Id.* at 256–58.



Earlier cases also sometimes said that discrimination against a transgender employee was discrimination because of *change* of sex, not discrimination because of sex.<sup>101</sup> But this is specious. As the EEOC and the federal district judge it quoted in its *Macy* decision explained, and as many of us studying and working in this area have long appreciated, discrimination against an employee who changes her religion is discrimination because of religion, an employment decision in which religion is treated as a relevant factor.<sup>102</sup> The same is true when a person “changes” or needs to “change” or is perceived to need or want to “change” her sex.<sup>103</sup> This analogy underscores the conclusion advanced here earlier, and reached by some courts, agencies, and even more scholars, that anti-trans discrimination is literally discrimination because of sex.<sup>104</sup> Couple these arguments with the fact that Congress amended Title VII to ensure that sex need only be “a motivating factor” in an adverse employment decision for it to be covered by the statute,<sup>105</sup> and that should be sufficient to put to rest the “change of sex” objection to Title VII coverage of anti-transgender discrimination.

These developments and arguments interpreting Title VII to reach anti-transgender discrimination have, however, been criticized on various grounds by some scholars, even ones clearly sympathetic to the justice claims of transgender persons.<sup>106</sup> People have contended that these developments and arguments do not fit all of the lower court precedents in this area of law;<sup>107</sup> that the protection offered is incomplete or under-inclusive;<sup>108</sup> that they reinforce gender norms or, contrarily, do not allow gender norms enough latitude;<sup>109</sup> that they conflate normative and descriptive

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101. *E.g.*, *Grossman v. Bernards Twp. Bd. of Educ.*, (1975) 11 E.P.D. (CCH) P 10,686, at pp. 6884–85 (D.N.J. 1975), *aff’d mem.*, 538 F.2d 319 (3d Cir. 1976).

102. *See, e.g.*, *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*13–14 (E.E.O.C. Apr. 20, 2012).

103. I use scare quotes here because all of my conversations and reading suggest that transgender persons taking actions in “transition” are *confirming* the sex they are and have long or always been, bringing their bodies into conformity with their gender identities.

104. *See e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

105. 42 U.S.C. § 2000e-2(m) (2012).

106. *See, e.g.*, Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 653 (2009).

107. *See, e.g.*, Jason Lee, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 451 (2012).

108. *See, e.g., id.* at 454.

109. *See, e.g.*, Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 795 (2013).

notions of stereotypes;<sup>110</sup> and that they erase the specificity of transgender identity and do not capture the heart of why people discriminate against transgender persons.<sup>111</sup> Some of these scholarly arguments seem addressed to more theoretical questions and may not all have been addressing the bottom-line question of whether or not Title VII's ban on sex discrimination should be interpreted to forbid anti-transgender discrimination.<sup>112</sup> For that inquiry, which is the focus of this Article, these concerns would be misplaced or lack force as a reason to reject the sex stereotyping or other broad understandings of forbidden sex discrimination, and, accordingly, they should not forestall courts from interpreting Title VII to forbid anti-trans discrimination, thus simultaneously advancing sex/gender equality and transgender equality.

Some scholars object to certain trans-protective positions on the ground that those arguments are not consistent with lower court decisions about the reach of Title VII's ban on sex discrimination. Non-liberal perfectionist Kimberly Yuracko, for example, has criticized judicial pronouncements that sex must be irrelevant and scholars who agree as offering an "implausible" interpretation of Title VII's ban on sex stereotyping.<sup>113</sup> But the

110. See, e.g., Glazer & Kramer, *supra* note 106, at 663.

111. See, e.g., Lee, *supra* note 107, at 445.

112. See, e.g., Kirkland, *supra* note 54, at 86 (characterizing one decision reaching anti-trans discrimination with Title VII's ban on sex discrimination as "simultaneously a victory for trans rights yet . . . also implausible, unstable, and *in some ways* undesirable") (emphasis added); *id.* (describing the aim of her article "to reflect on some critical conceptual problems in sex discrimination law"); Glazer & Kramer, *supra* note 106, at 660 (disclaiming intent "to argue that the outcomes in cases [protecting against anti-transgender discrimination under Title VII] should change").

