A SIMPLE TEST SHOWS DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY IS NOT DISCRIMINATION BECAUSE OF SEX

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Justice Sonia Sotomayor: *We have insisted on this extremely simple test. If you apply that test, I guess it seems to come out against you.*[1]

Justice Elena Kagan: *I'm just going to ask you again, if you applied that test, don't you lose?*[2]

I. INTRODUCTION

If an employer hires and employs a man for many years and then fires that man when he decides to identify, appear and act as a woman it defies commonsense to claim that the man was fired because he is a *man*. Lawyers and judges do just this, however, reasoning that the man's sex is the cause for firing because a woman who identifies, appears and behaves as a woman would not be fired. In other words, *but for* the employee's male sex, the result would be different.

The "but for" test is the Supreme Court's "simple test"[3] for determining whether an employee has been injured by differential treatment based on sex, that is, discriminated against because of sex.[4] Advocates claim that the but for test proves discrimination against homosexual and transgender persons is because of sex. Some judges have been so persuaded.[5] Based on comments and questions from the bench, the application of the but for test appears to be potentially pivotal for two cases pending before the Supreme Court.[6]

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[1] *Bostock v. Clayton County* (*Zarda v. Altitude Express, Inc.*), No. 17-1618, oral argument transcript, October 8, 2019, (Zarda Transcript) at 41-42 *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_b97c.pdf.

[2] Zarda Transcript at 43.

[3] *See Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978) (An employment policy that disfavored a member of one sex and favored all of the other sex "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" (footnote omitted)).

[4] Title VII of the Civil Rights Act of 1964, as amended, prohibits two categories of employment practices. 42 U.S.C. § 2000e–2(a). *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. __, 135 S.Ct. 2028, 2031-32 (2015) ("These two proscriptions, often referred to as the 'disparate treatment' (or 'intentional discrimination') provision and the 'disparate impact' provision, are the only causes of action under Title VII."). Not all differential treatment by sex is discrimination because of sex. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006) ("No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that *injure* protected individuals." (emphasis added)).

[5] *See Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir., 2004) (A three judge panel ruled for the first time that a transgender person's sex discrimination claim may be pursued under Title VII (based on a stereotype theory); *see also Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir., 2017) (A federal appellate court for the first time unequivocally held that "discrimination on the basis of sexual orientation is a form of sex discrimination" and therefore cognizable under Title VII.) (based on a plain text theory). In this article, the employees' legal theories are discussed as a "text theory" based on the plain meaning of the statute and a "stereotype theory" based on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[6] *EEOC v. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir., 2018).

II. THE TEST CONSISTENTLY IDENTIFIES SEX DISCRIMINATION

As a test for disparate treatment, the but for test has been regularly employed by courts but how the test applies in *Harris Homes* and *Zarda* is disputed. In fact, whether the test applies at all is doubted.[7] Assuming it is probative, however, it can be demonstrated that the test, if applied consistently with past applications, *defeats* claims that discrimination based on sexual orientation or gender identity statuses is discrimination because of sex.

Preliminarily, the but for test does not determine disparate impact claims. Employment policies can pass the but for test but still discriminate if they impact the sexes in a way that disadvantages one sex. As the Court has explained, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity."[8] The requirement of a business necessity is a means for identifying sex-neutral policies that are mere pretexts for discrimination.

Employee claims in *Harris Homes* and *Zarda* are based on allegations of disparate treatment only so the Court's application of the but for test is expected to be dispositive. In these two cases, however, the employees use the but for test to argue that employment policies based on sexual orientation and transgender status are sex-specific, motivated by sex, and therefore constitute discrimination "because of sex" consistent with the plain meaning of the statute. With that premise, much of the oral argument by the employees' counsel was spent reconciling the results of their application of the but for test with existing lawful sex-specific policies.

As applied by the Supreme Court, the but for test has been consistently relied upon to reveal whether an employment policy (compensation, terms, conditions or privileges) discriminates because of sex. What the Court's decisions show is that disparate treatment constitutes discrimination because of sex under Title VII if, and only if, one sex, male or female, is categorically advantaged by the employer.[9] If an employment policy advantages only some members of the opposite sex, then the but for test fails to show discrimination because of sex. These variations can be illustrated as follows: (1) an employment policy that benefits or burdens one sex (Diagram 1) and (2) a policy that benefits or burdens some of the opposite sex (Diagram 2). Differential treatment constitutes sex discrimination under Title VII only under Diagram 1. Otherwise, differential treatment is not discrimination because of sex.

[7] Judge Sykes in *Hively* argues that the but for test is an evidentiary test that is wholly inapplicable because the issue is one of statutory interpretation not proof. *Hively* at 366 (Sykes, J., dissenting). Stephens and Zarda, however, use the test to support their statutory interpretation.

[8] *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971).

[9] *See Manhart*, 435 U.S. at 715 ("[E]ach of the two groups of employees involved in this case is composed entirely and exclusively of members of the same sex.").

Diagram 1. No Member of Opposite Sex is Injured by Same Employment Policy.

Sex Discrimination

An employee (A1) of one class (A) is injured.

No member of the opposite class (B) is injured.

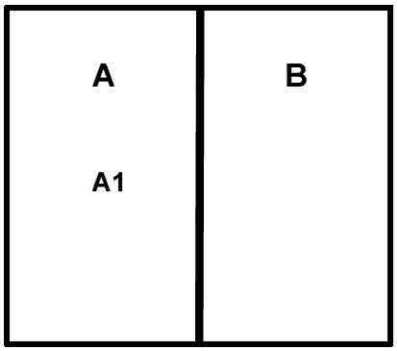
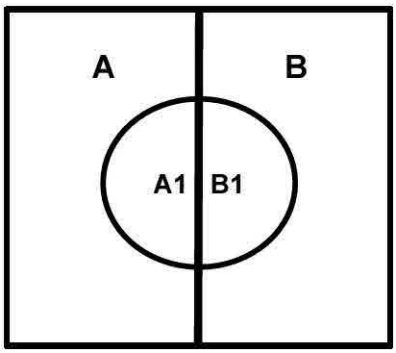


Diagram 2. A Member of the Opposite Sex is Injured by Same Employment Policy.

No Sex Discrimination

An employee (A1) of one class (A) is injured.

A member (B1) of the opposite class (B) is injured.



III. APPLICATION OF THE SIMPLE TEST

In *Harris Homes* and *Zarda*, the parties disagree about how the but for test applies. Harris Homes claims that the proper test compares Stephens, a male who identifies as the opposite sex, with a female who identifies as the opposite sex.[10] Stephens argues that this is wrong because it fails to hold everything but Stephens' male sex constant, including gender identity. Stephens asserts that the effect of sex cannot properly be determined unless sex is the only factor changed, about which Harris Homes agrees.[11]

In *Zarda*, the Second Circuit Court of Appeals observed,

> Although the Supreme Court has not elaborated on the role that the test plays in Title VII jurisprudence, based on how the Supreme Court has employed the test, we understand that its purpose is to determine when a trait other than sex is, in fact, a proxy for (or a function of) sex. To determine whether a trait is such a proxy, *the test compares a female and a male employee who both exhibit the trait*

[10] Harris Homes Brief at 27 *available* at https://www.supremecourt.gov/DocketPDF/18/18-107/112573/20190816105923793_18-107%20Brief%20for%20the%20Petitioner.pdf.
[11] *Id*. at 26-27.

> *at issue*. In the comparison, the trait is the control, sex is the independent variable, and employee treatment is the dependent variable. (emphasis added)[12]

Three paragraphs later, the court inconsistently states, "the proper question is whether sex is a 'motivating factor' in sexual orientation discrimination….but contrary to the government's suggestion, *this question cannot be answered by comparing two people with the same sexual orientation*." (emphasis added)[13]

To isolate the effect of sex for the but for test, however, all other factors need only be *ignored* whether they are the same or not. The but for test effectively isolates the effect of sex by holding constant only the sex of the injured employee and the sex of the opposite class when testing a particular employment policy. The purpose of the test is to determine whether the result is different if sex is changed *regardless* of whether any other trait is shared. Thus, a male who is transgender should be compared to females who are transgender *and* non-transgender and a male who is homosexual should be compared to females who are homosexual *and* heterosexual. If females are categorically treated differently, then sex is isolated as the cause of discrimination.

A. ONE SEX IS ADVANTAGED

In *Manhart*, based on differences in longevity for men and women, male employees paid less for the pension benefit than female employees. A female employee claimed the employer discriminated against her based on sex. Testing for discrimination based on sex, the but for question changes only the employee's sex and no other factors. Age, lifestyle, sexual orientation, gender identity and all other traits are *ignored* for her and for her male counterparts. The only comparison is between males and females: but for the female employee's sex, would the result be different? Because no male was required to pay the higher rate all men benefitted and the answer is "yes." Diagram 1 illustrates the case: one class—males—(B) categorically was advantaged compared to the employee injured (A1).