113. See, e.g., Yuracko, *supra* note 109, at 775 ("It follows that if the trait-neutrality reading of the sex stereotyping prohibition is implausibly expansive, then the narrow libertarian principle is implausible as well."); *cf. id.* at 780 ("Yet, to be workable in a society with rich gender norms, trait neutrality . . . [i]n practice would be culturally transformative, not conservative. It is this fact that perhaps best explains why courts have not applied the prohibition as a trait-neutrality requirement."). I believe that this is the clear and fair meaning of Yuracko's written words. Although at one point Yuracko's article *conditionally* says "that *if* the trait-neutrality reading of the sex stereotyping prohibition is implausibly expansive, then the narrow libertarian principle is implausible as well." *Id.* at 775 (emphasis added). Elsewhere, she bluntly argues that this reading "is" not "plausible." *Id.* at 761.

I do not find this suggestion of the implausibility of Title VII's banning trait discrimination established in the article; after all, Yuracko admits that "trait neutrality simply restates a conventional understanding of the sex discrimination prohibition that has been used in a range of contexts." *Id.* at 776. The only way I could see the "implausibility" suggestion substantiated might be if the standard were plausibility-as-an-explainer-of-lower-court-case-outcomes, which would give no one purchase to say that any court is wrong; if courts rule inconsistently with

primary reason Professor Yuracko has offered in support of this position has been that court decisions have not uniformly embraced that view.<sup>114</sup> Similarly, women's studies professor Anna Kirkland suggests that some of the decisions protecting trans people under Title VII cannot be taken at face value because "courts still uphold employers' rights to require sex-specific grooming standards . . . and sometimes excuse sex-specific hiring . . . ." <sup>115</sup> And non-trans legal advocate for trans persons Jason Lee likewise observes that "[t]he per se approaches conflict with existing Title VII precedent."<sup>116</sup>

The decisions upholding various forms of sex discrimination by employers that these scholars see as in tension or inconsistent with the logic of the plain reading of Title VII are not appropriate interpretations of Title VII's ban on sex discrimination.<sup>117</sup> The poor reasoning of many of the cases addressing transgender plaintiffs suing under Title VII makes "fit with lower court case law" a particularly inapt standard by which to judge theories about the statute's scope.<sup>118</sup> Moreover, in the multi-jurisdictional U.S. legal system, the fact that courts disagree about the meaning of a statute does not establish that broader understandings are incorrect.<sup>119</sup> And those such as the Commissioners of the EEOC who have argued in favor of a robust application of Title VII to forbid anti-trans discrimination are not purporting to fit the theory to all available precedents as if they were data determining a mathematical function. We espouse a normative view, one that can condemn certain decisions as wrong,<sup>120</sup> so observing that lower

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each other, then we would be reduced to saying that Title VII is indeterminate, and otherwise the law is simply what the courts say it is, which would be too deferential to courts.

114. See, e.g., *id.* at 779 (observing that "courts have not interpreted the sex stereotyping prohibition to require trait neutrality of [what Yuracko criticizes as] this formalistic sort"); cf. *id.* at 760 (writing descriptively that she "seek[s] to uncover the demands—and limits—of the [sex stereotyping] prohibition as it is actually being applied").

115. Kirkland, *supra* note 54, at 84.

116. Lee, *supra* note 107, at 450–51; see also *id.* at 454 (addressing supposed underprotection of people who only live part-time in the role of their gender identity and of people who might not be visibly not conforming to the role of their natally assigned sex).

117. See generally, e.g., David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240 (2004) (criticizing cases upholding sex-discriminatory dress codes for employees).

118. Lee, *supra* note 107, at 451.

119. See, e.g., Glazer & Kramer, *supra* note 106, at 659–60.

120. Thus, I think it a misreading to characterize Glazer, Kramer, and Kirkland as "scholars who adopt a more libertarian view of *the prohibition at work* in the cases," Yuracko, *supra* note 109, at 790 (emphasis added), the phrase Yuracko used

court decisions disagree is not the kind of argument that can, without more, undermine our doctrinal conclusions.

Another common complaint about approaches to Title VII—particularly reliance on the notion of sex stereotyping—that would hold anti-trans discrimination unlawful, is that the protection offered is incomplete or under-inclusive. “[T]he prohibition will not be a panacea,” Yuracko writes;<sup>121</sup> Lee worries that “a plaintiff may not be able to demonstrate conclusively that animus toward his or her transgender status motivated an employer’s action”<sup>122</sup> and thus worries about inability to reach “second generation employment discrimination.”<sup>123</sup> But these are problems with Title VII or with law generally—there are always problems outside the scope of a statute or its implementation. Perhaps Title VII might profitably be expanded to provide workers more protection. But that is not a reason to shrink from applying Title VII as it stands now categorically to prohibit discrimination by covered employers that *can* be proven to turn on the employee’s transgender status, transition, or gender expression.