In *Diaz v. Pan Am. World Airways, Inc.*,[14] the employer employed only women as cabin attendants. Because one class, women (B), was categorically advantaged compared to Diaz (A1), a man, the only issue was whether being female was a bona-fide occupational qualification (BFOQ) for the job.

In *Phillips v. Martin Marietta Corporation*,[15] Phillips alleged that she had been denied employment because of her sex. Martin had informed Phillips that it was not accepting job applications from women with pre-school-age children. At the same time, however, Martin employed men with pre-school-age children. When Phillips applied, 70-75% of the applicants for the position she sought were women and 75-80% of those hired for the same position were women. Thus, no bias against women, per se, was presented.

[12] *Zarda*, 883 F.3d at 116-17.
[13] *Id*. at 117-18.
[14] 442 F.2d 385 (5th Cir., 1971).
[15] 400 U.S. 542 (1971).

The Court, however, reversed the summary judgment against Phillips because the lower courts misread the statute to permit one hiring policy for women and another for men with pre-school-age children. The overall favorable treatment of women as a class was not relevant. As Diagram 1 illustrates, the but for test shows Martin's employment practice injured a member of one class (A1) but none of the opposite class (B).

The case of *Frontiero v. Richardson*,[16] was brought by a female U.S. Air Force officer who sought to claim her spouse as a dependent for increased housing and other benefits. At the time, by statute, spouses of male members of the uniformed services were dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but spouses of female members were not dependents unless they were in fact dependent for over one-half of their support. The Court found the treatment unlawful discrimination in violation of the Due Process Clause of the Fifth Amendment. The but for test shows the differential treatment constitutes sex discrimination under Title VII too because, but for the injured employee's sex, the result would be different. No male employee was subject to the less favorable treatment, even though some qualified for benefits under the different, more stringent, requirements.

In *Sprogis v. United Air Lines, Inc.*[17] the employer employed men and women as cabin attendants but required women to be unmarried. Sprogis was fired after she married. Because the injured female employee was subject to a disadvantageous condition of employment to which no man was subject, the court determined the policy discriminated because of sex. Although only some women, those who married, were injured, the court states, "United has contravened Section 703(a)(1) by applying one standard for men and one for women."[18] Had United equally conditioned the employment of men, the policy would not have discriminated because of sex.

During oral argument for *Zarda*, Justice Ginsburg referenced *Sprogis* and asked Solicitor General Francisco if refusing to employ women who are married is discrimination when such a policy harmed no men because only women were employed as cabin attendants.[19] To the contrary, however, United did employ men as cabin attendants who were not subject to the same condition. If the airline employed no men because being female was a valid BFOQ for employment as a cabin attendant, then firing a woman for being married arguably would not be discrimination because of sex but discrimination because of marital status. In that case, a married female is not disadvantaged compared to males who, as a class, are also denied employment (Diagram 2).

In *Dothard v. Rawlinson*,[20] the State of Alabama imposed height and weight requirements for prison guards and restricted persons from serving in contact positions in maximum-security facilities for the opposite sex. The facially neutral height and weight requirements were found by the Court to have a disparate impact on women in violation of Title VII. Although the restrictions on contact positions were facially sex-neutral, the district court found that the policy as applied only denied employment to women as correctional counselors in contact positions in

[16] 411 U.S. 677 (1973).
[17] 444 F.2d 1194 (7th Cir., 1971) (The court determined being female was not a BFOQ for cabin attendant jobs.).
[18] *Id*. at 1198.
[19] Zarda Transcript at 57-58.
[20] 433 U.S. 321 (1977).

all-male penitentiaries. Accordingly, the Court agreed the restriction discriminated because of sex. Restrictions were entirely sex-based. Consistent with Diagram 1, the female applicant (A1) was disadvantaged but males as a class (B) were not. Ultimately, however, the Court determined that being male was a BFOQ for the jobs at issue.

Bauer v. Lynch[21] is somewhat anomalous. There, Bauer failed out of the FBI Academy because he failed to do 30 push-ups in a physical fitness test required for graduation. Women students were only required to perform 14 push-ups. The Fourth Circuit Court of Appeals held that the but for test was not applicable. Furthermore, the court held that different categorical sex-based physical fitness standards do not violate Title VII as long as they impose equal burdens on men and women by requiring equal levels of *fitness*.[22]

On its face, the decision appears to be at odds with *Manhart*. Just as greater longevity for women as a class does not allow an employer to disadvantage Manhart compared to all men, a physical fitness standard for men as a class should not allow an employer to disadvantage Bauer compared to all women. If sex is a proxy for physical differences relating to size and strength, it is a generalization comparable to longevity. Longevity and fitness criteria were determined statistically by sex in both cases.[23] Unlike longevity, individual differences in physical stature are objectively discernable. If physical fitness is indeed measurable by the FBI's tests and performance correlates with a person's physique, requirements that assume all men are bigger and stronger and assumes all women are smaller and weaker are stereotypical and fail the but for test.

Instead of the but for test applied by the district court, the appeals court applied an undue burden test.[24] The court, premised its decision on a finding that there are innate physiological differences that distinguish men and women beyond physical stature.[25] No female student, even if physically larger than Bauer, was subject to the higher standards required of him. As a test of physical fitness, not strength, the court considered it appropriate to require men and women to achieve equal fitness levels commensurate with innate physiological differences rather than equal raw scores.[26]

If the objective of the FBI's policy is a *sex-neutral* standard for physical fitness to assure a student's ability to complete physical training without injury,[27] and the requirements are

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[21] *Bauer v. Lynch*, 812 F.3d 340, *reh'g en banc denied*, No. 14-2323 (4th Cir., 2016).
[22] *Bauer* at 351.
[23] The standards for men and women were "gender-normed" after a study of performances of men compared to men and women compared to women. *Id*. at 343.
[24] *See, e.g., Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 606 (9th Cir., 1982) ("We thus agree with the numerous decisions defining permissible grooming rules for male and female employees as those which do not significantly deprive either sex of employment opportunities, and which are even-handedly applied to employees of both sexes.").
[25] *Bauer* at 351 ("an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each.") The government also argued that different standards were justified, in part, because the physical tests are male-oriented. *Id*. at 343.
[26] *Id*.
[27] *Bauer*, 812 F.3d at 342. The FBI identified two primary reasons for the fitness test, to assure fitness for a strong and injury-free performance at the Academy and fitness for effective training and application of the elements taught

equivalent and not unduly burdensome for one sex, then the but for test shows the policy does not disadvantage one sex (Diagram 1). The result is the same under both tests. Therefore, the court's refusal to apply the but for test was unnecessary. Likewise, had differential fitness test requirements been considered a *sex-specific* policy based on generalizations about physical stature rather than actual innate sex differences they would fail the undue burden test and the but for test because the physical tests for establishing fitness are objectively more challenging for men than for women regardless of an employee's physical stature.

In *Price Waterhouse*, a female employee was injured as the result of improper consideration of her sex. This was evidenced by statements reflecting stereotypical views about women. The district court found that sex stereotyping "was permitted to play a part" in the evaluation of Hopkins as a candidate for partnership and, based on the record, the Supreme Court determined the finding was not clearly erroneous.[28] Because an impermissible motive, Hopkins' sex, was established, the burden shifted to Price Waterhouse to prove by a preponderance of evidence that it would have made the same decision without taking Hopkins' sex into account.[29]

Importantly, evidence of sex stereotyping—taking account of an employee's sex--was not sufficient for discrimination. There had to be evidence that consideration of the employee's sex caused the employee's injury. Only if it disadvantaged Hopkins because she was a woman and disadvantaged no men based on their sex could she prevail. But for her sex, the stereotype would not have caused the injury and the facts found by the Court (illustrated by Diagram 1) show Hopkins was a victim of discrimination because of sex.

Although some advocates claim *Price Waterhouse* expanded the application of Title VII and established a new theory for sex discrimination, this is refuted by the plurality decision which makes no such holding.[30] The Court reiterated that employment policies constitute sex discrimination when they injure a person, meaning they *disadvantage* and not merely *differentiate* persons based on sex.[31]

B. SOME OF OPPOSITE SEX ARE ADVANTAGED

In *Harris Homes*, Stephens claims Harris Homes wrongfully denied him employment due to transgender status.[32] The but for test question is, but for Stephens' male sex would the result be different? If all females are employable regardless of transgender status, then the answer is "yes" and sex is the cause of injury. If any female would be denied employment for the same

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within the defensive tactics program, which include self-defense, combat, and restraining techniques. Both reasons explain administration of the test before or during training which Bauer passed but not after training as a graduation requirement which Bauer failed.