Another set of concerns about Title VII protection from anti-transgender discrimination centers on stereotypes: the fear that such protection reinforces gender norms or, contrarily but sometimes held by the same critics, do not allow gender norms enough latitude. As to the former, Yuracko argues, for example, that “[i]n practice, the sex stereotyping prohibition encourages plaintiffs to endorse and adopt highly stereotyped gender packages . . . .”<sup>124</sup> “While the prohibition has extended Title VII’s protection to workers who had previously been excluded,” she admits, Yuracko argues that “it has done so by relying on and reinforcing traditional gender categories.”<sup>125</sup> “By doing so,

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to label her description of what she thinks courts are doing even though “the courts themselves have not yet explicitly articulated” it in that fashion, *id.* at 768 n.48.

121. Yuracko, *supra* note 109, at 804.

122. Lee, *supra* note 107, at 452. Lee also reads *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), as possibly requiring that a transgender person have surgery before being entitled to protection under Title VII. *Id.* at 454–55. But besides equating surgery as a potentially sufficient condition with surgery as a necessary condition, this reading also over-reads “change . . . anatomical sex” as necessarily meaning having genital surgery, *see id.* at 455, where hormone therapy and other non-genital surgeries might also be contemplated.

123. *Id.* at 451.

124. Yuracko, *supra* note 109, at 761; *cf.* Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENVER U. L. REV. 1305, 1306 (1998) (repudiating “division of life and its activities into two separate but equal and opposite gendered spheres”).

125. Yuracko, *supra* note 109, at 762.

moreover, the prohibition actually protects some individuals<sup>[126]</sup> at the expense of the class whose subordination (stemming from socially salient gender norms) remains intact.”<sup>127</sup>

Likewise, Lee contends that reaching anti-transgender discrimination as sex discrimination requires courts to reinforce stereotypes.<sup>128</sup> Following Liz Glazer and Zak Kramer, Lee believes that

Adjudication of a Title VII sex-stereotyping claim generally requires that a court first determine the plaintiff’s “anchor gender”— . . . the gender most commonly associated with the plaintiff’s sex. Male plaintiffs are thus presumed to have masculine anchor genders and female plaintiffs are correspondingly presumed to have feminine anchor genders. A court will then compare the plaintiff’s anchor gender to his or her “expressive gender”—the gender presented by the plaintiff’s appearance, conduct, and behavior. If an employer has discriminated against an individual because, in the employer’s view, the two genders do not align, such action constitutes impermissible sex-stereotyping in violation of Title VII.<sup>129</sup>

This, Lee thinks, “requires that courts reconstruct the very sex stereotypes that the doctrine purports to disdain.”<sup>130</sup>

But these authors overstate what a court must do to rule for a transgender plaintiff. As Yuracko acknowledges, her idea that in practice courts apply a “burden-shifting framework—in which [gender-norm] conformity demands viewed as highly costly by the court trigger a presumption of protection that the employer then bears the burden of overcoming”<sup>131</sup> is *not* part of Title VII

126. Not mere individuals, but a class of persons, I would maintain, eliminating the exaggerated discrepancy between a “class” of women and “individual” transgender persons.

127. Yuracko, *supra* note 109, at 762. It is not clear, though, how denying Title VII protection to transgender men and women would improve the lot of (cisgender) women under the statute.

As phrased here, Yuracko’s are empirical claims, but she does little if anything to establish their truth. Perhaps she meant to say things like “could” or “might” and so only makes a conceptual claim—later in *Soul of a Woman* Yuracko invokes the supposed “fact that judicial conceptions of gender may become real—affecting how people view themselves[,]” *id.* at 802,—but that is not how the words of the article seem to read.

128. Lee, *supra* note 107, at 444. Lee cites Laura Grenfell, *Embracing Law’s Categories: Anti-discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 93–94 (2003); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 171–72 (2004); and Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 300–01 (2011).

129. Lee, *supra* note 107, at 444 (footnotes omitted).

130. *Id.*

131. Yuracko, *supra* note 109, at 761.

doctrine.<sup>132</sup> Hence, even if her proffered<sup>133</sup> reconstructed rule did “encourage[] a particular kind of gender performance,”<sup>134</sup> that would be a problem for her rule, not for the actual rule courts have articulated. Similarly, Kramer, Glazer, and Lee’s notion of anchor genders is at best a heuristic to help think about Title VII sex discrimination doctrine. But that doctrine does not actually confine protection to a limited class of persons and so does *not* require courts to decide the sex/gender class to which a plaintiff belongs. Disparate treatment doctrine asks about whether an employer took an action because of an employee’s sex, a question answerable by reference to *the employer’s beliefs* about the plaintiff’s sex.<sup>135</sup> “What matters . . . is that *in the mind of the perpetrator* the discrimination is related to the sex of the victim.”<sup>136</sup> As the plurality opinion in *Price Waterhouse* read Title VII, the statute reflected “Congress’ intent to forbid employers to take gender into account in making employment decisions.”<sup>137</sup> “The critical inquiry,” *Price Waterhouse* explained, “the one commanded

132. See, e.g., *id.* at 785–86 (“I suggest that, while not doing so explicitly, courts have in fact adopted a burden-shifting framework for analyzing and applying the sex stereotyping prohibition . . .”); *id.* at 794 (admitting her “reading of the sex stereotyping prohibition as establishing a burden-shifting framework for analyzing claims is certainly more modest than courts’ rhetoric suggests”); *id.* at 768 n.48 (arguing that “the courts’ prohibition on sex stereotyping is complicated and nuanced in ways the courts themselves have not yet explicitly articulated”). This demotion of doctrine to mere “rhetoric” disserves the transgender people who would otherwise benefit from the robust sex discrimination doctrine articulated by courts.

133. *Id.* at 804 (contending that “the burden-shifting framework actually has much to recommend it”).

134. *Id.* at 798.

135. See, e.g., *Perkins v. Lake Cnty. Dept. of Utils.*, 860 F. Supp. 1262 (N.D. Ohio 1994) (denying summary judgment to defendant in case brought by plaintiff likely believed by employers to be Native American). “The EEOC has provided clear guidance that employment discrimination based on the misperceptions of an employee’s race, national origin, or religion violates Title VII.” Charity Williams, *Misperceptions Matter: Title VII of the Civil Rights Act of 1964 Protects Employees from Discrimination Based on Misperceived Religious Status*, 2008 UTAH L. REV. 357, 371 (2008) (citing, *inter alia*, EEOC COMP. MAN. 15-II (2006), available at <http://www.eeoc.gov/policy/docs/race-color.html> (“Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.”)). But cf., e.g., *Butler v. Potter*, 345 F. Supp. 2d 844 (E.D. Tenn. 2004) (granting defendant summary judgment where plaintiff pled that defendant discriminated because he perceived defendant to be Indian or Middle Eastern, citing no precedent and, at 850, deploying “protected class” notion unsupported by Title VII text).

136. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (emphasis added) (discussing the Gender-Motivated Violence Act (GMVA), after concluding, at 1200–01, that “Congress intended proof of gender motivation under the GMVA to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII”).

137. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

by the words of [Title VII], is whether *gender was a factor in the employment decision at the moment it was made.*"<sup>138</sup> And so generally Title VII is violated when an "employer relie[s] upon sex-based considerations in coming to its decision."<sup>139</sup>

Conversely, some scholars—indeed, some of the same scholars who complain that acknowledging the gender discrimination in anti-transgender discrimination reinforces sex stereotypes—fret that doing so does not leave employers sufficient latitude to require their employees to conform to gender norms. Professor Yuracko, for example, using passive voice that obscures whom she's privileging, writes: "[g]ender norms are not only pervasive, they are also, often, comfortable and comforting."<sup>140</sup> Comforting to whom? Not those who lose their job because of an employer's insistence on them. Yet Yuracko worries, like anti-feminist Phyllis Schlafly,<sup>141</sup> about the prospect of a tyranny of unisex: Yuracko argues that for employers uncomfortable with being barred from prescribing distinct gender codes for men and women, "compliance [with Title VII] might instead take the form of highly circumscribed gender codes confined to a banal androgynous core."<sup>142</sup> All this would come, Yuracko fears, "at the cost of a loss of freedom for gender conformists and nonconformists alike."<sup>143</sup>

But their "reduced" freedom would be formally equal, so employers would not be able to use market leverage to reinforce a normative view of sex *difference*, which *would* be a good thing.<sup>144</sup> Gender nonconformers would gain freedom from being sartorially

138. *Id.* at 241 (first emphasis added).