[28] *Price Waterhouse* at 255.

[29] *Id*. at 258.

[30] *Id*. at 248 (The plurality emphasized, "[i]n deciding as we do today, we do not traverse new ground."). Nevertheless, the Sixth Circuit panel in *Zarda*, citing another panel decision in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), claims *Price Waterhouse* reversed decades of jurisprudence and means *any* requirement that women wear makeup or wear dresses constitutes sex discrimination. *Harris Homes* at 573.

[31] *Price Waterhouse* at 244.

[32] Stephens alleged Harris Homes "terminated Stephens's employment on the basis of [his] transgender or transitioning status and [his] refusal to conform to sex-based stereotypes." *Harris Homes* at 566-67.

reason, the answer is "no." Unless all females are advantaged, sex is not the cause of Stephens' injury. (See Diagram 2. Stephens is represented by A1 and females who are transgender are represented by B1.) Because some women are also injured by the same policy alleged as the cause for injury (non-employment of transgender persons), the test shows there is no *sex* discrimination.

Stephens obtains a different result by changing the question. He asks, would a female *who identifies as a woman* be fired? He compares himself, a male injured for expressing himself as the opposite sex, with only female employees expressing themselves as women. Such a comparison would be valid only if no females are transgender or if the employer's policy applies only to males. In those instances, the answer is "yes," but for the employee's sex the result is different. The question is clearly wrong, however, because transgender status is not unique to males and Harris Homes' policy against employing persons expressing as the opposite sex is not alleged by Stephens to be applicable *only* to males who identify and express as women. According to Stephens, Harris Homes fired him for transgender status, not for being transgender *and* male. An employer who hires females who are transgender but not males who are transgender or vice versa discriminates because of sex but Stephens does not make that claim.[33] Thus, Stephens misapplies the test.

Like greater longevity in *Manhart*, transgender status is the trait that causes the injury. Unlike statistically greater longevity, however, transgender status or requiring employees to conform to their biological sex does not injure only males or females (Diagram 2). Transgender persons of *both* sexes (A1 and B1) are injured. Because neither all males nor all females are advantaged and avoid injury, the but for test demonstrates that the policy does not discriminate on the basis of sex for a transgender employee, male or female.

Similarly, in *Hively*, Professor Hively, who claimed she was discriminated against based on sexual orientation, does not claim that her employer denied promotion to only females attracted to the same sex.[34] Therefore, the proper but for question is, but for Hively's sex would the result be different? If all men avoid injury, then the injury to Hively is based on her sex. Otherwise, if men with the same trait, same sex attraction, are equally injured, Hively's injury is not because of her sex.

Applying the but for test to sex-specific employment policies such as Harris Homes' dress code produces the same result. If the sex-based requirements are equivalent in burden for men and women as classes, they are facially valid. If compliance is required of both sexes, the requirements are lawful as applied. The cause of injury, noncompliance, is a risk for members of both classes (A1 and B1 of Diagram 2). If the risk of noncompliance is equivalent for both sexes, then the but-for test shows that sex-specific practices do not discriminate on the basis of sex.

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[33] Similarly, Zarda claimed that "in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." *Zarda* at 109. When Zarda's counsel argued that lesbians are not treated the same as gay men, her argument was irrelevant to the case because Zarda made no claim of disparate treatment of men and women who are attracted to the same sex. Zarda Transcript at 66 ("the entire argument on the other side depends on the idea that men who are gay and women who are lesbians are being treated the same. And that's just not so.")

[34] *Hively* at 341.

The case of *General Electric v. Gilbert*,[35] decided before *Manhart*, is also illustrated by Diagram 2. There, women employees unable to work due to pregnancy or related conditions were denied certain benefits available to all employees disabled by other medical conditions. The factor that caused injury is pregnancy. Although pregnant persons are exclusively women, employees incapable of becoming pregnant are men and women. Gilbert, a pregnant employee, alleged sex discrimination when she was denied disability benefits. Because the employer's policy did not benefit any male compared to the injured female employee, the but-for test shows that it did not discriminate on the basis of sex. Instead, disparate treatment was caused by pregnancy, an unprotected status.[36]

Even though the employer necessarily understood that its policy would only adversely affect women employees based on biological differences with men and the trait is entirely dependent on an employee's female sex, this did not transform discrimination because of pregnancy into discrimination because of sex. If the question is whether a man would be denied disability benefits for pregnancy, the answer is "yes" because no man receives benefits denied to pregnant female employees. If males are categorically denied the benefit denied to the injured employee, then there is no discrimination based on sex. In *Gilbert*, all employees of both sexes were denied the benefit.

As mentioned, however, treatment that passes the but for test but disparately impacts one sex as a *class* can still violate Title VII. In *Gilbert*, the exclusion of disability benefits for pregnancy, for which only women could qualify, arguably had a disparate impact but the Court considered the employer's overall treatment of both sexes and found insufficient disparity to evidence a discriminatory purpose.[37]

In *United Air Lines, Inc v. Evans*,[38] Evans was forced to resign her position with United in 1968 pursuant to United's policy against employing female stewardesses who are married. Subsequently, the policy was determined to be incompatible with Title VII. Evans eventually was rehired by United in 1972. For seniority purposes, she was treated as though she had no prior service with United, however.

The Court acknowledged that some male employees with less total service than Evans had more seniority than she, but also recognized that this disparity was not a consequence of their sex or of her sex. Females hired between 1968 and 1972 also acquired the same preference over Evans just as males did. Additionally, employees of both sexes who had service prior to

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[35] *General Electric Company v. Gilbert*, 429 U.S. 125 (1976).

[36] In 1978, Congress passed the Pregnancy Discrimination Act and amended Title VII to include pregnancy as a separate cause of action. The conflict on the Court in *Gilbert* regarding the application of the but for test persisted, however. *See Newport News Shipbuilding and Dry Dock Company v. EEOC*, 462 U.S. 669, 675-76 (1983) ("[W]e shall consider whether Congress, by enacting he Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric v. Gilbert…*but also rejected the test of discrimination employed by the Court in that case. We believe it did.").

[37] *Gilbert* at 135. The Court relied on *Geduldig v. Aiello*, 8212 640, 417 U.S. 484, 496-97, n.20 (1974), stating, "the fact that there was no sex-based discrimination as such was not the end of the analysis, should it be shown "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other…."

[38] 431 U.S. 553 (1977).

February 1968, who resigned or were terminated and who were later re-employed, also were treated as new employees receiving no seniority credit for their prior service. The Court concluded that Evans "failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex."[39]

The decision is consistent with the Court's application of the but for test as illustrated by Diagram 2: some males (A1) and some females (B1)—those with a break in service—had less seniority than employees with less continuous service than the total service of reinstated employees. But for Evans' sex, United's seniority system would have had the same result. The cause of Evans' resignation and break in service was a discriminatory policy, but she did not challenge it as such for which a remedy might have applied.[40]

During oral argument for *Harris Homes*, Justice Kagan raised the issue of "double discrimination." She stated that discrimination resulting from a sex-stereotype for females is not saved by a comparable sex-stereotype for males.[41] In response, Solicitor General Francisco correctly distinguished double sex discrimination from lawful employment policies based on requirements applicable to both sexes.[42]

For example, if a job requires a trait of strength and it is applied to men and women equally, there is no legitimate claim of disparate treatment because of sex by persons injured by it.[43] Similarly, if an employer refuses to employ passive or non-aggressive persons then men and women injured are not discriminated against because of sex. These examples are illustrated by Diagram 2 where employees with the disadvantageous traits are A1 and B1. Such sex-neutral policies are clearly distinguishable from the sex stereotype that injured an individual of one sex in *Price Waterhouse* and distinguishable from *Manhart* where a generalization about longevity injured an individual of one sex, both of which are illustrated by Diagram 1. It is only if a trait shared by both sexes is combined with a stereotypical view that one sex should not or cannot possess it can it cause an injury because of sex.[44]

Employment policies applicable to both sexes that distinguish by sex are not double discrimination either. Lawful sex-specific requirements are lawful either because they are not stereotypical or, if they are, because they do not disadvantage one sex.[45] Expectations about sex-specific dress or sex-specific restrooms as sex stereotypes or social norms do not disadvantage

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[39] *Id*. at 558.
[40] *Id*. at 558-59.
[41] Harris Transcript at 50. An employer who *believes* that men should be masculine and women should be feminine can have a lawful dress code that reflects those beliefs, however. *See, e.g., Carroll v. Talman Federal Sav. and Loan Ass'n of Chicago*, 604 F.2d 1028, 1032 (7th Cir., 1979) ("[s]o long as [personal appearance regulations promulgated by an employer] find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women.").
[42] *Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, October 8, 2019, (Harris Homes Transcript) at 52 *available* at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf.
[43] Height and weight requirements can have a disparate *impact*, however. *See, e.g., Dothard*.
[44] *See, e.g., Price Waterhouse* (female injured); *Diaz v. Pan Am. World Airways, Inc.* (male injured).
[45] The plurality in *Price Waterhouse* stated that "Congress intended to strike at the entire spectrum of disparate treatment of men and women *resulting* from sex stereotypes." (emphasis added). Accordingly, a sex stereotype is not sufficient for discrimination. There must be disparate treatment caused by it. *Price Waterhouse* ar 251.

men or women as a class.[46] Men and women equally required to dress and use restrooms consistent with their sex are not harmed relative to the opposite sex. Men and women who choose not to conform are harmed. There is no catch-22 for employees like in *Price Waterhouse*.[47] If an employee is harmed, it is not because of their sex but because of a reason independent of their sex (Diagram 2). A dress code only applicable to one sex might discriminate as disparate treatment but that does not mean the same dress code combined with one for the opposite sex is double discrimination or "two wrongs" if the burden is equivalent and the risk of injury for nonconformance is the same (Diagram 2).[48]

IV. THE TEST IS CONSISTENT WITH TITLE VII'S PROHIBITION OF DISPARATE TREATMENT OF INDIVIDUALS

Justice Elena Kagan: *You're making Title VII into a statute about groups but Title VII is not a statute about groups….And here, Ms. Stephens, was being treated differently because of her sex.*[49]

When Harris Homes' counsel stated, "the line that has to be drawn based on Title VII's language is whether women are being treated less favorably than similarly situated men because of sex,"[50] Justice Kagan questioned whether that was consistent with the terms of the statute which protect individuals and not classes of individuals.[51]

The but for test is faithful to the statute's focus on treatment of individuals. The test the Court applied in *Manhart* is very clear: "treatment of a *person* in a manner which but for that *person's* sex would be different." (emphasis added).[52] The Court rejected the employer's argument that its plan treated male and female classes of employees equally based on general expectations of longevity. The Court emphasized that the individual female employee, if a male, would be treated differently. The female employee as an *individual* was compared to the entire *class* of male employees, none of whom was required to contribute as much as she (Diagram 1).

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[46] Harris Homes Transcript at 4. At oral argument, counsel for Stephens stated that Harris Homes "fired [Stephens] for contravening a sex-specific expectation that applies only to people assigned male sex at birth; namely, that they live and identify as a man for their entire lives. That is disparate treatment on the basis of sex." Thus, it is claimed that any expectation based on biological sex constitutes a sex stereotype. If the expectation applies to both males and females, however, then it is not disparate treatment. There is no evidence that Harris Homes denies employment to only transgender *women*.

[47] *Price Waterhouse* at 251 ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.").

[48] *See Carroll* at 1031 (The employer required all of its female tellers, office and managerial employees to wear uniforms, whereas male employees in the same positions were only required to wear customary business attire. Requiring a uniform was not a problem and the particular uniform required was not a problem. The court explained that "Title VII does not require that uniforms be abolished but that [the employer's] similarly situated employees be treated in an equal manner.") .

[49] Harris Homes Transcript at 39, 41.

[50] *Id*. at 39. Comparing the treatment of similarly situated men and women as classes is proper to determine if the burden of a sex-differentiated policy is not equivalent. For sex-neutral policies, comparing the impact on men and women as classes is proper to determine if the impact is disparate.

[51] *See Manhart* at 708 ("The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.").

[52] *Manhart* at 711.

As a test for disparate treatment, the but for test compares the injury an individual incurs with treatment of all members of the opposite sex. Under the test, it can only be concluded that the result would be different but for the employee's sex if the result would be different for *all* members of the opposite sex. Otherwise, sex does not cause discrimination. If some members of the opposite sex are equally disadvantaged the employer's treatment does not discriminate on the basis of sex. The focus remains on the injury incurred by the individual. By comparing treatment with all members of the opposite sex, sex is isolated as a trait.

Methodologically, comparing Stephens' injury from Harris Homes' refusal to employ persons who are transgender to the entire class of females employed by Harris Homes is no different than comparing the female injured in *Manhart* with the entire class of male employees. It just produces a different result.[53]

V. THE NEED FOR AN INJURY

Justice Ruth Bader Ginsburg: *You have to have someone who's injured. And the response to the bathrooms is who is the complaining plaintiff?And for most people, they would not be complaining plaintiff. They would not be eligible because they're not injured by the separate bathrooms. In fact, they like it.*[54]

At oral argument, Justice Ginsburg repeatedly interjected that sex-specific employment terms and conditions are merely differential and not discriminatory because there is no injury. This appears to be an attempt to explain how some sex-specific policies can be lawful even if sex-neutral policies disadvantaging employees attracted to the same sex and expressing as the opposite sex are unlawful. Any employment policy, sex-specific or not, can cause injury, however. The question is whether Title VII protects against it. If an employee is injured and makes a claim of disparate treatment because of sex, then the but for test is determinative.

Lawful sex-specific dress codes and restrooms segregated by sex are not lawful because they cause no injury for most persons but because they cause no injury due to *sex*. Courts consider the burden sex-specific policies impose on men and women as classes. If the burden is equivalent then there is no discrimination based on sex even if a person of one class claims an injury.[55] If the policy reasonably relates to commonly accepted social norms and business needs and but for the person's sex an equivalent burden applies, any injury from the policy necessarily results from some trait other than the person's sex. Title VII does protect against employers adversely treating employees who violate work rules, including sex-specific rules, and it does not protect against employers discriminating against employees based on traits other than those enumerated in the statute.

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[53] Zarda's attorney argued a different result can be obtained for sex-specific policies by applying a reasonable person standard. That approach, however, is not only inconsistent with the Court's application of the but for test but it also would shift focus from the individual to a class, precisely what Justice Kagan considered improper. Zarda Transcript at 16.

[54] Zarda Transcript at 48. Whether some employees "like" treatment that injures employees has been determined to be immaterial. *See, e.g., Carroll v. Talman Federal Sav. and Loan Ass'n of Chicago*.

[55] *See, e.g., Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006)* and *Carroll*.

VI. SEX DOES NOT CAUSE AN INJURY MERELY BECAUSE SEX IS A FACTOR FOR ENFORCEMENT OF SEX-NEUTRAL TERMS OF EMPLOYMENT

Justice Neil Gorsuch: *I think the --the argument on the other side is the language of the statute has a but-for causation standard, a more generous causation standard. So perhaps there are two causal factors at work here. But isn't one of them sex in the narrow sense of --of --of biological gender?*[56]

Justice Ginsburg's point that there needs to be an injury is valid for showing that differentiation alone is not discrimination.[57] She answers the question raised by Justice Gorsuch and refutes the view of appellate judges who believe sex is inherently a motivating factor when an employee is injured by an employer who considers a person's sex when enforcing terms or conditions of employment. The injured person's gender identity, gender expression, sexual orientation or other trait might motivate their decision not to comply but the employer's need to know the injured person's sex to apply and enforce a lawful sex-specific policy does not make sex a cause of injury when failure to conform regardless of sex is the cause. Sex as a criterion for dress or restroom use is neutral if it burdens and applies to men and women equivalently.

Justice Gorsuch, referring to Judge Flaum's concurring opinion in *Hively*, seems receptive to the argument that, because the sex of a homosexual or transgender person is integral to determining whether that person is homosexual or transgender, sex is necessarily a motivating factor. In his opinion, Judge Flaum explains his rationale by stating, "Ivy Tech allegedly refused to promote Professor Hively because she was homosexual—or (A) a woman who is (B) sexually attracted to women.[58] Thus, the College allegedly discriminated against Professor Hively, at least in part, because of her sex."[59] But for her sex, the result would have been different because a man sexually attracted to women would not be denied promotion.

Judge Flaum goes further. He insists that the employee's sex is always a motivating factor in these cases, arguing that "[o]ne cannot consider a person's homosexuality without also accounting for their sex....[a]s such, discriminating against that employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, *and* (B) their sexual attraction to individuals of the *same sex*." (emphasis in original).

Judge Flaum is wrong for three reasons: (1) sex is not inherently a factor for, or motivating cause of, discrimination based on sexual orientation and transgender status; (2) even if sex implicitly is a factor, it is not therefore a *cause* of injury; and (3) even when sex explicitly is considered for sex-specific policies, that consideration does not make them sex discrimination.

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[56] Zarda Transcript at 44-45.

[57] *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("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.").

[58] It seems assumed that Professor Hively's sex is female. If males who identify as women attracted to women are lesbian too, then does *sex* really matter? See "I'm a lesbian and a transgender woman—and those two aren't mutually exclusive" *available* at https://www.dailydot.com/irl/lesbian-transgender-woman/.

[59] *Hively*, 853 F.3d at 359.