139. *Id.* at 242.

140. Yuracko, *supra* note 109, at 778. No citation is offered to support this empirical claim.

141. See, e.g., Juliet Eilperin, New Drive Afoot to Pass Equal Rights Amendment, WASH. POST (Mar. 28, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR2007032702357.html> ("In the 1970s, Schlafly and others argued that the ERA would lead to women being drafted by the military and to public unisex bathrooms. Today, she warns lawmakers that its passage would compel courts to approve same-sex marriages and deny Social Security benefits for housewives and widows.") (partially quoted in Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 139–40 (2010)); Eagle Forum (Wash., D.C.), June 1983 ("No one can guarantee that ERA won't result in abortion-funding, gay rights, drafting women, unisex insurance, and more power to the Federal Courts—unless amendments are added which prevent ERA from doing those horrors.") (emphasis omitted) (quoted in Twiss Butler, *Abortion Law: "Unique Problem for Women" or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133, 136 n.16 (1991)).

142. Yuracko, *supra* note 109, at 778.

143. *Id.* at 779.

144. See *id.* at 779–80.

marked as one sex, in at least this context, if people of all sexes have to be allowed to wear the same things. All persons would remain free to adhere to whatever gendered dress conventions they wish outside the workplace.

For another iteration of the ‘people like gender’ lament, consider Professor Kirkland, who believes that many transgender persons “seek or occupy an alternative gender [to the one they were assigned at birth] precisely because it is meaningful and full of content for the dignified individuality they want to construct.”<sup>145</sup> If sex stereotyping proscriptions are enforced robustly, “[h]ow will we know the difference,” she worries, “between an oppressive script forced on someone and the very meaningful content of many people’s lives?”<sup>146</sup> She continues, speculating that

[P]erhaps some norms of gendered appearing-in-the-world as well as moments and places of same-sex privacy are deeply meaningful cultural practices reflected in the workplace rather than oppressive stereotypes, and thus simply banning them does not seem right. They are not always rooted in the subordination of the other, that is, and [some people] want to take their meanings and contexts one by one in deciding whether they are.<sup>147</sup>

I do not doubt that some, even many, transgender persons may feel generally at home in the gender norms traditionally associated with the gender with which they identify, and I would not want to legally interdict them from embracing such norms. Happily, though, one need not do so to resolve the problems Kirkland fears. The simplest way to determine whether “an oppressive gender script” is being “forced” on someone is to see whether the law or an employer is insisting on gender conformity in some context that a person challenges.<sup>148</sup> This would not identify all gender oppression, but it should ameliorate any warm fuzzy feeling that the gender demand at issue is somehow benign. After all, Title VII does not ban oppressive stereotypes; it bans sex discrimination, including that based on sex or gender stereotypes, whether or not someone deems it oppressive.<sup>149</sup> The further problem with Kirkland’s suggestion that social or cultural approbation of gender norms is “meaningful” and should be protected is that this would allow imposition/unequal constraints

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145. Kirkland, *supra* note 54, at 91 (possible footnote omitted).

146. *Id.* (possible footnote omitted).

147. *Id.* at 108–09.

148. *Id.*

149. 42 U.S.C. §§ 2000e–2000e-17 (2012).



on freedom justified by majority comfort.<sup>150</sup> If there really is a social or cultural norm supporting a particular gender practice, its devotees should be comfortable enough to trust in its survival absent legal coercion of dissenters. If, conversely, the norm would be imperiled if it were not mandatory (enforced by laws and/or economic power), that should be sufficient evidence at a minimum to establish a *prima facie* case that the norm is unjustly denying persons equal liberty. The burden then, in light of a sad past and ongoing history of sex discrimination, should be on supporters to defend such gendered practices with particularity and in a compelling way.