First, homosexuality is not confined to women. "Lesbian" as an adjective or noun refers to *female* homosexuals. An employer's policy against homosexuals does not harm just female homosexuals, however, and part (A) of Flaum's characterization of the issue in *Hively* is inaccurate. A more correct description of that case would be, "Ivy Tech allegedly refused to promote Professor Hively because she was homosexual—or (A) a *person* who is (B) sexually attracted to *persons of the same sex*. Part (A) in Flaum's hypothetical, "the employee's sex," is clearly superfluous when part (B) alone is sufficient. Thus, the College allegedly discriminated against Professor Hively, *regardless of*, not *because of*, her sex.

Sexual orientation is not dependent on a person's sex. There is no correlation let alone causation. If Hively was denied promotion for being homosexual, her injury was not caused by an attraction to women but by the attraction to the same sex. If the employer denied promotion to *female* homosexuals—lesbians—exclusively, then the policy discriminates because of sex. Otherwise, it does not. If the employment terms or conditions are sex-neutral, they are not facially invalid. Unless the policy is applied discriminately, no male or female employee is treated differently due to sex.

Second, Judge Flaum exaggerates dicta in *Price Waterhouse*, when he states that "[t]he Court made clear that '[t]he critical inquiry ... is whether gender was a *factor* in the employment decision' when it was made."[60] (Emphasis added by Flaum). The plurality in *Price Waterhouse* stressed, however, that "because of" means the motive in question—a person's sex—must make a difference to the outcome.[61]

The plurality states, "[o]ur decisions confirm that Title VII is not concerned with the mere presence of impermissible motives; it is directed to employment decisions that result from those motives."[62] Sex, as a factor for compliance with employment *policy*, does not make sex a factor for the employer's *decision*. Thus, even assuming an employer implicitly takes account of a person's sex when discriminating against persons attracted to the same sex as Judge Flaum asserts, that alone is insufficient for discrimination. Hively's sex must make a difference to the outcome. If same sex attraction caused Ivey Tech's decision not to promote her, Hively's sex made no difference.

Third, employment policy that explicitly considers employees' sex is not necessarily sex discrimination. Ivy Tech's policy against homosexuals does not consider employees' sex any more than the employment policy in *Manhart*. There, women paid one, higher, rate and men paid one, lower, rate. If there had been an actual correlation between sex and longevity, consideration of sex as a proxy for longevity would have been fine. The Court did not find that Manhart was discriminated against merely because the employer considered sex in setting rates but because her sex *caused* the higher rate.

In *Bauer*, the court did not find sex was a motivating factor or cause of Bauer's injury just because the FBI considered his sex for assigning physical fitness test requirements.

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[60] *Id*.
[61] The Court cited statements of the statute's drafters for support. *Price Waterhouse* at 244, citing 110 Cong.Rec. 7213 (1964) ("To discriminate is to make a distinction, to make a difference in treatment or favor.").
[62] *Price Waterhouse* at 282.

Arguably, consideration of sex is *required* when physiological differences create unequal burdens: "[E]qually fit men and women demonstrate their fitness differently. Whether physical fitness standards discriminate based on sex, therefore, depends on whether they require men and women to demonstrate different levels of fitness."[63]If fitness tests require women to achieve equal results with men but a higher level of fitness is required for women than men to achieve those results, then that test would discriminate because of sex.

Sex is also a similarly intrinsic factor in *Gilbert*. Women employees unable to work due to pregnancy were disadvantaged compared to employees unable to work due to other conditions. The employer denying benefits did so on the basis that (A) the employee is a woman who is (B) disabled due to pregnancy or related condition. The fact that all employees with this trait are female (just as all lesbians are female) was not determinative for the Court.

Judge Flaum's inconsistency with precedent is also evident when his analysis is applied to sex-specific policies such as dress codes.[64] According to his analysis, a man fired for wearing women's clothes is fired for (1) being male and (2) wearing women's clothes. In order for the employer to determine whether wearing women's clothes is cause for adverse action, the employee's sex must be known. It may be true that sex is considered for *differentiating* employees but differentiating is not, *ipso facto*, discrimination.[65] Logically, if Hively's sex motivated her employer's decision then this man's employer would similarly be motivated by sex too. Because sex-specific policies such as dress codes historically have been held not to violate Title VII per se, Judge Flaum's analysis and theories accepted by judges of the Second and Sixth Circuit Courts of Appeals cannot be reconciled with long-standing precedent.

The proper analysis of a sex-specific policy—one that produces results consistent with precedent—shows it does not depend on sex at all. A male employee fired for wearing women's clothes is fired for expressing as the opposite gender, a sex-neutral policy. Most but not all men and women express themselves consistent with their sex. The employment policy injures those who do not. Those injured are neither all men nor all women. Thus, the but for test shows there is no discrimination because of sex (Diagram 2).

As Diagram 2 shows, Judge Flaum's flaw lies in his framing of the question. The injury is not motivated by sex because the policy does not advantage men and women categorically in either case.[66] The policy is not based on one trait for men and another trait for women but one trait for both: same sex attraction. If this trait triggers harm, the sex of the person harmed is

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[63] *Bauer* at 351.

[64] "Sex-specific" is not "gender-specific." If the Court rules that gender discrimination *is* sex discrimination, however, then gender-specific employment policies will be equally unlawful as sex-specific employment policies.

[65] *But see* American Bar Association, amicus brief at 12, which argues "[s]exual orientation discrimination inherently involves sex-based differentiation. The employee's sex constitutes an essential—but for—element of the discrimination itself, because identifying an individual's sexual orientation requires two key considerations: the individual's sex and the sex of the individual's partners." The argument is fallacious. First, differentiation might be a necessary element but it is not sufficient for discrimination. Second, homosexuality, or more broadly sexual orientation, is an individual status or trait. The existence of a partner and a partner's sex are inconsequential to that status.

[66] Judge Richard A. Posner believes that discriminating between women is sex discrimination: "I don't see why firing a lesbian because she is in the subset of women who are lesbian should be thought any less a form of sex discrimination than firing a woman because she's a woman." *Hively* at 355 (Posner, J., concurring).

irrelevant and not a motivating factor. Furthermore, unlike a sex-specific policy that can impose an unequal burden, denying employment to homosexuals and transgender persons on the basis of these traits presents no such issue. There simply is no discrimination based on a trait that distinguishes males from females when a trait that distinguishes men from men and women from women is the basis for an employment decision.

VII. STEPHENS' THEORIES ARE INCOMPATIBLE WITH EXISTING LAW

In *Harris Homes*, the employer's dress code sets rules for men and women employees. Although Stephens was fired when he announced his intent to identify as a woman and comply with the dress requirements for women employees, neither the EEOC nor Stephens challenges the dress code as unlawful sex discrimination. Stephens does not claim to be injured by it because of sex and there is no claim that it disparately burdens or impacts men or women.

Still, Stephens claims a formal or informal policy requiring males to dress as men when females are not required to dress as men discriminates because of sex for two reasons: (1) because the policy takes account of sex and (2) because the policy is based on a sex stereotype. If either theory is adopted by the Court, no sex-specific policy that differentiates on the basis of sex (or gender) can survive a facial challenge (other than a BFOQ exemption) because it will be direct evidence of disparate treatment.[67]

A dilemma for advocates is created by their treatment of sex-neutral traits (same sex attraction and opposite sex expression) as sex-specific—one that differentiates by sex—to establish sex as a motivating factor.[68] Once argued, there remains the matter of distinguishing these so-called sex-specific policies from existing, lawful, sex-specific policies.

Just as Justice Ginzburg attempted to distinguish them based on the need for an injury, counsel for Zarda and Stephens attempt to distinguish them by arguing that they involve different issues and that injuries from other, lawful, sex-specific policies are not sex discrimination because any injury is *de minimis*.[69] Ultimately, however, both attorneys took the position that existing lawful policies that differentiate by sex violate Title VII because they injure employees

[67] To the contrary, Stephens' counsel argued that the Court's decision will not determine lawfulness of sex-specific policies: "how you answer this case will not resolve how you answer that case." Harris Transcript at 5.

[68] For example, advocates refer to gay men and lesbian women as two separate classes as opposed to same sex attraction as a single trait and transgender men and transgender women as separate classes instead of opposite sex expression as a single trait.

[69] Zarda Transcript at 18; Harris Homes Transcript at 17 (Counsel cited *Burlington Northern* as authority but that case deals with retaliation and how harmful actions must be to establish a claim. Courts consider the differential effect of a sex-neutral policy in disparate impact claims, making the degree of difference in harm by class an issue. Courts also consider whether sex-specific policies impose an undue burden on one class. *Jespersen* at 1110. But absent a disparate impact and absent an undue burden, the *de minimis* injury argument does not explain why injuries from policies allegedly based on an employee's sex are sex discrimination but injuries from lawful policies explicitly based on sex are not sex discrimination. It may be true that most employees like sex segregated restrooms but it is also true that most employees who like them are non-transgender. Incidence of injury from noncompliance by transgender employees might be greater but injury from noncompliance is no greater for *males* or *females*.

because of sex and because they are based on sex stereotypes.[70] This view is inconsistent with existing Title VII jurisprudence regarding sex-specific employment policies.[71]

Sex segregated restrooms are lawful because they do not disadvantage one sex as a class. Employers with multi-occupancy restrooms are free to protect legitimate privacy interests of both sexes. If an employee alleges the policy does not protect their privacy interests, it is not because the policy disadvantages one sex but because it disadvantages the individual based on a trait other than sex. What legally distinguishes this injured employee from others of either sex is not just their harm but the trait causing it.

The opinion that existing lawful sex-specific policies violate Title VII is compelled because their theories based on text and based on *Price Waterhouse* necessarily render them unlawful too. It is correct that policies that differentiate by sex can present different issues such as whether there is an undue burden but advocates' theories for deciding *Harris Homes* and *Zarda* involving sex-neutral policies logically decide them as well.[72]

Specifically, the advocates' improper application of the but for test[73] generates erroneous results for lawful sex-specific policies. Just as they argue that a person's sexual orientation (same sex attraction) and gender identity (opposite sex expression) must be held constant, they must logically do the same when applying the test to sex-specific dress codes and sex-segregated restrooms. If Stephens was fired for wearing women's clothes, they must ask whether a woman wearing women's clothes would be fired. Because a woman would not be fired and the result is different, this application of the test shows the policy to be sex discrimination. Similarly, if Stephens was fired for using the women's restroom when women are not, the injury is caused by his sex according to the advocates' application of the but for test, which is clearly wrong.

The proper application of the but for test, one that produces the current, lawful, result for sex-specific policies, produces a result *opposite* the one that advocates desire for sexual orientation and transgender status. An employer firing a man for dressing as a woman is not enforcing a policy against men dressing as women (Diagram 1) but a policy against men *and* women dressing opposite their sex (Diagram 2). Such a policy does not injure all men but only some men (A1) and some women (B1) who do not conform to different but equivalent standards (Diagram 2). Because A and B and A1 and B1 are treated the same, there is no discrimination because of sex. Policies against men and women attracted to the same sex or identifying as the opposite sex burden only some men and some women.

A colloquy between Chief Justice Roberts and Stephens' counsel exposed the conundrum for advocates who claim both (1) that discrimination based on gender identity is sex discrimination and (2) that their rationale for this position does not necessarily invalidate all employment terms and conditions that differentiate by sex:

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[70] Harris Transcript at 10, 64; Zarda Transcript at 16-17.

[71] *See, e.g., Jespersen* at 1109-10 (9th Cir. 2004) ("Grooming standards that appropriately differentiate between the genders are not facially discriminatory.")

[72] Logic might matter less than policy preferences. Justice Breyer openly discussed how the Court could reconcile one decision for *Harris Homes* and *Zarda* and another for lawful sex-specific policies. Harris Transcript at 31.

[73] See Section III.B., *supra*.

> CHIEF JUSTICE ROBERTS: So if the objection of the transgender individual is that I want to use a bathroom consistent with my gender identity, rather than biological sex, do you analyze it as --the affecting based on the transgender status or do you analyze it on the basis of biological sex?….if you analyze it because of sex, then I think, as has been pointed out there's no disadvantage, whether you're a man or a woman. But if you analyzed it on the basis of transgender status, there is, because you want to use the women's restroom and be biologically male. So when it's analyzed on the basis of sex, there's no problem, but when it's analyzed on the basis of transgender status, it presents a whole different case.
>
> ….
>
> MR. COLE: What this Court said in Burlington Northern and in Oncale is that to decide whether something discriminates that refers to sex is you have to ask whether --not just whether it differentiates, but whether it differentiates in a way that injures. And you answer that question by asking would a reasonable person in the plaintiff's position experience a significant or trivial harm?[74]

Chief Justice Roberts' question shows that there are the two distinct traits subject to discrimination. If an employer segregates restrooms by sex then all males, including some who identify as women, are required to use the men's room. All females, including some who identify as men, are required to use the women's room. If the policy causes injury for an employee who identifies as the opposite sex, the policy differentiates by sex but does not discriminate because of sex. (Diagram 2) A transgender employee might be injured. But for his or her transgender status, the result would be the different.[75] To the extent sex is a component of being transgender it is equally a component of being non-transgender. Discriminating on the basis of sex injures all employees of one sex whether transgender or not but discrimination on the basis of transgender status does not injure all employees of one sex.

Stephens' counsel, however, simultaneously insists that the Court's decision would not decide the lawfulness of sex-specific policies like dress codes[76] while he confides that such policies that differentiate on the basis of sex do discriminate for anyone significantly injured by them, namely transgender employees.[77] In effect, he argues that sex-specific policies do not discriminate because of sex for non-transgender men and women who are not injured but that they do discriminate because of sex for transgender men and women who are injured. But if any policy that distinguishes between transgender persons and non-transgender persons discriminates

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[74] Harris Homes Transcript at 6, 7-8. *Burlington Northern* and *Oncale* adopt an objective, reasonable person, standard for cases involving retaliation and sexual harassment, respectively, where an employer's conduct is evaluated like a common law tort. Results of the but for test are not subject to such a qualification. Employees in *Harris Homes* and *Zarda* did not base their claims on the degree of harm they experienced.

[75] Diagram 1 illustrates this where A are employees who identify as their biological sex and B are employees who identify as the opposite sex. A transgender employee (A) using the restroom that coincides with his or her identity is fired. A non-transgender employee (B) using the restroom that coincides with his or her identity is not fired.

[76] Harris Homes Transcript at 19 (Cole states, "a policy that permits sex segregation, how that applies to transgender people is just a different question. It is not answered one way or the other by this case.").

[77] *Id*. at 10.

because of sex, then enforcement against one and not the other would be unlawful sex discrimination. Sex segregated restrooms would become facially invalid.

Consider an employer that employs only females in a job for which being female is a BFOQ. In addition to refusing employment to biological males (men and transgender women), the employer refuses to employ females who are transgender men. The discrimination against men is permitted by Title VII but is discrimination against transgender men because of sex or some other trait? As females, transgender men are treated the same as all males but differently from other females. But for her sex, a transgender man would not be employed. But for her transgender status, she would be employed. The test shows that the cause of injury for a transgender man is transgender status, not sex, and shows there are two separate, independent, traits. If discrimination against transgender status is inherently because of sex, the employer's policy seemingly would fall outside the BFOQ exemption and violate Title VII. Jobs limited to females would be open to females whether they express themselves as women or men. Such a result is arguably inconsistent with the BFOQ exemption.

Whether the Court's decision in these two cases decides the lawfulness of sex-specific policies is really academic, however, and claims to the contrary are disingenuous. Justice Ginsburg's opinion that most people use sex segregated restrooms because they like it is true. Separating men and women serves legitimate privacy interests.[78] But these interests and sensibilities are immediately offended if someone of the opposite sex is present. If an employer must allow any male to use the women's room and any female to use the men's room, sex segregated restrooms no longer exist.[79] Employees who like them are injured. Balancing the interests of transgender employees who like gender-specific restrooms with non-transgender employees who like sex-specific restrooms is a policy matter for legislatures, not courts. Just as restroom policies based on gender and sex are irreconcilable, so too are the theories advocated by

[78] *See Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) ("Shielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex is impelled by elementary self-respect and personal dignity."); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (people have "a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating." (internal citations omitted)); United States v. Virginia, 37. 518 U.S. 515, 540 n.19 (1996) (Coeducation of women at VMI "would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets.").

[79] In 2015, the EEOC reversed itself and found that the disparate treatment in restroom access based on sex was a direct violation of the ban on sex discrimination. Based on an employment discrimination decision in 2012, *Macy v. Dept. of Justice, available* at https://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt), it held that a male transgender employee presenting as a woman is entitled to be treated as a woman, including access to women's facilities, regardless of whether the individual transitioned surgically. *Lusardi v. Dept. of Army, available* at https://www.eeoc.gov/decisions/0120133395.txt; https://www.lieffcabraser.com/pdf/Lusardi.pdf. Federal regulations allow for sex-segregated facilities. S*ee, e.g.*, 29 CFR § 1604.2 (b)(5) ("Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex."); 34 CFR § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."). Since 2014, however, the EEOC directs that access to these sex-segregated facilities must allow indiscriminate access to both sexes based on gender identity. Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) *available* at http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

Stephens and existing case law that tolerates differential treatment based on sex that does not disadvantage either sex.