One less common complaint about sex stereotyping arguments is that they supposedly conflate normative and descriptive notions of stereotypes. Professor Kirkland, for example, wonders: “[a]re the complex realities of gendered labor in family life the same thing as the fact that women outlive men? What is lost in collapsing them jurisprudentially as stereotypes . . . ?”<sup>151</sup> Yet she offers no reason to read the doctrine as improperly failing to distinguish between descriptive sex generalizations and normative of prescriptive sex role demands.<sup>152</sup> Yes, both are labeled “stereotypes” and condemned by sex equality jurisprudence.<sup>153</sup> But this is appropriate. When law relies on either, it restricts liberty differentially not based on unavoidable differences in human capacities, but due to gendered ideologies.<sup>154</sup> The fact that law restrains use of both prescribed and observed gender differences under the rubric of “stereotypes” does not mean that rights will inevitably be narrowed or “mischaracterized.”<sup>155</sup> The charge that narrowing is symptomatic of the law’s use of “stereotypes” goes unexplained, and the charge of mischaracterization mistakenly presumes that rights have an essence. “Whether or not there are Platonic forms, pure essences

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150. See Kirkland, *supra* note 54, at 108–09.

151. *Id.* at 102.

152. *Id.* at 102–03.

153. See, e.g., *supra* text accompanying notes 77–81 (addressing descriptive and prescriptive or normative stereotypes).

154. See, e.g., Cruz, *supra* note 51, at 1007–08 (2002) (developing the ideology point, including by arguing that “as predicates for differential distribution of rights, privileges, or obligations,” average or statistical “sex or gender differences are indeed ideological”).

155. “[T]here is no reason to think the *Smith* case will have the wide reverberations it seems capable of setting off. This is not simple disappointment in one case; rather, it is symptomatic of a primary mode of gender regulation in the law in which the concept of sex stereotyping simultaneously extends rights and also narrows and mischaracterizes them.” Kirkland, *supra* note 54, at 107.

that exist independent of human recognition, those are not what law uses. Law is a human project, using human categories instrumentally for human purposes.”<sup>156</sup> Legal rights against sex discrimination *should* embrace both rights against discrimination that is based on insistence that men and women be different (normative stereotypes) and rights against discrimination that is based on assumptions that men and women are different (descriptive stereotypes). Each may take varying forms, but that alone is not enough to condemn Title VII’s treatment of sex/gender stereotypes, let alone reason to reject extending protection from anti-transgender discrimination under the banner of rules against sex discrimination.

Perhaps more seriously, another critique of treating anti-trans discrimination as unlawful sex discrimination based on gender stereotyping maintains that this misses the gravamen of the discrimination trans people face and/or erases the specificity of transgender identity. Scholars such as Kirkland, Lee, Glazer, and Kramer suggest that treating anti-trans discrimination as sex discrimination, particularly under a gender stereotyping rubric, improperly denies the existence of trans people *as trans people*.<sup>157</sup> Professors Glazer and Kramer, for example, in rejecting what they perceive as “the prevalent understanding of transgender identity as gender nonconformity,”<sup>158</sup> criticize Title VII doctrine on the ground that it supposedly “require[s] plaintiffs to cast themselves as gender-nonconforming men [in the case of transgender women] or women [in the case of transgender men].”<sup>159</sup> “In order to state an actionable claim,” they write, a transgender female plaintiff “must transform herself into a man who just wants to wear women’s clothing.”<sup>160</sup> But this misconstrues Title VII’s disparate treatment doctrine, which for better or for worse in different cases

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156. David B. Cruz, *Getting Sex “Right”: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 DUKE J. GENDER L. & POL’Y 203, 217 (2010).

157. See, e.g., Kirkland, *supra* note 54, at 108; Lee, *supra* note 107, at 446–47; Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 654 (2009).

158. Glazer & Kramer, *supra* note 157, at 654.

159. *Id.* at 659. To be clear, Glazer and Kramer do “believe that transgender rights should fall within the ambit of Title VII’s existing protection against sex discrimination.” *Id.* at 660. However, they “are concerned with the path taken by courts in reaching [trans-protective] outcomes.” *Id.*; see also *id.* at 664 (suggesting that their “critique of anti-discrimination law” is “most accurately characterize[d]” by the argument “that the currently protected categories are not being used properly”).

160. *Id.* at 667.

focuses on the motivation of the perpetrator of discrimination.<sup>161</sup> So, a plaintiff could plead that the employer perceived her as a man without asserting that it was in fact the case that she was a man.