VIII. SEPARATION OF POWERS AND JUDICIAL MODESTY

Justice Samuel Alito: *May I ask you to respond to what some people will say about this Court if we rule in your favor?....if the Court takes this up and interprets this 1964 statute to prohibit discrimination based on sexual orientation, we will be acting exactly like a legislature.*[80]

Justice Neil Gorsuch: *When a case is really close, really close, on the textual evidence….The judge finds it very close….At the end of the day, should he or she take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that--that Congress didn't think about it and…that is…more appropriate a legislative rather than a judicial function?....It's a question of judicial modesty.*[81]

In *Price Waterhouse*, the Court recognized two interests Congress sought to balance: employee rights and employer prerogatives, stating "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice."[82] Although courts routinely quote the proposition that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,"[83] they ignore Congress' intent and purpose to preserve employers' freedom of choice. Without considering this countervailing interest, the Second Circuit panel has no restraint in promoting the other interest: "because Congress could not 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 that Congress used."[84]

In *Gilbert*, the Court properly ruled there was no discrimination because of sex even though only women get pregnant and the employment term or condition disadvantaged women who were pregnant. Even though the policy necessarily took the sex of these employees into account, the policy did not violate Title VII because pregnancy was not a trait protected by it. Congress responded by making pregnancy a separate cause of action under Title VII. That is precisely what Stephens is requesting the Court to do, to create a new cause of action, where Congress has thus far declined to do it.[85]

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[80] Zarda Transcript at 21-22.
[81] Harris Homes Transcript at 26-27.
[82] *Price Waterhouse* at 239.
[83] *See, e.g.*, *Manhart*, 435 U.S. 702, 707, n. 13; *Price Waterhouse* at 251; *Harris Homes* at 573; *Zarda* at 119.
[84] *Zarda*, 883 F.3d at 115.
[85] In 1974, Rep. Bella Abzug introduced a bill called the "Equality Act." No action was taken on it. An Employment Non-Discrimination Act (ENDA) was introduced in 1993. It failed to pass either house of Congress until 2007. That year, after gender identity language was eliminated, the bill passed the House narrowly, but never got a vote in the Senate. Despite large Democratic majorities in both houses of Congress during President Barack Obama's first two years in office ENDA never received another vote. In 2015, an Equality Act was introduced in the House and Senate but no action was taken on it. In 2019, an Equality Act was introduced in the House and Senate and passed the House.

Justice Ginsburg reasonably asked how the text can be interpreted to protect homosexual persons in 1964 when homosexuality was considered a mental illness and homosexual conduct was criminal in some jurisdictions. Zarda's attorney answered that you just read the words of the statute in spite of what Congress intended. When asked by Chief Justice Roberts if she agreed with Judge Posner that the Court should relieve Congress of the duty of updating the statute,[86] she rejected Posner's radical position, claiming she was not asking the Court to change anything.[87] Stephens' attorney stated the Court would merely be interpreting the statute, a traditional, constitutional, judicial function.[88]

The text theory of sex discrimination, however, relies on two false premises: (1) that sex is a broad term, broader than what members of Congress may have intended, and (2) that homosexuality and transgenderism are new circumstances. The claim that "sex" is a broad term that must be given full effect assumes "sex" in 1964 is synonymous with "gender" as understood today when, in reality, "gender" has been synonymous with "sex" as understood in 1964. In 1964, "sex" meant the immutable trait that distinguishes males from females. "Gender" has often been used synonymously with "sex" since then but as the meaning of "gender" changes, the meaning of "sex" in Title VII does not absent an amendment. The present meaning remains just as narrow as it was in 1964.[89]Although judges have redefined "sex" in other contexts,[90] judges do not have authority to redefine text to comport with their own enlightened opinions.

Second, as Justice Ginsburg noted, same sex attraction and opposite gender expression were known traits in 1964. Cross-dressing was unlawful in some local jurisdictions and prosecuted. The Supreme Court was aware of such laws when it rejected a petition for certiorari in one such case.[91] Laws also prohibited certain sex acts by homosexuals. There is no express intent by Congress to preempt local laws prohibiting opposite sex expression or to prohibit discrimination on the basis of same-sex attraction when sex by same-sex couples was a crime in some states. The existence then of laws adverse to both classes refutes the claim that they are new, unexpected, classes to which the plain text of Title VII now applies.

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[86] Zarda Transcript at 7. See *Hively* at 355, 357 (Posner, J., concurring). Judge Posner believes courts must assist Congress to update and amend laws: "A broader understanding of the word 'sex' in Title VII than the original understanding is thus required in order to be able to classify the discrimination of which Hively complains as a form of sex discrimination." He advocates a result Congress never intended: "I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would *not* have accepted." (emphasis added).

[87] Zarda Transcript at 7.

[88] Harris Homes Transcript at 63.

[89] *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.l (1994) (Scalia, J., dissenting) ("Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word "gender" has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.").

[90] For example, in 2018, a federal magistrate judge reinterpreted "sex" based on "advanced medical understanding" stating, "[d]espite the ongoing study to more fully understand the impact of differences in chromosomes, brain structure and chemistry, there is medical consensus that gender identity plays a role in an individual's determination of their own sex. Therefore, to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning." *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1143-44 (D. Idaho, 2018).

[91] *Mayes v. Texas*, 416 U.S. 909 (1974).

Zarda's attorney responded to Justice Alito, stating, "the fact that a loose cannon like Judge Posner says, "do whatever you feel like" is not what we're asking for."[92] Although advocates for Stephens and Zarda prudently deny wanting the Court to immodestly reinterpret the meaning of "sex" in the statute as a matter of law, they effectively argue for something far less modest: they want the Court to reinterpret what it means to be a man and woman as a matter of *fact* and law.

For Stephens, Harris Homes' differential treatment such as its dress code is not the problem. The problem is that Harris Homes' expectations of employees are based on biology instead of gender identity. Expecting a person of any sex who identifies as a woman to wear men's clothes is sex discrimination if it causes an injury. Stephens does not argue that sex-specific policies are unlawful. Instead, he wants the Court to apply protection based on the immutable trait of sex to his mutable trait of gender. Stephens, who admits to being biologically male, believes his gender is his sex.[93] His lawyer, using female pronouns, argued that "[Harris Homes] fired her for contravening a sex-specific expectation that applies only to people assigned male sex at birth; namely, that they live and identify as a man for their entire lives."[94]In other words, Title VII prohibits an employer from treating males as men and females as women.

Accordingly, sex, being "assigned at birth" but subject to change, is no longer an immutable trait. Sex itself, not just gender, is fluid and men are no longer just male and women are no longer just female. If men and women are defined by identity and not biology, applying the law this way does not add traits for protection, does not change the trait that is protected but does change who possesses the traits protected.

For example, if Stephens applied for admission to the FBI training academy with physical fitness requirements required in *Bauer*, the FBI could not apply the requirements for men to him. Sex, as gender, would no longer correlate with innate physiological differences justifying differential treatment. If so, the FBI could not apply the requirements for men to Bauer as a non-transgender male because discrimination based on non-transgender status would also be sex discrimination. Otherwise, Bauer could simply evade the more strenuous requirements by identifying as a woman.

Substituting gender identity for biology impacts sex-neutral policies too. For example, if males who identify as women must be treated as females who identify as women, facially neutral

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[92] Zarda Transcript at 22. Stephens' counsel stated that none of the "arguments ask this Court to redefine or, in Judge Posner's words, update sex." Harris Homes Transcript at 4.

[93] The Sixth Circuit panel considered the meaning of "sex" to be immaterial for its decision. In response to Harris Homes' claim that a person's sex is a biologically immutable trait, it stated, "[w]e need not decide that issue." *Harris* at 576.

[94] Harris at 4; 20-21 ("And so to say we're going to fire you because you fail to--to accord to a generalization about how people who are assigned a particular sex based on visible anatomy at birth have to live their lives for the rest of their lives is sex discrimination."). The declaration that sex is assigned at birth is at odds with "sex" as biology, which is established *before* birth. If sex is an immutable trait, by definition it is not changeable or convertible. Stephens' sex at birth was male. He was raised as a male. He lived and worked as a male. If Stephens was assigned anything at birth it was a gender. Stephens' *gender* changed from man to woman when he consciously identified as a woman. Stephens agrees: "'[b]y definition, a transgender person is someone who lives and identifies with a sex different than the sex assigned to the person at birth.' Amici Br. Am. Med. Ass'n 4-5." Stephens Reply Brief at 5.

height and weight requirements found to have a disparate impact on females as women as in *Dothard* will never again have a disparate impact.