Alternatively but relatedly, some scholars suggest that it is not sex per se, but people's profound discomfort with the idea that our sex may be within our control, that lies beneath anti-transgender discrimination. Glazer and Stevie Tran insist that "[w]hat bothers society most about transgender people is that they make choices about aspects of their gender that society believes are not their choices to make."<sup>162</sup> Kirkland asserts that it is not mere stereotypes about "contingent personal choices"<sup>163</sup> but beliefs about the nature of gendered identity that animate anti-trans discrimination.<sup>164</sup> But if this complaint were taken to weigh against using Title VII to reach anti-transgender discrimination, it would recapitulate the error of pre-*Price Waterhouse* denials that discrimination because of change of X is discrimination because of X. Were anti-trans discrimination founded on attitudes about choices about sex, that would be no objection to reaching anti-trans discrimination with a ban on sex discrimination unless discrimination about choices regarding or change of X is not discrimination because of X—but it is. This concern also wrongly treats law as an exercise in philosophical purity rather than as a tool to accomplish human aims.<sup>165</sup>

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161. See, e.g., *Perkins v. Lake Cnty. Dept. of Utils.*, 860 F. Supp. 1262 (N.D. Ohio 1994); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

162. Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J. GENDER & L. 399, 418 (2012).

163. Kirkland, *supra* note 54, at 95.

164. *Id.* at 94–95.

165. Cf. Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 500 (2001) (arguing that "[i]t mischaracterizes the nature of laws that discriminate against lesbians and gay men to see them as primarily harming women (or even as harming women as much as they harm gay men, lesbians, and bisexuals) [and] mischaracterizes laws that discriminate on the basis of sexual orientation to see them as primarily justified by sexism rather than by homophobia"). Yet nothing in sex discrimination arguments requires that they capture the "primary" basis for unlawful discrimination; if the law against sex discrimination can help lesbian and gay people (in the context Stein discusses) or transgender people (the focus of this Article), I would want to see more powerful arguments about unintended harms before abandoning this legal tool. Accord Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 520 (2001) ("Edward Stein's critique of the sex discrimination argument for gay rights is concerned about what the argument leaves out. I do not want to leave them out, either. But that is not a reason to neglect the wrongs specifically revealed by the sex discrimination argument.").

Glazer and Kramer also say that to determine whether a victim of discrimination may use Title VII for redress, “the individual must determine whether he [sic] fits within a category against which Title VII prohibits discrimination.”<sup>166</sup> But this is not true. The employer’s beliefs/mental states are generally all that matter doctrinally.<sup>167</sup> Again following loose language, Glazer and Kramer wrongly say the question is whether discrimination was against persons “because of their membership in a . . . protected category,”<sup>168</sup> but there’s no need to limit “because of sex” to require actual membership, rather than employer action predicated upon a belief about their membership.<sup>169</sup> They acknowledge that they “favor a system of anti-discrimination laws in which the plaintiff’s sense of herself rather than the defendant’s perception of her forms the basis for an actionable discrimination claim,” and so “it matters very little to [them] why individuals discriminate against transgender people.”<sup>170</sup> However, at least in this Article, they do not indicate recognition that they would totally revamp U.S. anti-discrimination law, both statutory and constitutional (equal protection), which turns, emphatically though not exclusively, upon the discriminators’ beliefs and motivations.<sup>171</sup> I doubt they would want, and I certainly would not insist, that transgender persons bear the potentially steep costs of giving up Title VII anti-discrimination protection as the first step toward what would need to be a foundational reworking of U.S. anti-discrimination laws across the board.<sup>172</sup>

Title VII has had an important impact over the past half century, but has yet to be used to its full potential. If courts acknowledge that anti-transgender discrimination is gender/sex discrimination under Title VII, courts can deepen their appreciation of the social constraints that gender norms place on

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166. Glazer & Kramer, *supra* note 157, at 661.

167. They fall into the common imprecision of referring to “protected categories,” when what Title VII does is prohibit certain bases for employment decision making. *Id.* at 662.

168. *Id.*

169. *Id.*

170. *Id.* at 666 (citing Elizabeth M. Glazer & Zachary A. Kramer, *Trans Fat*, available at <http://ssrn.com/abstract=1337129> (reviewing ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* (2008))).

171. See, e.g., Carlton Waterhouse, *Abandon Hope All Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 76-86 (2009) (summarizing important scholarly literature on the “perpetrator’s perspective”).

172. After all, Glazer and Kramer “believe that transgender rights should fall within the ambit of Title VII’s existing protection against sex discrimination.” Glazer & Kramer, *supra* note 157, at 660.

human beings, and advance transgender equality and gender equality simultaneously. That would be a truly worthy legacy of the Civil Rights Act for which so many worked so hard.