The stereotype argument accomplishes the same or more. It is based on the belief that the words "men" and "women" are without any fixed objective meaning. A male such as Stephens not only can be a woman but he can conform to norms for women as a man. Whether he is a male or female becomes meaningless for Title VII.[95] He can adhere to the men's or women's dress code as either one. For Harris Homes or the Court to say otherwise is nothing more than a sex stereotype *Price Waterhouse* prohibits, we are told. The social revolution not only expands protection to homosexuals and transgender persons but to every male and female of any sexual orientation, any gender identity and any gender expression.[96]

The effort to achieve legal protections in the workplace under Title VII through the courts is a part of a larger political gambit to deconstruct social norms related to sex.[97] Still, gender dysphoria is considered a medical condition subject to treatment by medical professionals.[98] Treatment includes living consistently (stereotypically) with the sex with which one identifies.[99] There is some disagreement about classifying transgenderism as a medical condition or illness to be remedied because doing so is stigmatizing.[100] Nevertheless, transgenderism is treated politically as a distinct sex status. As a medical condition or sex status, however, Congress has

[95] Transgenderism, by definition, is gender nonconformity with sex. Adverse employment action when gender nonconformity with sex becomes manifested by nonconformance to standards for one's sex—stereotypes—is claimed to constitute discrimination because of sex. For this rationale, sex is irrelevant. A male who dresses as a woman, adopts a woman's name and insists on use of female pronouns is protected whether the law considers him a man or woman or whether he is transgender or not, under the stereotype theory. Cross-dressers become protected class by virtue of the fact the behavior that defines their status is protected. Thus, the stereotype theory as advocated is not simply an application of the law to new contexts but a material change in the law.

[96] Even though advocates discount the legal effect because smaller businesses are not subject to Title VII, the revolutionary nature of the legal change is obvious. Stephens' status as a transgender woman, if protected, will demand not just tolerance but compliance with sex-nonconformance by Harris Homes, supervisors and co-workers. Stephens' letter to co-workers acknowledges this burden, stating it will be "distressing" for co-workers he regarded as friends. Nevertheless, if the change is not afforded complete acquiescence, claims of hostile work environment and sexual harassment could ensue. If mandated and enforced by courts, the social revolution gains the imprimatur of the State.

[97] Circumventing legislatures to achieve political ends is not new. Regarding same-sex marriage, the objective was to erode traditional marriage laws while avoiding a majoritarian backlash, to "allow room for public discussion and debate before obtaining a centralized national ruling that preempts ordinary political process over a moral issue about which society is in a state of evolution." Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 25, 26 (1994). In the absence of legislative change, an unelected EEOC reversed decades of precedence in 2012 and interpreted Title VII to prohibit discrimination on the basis of sexual orientation and gender identity. *Macy v. DOJ*, EEOC Dec. No. 0120120821 (April 20, 2012), *available* at https://www.eeoc.gov/decisions/0120120821 Macy v DOJ ATF.txt.

[98] *See* Amici Br. Am. Med. Ass'n at 10. The American Psychiatric Association lists gender dysphoria as a mental disorder. *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013). Gender nonconformity is not a mental disorder, however. https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

[99] Stephens Brief at 8; Amici Br. Am. Med. Ass'n at 14-15. While challenging social norms as sex stereotypes, advocates paradoxically promote them by seeking legal protection for transgender persons who want to conform to them.

[100] The World Health Organization announced in 2018 that it was moving "gender incongruence" from the mental disorders chapter to the sexual health chapter. https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/90875286.

expressly excluded transgenderism from protection under the Americans with Disabilities Act.[101] Employers are not required by law to accommodate transgender employees under its terms.

So, while the lawyers disclaim any support for legislating by judicial fiat, they encourage the justices to revolutionize societal norms and require Harris Homes to treat a male employee not as a transgender person but as a woman. Stephens' sex has not been litigated, however, and they do not propose it should be. They want the Court to make Stephens' gender identity his sex as a matter of fact and law. Ironically, this approach transforms a law designed to eliminate invidious discrimination between males and females as men and women to one that does not (because no one is, or can be expected to be, necessarily the sex they were assigned at birth).[102]

IX. CONCLUSION

The Court's but for test is premised on the fact that, for Title VII, sex is binary: male and female. Thus, the Court's test to determine whether employment policy discriminates because of sex is itself evidence of the Court's longstanding understanding of the meaning of "sex" as the immutable trait that distinguishes males from females.[103] The meaning of the term "sex" in 1964 and "gender" as a synonym later in *Price Waterhouse* is plain.

The Court's application of the but for test has consistently shown whether an employment policy discriminates because of sex. As traditionally applied, all factors other than the sex of persons are *ignored*. The injured *individual* is compared with the *class* of the opposite sex. If the employment policy causes the same result or injury for *any* member of the opposite sex, then the policy does not discriminate because of sex.

Even though sex is always a factor for them, sex-differentiated policies do not discriminate unless they disadvantage one sex. As Justice Ginsburg puts it, there needs to be an injury but not just an injury but one *caused* by sex. Policies like sex segregated restrooms and sex-specific dress codes do not disadvantage one sex unless they unduly burden one sex as a class. So long as the burden is neutral, no member of either class is disparately treated because of sex. If the policy is equally enforced against both sexes, no injury allegedly caused by the policy is motivated by sex. Properly applied, the but for test shows these policies are not sex discrimination.

The plurality decision in *Price Waterhouse* creates no new cause of action for discrimination based on sex stereotypes. The belief that sex as "assigned at birth" is a stereotype

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[101] 42 U.S.C. § 12211. Additionally, by definition, homosexuality and bisexuality are not impairments or disabilities.

[102] Additionally, judicial interpretation of law to achieve political ends in a pluralistic society with democratic institutions diminishes respect for the law including legal protection for individual and minority rights. Future judges reflecting majoritarian political interests will have no more compulsion to strictly interpret law protecting civil rights than those who seek to interpret them broadly.

[103] *See generally Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth…."); *Regents of University of California v. Bakke*, 438 U.S. 265, 360 (1978) ("[R]ace, like gender and illegitimacy…is an immutable characteristic which its possessors are powerless to escape or set aside." (citing *Weber*); *Manhart* at 727 (Burger, C.J., dissenting) ("categorizing people on the basis of sex, the one acknowledged immutable difference between men and women….").

that violates Title VII is incompatible with the public meaning in 1964 of sex as binary based on innate and immutable biological differences. A different definition of sex, as gender identity, would contravene Congress' commitment to root out invidious discrimination against males and females as men and women. If Title VII aims to achieve employment equality for men and women but males who identify as women are women, equality of biological males and females is effectively replaced with equality of genders subjectively defined.

Adoption of either the text theory or stereotype theory to protect transgender and homosexual employees from discrimination would produce results inconsistent with past applications of the Court's but for test. If the but for test is reimagined for purposes of *Harris Homes* and *Zarda*, to consider factors other than a person's sex—attraction to, or expression as, a man or woman—then the test so modified will change results for sex-specific policies that are lawful under the existing test where all other factors are ignored.

Furthermore, claims that discrimination based on gender identity and sexual orientation traits inherently discriminate because of sex are falsely premised on the belief that sex is a motivating factor if a person's sex must be known for the other traits to cause injury. Even assuming the premise is true, treating sex as a cause for injury when sex is implicitly or explicitly a factor conflicts with existing employment policies and practices that differentiate employees by sex but which do not violate Title VII. Because they cannot by reason and logic be distinguished, the claim by advocates that their theories do not decide those cases is wrong.

Although discussed euphemistically as "judicial modesty," the proper role of the Court is the most important issue before the Court. When courts make or change law they usurp the power of the legislative branch of government as authorized by the Constitution. When the Court devined a new constitutional right of same sex marriage,[104] Chief Justice Roberts criticized the majority, stating,

> [t]hose who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges.[105]

In the same case, Justice Scalia, stated, "[t]his is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government."[106]

When the Court in *Frontiero* needlessly characterized sex as a suspect classification, Justice Powell objected, stating,

> [t]here are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected

[104] *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015) (The Supreme Court "has recognized that new insights and societal understandings can reveal unjustified inequality [...] that once passed unnoticed and unchallenged.").
[105] *Id*. at 2624 (Roberts, C.J., dissenting).
[106] *Id*. at 2629 (Scalia, J., dissenting).

> representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.[107]

Contrary to policy arguments presented in both *Harris Homes* and *Zarda*, the question now before the Court is not whether discrimination on the basis of gender identity or sexual orientation should be prohibited but whether the Court will exercise unauthorized power, weaken democratic institutions and impair its legitimacy.

[107] *Frontiero* at 692. Judicial power like any other tends to expand unless checked. In 2018, a federal magistrate judge, who found Idaho's law that barred changing a transgender person's sex on their birth certificate failed to meet the rational basis test, replicated the Court's overreach in *Frontiero*, needlessly ruling that classifications based on transgender status require heightened scrutiny like those based on sex for purposes of the Equal Protection Clause. *Barron* at 1144.